Equity and Title IX in Intercollegiate Athletics

A Practical Guide for Colleges and Universities — 2012

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Title IX

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 Test

An athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender. No individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate athletics.

NCAA Gender Equity Task Force

Equal Pay Act

No covered employer ... shall discriminate ... between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system that measures earnings by quantity or quality of production; or (iv) a differential based on any other factor than sex.

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Introduction

In the spring of 1992, the NCAA created a Gender Equity Task Force in response to growing concerns that were amplified by the 1992 NCAA Study. The study indicated that despite the relatively even distribution of membership undergraduate enrollment by gender, males constituted nearly 70 percent of intercollegiate athletics participants and received nearly 77 percent of the athletics operating budgets, 70 percent of scholarship funds and 83 percent of recruiting dollars.

The task force issued its final report in July 1993, in which it concluded that "intercollegiate athletics offer interested and able students opportunities to experience the lessons of competition, develop physical and leadership skills, be part of a team and enjoy themselves. Good intercollegiate athletics programs require competitive parity, universal and consistently applied rules, and an opportunity to participate. For many years, the NCAA has sought to assure those conditions, but there is clear evidence that it has not succeeded in providing equitable opportunity to participate for women."

In order to address and remedy this inequity, the task force issued several recommendations to NCAA member institutions, the media and the general public. One recommendation in particular advocated for the creation of a gender equity source book for member institutions. The task force believed that such a book could convey the complex and evolving landscape of the law, while also providing practical advice and real-life examples to assist the membership in its efforts to alleviate inequalities in its intercollegiate programs.

Accordingly, this manual was written with college and university administrators, general counsel, faculty athletics representatives, Title IX and equal opportunity officers, athletics administrators, staff, and student-athletes in mind. It is not intended to provide the lone standard by which an institution measures its compliance with Title IX or a formalistic blueprint for compliance with the NCAA-adopted principle of gender equity. Quite frankly, there is no single model that can realistically apply across the board. Rather, it is hoped that this manual explains the law in a way that is accessible to those seeking to understand the law, to incorporate gender-equitable policies into existing athletics programs and to evaluate their implementation in a meaningful way.

Since this manual was first published in the fall of 1994, the NCAA has conducted equity seminars and intends to continue sponsoring such seminars on an annual basis. In addition, the NCAA inclusion staff has made extensive gender equity and Title IX resources available online. The manual, the seminars, the Title IX Resource Center and the NCAA Inclusion Web site are four services intended to provide a greater understanding and a clearer perspective on the need to ensure equitable opportunities and treatment for female student-athletes at all NCAA member institutions.

For further information regarding this publication and other gender inclusion initiatives, please contact Karen Morrison, NCAA director of inclusion, at 317/917-6222 or by e-mail at kmorrison@ncaa.org.

I. A Brief History of Title IX

In 1972, Congress passed Title IX of the Education Amendments to the Civil Rights Act of 1964. This law facilitated tremendous growth in women's athletics participation during the 1970s. By 1978, the number of female high school student-athletes had grown from 300,000 to more than two million. Similarly, women's collegiate sports participation doubled from 32,000 participants in 1971 to more than 64,000 in 1977. However, in the early 1980s, the rapid rise in participation began to level off when the U.S. Supreme Court ruled that the law applied only to those programs or activities that directly received federal funding. Since most collegiate athletics programs did not receive federal money directly, pending lawsuits were dismissed and the dramatic expansion of women's athletics opportunities stalled. Four years later, Congress responded by passing the Civil Rights Restoration Act of 1988. This act extended Title IX's protections to indirect recipients of federal funding, including collegiate athletics departments.

Enforcement of the law was bolstered in 1992 when the Supreme Court decided in Franklin v. Gwinnett County Public Schools that successful Title IX plaintiffs could recover monetary damages and attorney fees for intentional discrimination. This case was followed by the seminal Title IX decision out of the 1st Circuit, Cohen v. Brown University. During the next 10 years, net opportunities in athletics expanded for men and women across the country. Lawsuits were filed by both those attempting to enforce the law and by those challenging it. Every appellate court that reviewed the law and its application to high school and college athletics programs upheld Title IX. These judicial opinions further defined the obligations of schools under the law.

In 2002, the Bush administration created the Secretary's Commission on Opportunity in Athletics to study the impact of Title IX on college athletics. After holding controversial hearings over an eight-month period, the commission presented Department of Education Secretary Roderick Paige with a report titled "Open to All: Title IX at Thirty." Two commission members, Donna deVarona and Julie Foudy, then released a minority report containing their separate recommendations and concerns about much of the material contained in the original report. Thus, faced with a divided commission with wide-ranging (and sometimes conflicting) recommendations, interested parties wondered what impact, if any, the commission findings would have on future administrative enforcement of the law.

Speculation over the immediate future of Title IX ended July 11, 2003, when Gerald Reynolds, the assistant secretary for civil rights, released a "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance" (Further Clarification) on behalf of the Department of Education Office for Civil Rights. Reynolds made the following five points: (1) The three-part test for assessing compliance with the participation portion of Title IX provides schools with flexibility and will continue to be the test used by the OCR to determine compliance; (2) Title IX did not require the cutting or reduction of teams and that such a practice is disfavored; (3) although the OCR will "aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply," it also will work with schools to achieve compliance and thereby avoid such sanctions; (4) private donations to athletics programs are not exempt from Title IX equity considerations; and (5) OCR enforcement will be uniform throughout the country. In short, the Further Clarification restated and reincorporated the enforcement framework as set forth in the Policy Interpretation and the 1996 Clarification.

Meanwhile, a closely watched legal battle loomed in the federal courts in the District of Columbia. The National Wrestling Coaches Association (NWCA), concerned about decisions to discontinue wrestling at some institutions, filed a complaint against the Department of Education seeking to invalidate the department's Title IX enforcement framework. In its opinion, the District of Columbia Circuit Court held that the NWCA could not show that Title IX caused or required the elimination of men's athletics teams or that changing Title IX's enforcement scheme would lead to their reinstatement. In reaching this decision, the court stated that schools make independent decisions about which teams to field based on a variety of factors that may or may not include gender equity concerns. In June 2005, the U.S. Supreme Court refused to hear the case and denied the NWCA's petition for certiorari.

On March 17, 2005, the OCR issued a subsequent clarification: "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three" (Additional Clarification). In this guidance, purportedly designed to make it easier to assess interest and ability on campus consistent with the mandates of Title IX, the OCR set forth a sample e-mail survey, apportioned burdens of proof and otherwise set the rules for institutional administrative compliance with the third method of achieving Title IX participation compliance: the effective accommodation of the athletics interests and abilities of the underrepresented sex. The guidance was strongly criticized nationally, including by then-NCAA President Myles Brand, the NCAA Executive Committee, the Knight Commission and at least six members of the Commission on Athletics. On April 20, 2010, the Office for Civil Rights rescinded the 2005 Clarification, instructing schools to follow the 1996 guidance and providing additional advice about effective evaluation of interests and abilities.

On March 29, 2005, the U.S. Supreme Court issued its opinion in Jackson v. Birmingham Board of Education. In ruling 5-4, the court narrowly resolved a split among the federal circuit courts, ruling that affected parties could seek redress in the courts for instances of retaliatory conduct resulting from efforts to effectuate the mandates of Title IX. In this case, Roderick Jackson, a male high school coach alleged that he received negative performance evaluations and was relieved of his coaching duties as a result of his efforts to remedy the inequities faced by his girls' basketball team. In that Title IX provides for a cause of action to address retaliation, the majority ruled that "reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed if retaliation were not prohibited, Title IX's enforcement scheme would unravel."

In 2007, the 35th anniversary of Title IX's passage, national conversations turned to the results of the law's passage on the nature of and access to intercollegiate athletics. The federal government's General Accounting Office issued a report confirming that participation opportunities have increased for both genders and continue to increase for both.

Girls' high school participation for the first time passed the three million mark. The National Women's Law Center issued a report calling for greater scrutiny of athletics programs, citing more than 416 Title IX athletics complaints filed in the previous five years, but only one OCR investigation during that same time. The U.S. House of Representatives issued a proclamation "to celebrate the 35th anniversary of Title IX of the Higher Education Act, which assured a woman's right to educational equality. … By ending gender discrimination in all education programs, Title IX has given women the chance to excel and to take their rightful place as leaders and achievers on campuses across the United States. No longer would young women find their educational options limited by years of engrained discrimination. Thanks to Title IX, women can now prepare for their future – whether in the halls of power or corporate boardrooms – in the classrooms and on the playing fields of America's colleges and university."

In 2010 and 2011 the Office for Civil Rights issued new guidance, withdrawing the controversial 2005 clarification and setting forth standards for third-prong compliance efforts, as well as guidance related to sexual harassment, bullying and sexual violence. OCR began once again to actively pursue complaints and random investigations about Title IX failures in scholastic and intercollegiate athletics programs. The court systems have been engaged by numerous athletics retaliation and treatment cases.

In summary, all three branches of government have weighed in and found that Title IX is alive and well – a fact that would no doubt have pleased one of the law's staunchest defenders – U.S. Rep. Patsy T. Mink. Unfortunately, Mink passed away September 28, 2002, during the commission process and before the Further Clarification letter was published. On October 29, 2002, President George W. Bush renamed Title IX as the Patsy T. Mink Equal Opportunity in Education Act in order to honor her contributions. Her efforts, along with those of other longtime legislative supporters such as Sen. Birch Bayh and Rep. Edith Green, have resulted in annual athletics opportunities for more than three million high school girls and more than 180,000 collegiate women.

II. Overview of the Manual

Chapter I: Sources of Law
Gender equity law comes from a variety of sources, including legislation, agency regulations, policy interpretations and clarifications, and individual case decisions. This chapter is a brief summary of these sources, which will be referenced throughout the book.

Chapter 2: Understanding Title IX Athletics Compliance – A Step-by-Step Guide
This chapter breaks down compliance standards for athletics participation, financial aid and treatment issues. It is intended to be a basic and practical guide to help assess compliance and to implement equity on campus.

Chapter 3: Equity for Women and the NCAA, including the EADA

Several NCAA initiatives have women's equity components. This chapter explores how those initiatives compare with standards set forth in gender equity law generally and how to best ensure that institutions are consistent in their reporting and compliance efforts.

- **Athletics Certification and Self-Study**
  The manual's newest section summarizes portions of the Equity and Student-Athlete Well-Being portion of the Division I athletics certification process, though this latter program is currently under review. The purpose of athletics certification is to ensure integrity in the institution's athletics program and to assist institutions in improving their athletics departments. NCAA legislation mandating athletics certification was adopted in 1993. Similarly, Division II and III institutions are required to conduct a comprehensive self-study and evaluation of their intercollegiate athletics programs, including an active inclusion plan, at least once every five years using the Institutional Self-Study Guide (ISSG).

- **Emerging Sports**
  This section provides basic information regarding those sports that have been identified as "emerging" pursuant to legislation adopted at the 1994 NCAA Convention. Athletics programs can adopt these sports as a way to increase participation opportunities for female student-athletes. Also included is an explanation of relevant NCAA legislation regarding sport sponsorship.

- **Equity in Athletics Disclosure Act (EADA) and NCAA Financial Reporting, Filings and Forms**
  All colleges and universities that receive federal funds are required to file an annual equity and financial report with the federal government. All NCAA member institutions also are required to file a similar report with the NCAA. This section highlights the differences between the two reports and offers practical suggestions to help institutions provide an accurate picture of their athletics finances and commitment to equity.

- **Senior Woman Administrator Designation**
  Every NCAA institution is expected to designate the Senior Woman Administrator on staff and involve her in the management of the athletics department. This section explains the role and purpose of the appointment.

Chapter 4: Harassment Issues Facing Colleges and Universities under Title IX
Title VII and Title IX prohibit sex-based harassment on campus. This chapter explains the law and the enforcement standards applicable to colleges and universities.

Chapter 5: Employment Issues

Equity in employment in educational institutions is governed by a variety of federal and state laws, including Title IX, Title VII and the Equal Pay Act. Each of these laws has specific requirements and enforcement standards. This chapter helps schools understand the federal laws as they apply to athletics staff.

Chapter 6: Inclusion Plans, Audits, Policies and Training

Inclusion plans, department audits, policies and related training issues are valuable tools provided they are written, presented and/or implemented soundly. This chapter explores the value of equity audits, plans, clear policies and training to ensure compliance with the law.

Chapter 7: Case Law

This chapter contains an in-depth look at the critical developments in gender equity case law as it applies to intercollegiate athletics. The cases provide a practical insight into the real-life applications of the laws discussed in this manual.

Chapter 8: An Athletics Director's Summary Guide

This guide to the key equity issues – while not meant as a substitute for this manual as a whole – is provided as a helpful quick reference resource.

Chapter 9: Frequently Asked Questions

The NCAA has collected questions asked by the membership at NCAA educational sessions for years. This section provides answers to those questions that have been asked frequently.

