

Title IX Coordinator Training Online Course

Class Six: Athletics Equity and Applying the August 2020 Regulations

Marjory Fisher,
Associate Vice President & Title IX Coordinator,
Columbia University

Melinda Grier
Attorney,
Melinda Grier Consulting & Novus Law Firm, Inc.

Janet P. Judge
Partner,
Holland & Knight LLP

PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

1

Class Overview



- Athletic Equity
- Pay Equity
- The Regs
- Trans Athletes
- Training/Related NCAA Requirements

2

Athletic Equity

3



Sources of Law, Title IX Enforcement, and the impact of Pandemics (NCAA does NOT enforce Title IX)

Schoolhouse Rock:
<https://www.youtube.com/watch?v=tEPd98CbbMk>

4

U.S. DEPARTMENT OF EDUCATION

EADA (Equity in Athletics Data Analysis)

The tools you need for Equity in Athletics analysis

Get Data for One School
Search for a school to view general information and EADA participation data for the most recent year.

Compare Data for Multiple Schools
Select up to four schools to see a side-by-side comparison of data for the most recent year.

Download Custom Data
Select the EADA statistical data you are interested in for one or more years and download data for a customized group of schools.

Generate Trend Data
Select a subject area and a question that you are interested in, and then see the answer for a selected year, build a table, and see a graph that shows the trend over time. You can customize your results by various institutional characteristics such as athletic associations only, public or private, and state.

Download Data
Download the complete data file for all institutions from a single data collection. Files will include all data submitted by all institutions in the selected survey year.

PART 1: ATHLETIC EQUITY

5

Athletic Equity Compliance: Three Separate and Independent Areas of Compliance

Participation

Financial Aid

Treatment

6

Activities counted as Sports for purposes of Title IX

- NCAA Championship sports are presumed to be countable.
- For non-NCAA sports, a review may consider the following, among other factors:

PROGRAM STRUCTURE AND ADMINISTRATION —

Is the program provided a budget, support services, access to coaching, equitable eligibility for athletics scholarships and awards, and are the student-athletes recruited in a manner consistent with established varsity sports?

TEAM PREPARATION AND COMPETITION —

Does the team practice and compete in a manner consistent with established varsity sport programs? Included in this review, among other factors, are the following considerations:

- Are there standardized rules of play and competition criteria for the sport?
- Are the support services provided based on the competitive needs of the program?
- Is post-season play determined by regular season performance?
- Is team selection based on athletics ability?

Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance (OCR 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

7

Title IX Countable Participation Opportunity

OCR defines a Title IX Participant as one:

1. who is 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**
2. who is participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; **and**
3. who is listed on the eligibility or squad lists maintained for each sport; **or**
4. who, because of injury, cannot meet 1, 2, or 3 above but continues to receive financial aid on the basis of athletic ability.

Per guidance, "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."

Dear Colleague Letter, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC. (Jan. 16, 1996) available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

8

What about ...



Equitable Participation: The Three Part Test



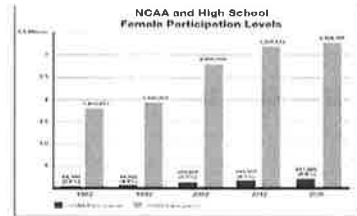
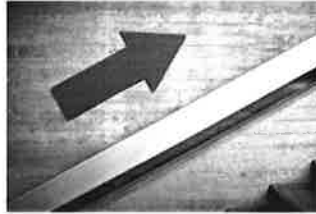
Prong 1.
Male and female intercollegiate participation is provided in numbers substantially proportionate to their respective full-time undergraduate enrollment, or

Prong 2.
The institution has a history and continuing practice of program expansion responsive to the developing interests and abilities of the members of the underrepresented gender, or

Prong 3.
The interests and abilities of the members of the underrepresented gender are fully and effectively accommodated by the present program.

Dear Colleague Letter, Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test, OFFICE FOR CIV. RIGHTS, U.S. DEPT OF EDUC. (Jan. 16, 1996) available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

Sport Cuts that Involve the Underrepresented Sex: Typically Require Prong 1 Compliance



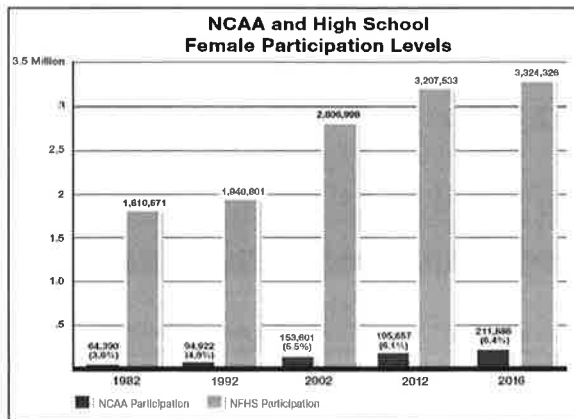
ENFORCEMENT —

OCR: Investigation. Letter of Findings. 302 Resolution Agreement. Referral to DOJ.

Court: No Administrative Exhaustion. No Cap on Damages. Injunctive Relief. Class Actions. Attorneys Fees.

11

Prong 3: Accommodating Interest & Abilities



Does the current line up of sports effectively accommodate the athletic interests and abilities of the underrepresented sex?

What is the underrepresented sex?

Is there:

- unmet interest in a particular sport;
- sufficient ability to sustain a team in the sport; and
- a reasonable expectation of competition in the normal competitive area?

