

Sex Equity in School Athletics: Three-Part Test

Why We Focus on Sex Equity in School Athletics

- **It's the law.** Title IX and Washington law require local educational agencies (LEAs) to ensure students do not experience sex discrimination in interscholastic athletic and recreational programs.
- **The associated benefits.** Students who play sports demonstrate improved physical, social, and emotional health; higher confidence; greater academic success, better employment outcomes; and stronger leadership skills.¹
- **There is still work to do.** Despite the exponential increase in girls' participation in sports over the last fifty years, there is still a significant athletics participation gap between girls and boys. For example, girls today still have fewer opportunities to participate in high school sports than boys did when Title IX was passed in 1972.²

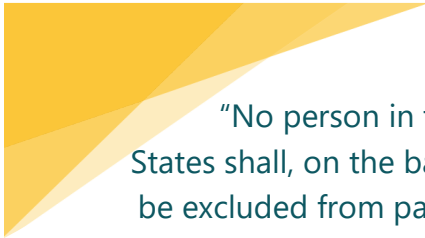
Legal Framework

Title IX of the Education Amendments of 1972

Under Title IX, which is the federal law prohibiting sex discrimination in public schools that accept federal funding, any school that operates or sponsors interscholastic, club or intramural athletics is required to provide equal athletic opportunities for members of both sexes.³

To make this determination, a school should consider a set of factors, often referred to as the "Title IX Laundry List."⁴

- Whether the selection of sports and levels of competition effectively accommodate both sexes' interests and abilities;



"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."

20 U.S.C. § 1681 ("Title IX").

¹ Staurowsky, E.J., Flowers, C.L., Busivis, E., Darwin, L., & Welch, N., *50 Years of Title IX: We're Not Done Yet*. Women's Sports Foundation (2022). Available here: https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/13_Low-Res_Title-IX-50-Report.pdf.

² *Id.* at 20 (showing that boys' high school sports participation numbers in 1972-73 were approximately 3.6 million, while girls high school sports participation opportunities in 2018-19 are approximately 3.4 million).

³ 34 C.F.R. § 106.41(c).

⁴ *Id.*




- Equipment and supplies;
- Scheduling;
- Travel and per diem;
- Coaching and tutoring;
- Athletic, medical, and training facilities and services;
- Housing and dining facilities and services;⁵ and
- Publicity.⁶

State law

Under state law, Washington public schools are also required to ensure that equal opportunities are available to members of both sexes with respect to any interscholastic, club, or intramural athletics they operate or sponsor.⁷

To determine whether it is providing both sexes with equal athletics opportunities, each LEA must evaluate any recreational and athletic program it offers at least once each year, using the same set of factors outlined in Title IX (*i.e.*, the Title IX Laundry List).⁸



“Recognizing the benefit to our state and nation of equal educational opportunities of all students, discrimination on the basis of sex for any student in grades K-12 of the Washington public schools is prohibited.”

RCW 28A.642.010

Additionally, each LEA must administer OSPI’s student athletic interest survey at least once every three years in each school and grade level where interscholastic, intramural, and other athletics are conducted.⁹ LEAs must then consider the survey results, disaggregated by building and by sex, when planning and developing school-sponsored recreational and athletic activities and when determining whether equal opportunities are available to boys and girls.¹⁰

Transgender and nonbinary students

To date, most interscholastic sports in Washington public schools are offered separately for boys and girls. This can pose a unique challenge for some transgender and nonbinary students, who may not identify as either male or female but who still want to participate in school sports, as well as for district athletic directors who may be unsure how to accommodate transgender and

⁵ Typically applicable only to post-secondary educational institutions.

⁶ 34 C.F.R. § 106.41(c).

⁷ WAC 392-190-030.

⁸ *Id.*

⁹ WAC 392-190-040.

¹⁰ *Id.*

nonbinary students in their athletic programs or include them when analyzing their athletic programs for sex equity.