Appendixes

Title IX Athletics

A Title IX Implementing Regulations
B 1979 Policy Interpretation
C Title IX Investigators Manual
D 1996 Clarification
E 1998 Clarification
F 2003 Further Clarification
G Dear Colleague Letter, 2004, Title IX Officer and Grievance Procedures
H 2008 OCR Revised Case Processing Manual
I 2010 Dear Colleague Letter: The Three-Part Test - Part Three

Title IX Harassment

J 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties
K 2010 Sexual Harassment and Bullying Guidance
L 2011 Dear Colleague Letter: Sexual Violence

Employment

M 1997 EEOC Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions

Resources

N List of organizations working in women's sports and education; also included are the links to the regional offices of the Office for Civil Rights and research articles and Web pages

Chapter 1 — Sources of Law

I. Introduction

Throughout this manual, there are references to a wide variety of legal resources, including laws, regulations, policy interpretations, administrative and judicial opinions, and agency guidance. For readers who have not had the pleasure of attending law school, this section provides a legal overview of the relevant sources of equity law and the authority of each.

A. The U.S. Constitution

The U.S. Constitution is the fundamental document upon which the United States federal government is founded. It is the "supreme law of the land" and sets forth the three separate but equal branches of government: the executive, the legislative and the judicial. The rights guaranteed by the Constitution cannot be taken by congressional action or judicial opinion. The only way to alter constitutional protection is through the passage of a constitutional amendment. Courts that have interpreted Title IX have found that, as applied, it does not conflict with the equal rights provision of the Constitution and that it is a viable statute.

B. Statutes

Statutes are laws written and passed by the legislative arm of the government. Federal laws are passed by the U.S. Congress, and state laws are passed by individual state legislatures. The statutes referenced in this manual, including Title IX, Title VII, the Equity in Athletics Disclosure Act (EADA) and the Equal Pay Act (EPA), are all federal statutes that apply to both public and private colleges and universities for a variety of reasons, including the fact that schools receive federal dollars. Although beyond the scope of this manual, many state equity laws also apply to athletics programs offered by colleges and universities. Because the language contained in these laws may differ from Title IX or any other federal laws discussed herein, it is important for athletics administrators to consult with counsel to understand how the laws of their state may apply to their program. Where state and federal laws differ, schools generally must comply with the most generous provisions of both, even if one permits a lower standard of compliance. Accordingly, the federal law requirements discussed in this manual set the floor for equity compliance. State laws may require more exacting standards.

C. Regulations

Many times a statute will contain language that grants an agency the authority to issue regulations interpreting the statute and to set forth an enforcement scheme. For example, Congress expressly delegated to the Department of Health, Education and Welfare (HEW) the authority to promulgate regulations for determining whether an athletics program complies with Title IX. Accordingly, HEW's drafted regulations (34 C.F.R. §106.41 et seq.) were adopted by the Department of Education through its Office for Civil Rights, the federal agency charged with administering Title IX. Courts have afforded these regulations "controlling weight" and have found that they are not "arbitrary, capricious, or manifestly contrary" to the underlying statute. (See, e.g., Cohen v. Brown University, 101 F.3d 155 [1st Cir. 1996]). The Title IX regulations prohibit an institution – on the basis of gender – from excluding an individual from participation in or being denied the benefits of intercollegiate athletics.

D. Policy Material

Policy materials are not laws, but may influence how laws are interpreted and applied by both the executive agencies and the judicial branch. Policy materials include, but are not limited to, policy interpretations, clarification memorandums, internal agency enforcement materials and agency opinions. For example, HEW published a Policy Interpretation (44 Federal Register 71,413) for public comment December 11, 1978. After receiving more than 700 comments reflecting a broad range of opinion and visiting eight universities over the summer of 1979 to see how the proposed policy and suggested alternatives would apply in actual practice at individual campuses, HEW issued the final Policy Interpretation on December 11, 1979. This document divides Title IX athletics compliance into three areas: athletics financial assistance (scholarships), equivalence in other athletics benefits and opportunities (the "laundry list"), and effective accommodation of student interests and abilities (participation). The key factors that are to be reviewed and assessed in each area are set forth in detail. Most importantly, the Policy Interpretation contains the three-part test for the assessment of compliance with the effective accommodation of student interests and abilities requirement (the participation test). This analytical model has withstood numerous court challenges because, as noted by then-Assistant Secretary for Civil Rights Gerald Reynolds, it provides institutions with flexibility "to consider which of the three prongs best suits their individual situations." (See July 11, 2003, Further Clarification, described more fully below.)

Other examples of relevant policy materials include:

- **1996 OCR Policy Clarification**
  In response to numerous requests by schools for guidance in the early 1990s, Norma Cantu, assistant secretary for civil rights in the Clinton administration, issued a document titled "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (the 1996 Clarification). The clarification was the subject of debate. Some argued that its reference to Prong 1 only – a strict numbers-based proportionality test – as a "safe harbor" was confusing and led schools to disregard Prongs 2 (history of expansion) and 3 (meeting interest). Opponents of the law argued that it was a "quota system" that disadvantaged male programs. A careful reading of the clarification and the fact that schools have relied upon and been found compliant under each of the three prongs, demonstrates that each prong offers safe harbor, provided schools meet the respective tests.

- **1998 OCR Letter on Financial Aid**
  On the 25th anniversary of Title IX, the National Women's Law Center filed complaints of financial aid discrimination with the OCR against 25 colleges and universities. In the midst of litigation, the OCR issued a letter stating that financial aid disparities are calculated by comparing the percentage of the total financial aid dollars awarded to each sex with their respective financial aid student-athlete percentage rate. For example, if females make up 48 percent of the student-athlete population, but only receive 45 percent of the athletically related financial aid, there would be a disparity of 3 percent. It further states that the OCR will presume discrimination where there exist unexplained disparities of greater than 1 percent.

- **The 2003 Further Clarification**
  After the Bush administration took office in 2001, substantial speculation existed over Title IX's future. These concerns were fueled by the appointment of a commission charged with reviewing current law and recommending improvements in the law. This guidance, set forth in a "Dear Colleague" letter, supported current agency enforcement policies and practices and contained the following five points: (1) The three-part test for accessing compliance with the participation portion of Title IX provides schools with flexibility and will continue to be the test used by the OCR to determine compliance; (2) Title IX does not require the cutting or reduction of teams and such a practice is disfavored; (3) although the OCR will "aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply," it will also work with schools to achieve compliance and thereby avoid such sanctions; (4) private donations to athletics programs are not exempt from Title IX equity considerations; and (5) OCR enforcement will be uniform throughout the country. In short, the Further Clarification restated and reincorporated the enforcement framework as set forth in the 1979 Policy Interpretation and the 1996 Clarification.

- **Title IX Grievance Procedures, Postsecondary Education**
  On August 4, 2004, the OCR issued another "Dear Colleague" letter. This document reminded institutions that Title IX regulations require schools to "designate a Title IX coordinator, adopt and disseminate a nondiscrimination policy, and put grievance procedures in place to address complaints of discrimination on the basis of sex in educational programs and activities." The agency noted that several recent investigations had revealed that institutions were deficient in this area.

- **The 2010 Clarification**
  On April 20, 2010, the OCR rescinded the controversial 2005 "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three." In its stead, the OCR issued guidance for third-prong compliance that reverted to the 1996 clarification. The letter details the OCR expectations for efforts to evaluate interests and ability to compete in sports. Those efforts are expected to include the examination of multiple data sources. The use of a survey of admitted and enrolled students is not sufficient alone to demonstrate compliance. The letter provides clear suggestions for development and implementation of surveys as one of many evaluative tools.

- **The OCR's Athletics Investigator's Manual**
  The OCR published an investigator's manual that focuses strictly on athletics in the context of Title IX and tracks the subject matter breakdown contained within the policy interpretation. The manual contains detailed guidance, standards and methods used by OCR investigators when assessing compliance. In addition to providing insight into the particular issues that the OCR will pursue within each of the program areas, it also contains standard information requests that may be issued during an investigation. Institutions subject to an investigation should consult the manual for insight onto an OCR review process. Please note that the OCR no longer uses the statistical test set forth in the financial aid portion of the manual.

- **The OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties**
  Both the Department of Education and the U.S. Supreme Court have found that sexual harassment is a form of sexual discrimination prohibited by Title IX. In January 2001, the department published "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties." That Title IX guidance updates and revises the original 1997 guidelines to incorporate and discuss important Supreme Court cases that were decided on the subject in the interim: Gebser v. Lago Vista Independent School District (a claim involving a teacher and student); Davis v. Monroe County Board of Education (student-on-student harassment); and Oncale v. Sundowner Offshore Services, Inc. (same-sex sexual harassment). The guidance is designed to help schools chart a course through what can sometimes be a very complicated area of the law. In 2010 and 2011 the OCR issued additional guidance related to harassment and bullying and sexual violence, which details school obligations in these areas.

- **Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions**
  This guidance, published by the Equal Employment Opportunity Commission in 1997, sets forth the commission's position on the application of various nondiscrimination laws, including the Equal Pay Act and Title VII, to the compensation of coaches at educational institutions.

E. Case Law

The judicial branch of the government is charged with interpreting laws. Court opinions, when published, become case law and may be cited as authority for interpretations of the law. This manual discusses a number of federal court decisions and how specific courts have interpreted certain aspects of equity law. Judges look to statutes, regulations, policy interpretations and prior case law when adjudicating the facts brought before them. Often, courts must reasonably interpret statutes in order to apply the law to questions presented that are not plainly answered by the language of the statute. Case law issued by the U.S. Supreme Court controls the 11 numbered circuits of the U.S. Court of Appeals, the District of Columbia Circuit Court and the 97 federal district courts. By the same token, case law decided by the federal appellate courts is controlling for all federal district courts in the respective circuit. For example, decisions issued by the Court of Appeals for the 1st Circuit, such as Cohen v. Brown University, control the federal district courts in Maine, New Hampshire, Massachusetts, Rhode Island and Puerto Rico, but do not control federal district courts in other states. Of course, courts often look outside their jurisdiction when deciding issues of first impression and may be influenced by and cite opinions of courts outside their circuit.

F. Secondary Sources

This manual, along with the myriad of law review articles and other commentary discussing equity in athletics, are secondary sources. Secondary sources attempt to explain the law and, although they may be persuasive to, relied upon and/or cited by courts, are not legally binding. Accordingly, secondary sources may offer legal analysis, but not legal authority. Every effort has been made to ensure the accuracy of the information provided in this manual. It is not intended, however, to provide legal advice regarding the specific application of any law to any individual circumstance.

Chapter 2 — Understanding Title IX Athletics Compliance – A Step-by-Step Guide

I. Introduction

Title IX prohibits sex-based discrimination in educational programs, including athletics, and requires that each institution designate at least one Title IX coordinator to oversee compliance. Title IX measures equity in athletics in three distinct areas: (1) participation; (2) scholarships; 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 framework by which equity in each of these areas is to be assessed is set forth below.

II. Title IX Coordinator and Notice Obligations

By its regulations, Title IX mandates that institutions designate at least one employee to coordinate the Title IX compliance responsibilities on campus. In addition, schools must effectively disseminate notice of the Title IX coordinator's identity and contact information, adopt and distribute a nondiscrimination policy and have a grievance procedure in place. Finally, Title IX regulations mandate that institutions publish a notice that they do not discriminate on the basis of sex in admission to or employment in education programs or activities and that the notice be displayed prominently in each announcement, bulletin, catalog or application form used in connection with recruitment of students or employees. The OCR also has stated that the notice should include the name, office address and telephone number of the Title IX officer on campus.
(www.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html)

III. Effective Accommodation of Interests and Abilities – The Participation Test

One of the fundamental requirements of Title IX is that equitable opportunities to participate in intercollegiate sports must be offered to members of each gender. This does not mean that schools must offer identical athletics teams for males and females, or identical numbers of athletics participation opportunities. Rather, Title IX provides three separate ways to meet this mandate. In order to access compliance in this area, however, it is necessary to first determine whether a program or activity meets the Title IX definition of a sport, and, if so, how to count team members as participants for purposes of Title IX.

A. What is an "athletics team" for purposes of Title IX?

When assessing compliance in the area of athletics participation, it is first necessary to determine what teams "count." The sport test is designed to determine whether programs or activities outside those sponsored by the NCAA – such as men's rowing – also qualify for inclusion when determining equity. The NCAA has sought to make the analysis easier in certain women's sports, including equestrian, rugby, squash and sand volleyball, by designating them as emerging sports for women, recognized by the NCAA and also by the OCR.