How much interest/ability/competition is enough?
What is the relevant pool to be assessed?

12

Equitable Levels of Competition:

The competitive schedules for men's and women's teams, on a program-wide basis, afford proportionately similar numbers of male and female athletes equivalently advanced competitive opportunities;

OR

There exists a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

13

Athletics-Based Financial Aid/Scholarship Equity

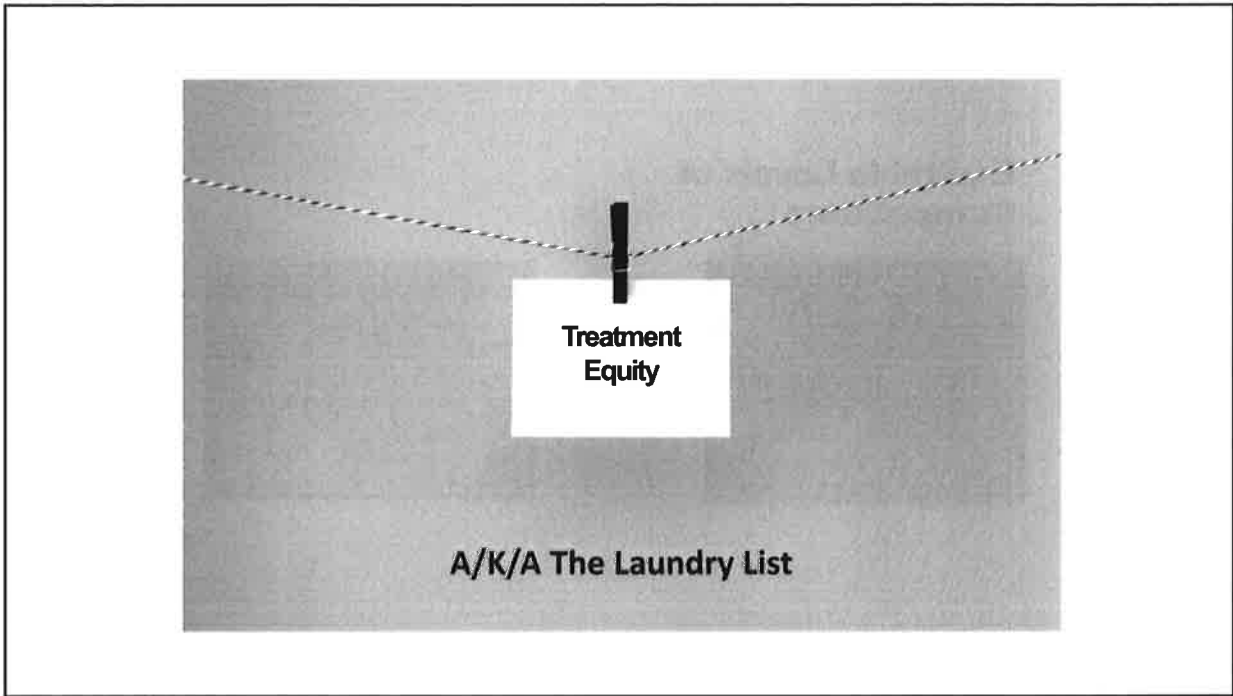


"If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the "substantially proportionate" requirement.

We would like to clarify that use of statistical tests is not appropriate in these circumstances."

Dear Candidate letter - Bowling Green Daily ZA, 1998

14



15

| Non-Exhaustive Areas of Review | Men's Program Overall | >/</= | Women's Program Overall |
|--|------------------------------|--------------------|--------------------------------|
| Equipment and Supplies (Apparel and Equipment) | | | |
| Scheduling (Practice, Competition) | | | |
| Travel (Mode, Housing, Food) | | | |
| Tutors/Academic Services (Personnel, Services) | | | |
| Coaches (Quantity, Quality, Compensation*) | | | |
| Facilities/Spaces (Practice, Competition, Locker Room) | | | |
| Medical (Personnel, Experience, Availability) | | | |
| Housing & Dining (Home) | | | |
| Publicity/Communications (Sports Information & Marketing) | | | |
| Support Services (Administrative, Office, Support) | | | |
| Recruiting (Financial & Other Support) | | | |

16

Sources of Funding

It's not a dollar to dollar analysis. Focus on goods and services. Where differences exist, OCR may focus on funding.

Private donations are institutional dollars and goods and services provided through private funding still count. In other words, those goods and services are included in the equity analysis.

See, e.g., Chalenor v. Univ. of North Dakota, 142 F. Supp. 2d 1154 (D.N.D. 2000)



Are the Disparities Significant? OCR v Judicial Review



Difference, on the Basis of Sex

- in benefits or services that has a . . .
- negative impact on athletes of one sex . . .
- when compared with benefits or services available to athletes of the other sex.

Disparity:

- So Substantial as to Deny Equal Opportunity to Athletes of One Sex.

Disparities that are not Substantial. . .

- Evidence to be Evaluated on a case by case basis.

See, e.g., Policy Interpretation, 44 Fed. Reg at 71,417 (1979).

Retaliation Prohibited

Retaliation is intentional discrimination on the basis of sex.

One who witnesses and complains about discrimination is protected from adverse action they encounter because of the complaints.

Recognition that coaches, teachers, administrators and students are in the best position to witness and alert schools

See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)



NACUA
National Association of College and University Attorneys

