

Title IX and Athletics Equity

2nd Edition

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Introduction

Title IX of the Education Amendments of 1972 prohibits public and private educational institutions that receive federal funds from discriminating based on sex, including discrimination by the institution in the administration of its athletics program. Title IX measures gender equity in athletics in three separate areas: (1) participation; (2) athletics scholarships; and (3) athletics benefits and opportunities (i.e., the laundry list). Sievert Werly created this Title IX practitioner’s guide (“Guide”) to provide college and universities with practical information and recommendations designed to ensure Title IX compliance relating to the administration of their athletics programs.

Topics covered in the Guide include:

- Full and effective accommodation of athletics interests and abilities through effective three-prong test management;
- Title IX requirements relating to the administration of institutional athletics aid.
- The provision of equivalent athletics opportunities for laundry list items using a legally sound disparity analysis.
- Best practices in Title IX and gender equity planning to avoid major legal exposure.

The Guide is not intended to be an institution’s sole source of information and requirements may have changed since the publication date. Please contact Sievert Werly’s College Sports Law Practice Chair Justin Sievert via telephone (615-601-0918) or email (Justin@SievertWerly.com) if you need additional guidance.

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College Sports Law Prac-

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JUSTIN SIEVERT is a Founding Partner of Sievert Werly LLC. As chair of the firm's College Sports Law practice, he represents clients on regulatory and legal issues, including NCAA infractions, Title IX, and a wide variety of athletics-related contracts.

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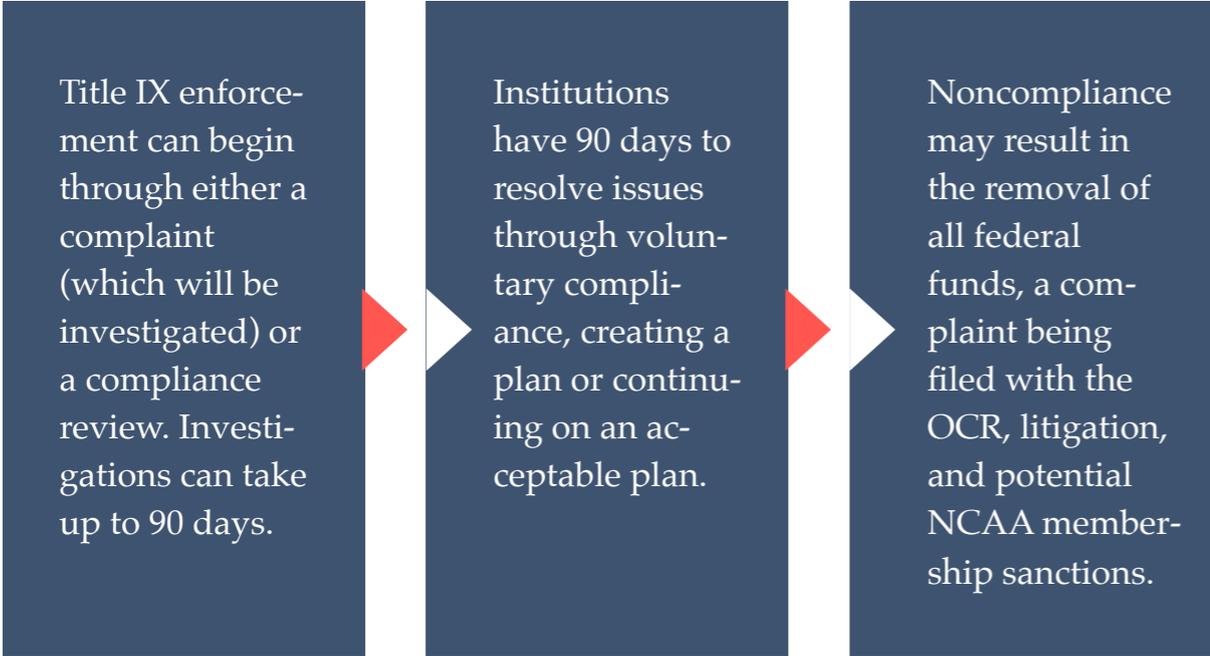
Title IX Overview

THE THREE COMPONENTS OF TITLE IX

Title IX measures equity in athletics in three distinct areas:

1. Athletics Participation Opportunities (the “Three-Prong Test”);
2. Athletics Aid; and
3. Other Benefits, including the provision of equipment and supplies, scheduling, travel, tutoring, coaching, locker rooms, facilities, medical and training facilities and services, publicity, recruiting, and support services (the “Laundry List”).

TITLE IX ENFORCEMENT PROCESS



“ 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.

- Title IX of the Educational Amendments

The Office of Civil Rights (OCR) examines each institution's athletics program as a whole; considering the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. However, an institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

COMPONENTS	BASIC TESTS
Component One (Participation)	An institution's athletics program will fully and effectively accommodate the athletics interests and abilities of its students if it can demonstrate <i>one</i> of the following: (1) its intercollegiate athletics level participation opportunities for male and female students are “substantially proportionate” to their respective full-time undergraduate enrollments; (2) it has a “history and continuing practice of program expansion” for the under-represented sex; or (3) it is “fully and effectively accommodating” the interests and abilities of the under-represented sex.
Component Two (Athletics Aid)	An institution will comply with athletics aid requirements under Title IX if reasonable opportunities for such awards to members of each sex are provided in proportion to the participation rate of each sex in intercollegiate athletics.
Component Three (Equitable Treatment)	An institution will comply with Title IX's equitable treatment requirements if the men's overall program and the women's overall program are equal in effect. The law does not mandate identical benefits, opportunities or treatment in each area but rather provides that where members of one sex enjoy more favorable treatment in one area, such benefit must be “offset” by treatment in another area that favors members of the other sex.

Component One

Athletics Participation Opportunities

THE THREE-PRONG TEST

An institution's athletics program will fully and effectively accommodate the athletics interests and abilities of its students if it can demonstrate **ONE** of the following:

1. its intercollegiate athletics level participation opportunities for male and female students are **"substantially proportionate"** to their respective full-time undergraduate enrollments; or
2. it has a **"history and continuing practice of program expansion"** for the under-represented sex; or
3. it is **"fully and effectively accommodating"** the interests and abilities of the under-represented sex.

Prong One - "Substantial Proportionality"

An institution can comply with the first prong, "substantial proportionality" if it can demonstrate the athletics participation rate of the underrepresented sex is substantially proportionate to the institution's full-time undergraduate enrollment. For example, if an institution's undergraduate enrollment is 57 percent female and 43 percent male and 57 percent of the participants in the athletics program are female, and 43 percent are male, the institution would satisfy the first prong.

Practice
Tips

Did You Know?
One Thing to Remember About
Each Prong

PRONG ONE

Although the favored practice is expanding opportunities for the underrepresented sex, institutions are not precluded from implementing a roster management system or eliminating programs for the overrepresented sex to meet prong one compliance.

PRONG TWO

Reducing participation opportunities provided to members of the over-represented sex that result in a net statistical expansion of women's participation percentages does not provide a basis for compliance with this prong.

PRONG THREE

If an institution is asserting Prong III compliance, it must be proactive through data collection and analysis. Institutions must collect reliable and neutral data to support their conclusions to the following questions: (1) is there an unmet interest in a specific sport; (2) is there sufficient ability to sustain a team in the sport (3) is there a reasonable expectation of competition for the team?

While this seems simple, the difficulty for institutions is the OCR has not set a bar as to what percentage disparity would be considered substantially proportionate.

Instead, the OCR provides institutions considerable leeway understanding that many variables are out of an institution's control and it may be unreasonable to expect an institution to achieve exact proportionality. For example, natural fluctuations in enrollment and participation rates, the number of students that may need accommodation to achieve exact proportionality, and the size of an institution's athletics program result in the OCR making a determination of prong one compliance on a case-by-case basis, rather than the use of an exact statistical test.

Examples of Prong One Compliance

In its 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, the OCR provided additional clarity on its analysis through a non-exhaustive list of examples where prong one compliance would be achieved despite the institution's proportionality disparity being greater than 1%.

- If an institution's enrollment is 52% male and 48% female and 52% of the participants in the athletics program are male and 48% female, then the institution would clearly satisfy part one. However, the OCR recognizes that natural fluctuations in an

institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.

- Over the past five years an institution has had a consistent enrollment rate for women of 50%. During this time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal--i.e., 50% of the student-athletes in its athletic program are female--its enrollment rate for women increases to 52%. Under these circumstances, the institution would again satisfy part one.
- The OCR will also consider 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. In other words, an institution would not be found to be noncompliant where there wasn't an adequate number of interested and able students and enough

competition to support a viable athletics program to overcome the difference between proportionality and the institution's disparity (i.e., if an institution had 300 student-athletes where the women made up 52% of the institution's enrollment but were only represented in athletics as 45% of student-athletes, the institution would be approximately 21 additional student-athletes from reaching proportionality. Numerous sports have average roster sizes under 21 student-athletes making a viable sport possible assuming interest, ability, and competition were present. However, if the women were represented as 49% of student-athletes, the institution would be approximately nine (9) additional student-athletes from proportionality. This may not be a sufficient number to support a viable sport program and thus the institution would likely comply even with a disparity of 3%).

These examples provide a few key takeaway points for institutions to consider:

- The OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates which may have a short-term impact on percentage disparities. While immediate correction isn't required, monitoring fluctuations and potential trends is expected.

- There is additional leeway under prong one when the number of opportunities needed to achieve substantial proportionality would not be sufficient to sustain a viable team (i.e., a team for which there is an adequate number of interested and able students and enough available competition to sustain an intercollegiate team). If an institution is going to make this assertion regarding a higher than acceptable disparity, it should be prepared to address the issue through data (e.g., average size of teams offered for the underrepresented sex, potential viable sport program additions that would fit into an acceptable disparity ratio).
- The OCR and the courts have recognized that institutions have the flexibility to determine compliance with prong one. Although the favored practice here would be expanding opportunities for the underrepresented sex, institutions are not precluded from implementing a roster management system or eliminating programs for the overrepresented sex to meet prong one (more on this in the Strategic Planning chapter).

Prong Two - "A History and Continuing Practice of Program Expansion"

An institution will be in compliance with the second prong "a history and continuing practice of program expansion", if it can

demonstrate a history and continuing practice of program expansion that is “demonstrably responsive” to the developing interests and abilities of the under-represented sex.

In order to demonstrate a net program expansion for the under-represented sex, the 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, the OCR identified specific factors it will use to analyze both of these requirements.

