

**EXHIBIT**  
**18**  
Paxson  
8/14/2020



BROWN

# Title IX in Athletics

Office of the General Counsel  
March 12, 2020

# Legal Framework of Title IX in Athletics

## 34 C.F.R §106.41 Athletics

### *(a) General.*

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics.

### *(b) Separate Teams.*

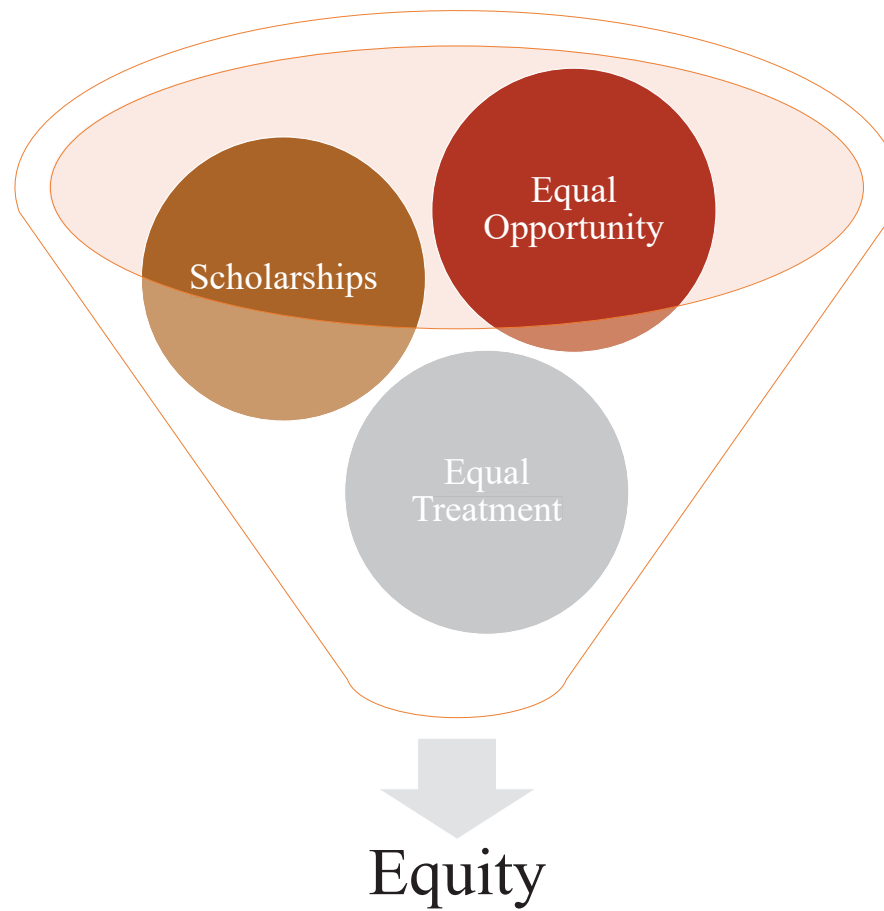
A recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport (i.e. boxing, wrestling, rugby, ice hockey, football, basketball, etc.).

### *(c) Equal Opportunity*

A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes (see “laundry list”).



## Title IX Athletic Equity



## Title IX Athletic Equity - Equal Treatment

### “Laundry List”

- Locker rooms, practice and competitive facilities
- Scheduling of games and practices
- Coaching: staffing, experience, and compensation
- Academic services
- Equipment and supplies
- Medical, training, strength and conditioning
- Communications and on-campus dining
- Travel and Per Diem
- Support services/director of operations
- Recruitment



# Title IX Athletic Equity - Equal Opportunity



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## Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test

Jan 16, 1996

Dear Colleague:

It is my pleasure to send you the enclosed (Clarification).

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979--both of which followed publication for notice and the receipt, review and consideration of extensive comments--specifically address intercollegiate athletics. Since becoming Assistant Secretary, I have recognized the need to provide additional clarification regarding what is commonly referred to as the "three-part test," a test used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics. This document provides that clarification in light of the Department's 1979 Policy Interpretation.

Accordingly, on September 20, 1995, OCR circulated to over 4500 interested parties a draft of the Clarification. In response to the numerous comments about whether the document provided sufficient clarity to the standards that have guided the enforcement of Title IX, OCR revised the draft. When circulating the draft of the Clarification, the obligation was to ensure that the standards that have guided the enforcement of Title IX were clearly stated.

