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Title IX's Three-Part Test for Athletic Participation Remains Enforceable in the Courts (At Least For Now...)

The current administration's focus on using Title IX to preclude athletic participation by trans female athletes may give colleges and universities the impression that other Title IX athletics compliance issues, such as meeting the "Three-Part Test" regarding participation opportunities for its student-athletes, are of less import. However, even if the Department of Education is not prioritizing such investigations at this time, Title IX still allows students to pursue litigation on their own to enforce Title IX's equity in athletics rules through the courts.

The latest example can be seen in a Jan. 20, 2026 decision by the Sixth Circuit Court of Appeals in *Niblock v. University of Kentucky* (UK), where plaintiffs alleged that UK failed to provide sufficient participation opportunities for female student-athletes to meet its Title IX obligations.

Title IX states that "[n]o person in the United States … shall, on the basis of sex, be excluded from participation in, be denied the benefits o or be subjected to discrimination under any education program or activity receiving Federal financial assistance," including in athletics. The Department of Education (DOE) created a "Three-Part Test" for Title IX compliance in the area of participation opportunities, which assesses:

> (1) Whether varsity athletics participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
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> (2) Whether the institution can show a history and continuing practice of program expansion which is responsive to the developing interest and abilities of the members of any underrepresented sex; or
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> (3) Whether the institution can demonstrate that the interests and abilities of the members of any underrepresented sex have been fully and effectively accommodated by its present program.

Because of the alternative nature of this test, a Title IX plaintiff must show that a school fails to meet all three of these standards. In *Niblock*, the Sixth Circuit affirmed the District Court's finding, following a three-day trial, that UK failed to meet the first two prongs of Title IX's Three-Part Test, but that plaintiffs failed to show sufficient unmet interest and abilities among UK's female students to support a viable team with a reasonable expectation of competitiveness. Accordingly, the Sixth Circuit upheld the District Court's ruling that plaintiffs failed to establish a violation of Title IX. Certain key takeaways warrant attention:

1. Impact of *Loper Bright* on the Three-Part Test

In both the trial and appellate courts, UK argued that, with the demise of the doctrine of regulatory agency deference resulting from the U.S. Supreme Court's 2024 *Loper Bright* decision, DOE's regulations and guidance – including the Three-Part Test – are not entitled to deference and should be disregarded. The District Court found that the Sixth Circuit's prior adoption of the Three-Part Test justified its continued application, as recognized in the *Loper Bright* decision. The Sixth Circuit avoided ruling on this issue, finding that plaintiffs' failure to establish UK's noncompliance with the Three-Part Test rendered such a ruling unnecessary.

However, this open issue could dramatically impact Title IX enforcement and private litigation in the future. Two Sixth Circuit judges filed a separate concurrence, arguing that *Loper Bright* "should prompt us to revisit" DOE's regulations and guidance and reject the Three-Part Test. Without the Three-Part Test, they wrote, "many indicators show that Title IX likely prohibits only intentional discrimination … on the basis of sex." Thus, only gender inequities that could be proven to be the result of intentional discriminatory animus would run afoul of Title IX, regardless of any inequity resulting from institutional practices.

2. Measuring Interests and Abilities

So long as the Three-Part Test stands, each institution has an ongoing duty to collect and assess information regarding student athletic interests and abilities. One common part of a school's assessment of interests and abilities is a survey of its student body, which must be conducted with sufficient frequency to capture changing interest and abilities during students' tenure at the institution. This survey featured prominently in the Sixth Circuit's decision. At UK, all first-year, sophomores and juniors were required to complete an athletics interests and abilities survey as a prerequisite to registration for classes. This resulted in a very high response rate of 70-80% of the undergraduate student body and may set a new high "bar" for other institutions to meet.

The court noted that plaintiffs presented evidence reflecting a fair amount of interest in the three sports they claimed should be added at UK (equestrian, lacrosse and field hockey). However, there was only scant objective evidence of sufficient ability to compete at Division I level, and not nearly enough to field viable teams in any of the three sports at issue. As the Sixth Circuit observed, "Title IX does not require a school to attempt to form a new team unless the student body can field teams to compete" at the varsity level.

Moreover, UK's survey asked students who were interested in athletics participation to provide contact information in order for UK to "consider [their] information," but only very few did so. Although the District Court said that "UK cannot form a new team based on anonymous responses," the Sixth Circuit declined to "create a blanket rule against anonymous accounts of ability or a prohibition on survey results in Title IX cases."

Bond will continue to track both litigation and enforcement activity in this space. If you have any questions about this update or Title IX athletics compliance, please contact **Kristen Thorsness** or any Bond attorney with whom you work regularly.