

Title IX Compliance – Part I: The Three-Prong Test

By Lee Green, J.D. on February 08, 2022

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Preface

Throughout the spring of 2022, as HST celebrates the upcoming 50th anniversary on June 23rd of the enactment of Title IX, each monthly sports law article in the magazine will address a component of Title IX compliance for high school athletic programs with respect to the legally-mandated equal treatment of female and male student-athletes. Title IX is, of course, a broad-based statute prohibiting gender discrimination in all aspects of educational programs and activities, not merely a law governing athletics.

However – for want of the space for a book-length treatment to discuss Title IX's full application to other topics such as academic curriculum, fine arts programs, school clubs and activities, sexual harassment, hazing, bullying, and LGBTQ rights – this series of articles will address only the law's impact on school sports programs, specifically the development and implementation of compliance strategies to avoid gender-based inequities between girls' and boys' teams: Part I (February) – Title IX's Three-Prong Test; Part II (March) – Title IX's 11 Areas of Athletics Benefits & Opportunities; Part III (April) – Title IX's Definition of a Sport; and Part IV (May) – Frequently Asked Questions About Title IX Law.

Following the conclusion of the four-part series, to print out the articles and compile a comprehensive guide to compliance for your athletic program, [visit here](#).

The Title IX Compliance Framework

The original text of the statute, only 37 words in length, was signed into law by President Richard Nixon on June 23, 1972, and stated *“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”*

Because of the law's brevity and the resulting ambiguity concerning its precise requirements, the federal government – beginning in 1972, the Department of Health, Education, and Welfare, followed by the Department of Education and its Title IX enforcement arm the Office for Civil Rights (OCR) after their creation in 1980 – were inundated with questions from school and athletic administrators nationwide regarding Title IX compliance, leading to the issuance over the decades of numerous policy guidances, legal clarifications, and other sources of law (that are beyond the scope of this article) detailing the statute's specific mandates, ultimately resulting in Title IX evolving into a highly complex regulatory framework.

The following is a Title IX Compliance Framework that provides for school and athletic administrators a “mash-up” of all of the sources of Title IX law and the infrastructure to conduct a self-audit of a school's sports programs:

TITLE IX COMPLIANCE FRAMEWORK

COMPONENT I: SPORTS PARTICIPATION OFFERINGS

A. Participation Opportunities – The Three-Prong Test

- Substantial Proportionality or
- History & Continuing Practice of Program Expansion or
- Full & Effective Accommodation of Athletic Interests

B. Levels of Competition – The Two-Prong Test

- Equivalently Advanced Competitive Opportunities or
- History & Continuing Practice of Improvement

COMPONENT II: FINANCIAL AID FLOWING TO ATHLETES

COMPONENT III: OTHER ATHLETICS BENEFITS/ OPPORTUNITIES

P - L - A - Y - I - N - G - F - A - I - R

In the event that a formal complaint is filed with the OCR or a federal lawsuit is filed related to alleged inequities between girls and boys teams, three broad issues will be evaluated by the agency or court. The first, represented by Component I, is whether the school is providing adequate sports participation opportunities to the girls enrolled at the institution. The second broad issue, represented by Component II, is whether any

financial aid related to athletics is being distributed on an equitable basis. The third consideration, represented by Component III, is whether the “amenities” tied to sports participation are being allocated fairly, 11 categories of benefits referred to by the OCR as its “laundry list” and including issues such as facilities, locker rooms, equipment, uniforms, travel benefits, access to quality coaching, and other such perks, a set of 11 categories that are represented in the framework by the acronym PLAYING FAIR, and which will be the subject of the March 2022 HST sports law article.

The Three-Prong Test

Evaluation of Component I – whether the school is providing adequate sports participation opportunities to the girls enrolled at the institution – first requires application of the “three-prong test.” An institution can demonstrate compliance by showing any one of three alternative criteria: 1) substantial proportionality, 2) a history and continuing practice of expanding sports participation opportunities for girls, or 3) full and effective accommodation of the athletics interests of the girls enrolled at the school.