The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes.

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.



## Title IX Athletic Equity - Equal Opportunity – 3 Part Test

Part 1

Substantial Proportionality

Part 2

History and Ongoing Program Expansion

Part 3

Full and Effective Accommodation of Interest and Ability



## Title IX Athletic Equity - Equal Opportunity – 3 Part Test

### Part 1

Institution provides intercollegiate level athletic participation opportunities for male and female students in a number substantially proportionate to their respective full-time undergraduate enrollment numbers



### OCR Analysis

OCR analyzes those athletes who:

- are receiving institution-sponsored support;
- are participating in organized activities during a sport's season;
- are listed on the eligibility squad list; and
- who, because of injury, cannot meet 1, 2, or 3 above but continue aid based on athletic ability.





## Title IX Athletic Equity - Equal Opportunity – 3 Part Test

### Example A

**Institution A** has a total of **600** athletes. Women make up **52%** of the University's enrollment, but only represent **47%** of its athletes. If the University provided women with **52%** of athletic opportunities, approximately **62** additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added.

**Institution A has not met Part 1**

### Example B

**Institution B** has a total of **60** athletes. Women make up **52%** of the University's enrollment, but only represent **47%** of its athletes. If the University provided women with **52%** of athletic opportunities, approximately **6** additional women would be able to participate. 6 participants are unlikely to support a viable team.

**Institution B would be able to meet  
Part 1**



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## Title IX Athletic Equity - Equal Opportunity – 3 Part Test

### Part 2

An institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex.



### OCR Analysis

OCR will review the entire history of the athletic program including an institution's

- record of adding or upgrading intercollegiate teams for the underrepresented sex;
- increasing the numbers of participants for the underrepresented sex; and
- affirmative responses to requests by students or others for addition or elevation of sports.



## Title IX Athletic Equity - Equal Opportunity – 3 Part Test

### Part 3

Is the institution fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex - including students who are admitted to the institution though not yet enrolled.



### OCR Analysis

- In making its determination, OCR will consider whether there is:
  - unmet interest in a particular sport;
  - sufficient ability to sustain a team in the sport; and
  - a reasonable expectation of competition for the team.

If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.



## Cohen v. Brown – Class Action Lawsuit

- Brought in Rhode Island federal court against the University, Brown's President, and Brown Athletics Director
- Plaintiff class comprised of all present, future, and potential Brown women students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown
- The suit arose in response to Brown's decision in May 1991 to demote 4 varsity teams from University-funded varsity status to donor-funded varsity status
- The demoted teams were women's gymnastics and volleyball and men's water polo and golf

In the 1990-1991 Academic Year, Brown funded 31 intercollegiate varsity teams  
(16 men's and 15 women's)

University  
undergraduate  
enrollment was  
52.4% men and  
47.6% women

Undergraduate  
varsity athletes  
was 63.3%  
men and 36.7%  
women



10.9%  
Differential



**Brown was  
found to have  
violated  
Title IX**



## Cohen v. Brown – Achieving Compliance: Part 1

1992

- The district court certified the class and denied Brown's motion to dismiss
- Preliminary injunction issued against Brown, ordering the reinstatement of women's gymnastics and volleyball to University-funded status and prohibiting the elimination or reduction in the status of funding of any existing women's varsity team until case resolved

1993

- Brown appealed preliminary injunction to the First Circuit, which upheld the district court's decision

1995

- The district court ruled that Brown was in violation of Title IX
- Brown was ordered to submit a comprehensive plan for coming into compliance



## Cohen v. Brown – Achieving Compliance: Part 1

1995

- Brown submitted a plan which was rejected by the district court
- The district court pointed out that Brown could achieve compliance in a number of ways:
  - Eliminate its athletic program altogether
  - Elevate or create the requisite number of women's positions
  - Demote or eliminate the requisite number of men's positions
  - Implement a combination of these remedies

1996

- Brown appealed to the First Circuit, which upheld the judgment, but reversed the remedial order and remanded the case back to the district court
- The First Circuit reasoned that, as part of academic freedom universities deserve great leeway in their operations, and thus, Brown should be able to determine how it will bring itself into compliance with Title IX:

“Our respect for academic freedom and reluctance to interject ourselves into the conduct of university affairs counsels that we give universities as much freedom as possible in conducting their operations consonant with constitutional and statutory limits”