However, Washington law is clear. LEAs must allow **all** students, including transgender and nonbinary students, the opportunity to participate on the interscholastic sports team that most closely aligns with their gender identity.¹¹ When analyzing their overall programs for sex equity under Title IX and state law, LEAs would then include transgender or nonbinary students when counting the total number of students participating on boys' and girls' teams.

LEAs with further questions about transgender or nonbinary students' participation in athletics are encouraged to contact the Equity and Civil Rights Office and review the resources relating to gender-inclusive schools that are available on our [website](#).¹²

Equitable Athletic Participation Opportunities

The Three-Part Test

To assess whether they are providing equal athletic participation opportunities to members of both sexes, schools should use OCR's Three-Part Test, outlined below.¹³

- 1. Substantial proportionality:** Whether a school's athletic participation opportunities for male and female students in an individual school building are provided in numbers that are substantially proportionate to their respective enrollments in that building.
- 2. History and continuing practice of program expansion:** Whether the school can show a history and continuing practice of program expansion that is demonstrably responsive to the developing athletic interests and abilities of the underrepresented sex.
- 3. Full and effective accommodation of interests and abilities:** Whether the school can show that the athletic interests and abilities of the underrepresented sex are fully and effectively accommodated by the current program.

A school can demonstrate annual compliance by meeting any part of the Three-Part Test (*i.e.*, a school does not need to meet more than one part of the Three-Part Test in any given year).

Providing equal athletic opportunities. Title IX and state law require LEAs to provide "equal" athletic opportunities to male and female students. In this context, "equal" does not mean

¹¹ See WAC 392-190-025. See also WIAA Rule 18.16.0: (Gender Identity Philosophy and Participation Procedure), available here: <https://assets.wiaa.com/results/handbook/2024-25/handbook.pdf>.

¹² OSPI's website on creating gender-inclusive schools: <https://www.k12.wa.us/policy-funding/equity-and-civil-rights/resources-school-districts-civil-rights-washington-schools/gender-inclusive-schools>.

¹³ U.S. Dep't. of Educ., Office for Civil Rights, "Dear Colleague" Letter, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996). Available here: <https://www.ed.gov/laws-and-policy/higher-education-laws-and-policy/higher-education-policy/clarification-of-intercollegiate-athletics-policy-guidance-the-three-part-test#two>.

identical—it means equivalent. For example, neither Title IX nor state law requires an LEA to offer boys and girls the same number of teams, or the same sports or number of sports. What is instead required is for the LEA to meet the interests and abilities of both sexes to the same extent, even if the interests and abilities themselves are different.

Unequal expenditures. While unequal expenditures for members of each sex or between male and female teams do not automatically constitute noncompliance with Title IX, the U.S. Department of Education, Office for Civil Rights (OCR) may nonetheless consider such unequal expenditures when assessing overall equality of opportunity for members of each sex.¹⁴

Cutting or reducing teams. Nothing in Title IX requires a school to cut or reduce teams to demonstrate compliance with the Three-Part Test. OCR discourages this practice (as “contrary to the spirit of Title IX”) because it diminishes opportunities for students who are interested in competing, rather than enhancing opportunities for students who have experienced discrimination.¹⁵

Compliance Tip: *Washington schools are encouraged to complete OSPI’s [Athletic Opportunities Worksheet](#) each year to help them analyze and document how they are meeting compliance with the Three-Part Test.*

Part One: Substantial Proportionality

To demonstrate compliance with Part One of the Three-Part Test a school must show it provides interscholastic athletic participation opportunities for male and female students in numbers substantially proportionate to their respective total enrollment numbers in the school.¹⁶

Defining a “sport.”¹⁷ Countable athletic participation opportunities must take place in the context of a “sport.” However, OCR does not have a specific definition for the term “sport.” Instead, when determining if an activity can be counted as a “sport” under Title IX, OCR

¹⁴ U.S. Dep’t. of Educ., Office for Civil Rights, “Dear Colleague” Letter, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996). Available here: <https://www.ed.gov/laws-and-policy/higher-education-laws-and-policy/higher-education-policy/clarification-of-intercollegiate-athletics-policy-guidance-the-three-part-test#two>.