Although men's rowing clearly appears to meet the test, the status of other team activities such as competitive cheerleading, dance squads, rodeo and judo are not as clear. The OCR has taken the position that cheerleading squads, for example, are support services and not varsity programs. This view has begun to change as competitive opportunities for cheerleading have increased nationally and as schools offer coaching, practice facilities, equipment and scholarship opportunities to squad members who compete against squads at other colleges and universities. It should be noted that the OCR and its regional offices have not uniformly accepted competitive cheerleading as a sport under Title IX, but rather continue to evaluate each program on a case-by-case basis. Schools seeking to include competitive cheer as part of their varsity sport equity analysis are required to receive OCR guidance before listing the sport on their EADA. Schools also may be required to carve out a competitive team separate from their sideline cheer squad.

The OCR has provided some guidance in this area. In 2008, the OCR issued a **Dear Colleague** letter that restated its reliance on the following factors, but also described a process for managing disputes about what constitutes a sport. It will consider the following factors when determining whether it will consider a program a "sport" for Title IX purposes:

- Whether selection for the team is based upon objective factors related primarily to athletics ability;
- Whether the activity is limited to a defined season;
- Whether the team prepares for and engages in competition in the same way as other teams in the athletics program with respect to coaching, recruitment, budget, tryouts and eligibility, length and number of practice sessions and competitive opportunities;
- Whether the activity is administered by the athletics department; and
- Whether the primary purpose of the activity is athletics competition or the support or promotion of other athletes or athletics teams.

The OCR has stated that it also may consider the following:

- Whether organizations knowledgeable about the activity agree that it should be recognized as a sport;
- Whether the activity is recognized as part of the intercollegiate athletics program by the athletics conference to which the institution belongs and by organized national intercollegiate athletics associations;
- Whether national and conference championships exist for the activity;
- Whether national or conference rule books or manuals have been adopted for the activity;
- Whether there is national or conference regulation of competition officials along with standardized criteria upon which the competition may be judged; and
- Whether participants in the activity/sport are eligible to receive scholarships and athletics awards (for example, varsity awards).

OCR also submitted an enlightening amicus brief in the Biediger v. Quinnipiac University case which provides comment on counting participants and when a sport can be included in varsity sport analyses.

Schools can seek an OCR determination of whether it would consider a particular activity to be part of the athletics program for purposes of Title IX. In order to get such an evaluation, schools should submit an argument for inclusion, reviewed by counsel, which tracks the factors listed above.

Designating a sport as a competitive team is not enough. Schools must also support the team in an equitable fashion. In Brown, for example, the 1st Circuit refused to recognize donor-funded teams and their team members for purposes of Title IX participation comparisons. In short, men participating on varsity teams are supported to a greater degree than women participating on junior varsity or donor-funded club teams. Accordingly, the OCR and courts do not allow institutions to offset varsity teams of one sex by junior varsity teams of the other sex for purposes of Title IX participation analysis.

B. Who is an athletics participant for Title IX purposes?

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 a participant as one:

1. Who receives the institutionally sponsored support normally provided to athletes competing at the institution involved, for example, coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
2. Who participates 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 athletics ability.

According to the 1996 Clarification, participants are those who are listed on the NCAA squad lists as of the first date of competition in the sport. It should be noted, however, that at least one court case has taken a slightly broader view on the definition. It defined a participant as one who participated for the majority of the season. The more accurate test is a combination of the two, using the first date of competition as the baseline. Typically, the OCR will check for situations in which squad numbers increase or decrease significantly after the first date of competition, especially in sports such as rowing, football and track and field. As a general rule, coaches and compliance officers must be aware that the names listed on squad lists as of the first date of competition are significant for equity purposes, but also mindful that additions or cuts after the first date of competition should be documented and may be included in the mix, depending on the circumstances.

When counting participants for a Title IX participation analysis (and not for the financial aid analysis as discussed later), it is important to remember that every time a student-athlete occupies a spot on an intercollegiate varsity team, he or she is to be counted as a participant. Accordingly, multisport athletes count more than once. A student-athlete who runs on the cross country, indoor and outdoor track and field teams, for example, would count as a participant three separate times.

Please note: There are three different definitions of participant used in equity analysis: (1) one for the participation analysis under Title IX; (2) one for purposes of Title IX financial aid analysis; and (3) one for EADA purposes. Each is defined in the relevant section of this manual.

C. Full and Effective Accommodation of Athletics Interests and Abilities – The Three-Part Test

An institution's athletics program will be determined to offer nondiscriminatory participation opportunities if it can demonstrate the following: (1) Its intercollegiate 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.

This three-part test first appeared in the 1979 Policy Interpretation and was explained further in the 1996 Clarification. In its transmittal letter accompanying the 1996 Clarification, the OCR created some confusion by referring to one prong only – the substantial proportionality test – as a "safe harbor." According to the 2003 Further Clarification, this reference led many schools to believe that substantial proportionality was the *only* safe measure by which to achieve participation compliance. This misunderstanding, in turn, opened the door for some to argue that the law required quotas. A careful reading of the 1996 Clarification, however, shows that no part of the test is favored over another. In an effort to put this controversy to rest once and for all, Assistant Secretary Reynolds' Further Clarification clearly defines the OCR's approach to determining participation compliance.

"If a school does not satisfy the 'substantial proportionality' prong, it would still satisfy the three-prong test if it maintains a history and continuing practice of program expansion for the under-represented sex, or if the interests and abilities of the members of (the under-represented) sex have been fully and effectively accommodated by the present program. Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX."

Courts have also found that the test is drafted in the alternative and therefore provides schools with sufficient flexibility to implement it as they see fit. A discussion of each of the three tests is detailed below, along with some practical compliance tips. Courts have also found that the participation opportunities must be legitimate, varsity participation to include the individuals in the school's participant calculation.

1. Part One – Participation Opportunities Proportionate to Enrollment

A school can demonstrate compliance with the first part of the three-part test if it can show that the athletics participation rate of the under-represented sex is substantially proportionate to the school's full-time undergraduate enrollment. The OCR has refused to define "substantially proportionate" using concrete percentage points, but rather has stated that it is to be determined on a case-by-case basis. Accordingly, institutions are left to their own best judgment when deciding whether their numbers are "substantially proportionate." In addition, the fact that OCR offices and courts throughout the country have interpreted this requirement in slightly different ways only continues to complicate the process. The 2005 Clarification Letter recognized that there have been differences in enforcement and pledged to enforce the law in a more uniform fashion in the future.

Although federal courts have approved settlement agreements in cases with participation variances as great as 5 percent (ranging back to the 1990s), the OCR, through its 1996 Clarification, has taken a more conservative approach. It cites the following examples of substantial proportionality: (1) exact proportionality; (2) a disparity of 1 percent caused by an increase in the current year's enrollment after a year of exact proportionality; and (3) an institution's pursuit of proportionality over a five-year period and in the final year – when proportionality would otherwise have been reached – enrollment of the under-represented sex increased so that there was a two percent disparity. While these examples are illustrative only, they suggest a more exacting standard than that set forth by the courts. At least one regional office stated informally that anything greater than one percent would raise red flags.

Of course, percentage-point disparities represent varying numbers of actual participants depending upon the overall size of the athletics program. Where there exists a disparity that translates into a number less than that required to field a viable team (in other words – not enough who have both the interest and the ability), the law provides that the program is in compliance and that an additional team need not to be added.

Finally, both the OCR and the courts have recognized that schools should be permitted to determine how they comply with this prong. Although strongly disfavored, schools may choose to implement a roster management system or eliminate programs instead of expanding opportunities to the under-represented sex. Such a practice will not, however, aid compliance under either the history or interest tests. Wherever possible, schools are encouraged to comply with the spirit of the law by adding opportunities for the under-represented sex through the allocation of additional funding or by reallocating existing resources without eliminating viable programs for either sex.

2. Part Two – History and Continuing Practice of Program Expansion

The second prong asks whether an institution has a history and continuing practice of program expansion that is "demonstrably responsive" to the developing interests and abilities of the under-represented sex. Institutions seeking to comply with this test must document net program expansion for the under-represented sex. The department's athletics history should detail when teams were added or discontinued, the institutional reasons for doing

so and the effect the respective additions and/or deletions had on the overall athletics participation numbers for men and women. Many institutions do not have this information readily available and therefore cannot know whether they comply with this test. For this reason alone, schools should compile a detailed chronological timeline that can be updated from year to year.

Once the historical data have been gathered, a school must determine whether there has been a net expansion of athletics opportunities for the under-represented sex and, if so, whether the expansion was demonstrably responsive to students' developing interests and abilities. In short, there must be some causal connection between the opportunities added and the expressed or demonstrated interests of the student body. Arbitrary expansion (for example, decisions to add teams that are made for financial or other reasons unrelated to interest) may raise questions about good-faith compliance and may compromise an institution's compliance with this test.

In a 2011 court decision in California, a school that had expanded sport offerings and grown participation opportunities, but then saw a significant drop in participants in the following years was not permitted to use the second prong to establish compliance. Schools should ensure that participant growth is maintained over time.

While there is no fixed time period within which an institution must have added participation opportunities, isolated gains without any plans for future growth generally will not provide the "history" and "continuing practice" evidence necessary to meet this test. The OCR has stated that it will focus upon the following when assessing an institution's "history" and "continuing practice" of expansion:

History

- 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

- 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)

When discussing expansion, some schools have argued (unsuccessfully) that the reduction of participation opportunities provided to members of the over-represented sex that results in a net statistical expansion of women's participation percentages should provide the basis for compliance with this prong. The OCR and courts have rejected the argument soundly, stating that expansion should be measured in real numbers and not mere shifts in percentages. Other institutions have pointed to significant upgrades (facilities, equipment, services, etc.) in an effort to demonstrate Prong 2 compliance. While the OCR has praised institutions that have upgraded programs without adding participation opportunities, it also has stated that such improvements will not lead to a finding of compliance for purposes of participation. Rather, the upgrades will be relevant when assessing compliance in treatment areas.

In its 1996 Clarification, the OCR set forth the following examples of compliant and non-compliant programs for purposes of Prong 2. Please note that 14 years have been added to the dates contained in the examples to make up for the 14 years that have passed since the clarification was written.

- At the inception of its women's program in the early 1980s, Institution A established seven teams for women. In 1998, it added a women's varsity team at the request of students and coaches. In 2004, 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 A is currently implementing a plan to add a varsity women's team in the spring of 2010 that has been identified by a regional study as an emerging women's sport in the region. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. The OCR would find Institution A 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 1994, Institution B established seven teams for women. Institution B added a women's varsity team in 1997 based on the requests of students and coaches. In 2005, it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 2007, Institution B eliminated a viable women's team and a viable men's team in an effort to reduce its athletics budget. It has taken no action relating to the under-represented sex since 2007. The OCR would not find Institution B in compliance with part two. Institution B cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the under-represented sex because its only action since 2005, with regard to the under-represented sex, was to eliminate a team for which there was interest, ability and available competition.
- In the mid-1980s, Institution C established five teams for women. In 1993, it added a women's varsity team. In 1998, it upgraded a women's club sport with 25 participants to varsity team status. At that time, it eliminated a women's varsity team that had eight members. In 2001 and 2003, Institution C added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletics 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 varsi-

ty athletics at the institution has increased. The OCR would find Institution C in compliance with part two because it has a history of program expansion and the elimination of the team in 1998 took place within the context of continuing program expansion for the under-represented sex that is responsive to their developing interests.

- Institution D started its women's program in the mid-1980s with four teams. It did not add to its women's program until 2001 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 2004, 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 D agreed to add three new women's teams by 2011. It added a women's team in 2005 and 2008. Institution D is implementing a plan to add a women's team by the spring of 2011. The OCR would find Institution D in compliance with part two. Institution D's program history since 2001 shows that it is committed to program expansion for the under-represented sex, and it is continuing to expand its women's program in light of women's developing interests and abilities.

3. Part Three – Effective Accommodation of Athletics Interests and Abilities

This is the part of Title IX that most often is overlooked when debating the relative merits of the law. Under this prong, schools that cannot show substantial proportionality or a history and continuing practice of expansion may still be in compliance with the law if they can demonstrate that they are fully and effectively accommodating the athletics interests and abilities of the under-represented sex. In other words, there is only a participation issue under Title IX where it can be shown that there are (most often) women waiting, ready and able to participate in athletics and where men already occupy a disproportionate number of the existing participation opportunities. Where an institution can show that it has fully accommodated the interests and abilities of the under-represented sex, it may continue to add participation opportunities for the over-represented sex without running afoul of the law.

On April 20, 2010, the Department of Education attempted to reduce controversy and avoid shortcomings of the 2005 Clarification by issuing new guidance. The directive provides schools with those specific factors the OCR will consider when determining if an institution is in compliance with Prong 3 of Title IX's three-part test. Three questions are asked and answered when exploring whether a school is meeting the interests and abilities of the underrepresented sex in sports participation:

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

A school would not be in compliance related to participation opportunities under the third-prong test if the answer to all of these questions is "Yes."

a. Evaluation of Unmet Interest

As most schools lament and as courts have observed, keeping up to date on interest and ability is no small task. Schools that wish to rely upon this factor to show compliance (and many do given the rapidly increasing numbers of female undergraduates) must be proactive. Courts have not been persuaded by arguments that aspiring teams failed to knock on the proper doors to request intercollegiate opportunities.