History of Program Expansion

- Record of adding intercollegiate teams by sex
- Record of upgrading teams to intercollegiate status by sex
- Record of increasing the number of participants of the under-represented sex
- Affirmative responses to requests by students or others to add or elevate sports

Continuing Practice of Program Expansion

- Current implementation of a policy or procedure for requesting the addition of sports that includes the elevation of club or intramural teams

- Effective communication of that policy or procedure to students
- Current implementation of a plan or program expansion that is responsive to developing interests and abilities of the under-represented sex
- Demonstrated efforts to monitor developing interests and abilities (and timely reaction to the results of those efforts)

As a result, institutions should be prepared to document when sport programs were added or discontinued, their rationale behind the decision, and the overall impact of these decisions on overall athletics participation numbers for men and women. Additionally, if an institution is asserting compliance with prong two, it should be prepared to present this information along with evidence the net expansion was responsive to their students’ interests and abilities. If there isn’t a connection between the opportunities added and the students’ expressed interests, compliance will not be achieved.

An institution’s requirements in demonstrating prong two compliance does not end with documenting history. An institution must also ensure program and participant growth is continued over time as to ultimately be in compliance with prong one or three. While the OCR does not have a fixed time period for

asserting compliance with prong two, the institution is required to create, implement, and monitor a policy and procedure that provides an avenue for sports to be added, how the institution will communicate the policy, and how the institution will monitor and respond to requests.

Examples of Prong Two Compliance

In its 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, the OCR provided a non-exhaustive list of examples analyzing hypotheticals where prong two compliance was, and was not, achieved.

- At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on

these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.

- By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.
- In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's

varsity team that had eight members. In 1987 and 1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

- Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In

1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

These examples provide a few key takeaway points for institutions to consider:

- You cannot comply with prong two if you eliminate a viable sport for the underrepresented sex. However, this doesn't mean the institution still couldn't comply with the other prongs (also important to note prong three likely would not be met either under the same rationale).
- Reducing participation opportunities provided to members of the over-represented sex that results in a net statistical expansion of women's participation percentages does not provide the basis for compliance with this prong. Expansion

should be measured in real numbers and not mere shifts in percentages.

- Significant upgrades relating to treatment areas such as facilities or equipment is not relevant to prong two compliance and is analyzed under the third component (see Equitable Treatment chapter).

Prong Three - “A History and Continuing Practice of Program Expansion”

If the institution cannot demonstrate compliance with the first or second prongs, it can still achieve compliance under the third prong, by demonstrating it is meeting the current interests and abilities of current and admitted students of the underrepresented sex. While there is nothing wrong with utilizing prong three, the issue lies in the “documentation” institutions are using to support this claim. This documentation, at best, often only includes the results of a survey to current undergraduate students and a statement, unsupported by evidence, that they have not heard any complaints from the underrepresented sex about a sport (or sports) not being offered by the department. While this rationale may never have legal implications for the institutions or fallout for the senior administrators tasked with Title IX compliance, an

institution is only one complaint away from their documentation, or lack thereof, being tested.

Turning Unsupported Assumptions into Evidence of Compliance

While there is no safe harbor for prong three compliance, the good news is that institutions can take immediate action to build their case for compliance through appropriate data collection and analysis.

To do so, institutions must utilize a broad range of nondiscriminatory factors to respond to three questions:

- Is there an unmet interest in a specific sport?
- Is there sufficient ability to sustain a team in the sport?
- Is there a reasonable expectation of competition for the team?

If the answer to all three of these questions is “no,” the institution will have met its burden in demonstrating opportunities for the underrepresented sex are not being denied, and thus be in compliance with Title IX.

Determining Unmet Interest

When determining what constitutes unmet interest, six main data sources are referenced by the OCR:

- interests and abilities survey results from current and admitted students;
- a publicized process whereby incoming and current students can request to add or elevate sports and evaluate and respond to all such requests;
- participation rates in club and intramural sports;
- participation rates in interscholastic sports for admitted students;
- interviews with students, coaches, and administrators; and
- participation rates in high schools, amateur athletics associations, and community sports leagues that operates in areas where the institution normally draws students.

Collectively, these sources provide institutions a roadmap in determining whether unmet interest exists for the unrepresented sex. Institutions merely choosing to rely on a single or limited number of data sources (e.g., survey results) will have difficulty proving prong three compliance.

Perhaps the most common data source institutions utilize to determine prong three compliance is the use of a survey. According to the OCR, a properly administered survey should

include a clear purpose statement, a comprehensive listing of potential sports and space for survey participants to write in unlisted sports and a request for contact information to allow institutions to further explore an indicated interest. Additionally, institutions should ensure personally identifiable information is kept confidential and reference this in a statement at the beginning of the survey. Finally, while the target population of the survey is admitted and enrolled students of the underrepresented sex, it is recommended institutions survey all admitted and enrolled students.

The most common question related to surveys is what response rate is acceptable. Although the OCR has not provided a specific rate, the U.S. District Court for the Eastern District of Pennsylvania in *Barrett v. West Chester University of Pennsylvania*, 2003 WL 22803477 (E.D. Pa. 2003), determined a 39% response rate was unacceptable.

The next data source institutions should utilize is requests made by incoming and current students to elevate (from the club or intramural programs) or add sports to the varsity program. As a result, institutions should implement policies and procedures for receiving and responding to these requests. Institutions must also ensure this policy is publicized and readily available to all incoming and current students.

The final three data sources are self-explanatory. Institutions should monitor participation rates in interscholastic sports for incoming students and in club and intramural sports for current students. Institutions should also schedule interviews with students, coaches and administrators to determine their opinions on sports they believe could be successful at the varsity level and any information they have regarding what incoming and current students feel should be offered by the institution. For example, a coach may know of students who did not accept their offers of admission to the institution due to another sport not being offered at the varsity level.

Finally, the OCR recommends institutions track participation rates in high schools, amateur athletic associations and community sports leagues in areas where it normally draws its students. One important distinction to remember with this data source is that it tracks possible interest rather than actual interest since the data is not directly tied to admitted and enrolled students. As a result, this data is helpful, but not as strong of an indicator as other sources. For example, if you are an institution located in New York, and 90% of your enrolled and admitted students generally come from New York and New Jersey, you should be tracking interscholastic sports offered and amateur athletic associations that operate in these states. More specifically, if the majority of

these students are from the greater New York City area, you would also track community sports league offerings in that area.

Ability to Sustain a Team

If you determine there may be an unmet interest, the next step is determining whether the team would be viable. Here, the OCR considers:

- the athletics experience and accomplishments of potential student-athletes interested in playing the sport in interscholastic, club or intramural competition;
- opinions of coaches, administrators, and athletes at the institution on whether the interested or admitted students have the potential to be a viable varsity program;
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team reflects the potential to sustain a team at the varsity level;
- participation in athletics at any level by the interested or admitted students that demonstrates similar skills or abilities that are necessary in the sport being considered; and,
- tryouts or direct observations of participation in the particular sport being considered.

In our experience, the two most common questions are (1) how to define ability; and (2) how to define sustainability. First, the OCR has indicated ability is not measured by immediate success or even the ability to compete at the same performance level as current varsity sports offerings. Rather, ability is measured in terms of being able to compete at the intercollegiate level. The ability to sustain a team is measured by considering the sample size of the interest. For example, an unmet interest spike in a specific sport that is short-lived would not require a sport to be elevated or added but would require institutions to closely monitor the situation and conduct assessments accordingly.

A final consideration when analyzing the ability to sustain a team is a thorough understanding of the specific needs of the considered sport. For example, the institution should gather information relating to how many participants are necessary in the considered sport based on factors such as the rate of substitutions necessitated by factors such as length of competitions, the intensity of play or injury, the variety of skillsets required for competition and the minimum number of athletes needed to conduct effective practices for skill development. Institutions should also seek the opinions of administrators and coaches concerning the skill and ability available to compete at the intercollegiate level and gather data from other institutions in the

governing athletic association or conference to which the institution belongs or that participate in the institution's competitive region.

Reasonable Expectation of Competition

If your institution determines there is an unmet interest in a particular sport where a viable program could be created, the potential team must also have a reasonable expectation of competition in the institution's normal competitive region. Here, the institution should analyze competitive opportunities for this program against schools in which the institution normally competes and other schools who are physically located in this geographical area. For example, if your institution identified an unmet interest in women's ice hockey and information gathered indicates the sport would be viable, but the institution is in Florida, and current sport offerings play a regional schedule, and the conference in which the institution is a member does not sponsor women's ice hockey, the institution would not be expected to add the sport.

However, the institution should approach the conference office to determine whether other members had gathered similar data. If this is the case, the conference should explore adding the sport. If the institution was in Minnesota, where there likely would be a

reasonable expectation of competition, the institution would need to add the sport within a reasonable period to maintain compliance with prong three.

Overall, if an institution is asserting prong three compliance, it must be proactive. Merely stating aspiring teams request intercollegiate opportunities isn't enough. Institutions must collect reliable and neutral data to support their conclusions.

Additionally, although it should be fairly obvious, the OCR and the courts state that where schools choose to eliminate viable teams of the under-represented sex, it cannot then claim compliance with prong three. This outcome is premised on the underlying point that if there is an existing team, it is virtually undisputed that there is a demonstrated interest in that particular team. The subsequent elimination of that team significantly undermines a claim that the institution is fully and effectively accommodating the athletics interests and abilities of the under-represented sex.

Classifying a "Team" Under Title IX

While sport additions have provided help with one problem, they have also created other potential Title IX issues in situations where institutions have liberally interpreted what the OCR considers to be a "sport." Specifically, using too liberal of a definition may lead

to a legal challenge of an institution's purported prong one (i.e., substantial proportionality) or prong two (i.e., a history and continuing practice of program expansion) compliance. For an institution to prevent this type of challenge, it is important to understand how the OCR classifies a "sport" for Title IX purposes.

A Framework for Defining a Title IX "Sport"

The OCR does not have a specific definition of "sport" and rather considers several factors related to an activity's structure, administration, team preparation, and competition, when determining whether an activity is a sport and counted as part of the institution's intercollegiate athletics program for determining compliance with Title IX. Specifically, the following factors are considered when determining whether a program will be considered a "sport" for Title IX purposes:

Program Structure and Administration

- Whether the operating budget, support services (including academic, sports medicine and strength and conditioning support) and coaching staff are administered by the athletics department or another entity, and are provided in a manner consistent with established varsity sports; and

- Whether the participants in the activity are eligible to receive athletic scholarships and athletic awards (e.g., varsity awards) if available to athletes in established varsity sports; to the extent that an institution recruits participants in its athletics program, whether participants in the activity are recruited in a manner consistent with established varsity sports.