¹⁵ U.S. Dep’t. of Educ., Office for Civil Rights, “Dear Colleague” Letter, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (Jul. 11, 2003). Available here: <https://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.pdf>.

¹⁶ U.S. Dep’t. of Educ., Office for Civil Rights, “Dear Colleague” Letter, Athletic Activities Counted for Title IX Compliance (Sep. 17, 2008). Available online at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.pdf>.

¹⁷ *Id.*

conducts a case-by-case evaluation of the activity, considering several factors, such as the activity's structure and methods of administration, team preparation, and competition.

Cheer and dance. OCR does not consider activities such as competitive or sideline cheer or dance to be sports under Title IX.¹⁸ As a result, OSPI strongly encourages Washington schools not to include competitive or sideline cheer or dance participants when counting athletic participation opportunities for Part One.

Counting athletic participation opportunities.¹⁹ A school determines the number of athletic participation opportunities it provides by counting the number of male and female students who participate on each individual sports team in the school's athletic program.²⁰ Each spot that a student-athlete occupies on an individual sports team counts one time.

- For example, a student who competes on the cross-country team in the fall, the ski team in the winter, and the track team in the spring would count as three athletic participation opportunities.

Substantially proportionate.²¹ OCR considers athletic opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team. OCR defines a "viable" team as one for which there is "a sufficient number of interested and able students and enough available competition to sustain an [interscholastic] athletic team".²²

Compliance Tip: Use Part One of the [Athletics Opportunities Worksheet](#) to count the number of athletics participation opportunities each school in your LEA is providing to male and female students and to determine which sex, if any, is currently underrepresented.

¹⁸ See, e.g., [Biediger v. Quinnipiac Univ.](#), 691 F.3d 85 (2d Cir. 2012).

¹⁹ U.S. Dep't. of Educ., Office for Civil Rights, "Dear Colleague" Letter, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996). Available here: <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

²⁰ To count, a student must be listed on the team's roster and be on the team as of the first competitive event.

²¹ U.S. Dep't. of Educ., Office for Civil Rights, "Dear Colleague" Letter, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996). Available here: <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

²²*Id.* OCR wrote that average team size could be considered as a frame of reference when assessing whether a school's participation opportunities are substantially proportionate. However, OCR recently indicated it is departing from average team size as a measure, and Washington LEAs are thus encouraged to instead use viable team size when determining their compliance under Part One.

Part Two: History and Practice of Program Expansion²³

Even if the school does not meet compliance under Part One, it can still meet compliance under Part Two by showing that it has a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex.

In other words, Part Two examines a school's continuing and present efforts to increase the underrepresented sex's participation opportunities through program expansion over time. Program expansion can include actions such as adding new sports or teams or elevating club or intramural teams to interscholastic status, among others.

To determine whether it meets compliance under Part Two, a school must be able to show:

1. A record of adding new sports or expanding current opportunities in response to the existing and emerging interests of students of the underrepresented sex;
2. A clear and effective method for requesting new sports; and
3. That a plan (to add more sports in response to known interest) is currently being implemented.

Timeline. There is no fixed timeline within which a school must have added participation opportunities for the underrepresented sex. However, OCR will not find that a school satisfies Part Two if it merely promises to expand its program for the underrepresented sex at some point in the future. Compliance with Part Two instead hinges upon actual and continuing (*i.e.*, present) practice of program expansion.

Responsiveness to existing or emerging interests. Any program expansion must be clearly tied to the existing or emerging interests of the underrepresented sex, as ascertained through the athletics interest survey or other method of identifying interest.

Compliance Tip: Use OSPI's [Athletics Opportunities Worksheet](#) to document whether your LEA has expanded (or cut) athletics participation opportunities for the underrepresented sex within the last five years.