The OCR will evaluate: (1) whether a school uses nondiscriminatory methods for assessing interest and ability; (2) whether a viable team was eliminated; (3) multiple indicators of interest and of ability; and (4) the frequency of conducting assessments. Schools that implement the following will have a good idea of where they stand with respect to unmet interest:

1. Distribute athletics interest surveys to all current and admitted students of the under-represented sex;
2. Make sure that there exists a publicized process whereby incoming and current students can request to add or elevate sports and evaluate and respond to all such requests);
3. Conduct ongoing reviews of the school's club or intramural sport participation levels;
4. Keep up to date on the high school sports, amateur sports association and community sports leagues data and their respective participation levels in your geographical recruiting area;
5. Track the interscholastic athletics participation of admitted students; and
6. Conduct interviews and meetings with students, admitted students, coaches, administrators and others regarding interest in particular sports.

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 this portion of the three-part test. This outcome is premised on the underlying point that if there is an existing team, it is virtually undisputed that there is 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.

The 2010 letter details the OCR survey content recommendations (e.g., clear purpose statement; listing of all sports and room for survey participants to write in their own; and a request for contact information to further explore indicated interest). The target population for the survey is admitted and enrolled students of the underrepresented sex, and the OCR recommends a census survey to avoid sampling shortcomings. While not providing exact response rates, the OCR makes helpful suggestions that can improve response rates. Only one court has provided a specific response rate analysis: a critical issue in Barrett v. West Chester University of Pennsylvania, a decision out of the federal Eastern District of Pennsylvania. In Barrett, the district court held that a 39 percent survey response rate was

too low to validate the survey; therefore, the school could not rely on the results to demonstrate compliance with Prong 3. The OCR would likely expect a school to conduct a survey again if the response rate is low or sampling, rather than census, is the method employed. The OCR also counsels schools to protect survey respondents' confidentiality.

b. Ability to Sustain a Team

Where unmet interest is identified, the institution must determine if a viable team could be fielded. The OCR and courts have held that the athletics ability analysis should focus on whether athletes can play the sport and not whether they will be successful. In the OCR's opinion, if the interested students have the potential to sustain an intercollegiate team as evidenced by the following factors that generally will be enough:

1. The athletics experience and accomplishments in interscholastic sports;
2. Club or intramural competition of students and admitted students interested in playing the sport;
3. Opinions of coaches, administrators and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team;
4. If the team has previously competed at the club or intramural level, and whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team;
5. The minimum number of members needed to sustain a team (note the size of teams in this sport in the conference or competitive region; numbers needed to practice; and substitution needs); and
6. If interested participants have athletics skills that could translate to ability to sustain a team in this sport.

c. Reasonable Expectation of Competition

Finally, in addition to interest and ability, prospective teams must also have a reasonable expectation of intercollegiate competition in the institution's normal competitive region. The 1996 Clarification provides that the following factors should be taken into account:

1. The competitive opportunities offered by other schools against which the institution competes; and
2. The competitive opportunities offered by other schools in the institution's geographical area, including those offered by schools against which the institution does not now compete.

If competition is scarce and that fact can be traced to historical limitations, however, institutions may be required to initiate discussions in their regional and national conferences about adding the sport in question.

Moreover, schools are not required to offer participation opportunities to either sex beyond their respective percentages in the full-time undergraduate community.

IV. Financial Aid

Institutions that provide financial aid to students on the basis of their athletics ability (that is, the aid is awarded to the student because of his or her athletics ability or participation) are required under Title IX to award "substantially proportionate" dollars to male and female student-athletes. Many times, an athletics scholarship award will be reduced because of the subsequent award of nonathletics aid, such as need-based aid, service scholarships, academic scholarships, etc. The nonathletics based awards should not be counted. The standard, simply put, is that if the student received the aid from any institutional source, based on athletics ability or participation, the OCR would include those dollars in its analysis of financial compliance.

The OCR set forth the framework it uses to determine scholarship aid is provided in a substantially proportionate manner in its1998 Clarification Letter on Financial Aid. The test is a simple comparison between the actual percentage of athletics-based aid awarded to men and women compared with the percentage of unduplicated male and female student athlete participants. Please note that for purposes of financial aid, student-athletes should be counted one time only no matter how many sports they may play. Thus, although the athlete who runs cross country, indoor track and outdoor track would count three times for participation, he or she should be counted one time only in the financial aid analysis.

According to OCR correspondence in December 2011:

Athletic financial assistance includes any financial-assistance expenditure through the institution's athletics program and any other aid connected to a student's athletic participation or ability. Therefore, any additional funds given to a student athlete in connection with the student's athletic participation or ability would be included in the Title IX analysis of athletic financial assistance. If an institution offers "athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." 34 C.F.R. § 106.37(c). Since 1979, OCR has interpreted this regulation to mean that an institution's "total amount of scholarship aid made available to men and women must be substantially proportionate to their [athletic] participation rates" at the school. Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979).

This substantial-proportionality test is conducted on a case-by-case basis. After accounting for nondiscriminatory factors, if the disparity between an institution's athletic-scholarship budgets for men and women is more than 1%, there is a strong presumption that the institution has violated the substantial-proportionality requirement. See Letter from Mary Frances O'Shea, National Coordinator for Title IX Athletics, U.S. Department of Education, to Nancy S. Footer, General Counsel, Bowling Green State University (July 23, 1998) (available at hyperlinks https://email.ed.gov/OWA/redir.aspx?C=dd74b2a0f4aa427e88c80d351a252b46&URL=http%3a%2f%2fwww2.ed.gov%2fabout%2foffices%2flist%2focr%2fdocs%2fbowlgrn.html and http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html).

OCR's analysis might not end with athletics-related scholarships or grants, however. The 1979 Policy Interpretation states that "[w]hen financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX." 44 Fed. Reg. at 71,415. Thus, even if an institution offers proportionate athletic scholarships or grants to both sexes, it may violate Title IX if it offers athletes of one sex a disproportionate amount of other types of aid.

Please note, while OCR sometimes refers to scholarship "budgets" in its guidance, in practice, OCR has applied the test to actual dollars awarded to student-athletes. Thus, it is not a defense to provide evidence that a coach had the budget to award aid but chose not to do so.

Legitimate non-discriminatory factors may include differences that can be mitigated when taking into account in-state and out–of–state tuition rates provided the differences are not the product of discriminatory recruitment practices, unexpected fluctuation rates in athletic participation, a phase-in scholarship plan for a newly added sport program, dollars awarded to promote program development or last minute decisions by student-athletes not to attend an institution. In its reviews, OCR has not counted summer aid and aid awarded to student-athletes who have exhausted their eligibility generally should not be included in analysis for Title IX purposes, even though summer aid must be reported on EADA forms. Summer school aid and exhausted eligibility awards may be subject to a separate equity analysis and must be awarded according to a non-discriminatory policy or practice. Accordingly, schools should have a policy that sets forth the nondiscriminatory criteria for making such award determinations.

Although the test appears to be fairly straightforward, there are some areas that can be tricky. For example, schools must include the dollar value of tuition waivers awarded to students on the basis of athletics ability or participation. As another example, if a school established an endowment to improve its athletics Title IX financial aid compliance and awarded aid to student-athletes from that fund, that aid would be related to athletics participation and should be included in a Title IX analysis. A final example, if a school awards academic-achievement scholarships, but purposefully puts student-athletes at the top of the list to receive the aid, those dollars awarded should be counted in the Title IX reporting because the student-athletes moved up the award list based on their athletics ability or participation.

Schools must keep accurate records of all awards. It is important to make sure that the athletics aid awards reflected on squad lists are correct as of the first date of competition and that where errors exist beyond that date, notations are made, initialed and accompanied by appropriate documentation.

V. Treatment

The controlling regulation requires that institutions "provide equal athletics opportunities for members of both sexes." In order to determine whether a school provides equivalent athletics benefits and opportunities, the OCR will review the following "laundry list" of treatment issues:

- Provision and maintenance of equipment and supplies;
- Scheduling of games and practice times;
- Travel and per diem expenses;
- Opportunity to receive tutoring and assignment and compensation of tutors;
- Opportunity to receive coaching, and assignment and compensation of coaches;
- Provision of locker rooms, practice and competitive facilities;
- Provision of medical and training services and facilities;
- Provision of housing and dining services and facilities;
- Publicity;
- Support services; and
- Recruiting.

The availability, quality and kinds of benefits, opportunities and treatment provided to members of both sexes must be assessed within each of these areas. Compliance can only be established 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. The OCR Athletics Investigator's Manual sets forth the three-step methodology used by the OCR to assess compliance in this area.

Step 1. As described more fully below, each treatment area has a list of facts to be evaluated. OCR investigators will "obtain and analyze information under each of the factors" 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 2. Once the first step is completed, the investigator will make an overall determination for that one program component (for example, equipment and supplies) as follows. Are factors that favor one sex "offset" by factors favoring the other sex? Offsetting factors "need to have the same relative impact within the particular program component (for example, not providing socks to a team is less significant than not providing uniforms). Thus, disparities need not necessarily be equal in number to offset each other, such as two factors favoring men are offset by two factors favoring women." Where there is no adequate

offset, the OCR will find a disparity for that program component that favors one sex over the other.

Step 3. After analyzing each of the program component areas, the OCR will then consider "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. Where greater disparities exist on one side and the "difference results in lack of equal opportunity for one sex," the investigator will find overall noncompliance.

This flexibility sometimes lulls schools into relying upon equitable budgeting for programs of each sex and then leaving it to the coaches to decide how best to spend money. While this approach certainly empowers coaches and encourages them to make responsible decisions, it can lead to treatment problems if not monitored. For example, some coaches like to practice at certain times and in certain locations; some like particular brands of equipment; and some like to participate in certain types of marketing and fundraising activities but not in others. Some coaches tend to spend less in one area in order to save for another. Such decisions are permissible as long as they do not distort the overall equity within the athletics program. In one program, for example, a coach decided to use per diem money to upgrade transportation. Unfortunately, players were then left without money for meals when on the road. It is imperative to make sure that the decisions do not merely reflect the preference of the coach but also the preferences of the majority of team members. Remember, when reviewing the athletics program, the OCR will look at it from the perspective of the student-athlete.

Another difficulty with this area of the law is that many student-athletes, parents and coaches believe that Title IX comparisons are sport-to-sport and component-to-component instead of overall program to overall program. This misunderstanding, when not corrected, can lead to hard feelings where there exists overall equivalence in the athletics program but not equity between individual sports. For example, one department may choose to highlight its women's basketball team and its men's wrestling team. The men's basketball team may end up with equipment that is not of the same quality as the women's team. When the superior quality of the women's uniforms is offset by uniforms provided to the men's wrestling team, it is a permissible disparity. To avoid such misunderstanding, information about the law and the department's reasoning must be shared with the coaches and student-athletes.

The key questions that must be asked in each of the treatment areas are the following:

- Are the benefits provided to students equally available?
- Is a benefit being provided to one sex, but not the other? If so, why?
- Is the under-represented sex denied or limited any benefit that is provided to the other sex? If so, why?

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 have an appreciation for what variations are permissible. The investigator's manual contains the following examples of nondiscriminatory differences:

- Differences inherent in the operation of specific sports because of rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition and the maintenance/upkeep requirements of those facilities. The key is that such sport-specific needs must be met in an equivalent manner for both men's and women's programs.
- 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. These differences are acceptable as long as they do not reduce the overall equality of opportunity.
- Differences directly associated with the operation of a competitive event in a single-sex sport that creates unique demands or imbalances, such as may be associated with large event-management issues. As long as these special demands are handled in an equivalent manner for sports of the opposite sex, the differences will be acceptable.
- Differences as a result of an institution's voluntary affirmative actions to overcome effects of historical differing treatment.

The OCR will review each program component with this framework in mind. Moreover, investigators are guided in their review by factors set forth in the Athletics Investigator's Manual and in the Policy Interpretation. The following descriptions of each component are drawn from these sources and from past investigations and audits of Divisions I, II and III programs. In some places, problems areas have been identified and suggestions offered to help those working through a review of the treatment areas in their own programs. Of course, no one list can cover all of the unique circumstances that may exist on campuses across the country. Schools should feel free to add additional pertinent factors or to tailor the existing factors to their own particular programs.

A. Provision and Maintenance of Equipment and Supplies

The first of the treatment areas – equipment and supplies – includes but is not limited to uniforms, other apparel, sport-specific equipment and supplies, instructional devices, and conditioning and weight-training equipment. In assessing compliance, the following factors are reviewed: quality, amount, suitability, maintenance and replacement, and availability of equipment and supplies.

With respect to uniforms and apparel, the common issues that often arise involve the number of game uniforms provided to the respective teams, the types and amount of practice clothing (numbers of shirts, shorts, etc.), the types and amount of footwear, the availability and amount of travel warm-ups, the availability of laundry service and the related turnaround time, and the types and availability of travel bags and gear.