Team Preparation and Competition

- Whether the practice opportunities (e.g., number, length and quality) are available in a manner consistent with established varsity sports in the institution's athletics program; and
- Whether the regular season competitive opportunities differ quantitatively and/or qualitatively from established varsity sports; whether the team competes against intercollegiate or interscholastic varsity opponents in a manner consistent with established varsity sports;

When analyzing this factor, the following may be taken into consideration: (1) whether the number of competitions and length of play are predetermined by a governing athletics organization, an athletic conference, or a consortium of institutions; (2) whether the competitive schedule reflects the abilities of the team; and (3) whether the activity has a defined

season; whether the season is determined by a governing athletics organization, an athletic conference, or a consortium.

- If pre-season and/or post-season competition exists for the activity, whether the activity provides an opportunity for student athletes to engage in the pre-season and/or post-season competition in a manner consistent with established varsity sports; for example, whether state, national and/or conference championships exist for the activity; and
- Whether the primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels rather than to support or promote other athletic activities.

When analyzing this factor, the following may be taken into consideration: (1) whether the activity is governed by a specific set of rules of play adopted by a state, national, or conference organization and/or consistent with established varsity sports, which include objective, standardized criteria by which competition must be judged; (2) whether resources for the activity (e.g., practice and competition schedules, coaching staff) are based on the competitive needs of the team; (3) if post-season competition opportunities are available, whether participation in post-season competition is dependent on or

related to regular season results in a manner consistent with established varsity sports; and (4) whether the selection of teams/participants is based on factors related primarily to athletic ability.

Favorable Presumption for Members of Intercollegiate Athletics Associations

The OCR presumes sport programs that are members of intercollegiate athletics associations, such as the NCAA, that have organizational requirements which address the above-factors identified by the OCR, are sports under a Title IX analysis absent evidence the institution is not offering the activity in a manner consistent with the above-identified factors. For example, if your program offers co-educational sailing, and the program is a member of the Inter-Collegiate Sailing Association, this sport would likely be considered a sport by the OCR unless there was evidence this program was being offered in a manner inconsistent with the OCR's sport test.

Classifying Cheerleading as a "Sport" Under Title IX and Seeking Advisement from the OCR

One of the trickier programs to classify under Title IX has been cheerleading. In the past, the OCR has taken the position that cheerleading programs are support programs for athletics

programs and are thus not a "sport program" under Title IX. However, this viewpoint has been challenged in recent years as competitive opportunities for cheerleading have increased nationally. This, coupled with the fact schools offer coaching, practice facilities, equipment and scholarship opportunities to squad members, has created a strong argument for colleges and universities. However, there is still not uniform acceptance of competitive cheerleading as a "sport" under Title IX, and institutions should understand their program will be analyzed on an individual basis.

If an institution is unsure whether a particular sport is a "sport" under Title IX, it can seek an OCR determination. The institution is required to submit an argument for inclusion that provides an analysis under the aforementioned factors.

Framework for Defining a Title IX "Participant"

After determining which teams are to be included in the mix, a school must determine the number of male and female athletics participants. The Policy Interpretation and the 1996 Clarification defines participants as those:

- Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution

involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

- Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- Who are listed on the eligibility or squad lists maintained for each sport, or
- Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

According to the 1996 Clarification, and under the above definition, the OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. Thus, as a general rule, the OCR will consider all athletes listed on a team's squad or eligibility list as of the team's first competitive event to be participants. Additionally, a multi-sport student-athlete will be counted in each sport he or she participates in. For example, a student-athlete who is a member of the cross country, indoor, and outdoor track and field teams would be counted three times.

Component Two

Athletics Aid

Institutions that provide athletics aid are required under Title IX to provide reasonable opportunities for such awards to members of each sex in proportion to the participation rate of each sex in intercollegiate athletics. In other words, if your institution's athletics program is comprised of approximately 55 percent female student-athletes, then 55 percent of your athletics aid should be provided to those female student-athletes.

Although the OCR, which set forth this framework, in its 1998 Clarification Letter on Financial Aid, has a high threshold for meeting the "substantially proportionate" standard, it does not require institutions to achieve exact proportionality. Instead, the OCR permits a small variance from exact proportionality, recognizing that, in practice, some flexibility is necessary to avoid requiring institutions to unreasonably adjust their scholarship allocations.

The OCR's Variance Evaluation Methodology

If an institution has an unexplained disparity of 1% or less in its allocation of athletics aid for either gender there will be a strong presumption that the

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Non-Discriminatory Factors in Athletics Aid

In the 1998 Clarification Letter on Financial Aid, the OCR provided a non-exhaustive list, of nondiscriminatory factors an institution may be able to utilize to support an athletics aid disparity over 1%:

PROGRAM DEVELOPMENT

Phasing in scholarships for a new athletics program that is based on a written timeline that is reasonable in light of the college athletics recruiting landscape

IN-STATE V. OUT-OF-STATE TUITION

Differences between in-state and out-of-state tuition at public institutions where one sex is not consistently awarded a greater number of out-of-state scholarships due to discriminatory recruitment practices noncompliance.

PRONG ONE COMPLIANCE

Legitimate efforts undertaken to comply with Title IX requirements, such as participation requirements

disparity is reasonable and based on legitimate and nondiscriminatory factors. However, if there is an unexplained disparity of more than 1%, the OCR, instead, will have a strong presumption the institution has violated its requirements under the athletics aid component of Title IX. As a result, institutions must be prepared to explain and provide evidence that any disparity variations over 1% are due to non-discriminatory factors and that these factors are reasonable given the circumstances.

Utilizing Non-Discriminatory Factors

In the 1998 Clarification Letter on Financial Aid, the OCR provided the following, non-exhaustive list, of nondiscriminatory factors an institution may be able to utilize to support an athletics aid disparity over 1%:

- Actions taken to promote athletic program development (i.e., phasing in scholarships for a new athletics program that is based on a written timeline that is reasonable in light of the college athletics recruiting landscape);
- Differences between in-state and out-of-state tuition at public institutions where one sex is not consistently awarded a greater number of out-of-state scholarships due to discriminatory recruitment practices;

- Legitimate efforts undertaken to comply with Title IX requirements, such as participation requirements (e.g., component one).
- Unexpected fluctuations in the participation rates of males and females (e.g., if an athlete who had accepted an athletic scholarship decided at the last minute to enroll at another institution).

Thus, utilizing our example from the beginning of this chapter, if women represent 55% of the institution's student-athletes, the OCR would expect that the women's athletic scholarship allocations represent 54%-56% of the scholarships allocations for all student-athletes, after accounting for any legitimate nondiscriminatory factors the institution is able to establish. However, institutions should keep in mind the OCR reviews an institution's compliance on a case-by-case basis and it is possible to be found in compliance with a disparity greater than 1% or to be found noncompliance with a disparity that is less than 1%. For example, if 1% an institution's athletics aid allocations are less than the value of one full athletics scholarship, the OCR may presume that a disparity up to the full value of one scholarship is equitable and nondiscriminatory. On the other hand, even if an institution has a disparity of less than 1%, if that disparity is

linked to some type of discrimination, the institution be deemed noncompliant.

Remaining Athletics Aid Considerations

In addition to the basic framework provided by the OCR, institutions often have additional questions regarding the nuances of athletics aid under Title IX and how these impact their campuses. The following is a list of common questions institutions have relating to athletics aid:

- **How are participants counted for financial aid purposes?**

Unlike with component one, athletics participation opportunities, student-athletes are only counted one time when making an athletics aid allocation analysis regardless of the number of sports they participate in. For example, although a student-athlete who competes in cross country, indoor, and outdoor track and field would be counted three times for participation, the student-athlete would only be counted once for athletics aid purposes.

- **How are other types of institutional aid counted when**

analyzing athletics aid allocations? If a student receives financial aid from any institutional source and this aid is based on the student's athletics ability, this amount should be included in the institution's athletics aid allocation analysis.

While this analysis seems simple, it can become more complicated based on the specific circumstances of a given award. For example, if an institution also distributes other types of financial assistance (e.g., work-related aid, student loans, etc.), these items also need to be analyzed to ensure they are proportionally available to both male and female student-athletes. Additionally, there may be instances where an athletics aid award is reduced due to another type of nonathletics aid, such as an academic scholarship. Here, the nonathletics award wouldn't be counted so long the reduction wasn't due to a discriminatory practice (i.e., masking athletics aid in the form of nonathletics aid to provide more opportunities to one sex).

- **How is summer athletics aid analyzed under Title IX?** While the OCR has not counted summer aid awarded to student-athletes under this framework, institutions should monitor and analyze the provision of summer aid to student-athletes under a separate equity analysis to ensure this aid is being awarded based on a nondiscriminatory, written policy.

- **How is aid awarded to student-athlete who has exhausted his or her eligibility analyzed under Title IX?** Similarly to summer aid, while the OCR has not counted aid awarded to student-athletes under this framework, institutions institutions

should monitor and analyze the provision of summer aid to student-athletes under a separate equity analysis to ensure this aid is being awarded based on a nondiscriminatory, written policy.

- **Our institution's athletics aid budgets are under the 1% disparity threshold, but our athletics aid allocations are over 1%. Are we in compliance with Title IX?** The OCR's analysis is based on actual dollars awarded to student-athletes. An institution cannot defend noncompliance on the grounds it budgeted appropriately, but a coach chose not to allocate the full budget amount to his or her program's student-athletes.

Component Three

Equitable Treatment

An institution's athletics program must provide equitable opportunities in areas including (1) the provision of equipment and supplies; (2) the scheduling of games and practice times; (3) travel and per diem allowances; (4) the opportunity to receive coaching and the assignment and compensation of coaches; (5) the opportunity to receive academic assistance and the assignment and compensation of academic support staff; (6) the provision of locker rooms, practice and competitive facilities; (7) the provision of medical and training facilities and services; (8) the provision of housing and dining facilities and services; (9) support staff; (10) publicity; and (11) recruiting. While identical benefits, budgets, opportunities or treatment are not required, the overall effect of any difference cannot have a disparate impact on one sex (i.e., where members of one sex enjoy more favorable treatment in one area, such benefit must be "offset" by treatment in another area that favors the other sex).

Equitable Treatment Test

In order to determine whether an institution's athletics program provides equitable opportunities in the above-referenced areas, the OCR uses the following three-step test:

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Three-Step Equitable Treatment Test

STEP ONE

Obtain and analyze information under each equitable treatment factor and determine for each factor whether the benefits or services provided favor the men's program, favor the women's program, are the same or, if different, have a negative effect on students of one sex.

STEP TWO

Make an overall determination for each program component: Are factors that favor one sex "offset" by factors favoring the other sex? Where there is no adequate offset, the OCR will find a disparity for that program component that favors one sex over the other.

STEP THREE

Compare the number and significance of disparities in the program components in which nonequivalence was found and compare the disparities favoring the men's program with those disparities favoring the women's program. Compliance is found where the disparities offset each other.