²³ U.S. Dep't. of Educ., Office for Civil Rights, "Dear Colleague" Letter, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996). Available here: <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

Part Three: Full and Effective Accommodation of Interests and Abilities²⁴

Even if the school does not meet compliance under Parts One or Two, it can still meet compliance under Part Three by showing that its athletic program “fully and effectively accommodates the interests and abilities” of the underrepresented sex.

In other words, even if a school has disproportionately low athletic participation rates for the underrepresented sex, it can still satisfy Part Three by showing that it is not discriminating against or denying opportunities to that sex, *i.e.*, that their interests and abilities are already being fully and effectively accommodated through the school’s current athletic offerings.

When analyzing Part Three, the school should consider, explain, and document its responses to the following three questions (which OSPI may refer to as the “Feasibility Analysis”):

1. Is there an unmet interest in a certain sport?
2. Is there sufficient ability to sustain a team in that sport?
3. Is there a reasonable expectation of competition for a team in that sport?

If the answer to all three questions is yes, then the school’s current program is probably not fully and effectively accommodating the interests and abilities of the underrepresented sex and is unlikely to meet compliance under Part Three.

Documenting a school’s responses. Schools should consider the following guiding principles and questions when documenting their responses to each question in the Feasibility Analysis.

- 1. Identifying unmet interests.** To determine whether the underrepresented sex has an unmet interest in a particular sport, schools should evaluate the underrepresented sex’s responses to the student athletic interest survey²⁵ and any other requests for sports.

Consider:

- *Are requested sports already offered?* If so, do the teams have a no-cut policy? Could the school add additional levels of competition, *i.e.*, a C team or JV II team?
- *Are students participating in a sport elsewhere?* For example, in community clubs or amateur leagues, or in the school’s club or intramural program? This could indicate the school’s program is not fully meeting their interests.
- *Could non-WIAA sports be offered?* Schools are not limited to offering sports sanctioned by the Washington Interscholastic Activities Association (WIAA), provided they align with the factors OCR considers when analyzing whether an activity counts as a “sport”.²⁶

²⁴ U.S. Dep’t. of Educ., Office for Civil Rights, “Dear Colleague” Letter, Guidance on Accommodating Students’ Athletic Interests and Abilities: Standards for Part Three of the Three-Part Test (Apr. 20, 2010). Available here: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

²⁵ Guidance on the student athletic interest survey begins on page 9.

²⁶ Guidance on the factors OCR considers when assessing whether an activity is a “sport” begins on page 4.

- 2. Sufficient interest and ability to sustain a team.** To determine whether there is sufficient ability to sustain a team in a particular sport, evaluate whether enough students of the underrepresented sex are interested in and able to sustain a team and whether those students have the athletic abilities necessary to participate.

Consider:

- *Would enough students turn out for a team?* Follow-up on possible unmet interests by holding informational meetings, administering targeted surveys, or organizing informal opportunities for students to try out the sport (e.g., PE class, intramurals, etc.)
- *Would students have the athletic abilities they need to participate?* Assess whether students may already use similar skill sets in other sports that could transfer to the new sport.

- 3. Reasonable expectation of competition.** To determine whether there is a reasonable expectation of competition for the team, consider whether there are enough available opportunities for competition in the geographic region where the school typically competes.

Consider:

- *Are there any available competitive opportunities in the school's existing geographic region?* Also consider those schools against whom the LEA does not always compete.
- *Are students from other schools also interested in the same sports?* A school may also need to confer with athletic directors from other districts and actively encourage the development of competition for a particular sport.

Compliance Tip: Use Part Three of OSPI's [Athletics Opportunities Worksheet](#) to identify the top five sports requested by the underrepresented sex in each school's athletics program. Then, for each of those sports, document your responses to each of the questions in the Feasibility Analysis, as well as whether a sport (or team in that sport) was added or not.

Student Athletic Interest Survey

Schools that operate or sponsor athletics and recreational programs must administer OSPI's student athletic interest survey at least once every three years.²⁷ This survey helps schools determine whether the school's athletic program fully and effectively meets students' interests and abilities. Critically for purposes of analyzing Part Three of the Three-Part Test, it asks students to share the sports they are interested in playing, those they participate in outside of school, and the reasons why they are not participating in the school's current athletic program.