The maintenance and replacement schedules for game uniforms, practice clothing and footwear also are important issues that are constantly recurring. The more consistent and uniform that an institution's policies and practices are in this regard, the better off it will be.

With respect to equipment, each team's access to practice- and game-related equipment needs – on both an individual and team basis – is important. The quality, currency and replacement schedule of equipment should be monitored to ensure an equitable allocation. Although some teams may not require yearly upgrades and replacements, care should be taken so that decisions are made on a logical and fair basis. Desires for the "best and the latest" are held by almost every team, but they must be tempered by the economic realities of the institution and guided by a fair decision-making process.

Clearly, there will be differences between athletics programs with regard to the amount spent on uniforms and equipment. Title IX does not require that schools provide identical uniforms or spend the same amount of money outfitting comparable teams. Rather, the test is whether teams are provided equitable uniforms. For example, a school might spend a good deal more outfitting its men's lacrosse team, which requires additional safety gear, than it will for the women's team. That's acceptable, provided the quality and quantity of equipment and clothing is equitable.

Weight-training programs and the addition of strength-training coaches have expanded dramatically for men and women since the passage of Title IX. Although the provision of a weight-training coach will be covered elsewhere, the location and adequacy of weight-training facilities should be part of this review. For example, is one team given its own weight facility or the exclusive use of a facility during specific times when others are not? Do some teams have access to weight facilities around the clock when others must use them during specific times? Also, are the machines and weights provided useful for the variety of sport programs offered at the institution and the needs of the individual team members? Again, where it can be demonstrated that weight training is integral to one program and not to another, differences may be justified.

The adequacy, quality and location of storage space for equipment are other factors to consider. Again, this review must be program-specific. It is not enough to give each program the same amount of space when each has different storage needs. A good review should take into account the amount of equipment to be stored and whether it is accessible. Its proximity to the practice and competition facilities is often of particular concern.

Checklist for Provision and Maintenance of Equipment and Supplies

1. **Key Questions:**
   - What do we provide to each team?
   - Are there differences between what we provide for the men's program and the women's program?
   - If so, what are the reasons for the differences?
   - Do we provide support items (gym bags, towels, jackets, travel bags, sweaters, rings, etc.) of similar quality and quantity for female and male athletes?
   - Do we provide practice and competitive uniforms of similar quality and quantity for male and female athletes?
   - Do we maintain and replace equipment and supplies on the same schedule?
2. **Areas to Review for Each Team:**
   a. Uniforms:
      - Type
        - Game
        - Practice
        - Travel
      - Amount/Availability
      - Quality
      - Maintenance
      - Replacement
      - Budget

   b. Equipment Provided to Athletes:
      - Amount/Availability
      - Quality
      - Maintenance
      - Replacement
      - Budget

   c. Supplies Provided to Athletes:
      - Amount/Availability
      - Quality
      - Maintenance
      - Replacement
      - Budget

   d. Equipment and Supplies Provided by Student-Athletes:
      - Type
      - Cost
      - Reasons student-athletes supply them

B. Scheduling of Games and Practice Times

The scheduling of games and practice times for various teams involves an analysis of the following five factors: the number of competitive events per sport; the time of day that competitive events are scheduled; the number and length of practice opportunities; time of day practices are scheduled; and the opportunities to engage in preseason and postseason competition.

Are there equitable numbers of competitive events offered per sport?
First, it helps to put together a list of the maximum number of contests permitted in each sport per NCAA and conference rules. Men's and women's teams should be provided the same number of contests in like sports (for example, men's and women's

basketball), and where they are not, schools will be expected to provide nondiscriminatory reasons for the differences. In some instances, institutions have stated that coaches have requested fewer games. Remember, the analysis is from the perspective of the student-athlete. In other words, are the student-athletes being given equivalent opportunities? It is not enough to leave the decision to the coach without careful administrative follow-up to determine the reason for the request for fewer games.

Are practice opportunities equivalent in number and duration? Would your like teams be satisfied with the practice schedule of the opposite sex?
This is a good test when trying to decide if one team is given more and better practice opportunities than another team. This analysis is fairly straightforward. Compare number of practices per season and length of practices. Investigate differences. In some instances, part-time coaching schedules result in the shortchanging of practice times. Schools must ensure that the coach they provide for each sport is able to be on campus regularly to provide sufficient and equitable practice opportunities.

Are teams permitted to return to school before the start of school in the fall and/or during semester breaks? If so, are the men's and women's teams afforded comparable opportunities? Are all teams permitted to return to school as early as their sport will allow, or do schools place restrictions on the number of preseason practices?

Many departments have policies with regard to fall preseason due to the high cost associated with housing and feeding student-athletes on campus before school begins. Are these policies applied equitably? In this instance, institutions need to look at all sports and not just those that are alike. For example, if football is the only program brought back early, the fact that there is no like program will not excuse the school's decision to bring back members of one sex and not the other. Clearly, all programs benefit from preseason training. So when conducting a review in this area, it is important to ask if programs are given equitable opportunities to come back early to practice or if some are given priority over others. By the same token, more and more teams are taking advantage of the opportunity to practice during the offseason. When are teams permitted to practice in the offseason? Are there equitable opportunities, and are coaches, trainers and fields available?

Are competitive events scheduled at comparable times? Which teams are given the prime-time contest slots?
The equitable assignment of the best (and worst) days and times for competitive events requires significant advance planning and coordination with conferences and other schools. In addition, what may be considered prime for one team may not be desirable for another. Schedule coordinators, on-campus or in the conference office, who make assumptions without speaking to teams get into trouble in this area. It helps to meet with each coach of like sports to get a sense of particular games and special schedule requests. It is also important to check with male and female student-athletes to make sure that they feel that their schedules and their sports are treated fairly.

Are teams given equitable practice times?
With respect to practice times, sometimes there exists a tendency to follow historical assignment patterns when facing field or facility availability limitations even though the schedule is not equitable. Institutions with limited facilities must assign the "prime" practice times equitably. Some form of rotational assignment system should be implemented so that teams of each sex are equally advantaged (and disadvantaged, as the case may be).

In addition, institutions with limited indoor facilities face particular problems with the allocation of equitable practice times during the winter and/or periods of inclement weather. Institutions also should look carefully at any competitive or practice facility that is reserved exclusively for one team because such policies frequently create an equity problem. Also, if schools offer practice time to visiting schools in the prime facility, do both men's and women's programs move to accommodate the requests, or does the practice inconvenience one program disproportionately?

Do programs have similar opportunities to engage in available preseason and postseason competition?
Schools should review their policies with regard to offseason and postseason competition. Compare spring trips for the baseball and softball teams. Are they equitable and equitably funded? Where does the money come from to fund the trips? What rules govern when and where teams are permitted to travel outside their normal competitive region?

The second part of this analysis is a look at the word "available" when reviewing preseason and postseason opportunities. For example, if a school has a department policy that all teams that make it into NCAA postseason competition get to go and more men's teams than women's teams qualify, there is not a Title IX issue. However, if there are other postseason opportunities that are not pursued for members of one sex but are pursued for members of the other sex, the institution could have some problems.

In short, this laundry list area involves a fairly straightforward analysis. Is scheduling done fairly in the department or is one program given preference over another? Ask your coaches and your students. They know.

Checklist for Scheduling of Games and Practice Times

1. **Key Questions:**
   - Are we providing teams of both sexes an equal opportunity for prime-time games?
   - Are we providing teams of both sexes an equal opportunity for prime-time practice times?
   - Is any team being treated less favorably in any way?
   - Do male and female athletes lose similar amounts of academic time due to practices and games?
   - Are we being fair in the allocation of preseason and postseason opportunities?
   - Are the lengths of the season equivalent for both the men's and women's teams?

- Are we scheduling the same number of competitions?
- Do we leave the control of the use and access of our facilities to our coaches or does the athletics department (or some other entity) control use?
- Do we have a master scheduling program for all of our facilities?

2. Areas to Review for Each Team:

a. Practices:
- Beginning and Ending Dates
- Days of Week
- Times

b. Games:
- Preseason
  - Days
  - Times
  - Number of Competitions
  - Opportunities Denied?
- Regular Season
  - Days
  - Times
  - Number of Competitions
- Postseason
  - Days
  - Times
  - Opportunities Denied?

C. Travel and Per Diem Allowance

The Policy Interpretation provides that the following five factors be addressed when assessing compliance in this area: modes of transportation, housing furnished during travel; length of stay before and after competitive events; per diem allowances; and dining arrangements. Before turning to the specific areas listed above, it is helpful to compare the size and composition of each team's travel party to ensure that differences, if any, are legitimate and not the result of inequitable funding or discriminatory decisions with regard to the availability of administrative or medical assistance on the road.

Mode of Transportation

Team transportation varies depending upon a number of factors including the number in the travel party, the distance traveled and the requirements of the particular sport. In sailing for example, a school may have student-athletes traveling to three or four different events at the same time and may be sending each small group out in cars, while other teams are traveling in buses or flying to contests. Many institutions run into problems in this area because of informal travel policies that depend on the ingenuity of the individual coach or team manager. A better option is to have a formal travel policy that sets forth guidelines for travel. For example, such a policy should set forth the authorized mode of transportation depending upon team size, class schedules and cost. It also is advisable to have such a policy approved by in-house counsel, especially for teams that are authorized to travel in private vehicles or vans.

Housing on the Road

When evaluating this factor, money is less of an issue than the comparative quality of the housing. For example, it costs more to house a team in some areas than others. In addition, teams with larger squads many times have to stay in larger hotels in order to find appropriate meeting space. Again, schools should have clear policies regarding housing on the road including, but not limited to, the maximum number of student-athletes permitted in each room. Some schools have discovered when assessing this area that coaches have used their housing budget for other program expenses and required students to double up or stay in alumni housing when on the road. If these choices are made by coaches unilaterally without administrative approval and unanimous student-athlete buy-in, these programs can find themselves in trouble. Also, some programs run into trouble because they house certain teams in hotels or motels before home contests. If this is not offered to members of each sex on an equitable basis, it is problematic. Remember, Title IX compliance is assessed through the eyes and experiences of all student-athletes.

Length of Stay

The length of stay before and after competitions is a sensitive issue for student-athletes, especially when some teams are permitted to arrive the day before competition when other teams are required to travel on the game day. Schools with uniform policies with regard to travel depending upon the time of the contest, distance traveled, academic schedule and team schedule generally are in good shape in this area provided the factors are uniform and nondiscriminatory. Some schools have attempted to justify trip extensions by pointing to outside funding for such trips. As is discussed elsewhere in this manual, all benefits provided by the school – no matter what the course of their funding – must be equitable.

Per Diem and Dining Arrangements

Members of all teams should be fed equitably when on the road. This relatively simple issue, however, is complicated by the timing of team departures, the availability of on-campus dining opportunities, bag lunches and the availability of affordable yet still nourishing meals while on the road. The types and qualities of restaurants and meals that are made available need to be reviewed. Do teams of one sex regularly eat fast food or sandwiches while teams of the other sex visit "sit down" restaurants? Do teams have pregame and postgame meals? If so, can the institution articulate a good reason for the difference?

In short, schools need a comprehensive travel policy that is fair and equitable. In addition, it must be applied uniformly. Deviations must be approved and justified. Finally, this is a good area for sporadic discussions with student-athletes. Do they feel that the travel policies are fair and appropriate? If they have legitimate concerns, schools should address them sooner rather than later.

Checklist for Travel and Per Diem Allowances

1. **Key Questions:**
   - Do we have a uniform travel policy and does it cover all aspects of travel?
   - Are we applying it consistently?
   - Do we have a consistent approach to travel party size and composition?
   - Do we treat length of stay (before and after competitions) differently for different teams?
   - Do we provide the same type of transportation to our teams?
   - Do we provide the same type of housing and dining arrangements for the teams when they travel?
   - When male and female student-athletes travel to games, do they get meals at similar places?
   - Are pregame meals and snacks provided on an equitable basis to male and female student-athletes?

2. **Areas to Review for Each Team:**
   a. Travel Party Size and Composition:
      - Student-athletes
      - Coaches
      - Support Staff
      - Others

   b. Modes of Transportation:
      - Van
      - Bus
      - Standard
      - Tour
      - Air
      - Commercial
      - Charter

   c. Hotel Accommodations
   d. Dining:
      - Team Meals
      - Per Diem Amounts
      - Pregame and Postgame
      - Restaurant
      - Catered

   e. Length of Stay:
      - Before
      - After

   f. Budget

D. Opportunity to Receive Academic Tutoring, Assignment and Compensation of Tutors

A review of this program component involves an analysis of the number, quality, compensation, employment conditions and availability of tutors.