- **Step One:** The OCR will analyze each treatment area to determine whether each individual factor of a treatment area favors the men's or women's program, are the same, or if different, has a negative impact on the students of one sex.
- **Step Two:** The OCR will then make an overall determination for each treatment area to determine whether factors that favor one sex are offset by the factors favoring the other sex. This disparity analysis is analyzed based on overall impact rather than the number of factors. Where the offset is found to be inadequate, the OCR will find a disparity for that treatment area that favors one sex over the other.
- **Step Three:** The OCR will then compare its overall determinations for each treatment area and will consider the number and significance of any disparities between the men's and women's programs. The OCR will find compliance where the disparities offset each other. If greater disparities exist for one sex the institution will be found to have not complied with this component of Title IX.

Remaining Equitable Treatment Considerations

- **How do differences in spending impact equitable treatment compliance?** The OCR recognizes that sport administrators or coaches may have differing viewpoints on how to spend their

program's budget. While this is permissible, these decisions should be monitored because treatment issues can still be present. Institutions should ensure these types of decisions are made based on the majority of team members rather than the personal preferences of a coach or the coaching staff.

- **Are sport-to-sport or component-to-component comparisons appropriate when analyzing equitable treatment?** One common misperception is that Title IX requires individual sports or treatment areas to be treated equally. However, Title IX instead requires overall equivalence. This permits an institution to tier sport programs, or offset treatment areas based on their own goals and needs.
- **How do we look at differences in individual sports?** Not all sports are alike, and differences in sports may result in differences in treatment. In order to make an informed examination in this area, it is important to understand instances where variations may be permissible. The Title IX investigator's manual contains the following examples of nondiscriminatory differences: (1) differences inherent in the operation of specific sports because of rules of play; (2) nature / replacement of equipment; (3) rates of injury resulting from participation; (4) nature of facilities required for competition; (5) the maintenance / upkeep requirements of those facilities; (6)

differences caused by sex-neutral factors arising from some type of special circumstances of a temporary nature, such as fluctuations in recruiting activities based on a team's annual needs and desires; and (7) differences directly associated with the operation of a competitive event in a single-sex sport that creates unique demands or imbalances.

The key is that such sport-specific needs must be met in an equivalent manner for both men's and women's programs.

EQUIPMENT AND SUPPLIES

The provision of equipment and supplies focuses on uniforms, apparel, sport-specific equipment, supplies and instructional devices, and sport-specific strength and conditioning equipment.

CHECKLIST

Uniforms (e.g., competition uniforms - standard and alternate, practice clothing, travel apparel, laundry services, etc.)

- ✓ Quality
- ✓ Amount/ Availability
- ✓ Suitability
- ✓ Maintenance
- ✓ Replacement Schedule
- ✓ Budget

Equipment and Supplies Provided to Student-Athletes and Sport Programs (e.g., practice- and game-related equipment)

- ✓ Quality
- ✓ Amount/ Availability
- ✓ Maintenance
- ✓ Replacement Schedule
- ✓ Budget
- ✓ Storage Space
- ✓ Storage Location and Accessibility

Equipment and Supplies Provided by Student-Athletes

- ✓ Type
- ✓ Cost
- ✓ Rationale for Student-Athlete Supply

Practice
Tips

Provision and Maintenance of Equipment and Supplies

SPORT-SPECIFIC DIFFERENCES

While a budget line for equipment and supplies is one factor an institution can use in its analysis, the OCR will take into account sport-specific differences between programs. For example, a football program will have a larger equipment budget than a cross country program due to the number of student-athletes on the team and the outfitting costs of the sport (i.e., helmet, pads, etc.). Additionally, football uniforms and equipment will also have more demanding maintenance needs and a more frequent maintenance schedule.

EQUIPMENT NOT SUPPLIED

While most institutions include equipment and supplies provided to student-athletes, items student-athletes supply themselves should also be considered and a disparity may be found where a program's student-athletes are required to furnish types of equipment or supplies that the institution provides to other student-athletes. For example, a disparity may be found should if the school funds wearable technology for football and men's basketball, but not for non-revenue programs.

GAMES AND PRACTICE TIMES

The scheduling of games and practice times focuses on pre-season, regular, and post-season competitive opportunities and practice opportunities and scheduling.

CHECKLIST

Practice

- ✓ Beginning and Ending Dates (e.g., full use of traditional and non-traditional seasons, opportunity to practice during break periods when applicable)
- ✓ Days of the Week and Times (e.g., equitable opportunity to practice at best available slot for student-athletes if facility availability is limited, number of practices, and length of practices)

Competition

- ✓ Preseason
 - ✓ Days of Week and Times
 - ✓ Number of Competitions (e.g., opportunity to compete during non-traditional season where applicable)
- ✓ Opportunities Denied
- ✓ Regular Season
 - ✓ Days of Week and Times (i.e., which teams are given prime-time slots)
 - ✓ Number of Competitions (e.g., opportunity to utilize maximum opportunities available under governing organization and conference legislation)
- ✓ Postseason
 - ✓ Days of Week and Times
 - ✓ Opportunities Denied (e.g., are there non-NCAA post-season competitive opportunities such as the NIT in basketball where some sport programs are funded to attend, but others are not)

Practice
Tips

Scheduling of Games and Practice Times

CALCULATING OPPORTUNITIES

In order to make comparisons relating to athletics competition opportunities an institution can utilize the maximum opportunities permitted under their governing organization and conference's legislation and then calculating out the available opportunities utilized for each sport program.

WHOSE VIEWPOINT MATTERS?

It is important to remember Title IX is viewed from the perspective of a student-athlete. While a coach may have a non-discriminatory preference to compete or practice less often than another coach or to practice at a different time, if student-athlete input is not considered, and it causes non-equivalent opportunities, a disparity may exist.

TRAVEL AND COMPETITIVE REGION

Institutions should have specific policies in place that govern travel outside the department's normal competitive region. These policies should ensure equitable opportunities are available to travel outside of this region.

TRAVEL AND PER DIEM ALLOWANCE

When analyzing a sport program's travel arrangements and per diem allowance an institution should focus on each team's modes of transportation, lodging arrangements and length of stay, dining arrangements, and travel party size and composition.

CHECKLIST

Modes of Transportation

- ✓ Van
- ✓ Bus
 - ✓ Institution-Owned
 - ✓ Charter
- ✓ Air
 - ✓ Commercial
 - ✓ Charter

Hotel Accommodations

- ✓ Quality (e.g., star classification, etc.)
- ✓ Student-Athletes per Room
- ✓ Amenities

Dining

- ✓ Team Meals
- ✓ Per Diem Amounts
- ✓ Pregame and Postgame Meals
- ✓ Restaurants
- ✓ Catered Meals

Travel Arrangements

- ✓ Length of Stay (i.e., before and after competition)
- ✓ Travel Party Size and Composition (i.e., student-athletes, coaches, support staff, others)

Practice
Tips

Travel and Per Diem Allowance

THE CORE OF MOST ISSUES

Most issues relating to travel and per diem allowances stem from institutions' failing to have written travel policies with Title IX appropriate guidelines. This policy should have clear guidelines relating to party size and composition, appropriate travel modes, dining, and length of stay before and following competition.

ANALYZING SOURCES OF FUNDING

A common misperception is that only internal funding is part of the analysis when looking at spring break or summer trips. However, Title IX requires equitable opportunities regardless of how these opportunities are funded.

PER DIEMS VERSUS TEAM MEALS

Institutions must analyze the type and quality of dining options student-athletes have during away travel. Any differences between programs should include appropriate rationale (under Title IX) and discussions with student-athletes.

ACADEMIC ASSISTANCE

The review of an institution's academic support program designed specifically for student-athletes should include an analysis of the number, quality, compensation, and availability of academic support staff members and tutors, as well as the athletics department's academic support resources.

CHECKLIST

Number of Student-Athlete Recipients

Tutors

- ✓ Number
- ✓ Availability
- ✓ Qualifications
- ✓ Experience
- ✓ Compensation
- ✓ Type of Instruction
 - ✓ Group
 - ✓ Individual
- ✓ Department Oversight

Budget

- ✓ Source
- ✓ Amount

Use of Other Athletics Department Academic Resources

- ✓ Computers
- ✓ Tablets

Practice
Tips

Opportunity to Receive Academic Assistance

DEPARTMENT OR INSTITUTIONAL ASSISTANCE?

This laundry list item measures services available specifically for student-athletes, if any. Academic support available to all students is not applicable in this analysis.

SPORT-SPECIFIC ARRANGEMENTS

While sport-specific arrangements are permissible, they should be closely scrutinized to ensure other teams are afforded the same opportunity to access those services,

THE CORE OF MOST ISSUES

As with travel and per diem allowances, most issues with academic assistance stem from institutions' failing to have written policies defining what assistance is available and how it is provided (e.g., how tutors are assigned, a uniform payment scale, etc.) and how student-athlete satisfaction is measured. Institutions can rectify these issues through the creation of policies and procedures relating to the provision of academic assistance and a student-athlete exit interview process.

COACHING

Analyzing the opportunity for student-athletes to receive coaching requires a review of each coach's availability, assignment and compensation. Additionally, institutional policies and procedures relating to hiring, compensation, discipline and advancement should be reviewed.

CHECKLIST

Head Coach

- ✓ **Availability** (e.g., full-time, part-time, volunteer, office location, etc.)
- ✓ **Qualifications**
- ✓ **Experience**

Assistant Coaches

- ✓ **Number** (i.e., full-time equivalencies)
- ✓ **Availability** (e.g., full-time, part-time, volunteer, student-athlete / coach ratio, office location, etc.)
- ✓ **Qualifications** (e.g., employment history, training, certifications, etc.)
- ✓ **Experience** (e.g., professional, collegiate, other, etc.)

Compensation

- ✓ **Pay** (use neutral factors to justify pay such as job responsibilities, past experience, seniority and demonstrated success at the institution)
- ✓ **Fringe Benefits** (e.g., memberships, vehicle or housing allowances, use of institutional property or services, etc.)
- ✓ **Bonuses** (e.g., athletics performance bonuses, academic performance bonuses, etc.)
- ✓ **Position Funding** (i.e., institution or booster funded position)

Terms and Conditions of Employment

- ✓ **Duration of Agreement** (i.e., seasonal, annual, or multi-year) and At-Will Status
- ✓ **Compensation and Bonuses** (see above)
- ✓ **Work Conditions**
- ✓ **Primary and Secondary Duties**
- ✓ **Job Descriptions and Personnel Policies**

Practice
Tips

Opportunity to Receive Coaching

COMPENSATION

The OCR and courts have recognized that there are numerous legitimate reasons for pay discrepancies (e.g., coach's experience, past success, job responsibilities, etc.). As a result, the key component when analyzing coach compensation is whether the quality of coaching provided to men's and women's sport programs is impacted due to pay.