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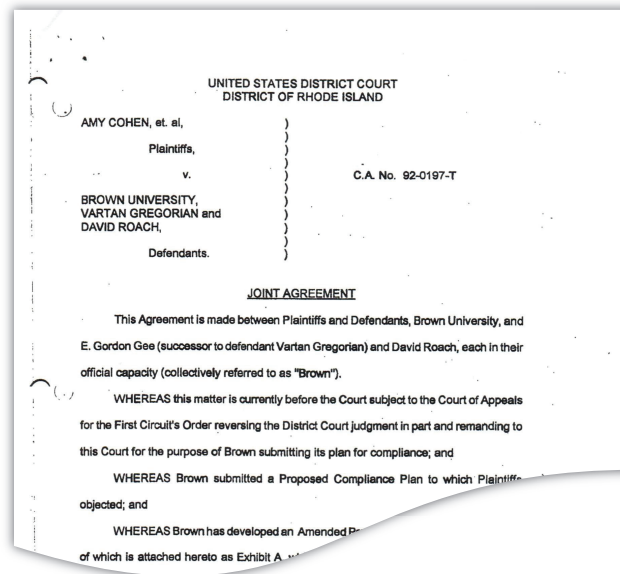
## Cohen v. Brown – Achieving Compliance: Part 1

1997

- On remand to the district court, Brown was ordered to submit its revised plan for compliance

1998

- The district court gave final approval to the Joint Agreement and entered judgment for the plaintiffs against Brown



## Cohen v. Brown – The Joint Agreement

- The Joint Agreement was entered October 9, 1998
- Indefinite in duration
- Contains mechanisms to bring Brown back into compliance if allowable variance is exceeded

The University will maintain no more than a 3.5% variance between percentage of women in the undergraduate population and the percentage of women varsity athletes





## Cohen v. Brown - Proportionality

Certain changes to the University's athletic program trigger a reduction in the permitted variance to 2.25%

### The triggers are:

- 1 The elimination of intercollegiate athletic teams for women or of co-ed teams or the change in status of intercollegiate athletic teams for women or co-ed teams from the university-funded to the donor-funded level
- 2 The replacement or substitution of existing intercollegiate athletic teams for women or co-ed teams at the university or donor-funded level
- 3 The creation of intercollegiate athletic teams for men at the university or donor-funded level
- 4 The change of intercollegiate athletic teams for men from the donor-funded to the university-funded level



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## Brown Recent History of Variances

Year	Variance
2009-2010	5.60%
2010-2011	0.91%
2011-2012	1.11%
2012-2013	0.34%
2013-2014	0.99%
2014-2015	1.43%
2015-2016	1.18%
2016-2017	2.63%
2017-2018	2.87%
2018-2019	2.68%



## Funding Determination

- Private donations are institutional dollars
- Goods and services provided through private funding will be included in any equity analysis

“A school may not skirt the requirement of providing both sexes equal opportunity in athletic programs by providing one sex more than substantially proportionate opportunity through the guise of ‘outside funding.’” (*Chalenor v. Univ. of North Dakota*)



## Brown Pending Title IX Matter



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS, REGION I  
5 POST OFFICE SQUARE, 8<sup>th</sup> FLOOR  
BOSTON, MASSACHUSETTS 02109-3921

May 9, 2017

Christina Paxson, President  
Office of the President  
Brown University  
Box 1887  
1 Prospect Street  
Providence, RI 02912

Re: OCR Case No. 01-16-2157  
Brown University

Dear President Paxson:

This letter is to notify you that the United States Department of Education, Office for Civil Rights (OCR) is opening for investigation the above-referenced complaint filed against Brown University (the University), alleging that the University discriminates against female students on the basis of gender with regard to its intercollegiate athletics program. Specifically, the Complainant alleged that the University is discriminating against women in its intercollegiate athletics programs by failing to provide an equal opportunity for female athletes in the areas of coaching, recruitment, and publicity.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972, and its implementing regulations.

**Complainant:**  
Unknown

### **Allegations:**

Brown discriminates against female students on the basis of gender with regard to its intercollegiate athletics program.

Specifically, that Brown discriminates against women by failing to provide an equal opportunity for female athletes in the areas of coaching, recruitment, and publicity.



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~~COHEN V. BROWN: DESIGNATED CONFIDENTIAL~~

Not Confidential: Publicly filed at 378-3(Ex. 27).

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