Does the institution have a policy regarding the provision of tutoring services to student-athletes? If so, does it define how students may access the services and how tutors are hired and assigned? If tutoring services are offered, there should be a nondiscriminatory policy setting forth the criteria for accessing tutors and for the assignment of tutors. Departmental oversight of an athletics-tutoring program is critical. If the program is established with a single set of policies that are uniformly applied to members of each sex and there is oversight outside the athletics department, the inquiry should end there.

In essence, the OCR wants to ensure that services, if any, are available to all student-athletes on the same terms conditions. Avoid specific team-based arrangements that are beneficial unless other teams are made aware of those arrangements and are offered the same opportunity for access to those services. If tutors are assigned to specific teams, their qualifications and abilities should be reviewed to ensure that they are assigned in an equitable manner so that each team receives quality tutoring services. Similarly, the compensation of tutors should be based on a uniform scale and should not differ based upon the team for which services are being provided. The availability of both group and one-on-one tutoring sessions should be the same for both sexes. Access to and the time allocated for accessing athletics department computer labs should receive a similar analysis.

As in other areas discussed in this manual, this area can be measured easily and accurately by including it as an area to discuss in student-athlete experience and exit interviews. Are students satisfied with the opportunities offered, or is there an unspoken rule that one team has access to the qualified tutors and the rest of the student-athletes are left to fend for themselves?

Checklist for Opportunity to Receive Tutoring, Assignment and Compensation of Tutors

1. **Key Questions:**
   - Are the same services available to all student-athletes?
   - Is the same quality tutoring services provided to all student-athletes?
   - Are the tutors compensated on the same basis?
   - Are any teams provided special services?

2. **Areas to Review for Each Team:**
   a. Number of Student-Athlete Recipients
   b. Tutors:
      - Availability
      - Qualifications

- Experience
- Rate of Pay
- Number
- Location of Instruction
  - Group
  - Individual
- Department Oversight

c. Budget:
- Source
- Amount

d. Use of Other Department Academic Resources (for example, computers)

E. Opportunity to Receive Coaching, Assignment and Compensation of Coaches

A full assessment of this area requires a review of each coach's availability, assignment and compensation. The OCR will assess the relative availability of full-time, part-time and graduate or student assistants. Assignment refers to the training, experience and other professional qualifications of the coaches of each team. Compensation is more complicated. The OCR has recognized that there are many legal reasons for pay discrepancies and, as such, will look only to see if the compensation structure at the school is affecting the quality of coaching provided to the men's and women's programs. Nonetheless, the basis and justification for compensation decisions should still be analyzed for Title IX, Title VII and Equal Pay Act purposes. (For further discussion of equal pay, please see the Employment Issues section, Chapter 5.)

With respect to availability, institutions should review the number of coaches that they have for each team and for the respective men's and women's programs overall. While not controlling, it is also advisable for "calculation purposes" to convert all the part-time positions into full-time equivalents, combine that with the full-time coaches and then calculate the ratio of coaches to male student-athletes and then to female student-athletes. There also needs to be oversight regarding the number and assignment of volunteer coaches to avoid creating an unintended imbalance.

Next, the relative level of accessibility of the coaches to the student-athletes must be assessed. Reliance on part-time head and assistant coaches for teams of one sex, but not the other is problematic. Part-time coaches usually are not available to their team members to the same degree full-time coaches are, even where full-time coaches have additional, non-team-related job responsibilities. Students interact with their coaches at times other than formalized practice times. Coaches who have offices in the department and who are on campus are much more accessible than those who work elsewhere. It is also important to review assistant coach staffing decisions to ensure that they are equitable and defensible. Issues may arise when comparable teams do not have the same number of assistant coaches and when women's teams have fewer assistants overall.

An analysis of assignment of staff, experience and qualifications also is material. Providing well-qualified coaches for teams of one sex but not the other is dangerous. This is not to say that a school will not have some coaches who are superior to others. Instead, institutions should apply a relatively uniform set of criteria for both the selection and compensation of their coaches. When going through the hiring process, an institution should make sure that its selected recruitment efforts are generating a quality pool of applicants, and in every situation, the most qualified candidate for the job, regardless of gender (or race or religion, etc.). Many administrators have articulated the need to consider gender as a factor in their hiring decisions. Although increasing the number of female coaches may be a laudable goal, hiring solely on the basis of gender (male or female) is illegal.

Although the OCR will not probe far into compensation matters during a review, compensation is a hot-button issue in athletics and is even more of an issue now that the NCAA is requiring institutions to report third-party guaranteed contract compensation (see EADA discussion, Chapter 3). Compensation systems for college coaches often are very complex and – in some cases – muddled. It is not enough, however, to defend one's pay scale and pay discrepancies by arguing that it was the system the administrator inherited when he or she arrived or that the discrepancies are the result of vague and undocumented merit increases through the years. Nondiscriminatory discrepancies are defensible provided they are documented. All departments should work with the institution's human resources department to develop (or update) a set of nondiscriminatory criteria for making salary decisions and adjustments.

Administrators should do the following to ensure that their compensation practices are equitable.

- List those factors that go into compensation decisions for coaches. Such a list might include job responsibilities, past experience, seniority and demonstrated success at the institution.
- Review the total compensation packages of all of your coaches, including salary and any additional benefits (for example, club memberships, car allowance). Please note, although the EADA forms provide ready access to this type of information, salary payments from sources other than the institution are generally not included in the EADA comparison, although they are included for Title VIII and Equal Pay Act purposes.
- Determine whether the compensation system and the actual packages are fairly implemented.
- Where disparities exist, determine if they can be accounted for by nondiscriminatory reasons.
- If not, compensation should be adjusted upward for the underpaid employee. The Equal Pay Act (discussed later) prohibits employers from making downward equity pay adjustments.

The type of employment arrangement that exists is also important. Is it "at will," pursuant to a letter of hire or an appointment letter for a specific period of time, or pursuant to

an employment agreement? Is it for a year, or is there a commitment for a multiyear relationship? Is the "year" a 9-, 10-, 11- or 12-month year? Are there automatic renewal provisions? Whatever the nature and duration of the relationship, there should be a logical and consistent approach employed for all teams. For example, extended contracts should be offered to men's and women's teams at both the head coaching and assistant coaching levels on an equitable basis.

The equity in the assignment of duties is a complicated but essential element of this review, particularly at Divisions II and III schools where coaches often wear many hats. An assessment needs to be made of the duties assigned to the coaches. Are they full-time coaching duties? If not, what duties are assigned? Are the coaches of the teams of each gender given fair and equitable assignment of duties? In any situation in which there is an assignment of additional duties, an analysis of the actual duties should be undertaken in order to make sure that coaches of particular teams are not unfairly hampered with "more burdensome" or substantive duties. The stereotypical case that should be avoided is when the coaches of the men's teams are assigned the easy courses to teach or the "make work" assignments, while the coaches of the women's teams are required to teach difficult and substantive courses. The OCR will determine what coaches actually do on a day-to-day basis; it will not simply rely on what is written in job descriptions.

Athletics departments should make sure personnel policies are applied equitably and that documentation for hiring, compensation, discipline and advancement are maintained as a historical record. Job descriptions should be reviewed and updated as needed to ensure that as an employee's responsibilities evolve, the personnel records evolve, as well.

Checklist for Opportunity to Receive Coaching, Assignment and Compensation of Coaches

1. **Key Questions:**
   - Do we have an equitable number of coaches in the men's and the women's programs?
   - What is the relative experience and quality of those coaches?
   - Is any team being disadvantaged as a result of the number, qualifications or experience of the coaches?
   - Do we have an equitable approach to the use of contracts for our coaches?
   - Do we have a basis for any compensation differences among the coaches?
   - When we look at the actual duties being performed, have we assigned any noncoaching duties in an equitable manner?

2. **Areas to Review for Each Team:**
   a. Head Coach/Assistant Coaches:
      - Number
      - Availability
      - Qualifications
      - Experience

   b. Compensation:
      - Benefits
        - Traditional
        - Fringe
      - Bonuses
      - Institution Funded
      - Booster Funded

   c. Employment Terms:
      - Contract
        - Length
      - Appointment Letter of Hire
      - At-Will

   d. Work Conditions
   e. Primary Duties
   f. Other Duties

F. Provision of Locker Rooms, Practice and Competitive Facilities

The following six factors are reviewed when determining compliance in this area: the quality and availability of the facilities provided for practice and competitive events; exclusivity of use of facilities provided for practice and competitive events; availability of locker rooms; quality of locker rooms; maintenance of practice and competitive facilities; and preparation of facilities for practice and competitive events.

The most significant issue in this area is access. The two key areas that must be pursued in this regard are the exclusivity of use (and/or the limitations on the use of practice and competitive facilities) and the comparative quality of the facilities. Any limitations on the use of facilities should be thoroughly reviewed except during a team's practice or competition times. In addition, if teams of one sex are provided greater freedom of access to practice and conditioning facilities, the same privileges should be afforded to the teams of the other sex. In other words if the "keys to the gym" are given to the student-athletes on the teams of one sex, they should also be given to the members of teams of the other sex.

An important question is always the location of the facility in relation to the team's locker room. Although a relatively fundamental issue, the proximity of the locations should be relatively comparable and therefore travel burdens to and from sites should be equitably shared. In addition to locker rooms, proximity is also an issue for the training and strength and conditioning rooms as well. Depending on the size of the institution, care should be taken for the assignment of teams to their respective rooms so that the assignments are logical and convenient. At the same time, the institution should be mindful of the quality of the rooms to which the teams have been assigned. Although this process requires a careful balance, an institution should avoid a disproportionate assignment process so that the teams of one sex are predominantly assigned the less desirable training rooms and strength and conditioning rooms.

An overall assessment is made of each facility: from the location and aesthetics of the facility as a whole to the quality of the playing surface. As indicated above, each venue needs to be assessed from the outside in. This necessarily begins with a review of the look of the respective facilities from the outside. The appearance should be of a similar quality. It is of course understandable that a new facility that houses certain sports may clearly outshine an older facility that houses others on the same campus. The key is that access to the new facility should still be as equitable as possible.

Because no institution can afford to build all new facilities for every team at the same time, it may be beneficial to draft a facilities development and management plan. This comprehensive plan will outline the long-term development of new facilities and renovation of existing facilities. The existence of such a plan will place in the proper context any shorter-term disparities in facilities that might otherwise seem to exist. For example, if a baseball facility undergoes a significant renovation, it would be advantageous to include in the plan a similar approach for a facility for a women's sport at a specific time in the future. The bottom line is that the existence of such a plan puts the issue squarely on the table and allows an institution to plan properly and equitably for facility upgrades over the years. To the extent appropriate, this plan could then be incorporated into the institution's overall equity plan.

With respect to the facilities themselves, an institution should evaluate the quality, age and maintenance of the facility as a whole and the playing surface. Indeed, playing surfaces can vary significantly based on their original design, the maintenance and upkeep they receive, and the use level. For indoor facilities, issues ranging from lighting, floor condition, air flow and the temperature must be reviewed. On the other hand, lighting, field conditions, use and maintenance, restroom facilities, coaching evaluation locations, and videotaping locations are key areas of analysis for outdoor facilities. In addition to the same concerns that exist for practice facilities, concerns for competitive facilities also include the quality and capacity of spectator seating, spectator restrooms, concessions and media.

Locker rooms and team rooms frequently are identified as areas where inequities exist. The number, size and quality of the lockers and the relative size and quality of the locker room as a whole must be evaluated in context with the size of the team. The locker room environment must be assessed, including the comparable number, size and quality of the shower stalls, restroom facilities, mirrors, chairs and benches. While locker rooms do not have to be mirror images of one another, the situation of the men's teams should be comparable to the situation of the women's teams. The football team ordinarily has the largest locker room, which is understandable given the participation numbers and equipment needs. However, problems inevitably arise when that locker room is disproportionately large in size or has the best and most recently acquired furnishings. The presence of entertainment equipment also needs to be considered as part of the overall assessment.

Team rooms also generate a similar high level of interest and are frequently the subject of discussion among the student-athletes on campus. No one should underestimate how quickly word spreads, particularly if the team room is a large room, is nicely furnished and has an attractive television, gaming and stereo equipment. As a result, an institution must thoughtfully consider its policies on providing team rooms and decide how they will be furnished so that inequities and/or misperceptions are not created.

A final issue with respect to facilities involves the access to the facilities for summer camps. Although this is more of an issue for the coaches than for the student-athletes, it is important that facilities be made available on an equitable basis. In addition, this type of approach enables support for the programs to grow in the local communities and can boost recruiting efforts. Because of that, camps also can be viewed as part of an overall approach to developing interest in and support of the women's programs.