FEMALE COACHES FOR FEMALE TEAMS

Title IX does not favor female coaches for women's sport programs. Title IX promotes generating a quality applicant pool and then hiring the most qualified applicant.

CALCULATING AVAILABILITY

Institutions may convert all part-time positions into full-time equivalents when determining coaching availability. An institution can utilize this methodology based on the responsibilities of the part-time coach. Once the institution has a full-time equivalency it can divide this number by the total student-athletes for a sport program to calculate a student to coach ratio.

LOCKER ROOMS, PRACTICE, AND COMPETITIVE FACILITIES

When analyzing athletics facilities, institutions should review the quality, availability, and exclusivity of use for the facilities and locker rooms provided and the preparation of facilities for practice and competitive events.

CHECKLIST

Practice/Competitive Facilities

- ✓ **Location** (e.g. proximity to campus, locker room, etc.)
- ✓ **Quality, Condition, and Size**
 - ✓ Playing Surface (e.g., natural grass, field turf, astro turf, etc.)
 - ✓ Team Areas (e.g., dugouts, sideline space, etc.)
 - ✓ Spectator Areas (e.g. seating capacity, type of seats, video boards, sound system, etc.)
- ✓ **Daily Preparation and Maintenance** (i.e., set-up and breakdown for practices and events, cleaning, upkeep etc.)
- ✓ **Use** (i.e., exclusive, shared or other limitations)
- ✓ **Teams**
 - ✓ Seasons
 - ✓ Schedules
 - ✓ Times
- ✓ **Overall Condition**

Locker Room

- ✓ **Condition and Quality**
- ✓ **Size**
- ✓ **Lockers**
 - ✓ Number, Condition and Quality, and Size
- ✓ **Shower/Restroom Area**
 - ✓ Number, Condition and Quality, and Size
- ✓ **Team Room**
 - ✓ Size, Condition, Quality, and Amenities

Practice
Tips

Provision of Athletics Facilities

FACILITY DEVELOPMENT PLANNING

Facility analysis can be difficult as a newer facility is most likely going to offer enhanced aesthetics and amenities. Because institutions can't create new facilities for all sport programs at the same time a facility plan should be drafted with Title IX requirements in mind. This will allow an institution to explain significant facility upgrades with the appropriate long-term context.

FACILITY EXCLUSIVITY AND ACCESS

Facility access can be limited in a number of ways. A team may share a facility or locker room during their non-traditional or traditional season. A team could be displaced due to community use or a rental agreement. A team may have to move out of their locker room due to a visiting team needing the space. As a result, institutions must be proactive in assessing this area with a broad lens.

HOUSING AND DINING FACILITIES AND SERVICES

Housing and dining facilities and services should include a review of student-athlete housing, dining, and related arrangements.

CHECKLIST

Housing

- ✓ **Assignment Source**
- ✓ **Assignment Methodology** (i.e., institution, athletics department, sport program)
- ✓ **Location** (i.e., proximity to campus, athletics facilities, academic programming)
- ✓ **Quality**
 - ✓ Condition
 - ✓ Age
 - ✓ Amenities (e.g., furnishings, common space upgrades, etc.)
 - ✓ Summer/Break Periods Access

Dining

- ✓ **Meal Plan**
 - ✓ Type
 - ✓ Quality
- ✓ **Team Meals** (e.g., training table, snacks, pregame and postgame meals, etc.)
- ✓ **Summer/Break Periods Options**

Related Arrangements and Amenities

- ✓ **Parking**
- ✓ **Laundry Services**
- ✓ **Cleaning Services**

Practice
Tips

Provision of Housing and Dining Facilities and Supplies

HOUSING ASSIGNMENTS

When looking at housing assignments an institution should pay attention to programs that are provided with preferential housing assignments in terms of location and quality and the related arrangements that may come with the housing such as free parking, laundry services, or cleaning services.

DINING OPTIONS

When analyzing dining options for student-athletes, an institution must go beyond an analysis of only meal plans and should consider additional dining options such as training tables, catered meals, pregame and postgame meals and snacks, and other nutritional options available to student-athletes.

BREAK PERIODS

Institutions need to make sure the opportunity to have housing and dining arrangements available during break periods (i.e., summer, winter, and spring break) is available on an equitable basis.

SUPPORT SERVICES

The review of a sport program's support services should focus on the administrative and clerical assistance provided to each program along with an analysis of each program's office space and accompanying amenities.

CHECKLIST

Administrative Assistance

- ✓ Type
- ✓ Services Provided
- ✓ Reporting Lines

Clerical Assistance

- ✓ Type
- ✓ Ratio/Amount
- ✓ Availability
- ✓ Proximity
- ✓ Quality
- ✓ Services Provided

Office Space

- ✓ Head and Assistant Coaches
- ✓ Quality (e.g., size of office, features/amenities, shared or exclusive use, condition, etc.)
- ✓ Location (e.g., proximity to other program facilities and student-athletes, stature, etc.)
- ✓ Amenities (e.g., conference room, video room, locker facilities, kitchen, etc.)
- ✓ Office Equipment and Furniture (i.e., amount, condition, type)
- ✓ Technology (i.e., computers, televisions, cell Phones, tablets, laptops, software, etc.)
- ✓ Storage Space

Practice
Tips

Availability and Use of Support Services

ADMINISTRATIVE ASSISTANCE

Administrative assistance can include any type of departmental support that allows coaches to spend more time on their coaching (e.g., recruiting, marketing, event management, etc.).

REPORTING LINES

Another important consideration with administrative assistance is analyzing each sport program's reporting lines to ensure assignments are made with Title IX considerations. For example, men's revenue sports shouldn't be the only sports to report directly to the director of athletics while women's programs report to other administrators on the athletic department's organizational chart.

EMERGING TECH

The equipment and technology utilized by sport programs has drastically changed since Title IX was implemented. Institutions must ensure men's and women's sport programs have equal access to the latest technology.

MEDICAL AND TRAINING ASSISTANCE AND FACILITIES

The six factors to be addressed relating to medical and training assistance and facilities are health and accident insurance coverage, the availability and quality of medical personnel, the availability and quality of athletics trainers, the availability and quality of medical and training facilities, the availability and quality of strength and conditioning facilities, and the availability and quality of strength and conditioning coaches.

CHECKLIST

Health and Insurance Coverage

Medical Services

- ✓ Team and Other Doctors
- ✓ Specialists (e.g., nutritionist, psychologist, etc.)
 - ✓ Availability and Quality

Athletics Trainers

- ✓ Type (e.g., certified, student, etc.)
- ✓ Availability and Team Assignment
- ✓ Schedule
- ✓ Quality and Experience

Medical, Athletics Training, and Strength and Conditioning Facilities

- ✓ Type
- ✓ Quality, Size, and Condition
- ✓ Availability
- ✓ Technology (e.g., machines, equipment, etc.)

Strength and Conditioning Services

- ✓ Type (e.g., certified, student, etc.)
- ✓ Availability and Team Assignment
- ✓ Schedule
- ✓ Quality and Experience

Practice
Tips

Provision of Medical and Training Assistance and Facilities

SIMILAR ANALYSIS

When reviewing strength and conditioning services, the analysis will be similar to the analysis used when looking at coaches. Furthermore, medical, athletic training, and strength and conditioning facilities will be reviewed using many of the same criterion as practice and competitive facilities and locker rooms.

COVERAGE PLANNING

Institutions should utilize a uniform practice, competition, and travel plan for athletics trainers regardless of institutional size or department budget. Problems arise when differences arise regarding the type and use of trainers for similar sports (i.e., collision v. contact v. non-contact, or the use of student trainers instead of full-time certified trainers, etc.).

PROVISION OF SERVICES BY SPECIALISTS

Many revenue sport programs now have access to their own strength and conditioning coaches, psychologists, or nutritionists. Institutions must ensure these services are available to both genders on an equitable basis.

PUBLICITY

When analyzing publicity, the primary focus is on the availability and qualifications of the sports information office, the marketing opportunities provided to individual sport programs, and other promotional devices the institution uses to provide publicity to its sport programs.

CHECKLIST

Sports Information

- ✓ Services Provided
- ✓ Coverage Location (i.e., home and away competitions, practice, special events, etc.)
- ✓ Website and Social Media Coverage
- ✓ Personnel (e.g., full-time status, number, quality, team assignment, availability, etc.)

Marketing (i.e., quality, size, number, budget, etc.)

- ✓ Promotional Items
- ✓ Groups (e.g., booster clubs, fan clubs, kids clubs, alumni groups, etc.)
- ✓ Game Day Promotions (e.g., giveaways, attendance boosters, contests, sweepstakes, doubleheaders, etc.)
- ✓ Team Specific Marketing
 - ✓ Plans
 - ✓ Budget

Media Relations and Broadcast Coverage (i.e., newspaper, television, advertising, applications, webcasts, etc.)

- ✓ Local
- ✓ Regional
- ✓ National
- ✓ Institutional

Practice
Tips

Publicity Services and Coverage

SPORTS INFORMATION COVERAGE

Institutions should review their policies and procedures when assigning Sports Info personnel to both home and away competitions, including the level of support provided and the abilities of the covering party. Additionally, the publication of press releases should be similar in quality and quantity for both the men's and women's teams.

TITLE IX AND BUSINESS DECISIONS

While some believe enhanced publicity for more popular sport programs is a justifiable business decision, it doesn't alleviate an institution's obligations under Title IX.

INEQUITABLE MEDIA COVERAGE

The reality is the media covers some sport programs more than others. While an institution cannot control this, it can control its press releases, how it packages less popular sports with its premium offerings, and how it uses institutional and conference productions (i.e., webcasts, institutional television and radio) to boost coverage of less popular sports.

RECRUITING

Analyzing recruiting opportunities includes a review of each sport programs's opportunity for coaches and other personnel to recruit, each sport program's financial resources to recruit, and any limitations each sport program has to recruit at an adequate level when compared to the other gender.

CHECKLIST

Personnel

- ✓ Number
- ✓ Other Duties and Percent of Time

Recruiting Areas (i.e., state, regional, national, international)

Methods

- ✓ Telephone
- ✓ Mail
- ✓ Electronic (i.e., email, texting, social media)
- ✓ Travel (e.g., in-school, in-home, off-campus tournaments and events, camps)

Visits

- ✓ Subsidized (official), Unsubsidized (unofficial), Number, Quality and Activities

Budget

- ✓ Amount and Limitations

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Tips

Recruiting Opportunities

RECRUITING BUDGETS

Analyzing a recruiting budget's bottom line isn't the end all item when reviewing a sport program. Factors including roster size, annual roster fluctuations, and travel needs need to be taken into account to get an accurate picture of each program's ability and limitations on recruiting.