Prong One: Substantial proportionality requires numerical proof that a school's ratio of female athletic participation is close to the ratio of female enrollment at the institution. Although none of the Title IX sources of law establish a strict statistical test for how close is close enough, the OCR and courts generally accept a difference of less than five percent as being within the “safe harbor” of proportionality. To compute proportionality, two calculations are typically made – an “unduplicated” measure and a “duplicated” measure, with the latter relied on as the definitive.

The unduplicated measure does not count two- or three-sport athletes multiple times. For instance, at a school with 50 percent female enrollment, a head count would be made using rosters from the first date of competition of the number of athletes competing in the program (varsity, JV, sophomore and freshman levels combined, but not PE, club or intramural participants), and if the data showed 300 athletes by head count, including 180 boys and 120 girls, then the female rate would be 40 percent ($120 \div 300$) and the differential with the enrollment percentage would be 10 percent ($50\% - 40\%$), outside the five percent safe harbor, thus not constituting substantial proportionality.

The duplicated measure counts two- or three-sport athletes multiple times, thereby reflecting the true number of participation slots and empowering schools to add female participation opportunities in underserved seasons in order to better serve the girls and to attempt to comply with the substantial proportionality criteria. At the same hypothetical institution described above, if the first-date-of-competition rosters showed 400 filled participation slots, 250 by boys and 150 by girls, then the duplicated measure for females would be 37.5 percent ($150 \div 400$), a 12.5 percent ($50\% - 37.5\%$) differential, even worse than the 10 percent difference yielded from the unduplicated measure. However, in many schools where girls teams are added to seasons where they will incentivize multi-sport participation while not cannibalizing the rosters of other teams in that season, the duplicated measure may bring the institution under the five percent range and into the safe harbor of proportionality.

Prong Two: If substantial proportionality cannot be shown, then a school's second option is to demonstrate a history and ongoing pattern of adding participation opportunities for girls and improving the already existing opportunities. The OCR and courts focus on the expansion of opportunities that has taken place in the very recent past – “history” is typically defined as the last three-to-five years. Also, prong two is unavailable to schools that are in the process of eliminating/downsizing sports for girls.

Prong Three: If neither prong one nor prong two can be established, then the school's final alternative is to show that it is fully and effectively accommodating the athletics interests and abilities of the females enrolled in the institution, in other words that it has “maxed out” its sports offerings for girls and that there are no other sports that could be offered in which there is enough interest by the girls at the school to be able to field a team. Surveys should be used and other indicia should also be evaluated (popularity of sports at the middle school, youth, and park and rec league levels) to determine whether all of the athletics interests of a school's female students are being “fully” and “effectively” satisfied.

Some schools try to add long-term participation opportunities for girls at lower levels of competition (club teams or sophomore/freshman levels only) than those made available for boys, and therefore Component I of the Title IX Compliance Framework also includes a “levels of competition test” with which an institution can comply by showing that it already offers equivalently advanced participation opportunities for girls or that it is moving in the right direction via a history and ongoing pattern of improving competitive options for females.

A Court Case Example:

In *Ollier v. Sweetwater Union School District*, a dispute originating in 2006 focused on facility inequities between softball and baseball at Castle Park High School (CA), the starting point for the OCR in its investigation of the situation and by a federal court after the filing of a lawsuit was to evaluate Component I of the Title IX Compliance Framework. In a 2009 decision by the U.S. District Court for the Southern District of California, the judge referenced data that had been collected showing that female enrollment at the school was 45.4 percent, but that only 38.7 percent of sports participation opportunities at Castle Park belonged to girls (per the duplicated measure of proportionality) – a 6.7 percent difference – and

that the school could demonstrate neither a history and continuing practice of program expansion nor full-effective accommodation of the athletics interests of the girls at Castle Park, the school was not in compliance with the three-prong test.