



THE SECRETARY OF EDUCATION  
WASHINGTON, DC 20202

March 27, 2008

Steven Geoffrey Gieseler  
Pacific Legal Foundation  
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Suite 102  
Stuart, FL 34996

Dear Mr. Gieseler:

This letter is in response to your letter dated June 19, 2007, containing the "Petition of the College Sports Council to Repeal, Amend, and Clarify Rules Applying Title IX to High School Athletics" (Petition). The Petition requests that the United States Department of Education (Department) take the following actions with regard to Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 et seq.: (1) clarify that the Three-Part Test does not apply to high school athletics; (2) repeal or amend any rule, regulation, interpretation, or clarification applying the Three-Part Test to high school athletics; and (3) clarify the Department's guidance to high schools with regard to measuring athletic interests and abilities. I apologize for the Department's delayed response to your letter.

After careful consideration of your arguments, the Department has decided to deny your Petition. Your Petition first asks the Department to clarify that the Three-Part Test does not apply to high school athletics. The regulations implementing Title IX (Title IX Regulations), 34 C.F.R. Part 106, effective July 21, 1975, require recipients of federal funds in part to provide equal athletic opportunity for members of both sexes to participate in interscholastic and intercollegiate athletics. In order to determine compliance in accordance with this requirement, the Department considers, among other factors, "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes" in interscholastic and intercollegiate athletics programs. 34 C.F.R. § 106.41(c)(1).

On December 11, 1979, the Department published the Intercollegiate Athletics Policy Interpretation (1979 Policy Interpretation), which provides guidance to institutions on the requirements for compliance with Title IX. Among the issues addressed in the 1979 Policy Interpretation is the requirement to effectively accommodate student athletic interests and abilities, which is measured through the Three-Part Test.

The 1979 Policy Interpretation explains the scope of its application to high school athletics as follows:

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

44 Fed. Reg. 71413, 71413 (December 11, 1979).

Numerous federal courts have held that the 1979 Policy Interpretation and the Three-Part Test are entitled to substantial deference. *See, e.g., Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046-47 (8th Cir. 2002); *Neal v. Bd. of Trustees of Ca. State Universities*, 198 F.3d 763, 770 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) (“*Cohen II*”); *Kelley v. Bd. of Trustees, Univ. of Ill.*, 35 F.3d 265, 271 (7th Cir. 1994); *Cohen v. Brown Univ.*, 991 F.2d 888, 896-97 (1st Cir. 1993) (“*Cohen I*”); *Roberts v. Colo. State Univ.*, 998 F.2d 824, 828 (10th Cir. 1993). Additionally, federal courts have referenced the above statement in the 1979 Policy Interpretation regarding its application to interscholastic athletic programs to apply the principles of the Policy Interpretation to claims against high schools for failing to provide equal athletic opportunities. *See McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 290-91 (2d Cir. 2004); *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 273 (6th Cir. 1994); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993). For example, the Sixth Circuit applied the Three-Part Test specifically to address a claim against a state high school athletic association for failing to effectively accommodate the athletic interests and abilities of female high school student athletes. *See Horner*, 43 F.3d at 274-275. In light of this existing guidance, which federal courts have applied authoritatively and unambiguously to interscholastic athletics, further clarification on this matter is not necessary.

Your Petition also requests that the Department repeal or amend any rule, regulation, interpretation, or clarification applying the Three-Part Test to high school athletics. You suggest that this action should be taken because the Three-Part Test violates the principles of equal protection and limits participation opportunities. We note that you raised similar arguments in your January 2003 “Petition to Repeal and Amend Guidance Issued under 34 C.F.R. 106.41(c) Concerning Equal Athletic Opportunity,” in which you requested that the Department repeal the Three-Part Test. The Department denied that request, and the Department denies your request in the instant Petition because the Three-Part Test neither violates equal protection nor creates a gender-conscious affirmative action or quota system. The Three-Part Test provides three separate ways to measure a school’s compliance with one aspect of the Title IX regulations. Federal courts have agreed that the Three-Part Test is not a quota, *see, e.g., Cohen II*, 101 F.3d at 175; *Kelley*, 35 F.3d at 271, and every federal court that has considered an equal protection challenge to the Three-Part Test has upheld its constitutionality, *see, e.g., Neal*, 198 F.3d at 772; *Cohen II*, 101 F.3d at 170-72; *Kelley*, 35 F.3d at 272; *Cohen I*, 991 F.2d at 900-01.