OPPORTUNITIES TO RECRUIT

When analyzing a sport program's opportunity to recruit from a personnel standpoint, each individual coach's employment status and duties are taken into account. If a coach is part-time or has significant on-campus responsibilities that limit the coach's ability to recruit, a disparity may exist if this burden largely falls on one gender.

CAMPUS VISITS

A disparity may exist where the substance of a visit is different for prospective student-athletes. This can be addressed through appropriate review, exit interviews with student-athletes, and consistent department policies and procedures.

FUNDRAISING

Analyzing fundraising support and a sport program's ability to fundraise primarily looks into whether all sport programs have equitable opportunities to fundraise. This can include a review of each sport program's support from institutional personnel, athletics personnel, and other resources such as use of facilities, alumni and donor lists, and budgeting.

CHECKLIST

Personnel

- ✓ Institution's advancement/development office
- ✓ Athletics department's Advancement/Development Office
- ✓ Program-specific personnel
- ✓ Booster clubs
- ✓ Assistance by other institutional office's (i.e., academics, faculty, etc.)

Facilities Availability and Event Management

- ✓ Quality
- ✓ Access
- ✓ Assistance

Access to Donors (i.e. access to donor lists, alumni lists, etc.)

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Fundraising Support and Opportunities

NOT LISTED IN THE LAUNDRY LIST?

While fundraising was not included in the original laundry list of items provided by the OCR, it's increasing role in funding college athletics and the potential ramifications it has in creating a different student-athlete experience makes it an important area of analysis for institutions.

EFFORT AND POPULARITY

While some coaches may work harder in their fundraising efforts and some programs are more popular among donors, this doesn't serve as a safe harbor for institutions to offer different student-athlete experiences. Where fundraising money creates a more favorable experience for one gender, the institution may need to offset the additional funding through the budgeting process.

PROGRAM-SPECIFIC DONATIONS

As noted, if a donor earmarks funding for a specific sport program, the institution will need to carefully review the situation to ensure equitable treatment for both genders. All donations are considered institutional money.

Strategic Planning

One of the most difficult aspects of Title IX is balancing its complexities with other campus issues, such as admissions and enrollment or development and funding. These factors often cause institutions to make difficult decisions without considering the substantial legal ramifications by not considering Title IX compliance as a part of these decisions.

As noted in prior sections, one of the major goals of Title IX, as it relates to athletics, is for institutions to provide equal participation opportunities while working towards substantial proportionality. If an institution has not yet reached substantial proportionality under prong one, the institution is expected to increase participation opportunities for the underrepresented sex under prong two or to add new programs or participation opportunities for the underrepresented sex if there is a demonstrated interest under prong three. An institution's decision to eliminate a current sport program or add a new sport program for either the over- or underrepresented sex can create legal consequences should these decisions be made without keeping the institution's compliance with the three-prong test in mind.

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Creating a Gender Equity Improvement Plan

STEP ONE - EVALUATE

The institution must review its current compliance with Title IX requirements and corresponding legislation from the institution's athletics governing body (i.e., NCAA, NAIA, etc.).

STEP TWO - PLAN

The institution use its assessment to create an improvement plan to address key areas of noncompliance and to ensure areas of compliance are thoroughly monitored.

STEP THREE - IMPLEMENT AND MONITOR

Finally, the institution must create actionable steps to properly implement the plan and monitor its success over the plan's duration.

Eliminating or Adding Sport Programs for the Underrepresented Sex and Participation Opportunities

The most important consideration for an institution to make when deciding to eliminate a sport program for the underrepresented sex is that substantial proportionality must be maintained (assuming it is already being met). The elimination of a sport program for the underrepresented sex would prevent an institution from claiming compliance with prongs two or three unless there was a net opportunity gain (i.e., another sport program was added at the same time the eliminated sport was dropped and the new sport program provided more participation opportunities for the underrepresented sex). This is because under prong two, it would be impossible for the institution to demonstrate a history and continuing practice of program expansion, and under prong three, they would not be able to claim they are effectively accommodating the interests and abilities of the underrepresented sex because there would be the elimination of a viable sport program.

In terms of adding a new sport program for the underrepresented sex, an institution would be permitted to do this under any of the three prongs as it would allow an institution to either meet or work towards substantial proportionality under prong one, demonstrate they are continuing to expand opportunities under

prong two and are effectively accommodating the interests and abilities of the underrepresented sex under prong three. However, it is also important to keep in mind decisions to add a new sport program for the underrepresented sex must be tied to actual interest from the underrepresented sex's undergraduate population.

Eliminating or Adding Sport Programs for the Overrepresented Sex and Participation Opportunities

Eliminating sport programs for the overrepresented sex is strongly disfavored because it takes away opportunities for students who are interested in participating in athletics rather than enhancing opportunities for students who may have been discriminated against. However, while disfavored, it is permissible as it moves an institution closer to substantial proportionality. However, it is important to note that unless substantial proportionality is achieved because of the elimination, an institution may still have legal obstacles. First, the elimination of opportunities for the overrepresented sex is not the same as providing additional opportunities for the underrepresented sex under prong two. Additionally, eliminating sports for the overrepresented sex does not equate to fully and effectively meeting the interests and abilities of the underrepresented (or overrepresented) sex under

prong three. And finally, if the overrepresented sex suffered all program cuts and substantial proportionality still wasn't achieved, the institution may not be able to justify this disparate treatment.

It is permissible for an institution to continue adding sport programs for the overrepresented sex if it can demonstrate it has fully and effectively accommodated the interest and abilities of the underrepresented sex under prong three. However, if a demonstrated interest arises for the underrepresented sex, the institution would need to act accordingly.

Eliminating Sport Programs, Athletics Aid and Provision of Benefits

While most of the focus when eliminating sport programs is based on participation opportunities, institutions should also keep in mind how these decisions impact compliance with athletics aid requirements and the equitable provision of benefits. In terms of athletics aid, the institution should ensure the over- and underrepresented sex's athletics aid allocations meet any changes the elimination of programs has caused to proportionality.

Additionally, the elimination of programs may also cause the overall effect of any difference in treatment to change based on how overall, benefits, budgets and opportunities are allocated.

Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams. Therefore, in negotiation compliance agreements, OCR's policy will be to seek remedies that do not involve the elimination of teams or reducing a portion of the men's athletics budget leaving men's non-revenue sports with much smaller allocations.

Roster Management

In a nutshell, roster management is when an institution caps or sets a floor on the number of student-athletes who it allows to participate on a given sports team. While the application is different based on an institution's goals and Title IX compliance needs, it has primarily been used to eliminate roster spots from the overrepresented gender to fund more opportunities for the underrepresented gender. As noted, although the OCR prefers institutions create additional opportunities for the underrepresented sex, institutions have considerable leeway to establish compliance with prong one using roster management or program elimination.

There are many different methodologies in designing a roster management system. The preferred option with many institutions begins by working with sport program head coaches to determine the preferred and maximum roster sizes for their sport programs. If the institution is attempting to figure out a pathway to reach proportionality under prong one they can calculate the gap by using the preferred roster size for the overrepresented sex and the maximum roster size for the underrepresented sex.

Other roster management systems begin with again using the maximum roster size listed for the underrepresented sex and then measuring the proportionality gap with either the institution's divisional average (i.e., Division I, II, or III, etc.) or the institution's conference average (e.g., Big 10, ACC, etc.) for the overrepresented sex.

Once these numbers are collected an institution will have appropriate data to determine if a roster management system alone would allow prong one compliance. If not, the institution should pay close attention to the feasibility of adding programs for the underrepresented sex.

The benefits of using a program like this is it allows institutions to fund more opportunities for the underrepresented sex by reallocating the funding from capping the roster sizes of the

overrepresented sex. While this would still allow fewer opportunities for the overrepresented sex, it may prevent the elimination of sport programs for the overrepresented sex while decreasing an institution's proportionality gap.

While roster management systems have proven to be effective, institutions should be mindful of a various challenges they may face. For example, a critical aspect of roster management that institutions often forget is laundry list allocations also may need to change once a system is implemented. For example, if the institution increases the floor of a sport program that program may need additional coaches, a larger operating budget, or even new locker rooms to meet those changes.

Additional issues may arise if a cap is set on a program for the overrepresented sex that is so low the program cannot be competitive or if a ceiling is set so high the program for the underrepresented sex's student-athletes do not have a meaningful experience in comparison with the overrepresented sex.

Tiering

Tiering within an athletics department is the process where an institution places sport programs in different tiers based on the amount of support the department will provide that program.

Regardless of whether an institution formally or informally tiers its athletics programs, it is a popular model because it allows an approach where specific sport programs can be treated differently. From a Title IX standpoint, this is permissible so long as the programs within each tier are treated on an equitable basis. While this is simple in theory, it requires institutions to complete a comprehensive analysis of its tiering model.

Best practices in creating a tiering system include:

- Identify the number of tiers to be created and the selection of teams to be included in each tier based on the institutions identity and goals.
- Review the number of student-athletes in each tier and the proportion of student-athletes for each gender in that tier compared to the general student enrollment (i.e., each tier should have the same percentage of each gender's student-athlete participation ratio assuming prong one is met. If the institution is not in compliance with prong one a step towards compliance would be allocating more student-athletes for the underrepresented sex in the top tier).
- For athletics aid and treatment purposes, the institution should attempt to match support between programs in that tier. For example, tier one sports may receive the full amount of

athletics aid, while lower tiers may receive a designated amount less in terms of percentage of the NCAA maximum. Additionally, tier one programs may have recruiting budgets that allow for international recruiting, a staff composition that meets NCAA maximums and a support staff, and play a national schedule, while lower tiers may have lesser designated support.

Non-Varsity Athletics Programming: Junior Varsity, Club, and Intramural Sport Programs

One common misunderstanding institutions have is how Title IX applies to junior varsity programming, club sport programs, and intramural sports. The first important point to remember is if a student-athlete who is participating on a junior varsity team meets the Title IX definition of a participant, they can be included in the institution's compliance efforts with the three-prong test. The issue usually lies with using junior varsity programming opportunities to offset varsity participation opportunities for the overrepresented sex. For example, if your varsity sport program has a junior varsity component within it (i.e., some student-athletes compete against other junior varsity programs, but are treated as varsity student-athletes), these student-athletes can likely be included in your normal three-prong test analysis.

However, if the junior varsity program is separated from the varsity program (i.e., has its own coaches, practices at a different time, etc.) then an analysis similar to tiering is more appropriate. Here you would compare junior varsity programming for the different sexes just as you would different tiers of varsity programming. Similarly, an institution's club and intramural sport programs cannot use participation data to offset varsity student-athlete participation. These programs should also be analyzed according to their specific levels.