Checklist for Locker Rooms, Practice and Competitive Facilities

1. **Key Questions:**
   - Are the locker rooms and team rooms of the women's teams comparable to the men's teams?
   - Are the practice facilities of the women's teams comparable to the men's teams?
   - Are the competition facilities of the women's teams comparable to the men's teams?
   - Are spectator seating, scoreboards, concessions, restrooms and other venue-specific benefits provided equally to male and female teams?
   - Are the conditions of playing fields, courts and pools equal for male and female teams?
   - Do any facilities have limitations on their use?
   - If so, what are the limitations? Why?
   - Which teams have the newest and best-equipped facilities?
   - Do we have a facilities development and management plan?
2. **Areas to Review for Each Team:**
   a. Practice Facility/Competitive Facility:
      - Location
      - Proximity to Locker Room and Campus
      - Quality, Condition and Size
        - Playing Surfaces
        - Team Areas
        - Spectator Areas
      - Daily Preparation and Maintenance
      - Use
        - Exclusive
        - Shared
      - Teams
        - Seasons
        - Schedules
        - Times

   b. Overall Condition and Environment of Practice and Competition Facilities

c. Locker Room:
   - Condition
   - Quality
   - Size

d. Lockers:
   - Number of Lockers
   - Condition
   - Type
   - Quality
   - Size

e. Shower/Restroom Area:
   - Number
   - Quality
   - Condition
   - Size

f. Team Room:
   - Size
   - Amenities

G. Provision of Medical and Training Facilities and Services

The Policy Interpretation states that the following five factors are to be assessed when determining compliance in the provision of medical and training facilities and services: availability of medical personnel and assistance; health accident and injury insurance coverage; availability and quality of weight and training facilities; availability and quality of conditioning facilities; and availability and qualifications of athletic trainers.

One of the most significant issues with weight and conditioning facilities are the limitations that are placed on the use of particular facilities. While in certain instances, some limitations on access may be acceptable, it becomes problematic overall when the remaining facilities are not comparable in terms of the quality of the equipment and/or the facility. On the other hand, if both sexes have access to the best facilities but certain men's teams are afforded the prime times for access to the exclusion of women, the OCR will take notice. This area is another to be addressed in the overall facilities scheduling system. A quick review of an overall plan – particularly if computerized – can provide an objective and verifiable assessment of equity.

Like access to coaches, men and women must be provided equitable access to strength and conditioning coaches. Although this issue could be considered under the coaching component, it fits better here. The primary concern is that the women's teams be given access to quality strength coaches. Problems inevitably arise when there is one primary facility and several teams use the facility at the same time. In those instances, it is important for the head strength and conditioning coach to ensure that his or her coaching services are being equitably distributed among the teams.

It is not unusual to have several training rooms in one or more facilities. The location and quality of those respective rooms should be reviewed so that each sex is being assigned to the preferred room(s) in an equitable manner. Priority of access to the training room is always an issue for coaches and student-athletes, even those with well-staffed training departments. Institutions need to ensure that teams of one sex are not being relegated to the unpopular or inconvenient times in order to accommodate the programs of the other sex. Proper prioritization of the delivery of the training services is the key in those instances. The head trainer must have a firm understanding of the institution's obligations in this regard.

The same analysis applies to medical facilities. While it is understandable that the campus-based medical facilities may be in one location, access to those facilities must be completely open to members of both the men's and women's program. In theory, the access to off-campus facilities will most likely be equally inconvenient to both programs. However, the reservation of prime times for doctor's visits to members of the men's teams (whether on or off campus) can be problematic.

Athletics training staffs frequently consist of both certified and student athletic trainers. The size of the institution ordinarily dictates the size of the athletics training staff. The only constant theme at most institutions regardless of their size is that the athletics training staff frequently is overextended, trying to do as much as it can with limited resources. Institutions must guard against a team-assignment process that places student athletic trainers primarily with women's teams. At the same time, institutions should review their practice, competition and travel assignment process for athletic trainers. Ideally, there should be a uniform policy and approach used by the institution. Problems arise when women's teams are disproportionately assigned student athletic trainers or no athletic trainers for their away competitions and a heavy reliance is placed on the certified athletic trainer of the host institution. Although "coverage" is technically provided in those instances, as a practical matter, the student-athletes who require pre-competition athletics training services are frequently placed at a disadvantage because of the need to be "fit in" by the host athletic trainer. These situations should be closely monitored.

Access to the team doctors and specialists also needs to be provided on an equitable basis. Appointments should be made available to members of both sexes. Any requirements that exist regarding access to the doctors and appointments should be applied on a uniform basis. Finally, the OCR has recognized that some sports are inherently more dangerous than others and should have doctors or more experienced trainers in attendance.

For more information about NCAA Health and Safety Issues, you can visit the NCAA Personal Welfare Web site.

Checklist for Medical and Training Facilities and Services

1. **Key Questions:**
   - How do we assign athletic trainers to teams for practices and competitions?

- Are women's teams assigned a disproportionate number of student athletic trainers?
- Do we apply the same policy on the travel of athletic trainers and medical personnel to away competitions?
- Is there equal access among the sexes to the newest and best-equipped athletics training rooms?
- Are men's teams given the preferred times for athletics training or medical services?
- Is there equal ease of access to doctors and specialists?
- Are the strength and conditioning facilities equally available to the women's teams?
- Is the quality of strength and conditioning coaching that is provided equal for the women's teams?
- Do the team travel commitments of certain strength and conditioning coaches have an adverse effect on women's teams?
- Are the burdens of any understaffing in the training area shared equitably among the teams?

2. Areas to Review for Each Team:

a. Medical Services:
- Team and Other Doctors
- Specialists (for example, nutritionist, psychologist)
- Nurse
  - Availability of Each
  - Quality of Each

b. Athletic Trainers:
- Certified
- Student
- Availability
- Team Assignment
- Quality

c. Strength and Conditioning Coach:
- Availability
- Team Assignment
- Schedule
- Quality
- Experience

d. Medical and Athletics Training Facilities:
- Type
- Machines
- Equipment
- Quality
- Size
- Condition

- Proximity to Locker Rooms, Practice Facilities, Competitive Facilities
- Scheduling Issues
- Access

H. Provision of Housing and Dining Facilities and Services

This factor involves an analysis of the housing that is provided to the student-athletes (as well as any related arrangements ranging from laundry facilities, to parking spaces and maid services) and the dining services provided, if any.

This program component applies to those schools that provide student-athlete housing if such a system exists. Attention must be paid to the location of the housing that is assigned and the quality of the dormitory or apartment and the furnishings that are provided. Problems arise when members of one sex are disproportionately housed in the newest and the most desirable accommodations.

An analysis of dining provisions must be made for the type of meal plan that is provided to the respective teams. A uniform approach in this regard is essential.

Checklist for Housing and Dining

1. Key Questions:
- Are housing assignments made on a fair and equitable basis?
- Are members of any teams given preferential housing assignments either on campus or off campus?
- How comparable are the housing units that are provided?
- Are extra services or arrangements (such as laundry, parking spaces, cleaning services) made available to all student-athletes on an equitable basis?
- Does the athletics department control the housing assignments for student-athletes?
- Are the same meal plans made available to both the men's and women's programs?
- Are any teams provided preferential dining arrangements?

2. Areas to Review for Each Team:

a. Facilities and Services

b. Housing:
- Assignment Source
- Assignment Methodology
  - College
  - Student-athletes
  - Team
- Location
  - Proximity
- Quality
  - Condition
  - Age
  - Special Features

- Summer/Break Periods

c. Dining:
   - Meal Plan
     - Type
     - Quality
   - Team Meals
     - Catered
     - Game Day
   - Pregame
   - Postgame
   - Summer/Break Periods

I. Publicity

In the area of publicity, the following three factors will be considered: the availability and qualifications of sports information personnel, access to other publicity resources for men's and women's programs; and quantity and quality of publications and other promotional devices featuring men's and women's programs.

Institutions typically have understaffed and underfunded sports information and marketing departments. Nonetheless, the services that are provided must be equitable. With respect to SID-related services, institutions should review their policies and practices on assigning SID personnel to both home and away competitions and what level of support is provided. If men's teams are provided a certain level of support, the women's teams should be afforded the same treatment. To the extent that interns or students are used to provide these services, care must be taken so that they are not assigned in a disproportionate manner to the women's teams. The strengths and weaknesses of the SID personnel and services must be shared among all the teams.

All team-related publications (including media guides, game-day programs, posters, schedule cards and Web site materials) should be of the same quality and size and provided in sufficient quantity to meet each team's needs. Disparities arise when the content, packaging and distribution of the publications are different. A stereotypical problem exists when the men's basketball team, for example, has a large hard-bound guide and the women's team has a small soft-bound guide. In addition, the timing of the delivery of the items should not favor one sex over another. Any burdens associated with the late delivery of the publications should be distributed in an equitable manner. Some institutions attempt to justify the differences in the publications based on team preferences. Although some deference can be given to the individual teams and coaches in this regard, it is still the institution's responsibility to assess the situation and determine if that preference has any impact on the equity of the provision of these services as a whole. The most notable differences exist in the provision and quality of game programs.

The publication of press releases should be similar in quality and quantity for both the men's and women's teams. This is not to say that special circumstances will not arise necessitating a particular focus on a specific team or individual. In those instances, an imbalance easily may be justified. However, the underlying approach to the issue of press releases should be the same. A frequent complaint from women's teams is that the local press fails to provide them sufficient coverage. While an institution cannot dictate or control the content of those publications, it can routinely provide media information about the various programs via releases. Ultimately, this approach serves both an SID function and a marketing function.

Similarly, institutions and conferences are Web-streaming competitions through on- and off-campus productions. An institution is in more control of its Web-site offerings than local or national media broadcasting decisions. The institution should evaluate its online broadcasts for equity.

The area of "other publicity and promotional resources" is often a broader area of controversy and contention. A common complaint by the women's teams is that they do not feel that they are provided the same level of marketing support as the men's teams. They usually begin by pointing to the absence of any preseason planning session with them over the upcoming marketing efforts, the absence of a team-focused marketing plan, and the absence of continuous contact and promotional efforts during the season by the individuals responsible for the athletics department's marketing efforts. A common institutional response is "market driven." In short, some SIDs believe that they need to invest their limited resources in the areas that will generate the largest return on their investment. For many institutions, this means investing money and personnel in the marketing of the football and men's basketball team. Although this argument may be understandable from a business perspective, it fails to incorporate an institution's obligations under federal law. As a result, the institution is mandated to provide both financial and human resources to market its women's programs.

Some institutions have begun to outsource the marketing needs of individual or entire programs. While that approach is completely acceptable, institutions must remember that it does not relieve them of compliance in this area. Instead, they must ensure that the contractor is providing an equitable level of service. The best way to deal with this requirement is to incorporate the requirement of providing equitable treatment into the contract with the marketing vendor. If the vendor fails to provide equitable treatment, the institution must fill the void in-house.

Checklist for Publicity

1. **Key Questions:**
   - Do we provide the same level of SID support to the women's teams?
   - Do we have a policy for SID support at home and away competitions?
   - Are the team Web sites maintained properly and promptly updated?
   - Do we make available the same quality and amount of promotional material to the men's and women's programs?
   - Do we deliver our promotional materials to all teams in a timely manner?
   - Do we issue the same number of press releases for both programs?
   - Are we marketing our programs equally and effectively?

- If we contract out our marketing efforts, are we requiring our contractors to produce results for the entire program or just selected portions of it?
- Do our SID and marketing personnel meet regularly with our coaches?
- Are we taking actions to generate more interest in the women's programs among the student body and the community?
- Have we used scheduling and other events to help generate interest and attendance?
- Have we leveraged contractual arrangements for football and men's and women's basketball and/or other sports to highlight the women's programs?
- Have we used the football and men's and women's basketball coaches' radio and TV shows to highlight the women's programs?
- Are we producing Web-site materials and broadcasts equitably for men's and women's teams?

2. Areas to Review for Each Team:

a. Sports Information:
- Services
- Games
  - Home
  - Away
- Web site
- Personnel
  - Employees
  - Contractors
- Number
- Quality
- Team Assignment
- Availability

b. Marketing:
- Promotions
  - Media Guides
  - Web Site
  - Schedule Cards
  - Posters
  - Promotional Items
    - Quality
    - Size
    - Number
    - Fan Clubs
    - "Kiddie Clubs"
    - Budget
- Game-Day Promotions
  - Giveaways
  - Attendance Boosters
  - Doubleheaders
  - Sharing Prime Time
  - Budget
- Media Relations
  - Newspaper, Radio, TV Stories, Ads
  - Local/Regional
- Broadcast of Games
  - Television
  - Radio
  - Local/Regional
  - College Station
  - Webcasts
- Packaging Other Sports with Premier Sport
  - Leveraging Contacts and Media Contracts
- Team-Specific Marketing
  - Marketing Plans
  - Marketing Budget

J. Support Services

The two factors of inquiry under this program component are the amount of administrative assistance provided to men's and women's programs and the amount of secretarial and clerical assistance provided to men's and women's programs.

These areas are not only important from the perspective of equity in general, but also because the level of support that is provided can provide coaches more free time to devote to their coaching functions that, in turn, can affect the overall provision of opportunity to male and female student-athletes.