Step 1: Survey Students Using the OSPI Survey Questions

LEAs must use the survey questions developed by OSPI.²⁸ LEAs can make formatting changes, add questions, or adapt the survey for Scantron or online application without OSPI approval. However, if an LEA wants to modify the survey more substantively, it must request advance approval from the Equity and Civil Rights Office by emailing equity@k12.wa.us.

Survey all students in schools that operate or sponsor athletic or recreational programs.²⁹ Some schools choose to also survey the next incoming class (e.g., rising 6th graders or 9th graders, etc.) and skip the graduating class (e.g., graduating 8th graders or 12th graders, etc.).

To ensure higher response rates, schools could administer the survey as part of a mandatory student activity, such as during course registration or advisory periods. Additional tips and instructions are available in OSPI's [Student Athletic Interest Survey Instructions](#).

Step 2: Disaggregate the survey results by sex and by building

To identify possible unmet interests of male and female students in each school, the survey results must be disaggregated by building and by sex. In other words, separate the results of the survey so that each school can identify how female students in a particular building responded and how male students in that same building also responded.³⁰

Compliance Tip: Use OSPI's [Survey Results Worksheet](#) to help ensure that your survey results are properly disaggregated by building and by sex.

²⁷ Last revised in 2018, the OSPI athletics interest survey is available online at: <https://ospi.k12.wa.us/policy-funding/equity-and-civil-rights/resources-school-districts-civil-rights-washington-schools/sex-equity-athletics> (scroll down to Student Athletic Interest Survey and click on "Step 1" to access the survey in multiple languages).

²⁸ OSPI's survey includes a list of possible sports that students can select from. While many of these options may not be currently offered or available at each school or may not be sanctioned by WIAA, they must be included in the survey to comply with federal guidance. The survey includes sports sanctioned by WIAA, sports sanctioned by K-12 interscholastic activity associations in adjacent states (Oregon and Idaho), and emerging K-12 sports.

²⁹ Larger schools may choose to survey a sample of students but should carefully consider and document the process of selecting the sample populations to ensure that the survey accurately represents student interest.

³⁰ OSPI's Survey Results Worksheet is available here: <https://www.k12.wa.us/policy-funding/equity-and-civil-rights/resources-school-districts-civil-rights-washington-schools/sex-equity-athletics>. (Scroll to Student Athletic Interest Survey, click on "Disaggregate the survey results", and open the Word document).

Step 3: Analyze the survey results

Schools should use the results of the athletics interest survey to identify the top five sports being requested (as well as the top reasons for non-participation) by the underrepresented sex in a given building and to help determine whether they meet compliance with Part Three of the Three-Part Test.

For example, if any of the top five sports requested by the underrepresented sex is not currently being offered, the school should take additional steps to determine the feasibility of adding it. Additional steps might include following up with students to determine whether they would actually participate in the sport if offered, whether they have sufficient ability to sustain a team, and whether there is a reasonable expectation of competition. Similarly, if any of the top five sports requested by the underrepresented sex is already being offered, the school should still explore whether it would be feasible to add an additional team (e.g., JV team, C team, etc.) in that sport.

Federal Guidance and Resources

Key Regulatory Provision: [34 C.F.R. §106.41](#).

Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (1996).
www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

Athletic Activities Counted for Title IX Compliance (2008).
<https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-20080917.pdf>

Dear Colleague Letter: The Title IX Athletics Three-Part Test (2008).
<https://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008-0327.pdf>

Standards for Part Three of the Three-Part Test (2010).
<https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-20100420.pdf>

Q & A on Part Three of the Three-Part Test (2010).
<https://www.ed.gov/laws-and-policy/civil-rights-laws/sex-discrimination/intercollegiate-athletics-policy-three-part-test--part-three-qs-as>