Gender Equity Improvement Planning

One of the biggest mistakes institutions make is waiting until a Title IX issue arises before conducting a Title IX review or creating a gender equity improvement plan. Just because a complaint has not been made doesn't mean an institution is in compliance or acknowledge the reality that a lot of the factors measured are extremely fluid. By being proactive, an institution can end up minimizing costs on the back end that the institution would ultimately be spent defending itself against a complaint or lawsuit.

As a result, an institution should complete a comprehensive Title IX audit and create a corresponding improvement plan at least once every five years. Once the audit is completed, the institution

should have identified issues that must be addressed which can be done through the creation of a gender equity improvement plan which can be followed until the next audit occurs.

In order to create an improvement plan, there are three critical phases an institution should go through. First, the institution must review its current compliance with Title IX requirements and corresponding legislation from the institution's athletics governing body (i.e., NCAA, NAIA, etc.). Next, the institution use its assessment to create an improvement plan to address key areas of noncompliance and to ensure areas of compliance are thoroughly monitored. Finally, the institution must create actionable steps to properly implement the plan and monitor its success over the plan's duration.

Evaluating Your Institution's Compliance

As noted, the first step in creating a gender equity improvement plan is assessing your institution's compliance with Title IX. Whether the institution chooses to handle the audit in-house or hire outside legal counsel, the initial audit should include a comprehensive review of the institution's compliance with the three-prong test, athletics aid, and the equitable treatment of student-athletes. The internal audit should be documented via a written report which should include, at a minimum, the

methodology used to complete the audit, the analysis gauging compliance, and recommendations for each area of compliance.

Creating, Monitoring, and Implementing the Plan

Once the audit is completed, the institution will have the information necessary to create a gender equity improvement plan that addresses areas of noncompliance and concern and maintains compliance where the institution currently meets its Title IX obligations. Where disparities exist in any of the three components discussed in previous chapters, these issues should be addressed.

When creating a plan, some key elements to consider are:

- The plan should be in writing and approved by the institution's president or chancellor;
- The plan should be developed in response to a thorough assessment of the institution's compliance with all three Title IX components;
- The planning process should include involvement from key campus constituencies (i.e., the creation of a Title IX committee that has members within and outside of athletics)

- The plan should identify and address all issues the institution discovered through its assessment and other areas that need active monitoring;
- Each issue and area of monitoring should include measurable goals the institution will address by the conclusion of the plan and detailed steps it plans to take to accomplish these goals;
- Action steps will be assigned to specific staff members or groups to ensure accountability is understood and a timetable with proposed deadlines;
- If action steps require funding, the plan will specifically outline costs for these goals and how the institution plans to obtain such funding;
- The plan will include a system to monitor the implementation of the plan on an ongoing basis.
- The plan will have a mechanism for tracking progress and maintaining records relating to the implementation of the plan.

During the duration of the plan, an institution may encounter issues that could delay the timetable for implementation. This may be caused by issues such as staff turnover, inability to secure funding, or other Title IX issues not previously identified that take priority. Should this occur, the institution should ensure any

changes are fully analyzed before taking action. Any deadlines that cannot be met in the plan should be fully explained and documented.

Creating a Title IX Oversight Committee

While a senior woman administrator or a Title IX coordinator are often tasked with day-to-day Title IX oversight as it relates to athletics, these positions should be supported in their efforts to oversee the implementation of a improvement plan by a Title IX committee. While there is no requirement relating to committee composition, the committee should include a broad representation of the campus community. For example, key considerations (in addition to the senior woman administrator and a representative from the institution's Title IX office) should include a representative from the general counsel's office, male and female athletics administrators and coaches, the faculty athletics representative and/or other faculty members, a designee from the President or Chancellor's office, male and female student-athletes, and general student body representatives.

This broad spectrum of representatives will allow for a complete, objective analysis of Title IX compliance as it relates to athletics and differing viewpoints on how to prioritize and plan improvements.

OCR Enforcement

While most institutions are familiar with the potential consequences of a Title IX complaint, many are unaware of with the process the OCR follows when investigating a complaint.

Evaluating a Title IX Complaint

The OCR reviews every complaint submitted to its office to determine if it has the legal authority to conduct an investigation. The OCR will review each individual allegation to determine if any of the allegations describe an incident of sex discrimination (or another regulation which the OCR enforces). If no allegations meet this standard, the complaint will be dismissed. If the OCR determines the complaint does not contain sufficient detail, it may request additional information from the complainant. The complainant will then have 14 days to respond. The OCR may also dismiss the complaint if the issue has been resolved, if the same allegations have been included in a lawsuit against the same institution in state or federal court, or if another qualified legal body has already investigated or rendered a decision on the allegations included in the complaint.

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Title IX Enforcement Timeline

BEGINNING AN INVESTIGATION

Title IX enforcement can begin through either a complaint (which will be investigated) or a compliance review. Investigations can take up to 90 days.

RESOLUTIONS

Institutions have 90 days to resolve issues through voluntary compliance, creating a plan or continuing on an acceptable plan. noncompliance.

NONCOMPLIANCE

Noncompliance may result in the removal of all federal funds, a complaint being filed with the OCR, litigation, and potential NCAA membership sanctions.

Investigating the Complaint

Once the complaint is evaluated and the OCR finds further investigation is warranted, it will notify the parties involved with a letter. The OCR will then begin collecting and analyzing relevant evidence. These methods include collecting documentation, conducting interviews, and a campus visit. Once the OCR completes its investigation, it will determine if the evidence indicated the institution has violated the law based on a preponderance of evidence standard. The OCR will explain its findings and corresponding analysis in a letter to the involved parties.

Post-Investigation

If the OCR determines that a Title IX violation occurred, it will attempt to negotiate and sign a written resolution agreement with the institution that outlines the steps the institution will take in areas of noncompliance. This agreement will be monitored by the OCR to ensure the institution is in the process of or has taken appropriate action.

If an institution does not agree with the OCR's findings and refuses to enter into an agreement, the OCR will send a letter finding ("Letter of Finding") the institution noncompliant and the legal basis for its findings. If an institution still refuses to negotiate

an agreement, the OCR will then send another letter indicating it is prepared to enforce the institution's compliance ("Letter of Impending Enforcement Action"). If an agreement still hasn't been made, the OCR will begin enforcement action to suspend or terminate the institution's federal financial assistance.

Institution's Appellate Rights

Should an institution disagree with the OCR's findings, an institution may appeal arguing the OCR's evidence was insufficient, the facts the OCR relied upon were incorrect, or the appropriate legal standard wasn't applied. An institution's appeal must be filed within 60 days from the date of the determination letter. The OCR will submit a written response to the appeal once it has reviewed the appeal.

Additionally, an institution may file a separate lawsuit in federal court challenging the decision.

During this process, the school can bring additional information to the OCR to change the office's ruling.

Resolution Through Agreement

Should an institution receive a Title IX complaint has a few options to settle the matter through agreement. First, an institution may reach a settlement with the complainant through an Early Complaint Resolution. This process requires an agreement by both parties as well as a determination by the OCR that this agreement is appropriate. Although the OCR does not monitor this type of agreement, the complainant has the ability to file an additional complaint against the institution if it breaches the terms of the Resolution. This complaint must be filed within 60 days of learning of the violation.

Additionally, an institution may negotiate a resolution agreement with the OCR itself following the investigation. The agreement will address the areas of noncompliance determined during the investigation. Should this agreement be made, the OCR will monitor the institutions efforts to comply with its terms.

Full information on OCR Complaint Processing Procedures can be found [here](#).

Hot Topics in Title IX

Addendum #1: The Rise of Esports and Title IX Compliance

While we wait for the NCAA and its members to decide on whether to collectively enter the booming Esports industry the reality is that individually, colleges and universities have already begun the process. The National Association of Collegiate Esports (NACE), which is comprised of varsity-recognized programs, currently has over 130 members, while Tespa offers competitive opportunities for over 270 colleges and universities. There are also competitive collegiate opportunities available via the American Collegiate Esports League, a student-formed competitive organization, the Electronic Gaming Federation, which offers competitive opportunities at the high school and collegiate level, and the Collegiate Starleague, which has recently partnered with ESPN to host a College Esports championship.

However, as with any rapidly expanding industry, legal complexities begin to arise. One issue, related to college Esports, has been where does an individual program fit concerning its institutional classification and how does this impact the institution's compliance with Title IX.

The reality is that regardless of how your institution has chosen to classify its Esports program, there are Title IX implications. Title IX, which was passed

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Three Takeaways in eSports Program Creation under Title IX

CONCEPTUALIZE YOUR PROGRAM

Institutions must determine whether the goal is for the program to compete at the varsity or club sport level and understand, if competing as a varsity program, how this is defined by the OCR

ASSESS YOUR PROGRAMMING

Whether your program is classified as a varsity or club sports program a Title IX analysis will be required as any changes in your sport or club sponsorship mix will likely result in changes to all three equity components.

UNDERSTAND THE LEGALITIES OF PROGRAM ADDITION

Program addition isn't just a matter of financial planning. Institutions need to understand the legalities of Title IX program addition to ensure appropriate risk management.

in 1972, prohibits discrimination on the basis of sex in any federally funded education program or activity. Simply put, there will be a Title IX analysis as long as the program is officially sanctioned or sponsored by your institution.

Title IX Primer

While this practice guide covers Title IX's application to athletics in much greater detail, here is a brief primer if you have downloaded this guide due to your questions relating to Esports.

Title IX measures equity in athletics in three distinct areas:

1. Athletics Participation Opportunities (the “Three-Prong Test”);
2. Athletics Aid; and
3. Other Benefits, including the provision of equipment and supplies, scheduling, travel, tutoring, coaching, locker rooms, facilities, medical and training facilities and services, publicity, recruiting, and support services (the “Laundry List”).

Athletics Participation Opportunities

In terms of the first component, an institution can fully and effectively accommodate the athletics interests and abilities of its students if it can demonstrate ONE of the following:

- its intercollegiate athletics level participation opportunities for male and female students are “substantially proportionate” to their respective full-time undergraduate enrollments; or

- it has a “history and continuing practice of program expansion” for the under-represented sex; or
- it is “fully and effectively accommodating” the interests and abilities of the under-represented sex.

An institution can comply with the first prong, “substantial proportionality” if it can demonstrate the athletics participation rate of the underrepresented sex is substantially proportionate to the institution’s full-time undergraduate enrollment. For example, if an institution’s undergraduate enrollment is 57 percent female and 43 percent male and 57 percent of the participants in the athletics program are female, and 43 percent are male, the institution would satisfy the first prong. While exact proportionality is the goal, the OCR provides institutions considerable leeway and analyzes compliance on a case-by-case basis using a variety of nondiscriminatory factors.