Moreover, as explained in the Department's "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance," issued on July 11, 2003 (2003 Further Clarification), the Three-Part Test does not limit opportunities but instead provides schools "with the flexibility to provide greater athletic opportunities for students of both sexes."

Your Petition next requests that the Department clarify its guidance to high schools on measuring athletic interests and abilities. Specifically, your Petition requests that the Department issue guidance: (a) stating that high schools seeking to use the third prong of the Three-Part Test must survey both genders to determine relative athletic interests and abilities; (b) interpreting the Three-Part Test "not as superseding the 1975 Regulations, but as an elaboration on some of the types of 'reasonable methods' the regulations require schools to develop"; and (c) clarifying that the so-called "cutting-and-capping" approach is not authorized in the high school setting.

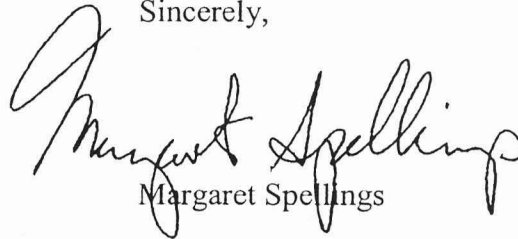
The Department respectfully denies your request for guidance that would state that schools using the third prong of the Three-Part Test must survey both genders. In the Dear Colleague letter accompanying the Department's 1996 "Clarification of Intercollegiate Athletics Policy Guidance" (1996 Clarification), the Department responded to similar suggestions to modify the third prong of the Three-Part Test so that it would not focus on the underrepresented sex only. As explained in that document, the focus on the underrepresented sex is appropriate because "Title IX, by definition, addresses discrimination." The First Circuit, which rejected a similar argument to modify the third prong of the Three-Part Test, further explained that "[t]he fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender." *Cohen I*, 991 F.2d at 899. Finally, we believe that the denial of this request is consistent with the unanimous recommendation of the Secretary's Commission on Opportunity in Athletics that the Department should not change current policies in a manner that would undermine Title IX enforcement regarding nondiscriminatory treatment in athletic participation. See U.S. Department of Education, Secretary's Commission on Opportunity in Athletics, *Open to All: Title IX at 30*, Washington, D.C., 2003.

The Department also respectfully denies your request to issue guidance stating that the Three-Part Test does not supersede the Title IX Regulations because existing guidance already makes it clear that the Three-Part Test is consistent with the Title IX Regulations. As stated in the 1979 Policy Interpretation, its purpose is to explain the standards set out in Title IX and the Title IX Regulations and to provide a framework within which complaints alleging discrimination in athletics can be resolved. 44 Fed. Reg. at 71413. Accordingly, the Three-Part Test clarifies, not replaces, one requirement in the Title IX Regulations. Similarly, courts have characterized the 1979 Policy Interpretation as a clarification or interpretation of the Title IX Regulations, and no court has held that the 1979 Policy Interpretation is inconsistent with Title IX or its implementing regulations. See, e.g., *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 940 (D.C. Cir. 2004); *Miami Univ. Wrestling Club*, 302 F.3d at 615; *Chalenor*, 291 F.3d at 1045, 1047; *Cohen I*, 991 F.2d at 899.

Lastly, with regard to the request in your Petition for the Department to clarify that the cutting-and-capping approach is not authorized in the high school setting, the Department must also respectfully deny this request. Through the 1996 Clarification, 2003 Further Clarification, and 2005 "Additional Clarification of Intercollegiate Athletics Policy" (March 17, 2005), the Department repeatedly and clearly has stated its view that institutions are not required to cut or reduce teams to comply with Title IX or, specifically, with the Three-Part Test, that taking such action is disfavored, and that the Department will not seek remedies that involve the elimination of teams.

Therefore, we do not believe that further guidance on this matter is necessary when the Three-Part Test is applied in the context of high school athletics. The Department remains committed to working with schools on an individualized basis to ensure equal athletic opportunity for all students.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret Spellings". The signature is written in a cursive, flowing style with a large initial "M".

Margaret Spellings