An institution will be in compliance with the second prong “a history and continuing practice of program expansion”, if it can demonstrate a history and continuing practice of program expansion that is “demonstrably responsive” to the developing interests and abilities of the under-represented sex.

In order to demonstrate a net program expansion for the under-represented sex, the 1996 Clarification of Intercollegiate Athletics

Policy Guidance: The Three-Part Test, the OCR identified specific factors it will use to analyze both of these requirements.

History of Program Expansion

- Record of adding intercollegiate teams by sex
- Record of upgrading teams to intercollegiate status by sex
- Record of increasing the number of participants of the underrepresented sex
- Affirmative responses to requests by students or others to add or elevate sports

Continuing Practice of Program Expansion

- Current implementation of a policy or procedure for requesting the addition of sports that includes the elevation of club or intramural teams
- Effective communication of that policy or procedure to students
- Current implementation of a plan or program expansion that is responsive to developing interests and abilities of the underrepresented sex

- Demonstrated efforts to monitor developing interests and abilities (and timely reaction to the results of those efforts)

If the institution cannot demonstrate compliance with the first or second prongs, it can still achieve compliance under the third prong, by demonstrating it is meeting the current interests and abilities of current and admitted students of the underrepresented sex. While there is nothing wrong with utilizing prong three, the issue lies in the “documentation” institutions are using to support this claim. This documentation, at best, often only includes the results of a survey to current undergraduate students and a statement, unsupported by evidence, that they have not heard any complaints from the underrepresented sex about a sport (or sports) not being offered by the department. While this rationale may never have legal implications for the institutions or fallout for the senior administrators tasked with Title IX compliance, an institution is only one complaint away from their documentation, or lack thereof, being tested.

Athletics Aid

Institutions that provide athletics aid are required under Title IX to provide reasonable opportunities for such awards to members of each sex in proportion to the participation rate of each sex in intercollegiate athletics. In other words, if your institution’s

athletics program is comprised of approximately 55 percent female student-athletes, then 55 percent of your athletics aid should be provided to those female student-athletes.

Although the OCR, which set forth this framework, in its 1998 Clarification Letter on Financial Aid, has a high threshold for meeting the “substantially proportionate” standard, it does not require institutions to achieve exact proportionally. Instead, the OCR permits a small variance from exact proportionality, recognizing that, in practice, some flexibility is necessary to avoid requiring institutions to unreasonably adjust their scholarship allocations.

If an institution has an unexplained disparity of 1% or less in its allocation of athletics aid for either gender there will be a strong presumption that the disparity is reasonable and based on legitimate and nondiscriminatory factors. However, if there is an unexplained disparity of more than 1%, the OCR, instead, will have a strong presumption the institution has violated its requirements under the athletics aid component of Title IX. As a result, institutions must be prepared to explain and provide evidence that any disparity variations over 1% are due to non-discriminatory factors and that these factors are reasonable given the circumstances.

Equitable Treatment in “Laundry List” Areas

An institution’s athletics program must provide equitable opportunities in areas including (1) the provision of equipment and supplies; (2) the scheduling of games and practice times; (3) travel and per diem allowances; (4) the opportunity to receive coaching and the assignment and compensation of coaches; (5) the opportunity to receive academic assistance and the assignment and compensation of academic support staff; (6) the provision of locker rooms, practice and competitive facilities; (7) the provision of medical and training facilities and services; (8) the provision of housing and dining facilities and services; (9) support staff; (10) publicity; and (11) recruiting. While identical benefits, budgets, opportunities or treatment are not required, the overall effect of any difference cannot have a disparate impact on one sex (i.e., where members of one sex enjoy more favorable treatment in one area, such benefit must be “offset” by treatment in another area that favors the other sex).

In order to determine whether an institution’s athletics program provides equitable opportunities in the above-referenced areas, the OCR uses the following three-step test:

- **Step One:** The OCR will analyze each treatment area to determine whether each individual factor of a treatment area

favors the men's or women's program, are the same, or if different, has a negative impact on the students of one sex.

- **Step Two:** The OCR will then make an overall determination for each treatment area to determine whether factors that favor one sex are offset by the factors favoring the other sex. This disparity analysis is analyzed based on overall impact rather than the number of factors. Where the offset is found to be inadequate, the OCR will find a disparity for that treatment area that favors one sex over the other.
- **Step Three:** The OCR will then compare its overall determinations for each treatment area and will consider the number and significance of any disparities between the men's and women's programs. The OCR will find compliance where the disparities offset each other. If greater disparities exist for one sex the institution will be found to have not complied with this component of Title IX.

Three Title IX Takeaways to Consider When Launching Your ESports Program

While Esports has become a trendy addition to college and university extracurricular activity offerings, Title IX is an often overlooked area during the decision-making process. With the primer in hand, and likely some information overload as well, the

resulting questions from institutions usually revolve around not knowing where to begin. This experience is common whether there an Esports program has already operational or whether it is still a program being vetted. However, a solid combination of advance planning and research can help ensure your program is appropriately managing risk.

Here are a three key Title IX considerations to get your institution started:

1. Brainstorm how you will administer your Esports program

The first thing any institution launching in ESports program should do is determine whether and how the program will be administered and funded by the institution. This decision likely involves determining whether the ultimate goal is for the program to compete at a varsity or club sport level.

While club sport programs may vary in terms of administrative oversight (i.e., whether the club is housed in the athletics department or in the student life or affairs department) the normal distinguishing factor from varsity programs is the allocation of club sport budgets. Typically, while a club sport program may have some institutional funding, a portion of its budget will be supplemented using a student pay to play model or through the team's own fundraising efforts.

If the institution wants to add Esports as a varsity program it must consider whether the program will meet the OCR's standards in terms of what is a "sport" under Title IX. Here, instead of having a specific definition, the OCR considers several factors related to the activity's structure, administration, team preparation, and competition. Specifically, the following factors will be considered when determining whether your Esports program will be considered a "sport" for Title IX purposes:

Program Structure and Administration

- Whether the operating budget, support services (including academic, sports medicine and strength and conditioning support) and coaching staff are administered by the athletics department or another entity, and are provided in a manner consistent with established varsity sports; and
- Whether the participants in the activity are eligible to receive athletic scholarships and athletic awards (e.g., varsity awards) if available to athletes in established varsity sports; to the extent that an institution recruits participants in its athletics program, whether participants in the activity are recruited in a manner consistent with established varsity sports.

Team Preparation and Competition

- Whether the practice opportunities (e.g., number, length and quality) are available in a manner consistent with established varsity sports in the institution's athletics program; and
- Whether the regular season competitive opportunities differ quantitatively and/or qualitatively from established varsity sports; whether the team competes against intercollegiate or interscholastic varsity opponents in a manner consistent with established varsity sports;

When analyzing this factor, the following may be taken into consideration: (1) whether the number of competitions and length of play are predetermined by a governing athletics organization, an athletic conference, or a consortium of institutions; (2) whether the competitive schedule reflects the abilities of the team; and (3) whether the activity has a defined season; whether the season is determined by a governing athletics organization, an athletic conference, or a consortium.

- If pre-season and/or post-season competition exists for the activity, whether the activity provides an opportunity for student athletes to engage in the pre-season and/or post-season competition in a manner consistent with established varsity sports; for example, whether state, national and/or conference championships exist for the activity; and

- Whether the primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels rather than to support or promote other athletic activities.

When analyzing this factor, the following may be taken into consideration: (1) whether the activity is governed by a specific set of rules of play adopted by a state, national, or conference organization and/or consistent with established varsity sports, which include objective, standardized criteria by which competition must be judged; (2) whether resources for the activity (e.g., practice and competition schedules, coaching staff) are based on the competitive needs of the team; (3) if post-season competition opportunities are available, whether participation in post-season competition is dependent on or related to regular season results in a manner consistent with established varsity sports; and (4) whether the selection of teams/participants is based on factors related primarily to athletic ability.

Another potential consideration is whether your Esports program is a member of an intercollegiate athletic association. If this is the case, the OCR will presume the program is a sport for Title IX

purposes unless it is offered in a manner inconsistent with the above-referenced factors.

Although institutions are able to make this analysis on their own, there is still risk involved in including Esports in your Title IX analysis. The reason, because this is a novel issue, and we can only past OCR publications and case law to guide our analysis. If an institution is unsure whether a particular sport is a “sport” under Title IX, it can seek an OCR determination. The institution should submit an argument for inclusion that provides an analysis under the aforementioned factors.

2. Conduct a Title IX review of your current athletics and club sport offerings

Once you have an understanding of how you will administer your Esports program, you should conduct an assessment of your institution’s compliance with Title IX from an athletics perspective (i.e., opportunities, financial aid, and treatment). This review should include a thorough analysis of all areas outlined in this guide with determining how your planned administration of a varsity Esports will impact your Title IX compliance.

If your Esports program will likely be considered a club sport, the same analysis would be completed, but it would be in comparison

with all of your institution's club sport offerings (i.e., you are analyzing programming at specific competitive levels).

Once this review is completed you can determine where your Esports program fits compared to current varsity and club sport offerings. The institution can then analyze if additional changes need to be made and can explore other prioritization strategies, including tiering.

3. Understand the legalities of adding sport programs for the underrepresented and overrepresented sex

Currently, Esports programming is dominated by male players. While this is helpful to many institutions in terms of building on declining male enrollment numbers, it will likely hurt them in terms of where they currently stand when looking at their institution's proportionality disparity (i.e., a large majority of institutions fail to meet prong one substantial proportionality requirements). If your female student-athletes are the underrepresented sex, adding a Esports program for women is permitted under any of the three prongs because it would allow an institution to either meet or work towards substantial proportionality, demonstrate it is continuing to expand opportunities under prong two and is effectively accommodating the interests and abilities of the underrepresented sex under prong

three. However, it is also important to keep in mind decisions to add a new sport program for the underrepresented sex must be tied to actual interest from the underrepresented sex's undergraduate population.

However, the reality is most institutions have primarily looked at adding mixed-gender or male programs. While it would likely be permissible to add a male Esports program or a male-dominated mixed gender program if the institution can demonstrate it has fully and effectively accommodated the interest and abilities of the underrepresented sex under prong three, this is a decision that should only be made after a careful analysis of the bigger Title IX picture and the creation of a sufficient gender equity improvement plan. The institution should also keep in mind that in this scenario if a demonstrated interest arises for the underrepresented sex, the institution would need to act accordingly.

Conclusion

While this is not a comprehensive look at all of the Title IX and legal issues your institution may encounter when administering your Esports program, it should give you a basis on which to begin your analysis. Should you need additional expertise with your planning and decision-making, please contact Sievert

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