Administrative assistance should be viewed in a broad sense. Assessment of compliance under and justification of this assignment process should be scrutinized. If particular men's teams have them, the institution should be making a determination if they should be provided to certain women's teams even if they haven't asked for them. The key point here, which is present throughout all of these treatment issues, is that the institution should be proactive and not simply reactive on the equity front. It should make tactical and strategic assessments of its programs and shape it for the future.

Administrative assistance also encompasses the various support services provided by the athletics department. An institution should review the manner in which support services are requested and provided to ensure that they are being provided on an equitable basis. Access and direct dealing with the athletics director can be pivotal. The question must be asked whether any specified lines of supervision impede the access to and provision of support services by the athletics department. In this regard, an institution should place all of its teams on a flow chart that shows their hierarchical line of supervision. If a review of that document reveals that women's sports all report to the senior woman administrator (SWA) and/or only football and men's basketball report directly to the athletics direc-

tor, it may be advisable to consider revising the reporting structure. The bottom line is that even though there may be specified reporting hierarchies, all coaches still must have a sufficiently open line of communication to the athletics director so that if they feel they are not receiving the support they need and/or deserve, they will be able to raise that concern directly with the athletics director.

With respect to clerical support, an analysis is necessary to determine whether those services are being provided on an equitable basis to the men's and women's programs. While it is understandable that some teams require greater assistance than others, the overall support should be provided on an equitable basis. While team-by-team comparisons are not ultimately determinative, inequities in the support provided to similar teams leads an outside reviewing entity to question the fairness of the support that is provided. Problems sometime arise when more than one program is assigned to a particular support person. Although on the surface the arrangement can be set up in an equitable fashion, if the end result is an insufficient amount of support provided to the teams of one sex over the other, this type of allocation will need to be reviewed.

An institution also needs to look at the equity associated with the location, size and quality of the office space that is assigned to the coaches, the furniture that is provided and the number of coaches assigned to particular offices. Offices in "premium" locations should be allocated on an equitable basis. When constructing new facilities, thought should be given to the equitable nature of office assignments. Technological support devices such as desktop and laptop computers, Internet and e-mail access, faxes and cellular telephones, and pagers also need to be reviewed and assessed so that they are made available on an equitable basis.

Checklist for Support Services

1. **Key Questions:**
   - Is the same level of administrative support from the various areas within the athletics department available for all teams?
   - Which teams report directly to the AD?
   - Which teams report directly to the SWA or another associate or assistant AD?
   - Do all teams have direct access to the AD?
   - Are the men's and women's teams provided the same level of administrative assistance?
   - Which teams have administrative assistants assigned solely to them?
   - Which teams have secretaries/clerical personnel assigned solely to them?
   - Are secretaries and clerical personnel assigned on an equitable basis?
   - Are the location, proximity, size and quality of the coaches' offices equitable?
   - Are all coaches provided technology (computers, faxes, cell phones, pagers, Internet, e-mail) on an equitable basis?
   - Are the teams and coaches provided equitable access to the use of video equipment?

2. **Areas to be reviewed for each team:**
   a. Administrative Assistance
   b. Clerical Assistance:
      - Type
      - Ratio
      - Quality
      - Proximity
      - Amount/Number
      - Availability
      - Services
      - Clerical Duties by Coaches
   c. Office Space:
      - Coaches
        - Head
        - Assistants
      - Quality
        - Size
        - Features
        - Exclusivity of Use/Shared
        - Condition
      - Locker/Shower Facility
      - Location
        - Stature
        - Proximity
      - Conference Rooms
      - Video Room
      - Office Equipment
      - Furniture
        - Amount
        - Condition
        - Type
      - Technology/Electronics
        - Computer
        - Television/Video
        - Cell Phones/PDAs
        - Laptop
        - Telephone Lines
        - Fax
      - Storage
        - Files
        - Equipment

K. Recruiting

In the area of recruiting, the following three factors are reviewed: whether coaches or other professional athletics personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit; whether the financial and other resources made available for recruitment in male and female athletics programs are equivalently adequate to meet the needs of each program; and whether the differences in benefits, opportunities and treatment afforded prospective student-athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

Schools often argue that all coaches have an equal opportunity to recruit, but that some just put in greater effort in the area. While that may be true in some cases, further investigation often shows that the recruiting budgets, support networks and time available to recruit due to full-time versus part-time coaching assignments and availability of assistant coaches account for the disparity of "effort." This situation is highlighted when teams are in season, need to prepare for their competitions and yet have to find time to devote to recruiting efforts. Thus, the number and quality of assistant coaches plays a significant role in easing this burden. In addition, if a coach has other significant duties other than coaching, a determination has to be made if those duties effectively deprive the coach of the opportunity to recruit. If so, and if coaches of teams of the opposite sex are not suffering from similar limitations, some changes may be necessary. In addition, the presence or absence of an institutionally owned vehicle to use while recruiting could have a significant impact on a coach's ability to recruit.

Budgetary amounts and limits on expenditures are always an important area to review. Although institutions understandably want to limit their expenditures, the allocation of recruiting dollars should be done on an equitable basis. Although there may be periodic and legitimate reasons for occasional deviations from this approach, those reasons should be carefully scrutinized.

Finally, the treatment afforded prospective student-athletes should be relatively similar. In the wake of recent recruiting scandals, every institution should review and implement recruiting policies in addition to meeting with those involved in the process to avoid the problems that some institutions have faced.

Checklist for Recruitment

1. **Key Questions:**
   - Do we provide equitable recruiting budgets to the men's and women's programs?
   - Have both the men's and the women's program been provided the same opportunity and tools to recruit?
   - Are both programs given the same administrative support to recruit?
   - Do we have a policy for visits by prospective student-athletes?
   - Are prospective student-athletes treated in the same manner when they visit?
2. **Areas to be Reviewed for Each Team:**
   a. Personnel:
      - Number
      - Other Duties
      - Percent of Time

   b. Area:
      - State
      - Regional
      - National
      - International

   c. Methods:
      - Telephone
      - Mail
      - E-mail/Text Messaging
      - Travel
      - School/Home
      - Tournament
      - Event
      - Camp

   d. Campus Visits:
      - Subsidized
      - Unsubsidized
      - Number
      - Quality

   e. Budget/Expenses:
      - Amount
      - Limitations

L. Other Issues

Fundraising

Although not specifically covered above, the issue of fundraising is important and frequently misunderstood. All institutions should have a uniform approach to fundraising and the expenditure of money collected. Title IX requires that the opportunity to fundraise not be limited in a discriminatory fashion. If men's teams are allowed to fundraise and/or supported by institutional personnel, facilities or resources, then women's teams should be provided the same opportunity and support. In this regard, the institution should use its network of contacts to equitably assist its teams with fundraising. The law does not permit provision of disparate benefits on the basis of sex. The institution's duty to provide equitable benefits is not assuaged in situations where certain sports or coaches are more popular or work harder to fundraise.

No matter in what form donations arrive – cash, ticket "taxes," equipment, endowments, services – once expended or provided to teams, those donations must be considered in

the institution's evaluation of its equity obligations. Finally, institutions must be aware that even though targeted donations are received for a particular purpose, all of the money that comes in is considered the institution's money as a whole. As a result, the institution may need to reallocate some budgeted money from men's programs to women's programs in order to offset the effect of a targeted donation.

Tiering

Another issue that has received significant attention and scrutiny is tiering. Tiering is the process by which institutions place their respective teams into different levels or tiers within the athletics department for funding and support purposes. Although institutions have used tiering on an informal basis for years, many institutions have formalized the process during the past five to 10 years.[1]

The underlying concept of tiering is that it enables institutions to treat the teams within each tier on an equitable basis, but it also allows the institution to treat each tier differently. This approach is particularly helpful in an era of limited and often shrinking budgets. By approaching the institutional support of the various teams in this manner, there is a logical and justifiable basis for the differing levels of support that are provided from tier to tier. In many respects, the formalization of these types of systems and the open discussion of where the teams are placed within the respective tiers enables the team members, their supporters and the collegiate community as a whole to understand that their team support levels are neither arbitrary nor unfair.

With respect to Title IX, tiering is viewed as a comprehensive treatment issue because the level of support that is provided to each team has a direct connection with each of the areas of inquiry under Title IX in general and the financial aid and "laundry list areas" in particular. In other words, because the higher-tiered teams receive more support and the lower-tiered teams receive less; tiering becomes inextricably intertwined with any Title IX analysis. As a result, the manner in which the tiers are structured, their composition, and how they are supported and funded by the institution must be carefully reviewed.

There is no specific formula for creating a tiered program. Instead, the decision on the number of tiers that should be created and the selection of teams for inclusion within them is an institutional decision. As a result, an institution that decides to pursue a tiered athletics program should create a system that reflects its own identity, approach and philosophy and then review and if necessary modify it to ensure that it is consistent with Title IX.

It is the latter point (consistency with Title IX) that always triggers the most substantive review and analysis of any tiering decisions. The first key issue is the number of and/or the relative proportion of student-athletes in each tier (as opposed to the number of teams in the tier). Needless to say, this is because the related funding and support of those student-athletes has a direct connection with many of the treatment areas under Title IX. As a result, the closer that an institution is to an equitable distribution of resources to the student-athletes of each gender in each tier, the more likely that it will be closer to overall program-based compliance with Title IX.

In any tiering process, each tier should at least theoretically be composed of the same percentage of each gender's student-athlete participation ratios. In other words, if 33 percent of the male student-athletes are in the top tier, then 33 percent of the female student-athletes should be there, as well. The caveat here is that an institution's compliance level under the effective accommodation of athletics interests and abilities requirement may be a significant factor in the appropriateness of this type of approach. For example, if an institution is not in compliance and its athletics participation ratios are skewed, the mere mirroring of the participation rates may not be enough. In those instances, more support of the women's program may be necessary in order to improve the institution's level of compliance. As a result, there may be instances in which a greater percentage of female student-athletes receive benefits at a higher tier than do their male counterparts. The underlying actions are taken, however, to bring the overall athletics program into a state of compliance.

The bottom line is that tiering approaches and programs are extremely varied. Regardless of the approach that is undertaken, it must be understood that because of its relationship with the financial aid and treatment components, the tiering process must always be reviewed with Title IX in mind.

Title IX and Pregnancy

Title IX guarantees equal educational opportunity to pregnant and parenting students. This means that student-athletes cannot be discriminated against in the event of their pregnancy, childbirth, conditions related to pregnancy, false pregnancy, termination of pregnancy or recovery there from, or parental or marital status; and they must be offered reinstatement to the same position after pregnancy as they held before the onset of pregnancy. Some actions that may be permissible under NCAA rules are impermissible under Title IX.

Institutions should carefully monitor precedent regarding athletics financial aid renewal, access to athletics benefits and treatment issues. Student-athletes who are pregnant should be treated like any other student-athlete with a temporary disability. For example, if the institution regularly provides athletics aid, tutoring, athletics trainer and team physician support, insurance or access to assistance or opportunity funds to a student-athlete while he rehabilitates from an injury, the pregnant student-athlete should not be excluded from such benefits. Institutions should make sure student-athletes understand the law and institutional policy as part of the normal orientation or team meeting agenda.

The NCAA has developed a Toolkit to help students and athletics personnel understand the issues related to Title IX and pregnant and parenting student-athletes.

Schools should also speak to legal counsel about the **Health Information Portability and Accountability Act** of 1996 Privacy Rule, which protects individually identifiable

1 For an extensive discussion of tiering, you may wish to review, "What is a Tiered Sports Program?" by Connee Zotos, Senior associate, Sports Management Resources.

health information held or transmitted in any form or media, whether electronic, paper or oral. Individually identifiable health information includes such common identifiers as name, address, birth date, Social Security number or other demographic data, provision of care relating to the individual's past, present or future physical or mental health, and future payment for the provision of health care to the individual. The Privacy Rule applies to health plans, to health care clearinghouses and to any health care provider who transmits health information in electronic form (namely, "covered entities"), including university athletics departments. A covered entity must obtain the individual's written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations. A covered entity may not condition treatment, payment, enrollment or benefits eligibility on an individual granting authorization. A person who knowingly obtains or discloses individually identifiable health information in violation of HIPAA faces a fine of $50,000 and up to one year of imprisonment. This complex law should be reviewed thoroughly with campus legal counsel.

Special circumstances permitting the unauthorized release of health information include releases to parents of minor children, to public health officials for the prevention or control of communicable disease, or in some situations of domestic violence or abuse. Covered entities may disclose protected health information that they believe is necessary to prevent or lessen a serious and imminent threat to a person or to the public, when such disclosure is made to someone they believe can prevent or lessen the threat. The Fourth Amendment to the U.S. Constitution prohibits unreasonable search of an individual's person, home, papers and effects. Nonconsensual blood or urine testing for pregnancy would constitute a Fourth Amendment violation.

Chapter 3 — NCAA Issues

NCAA constitutional principles express equity expectations for member schools: Every NCAA school must establish and maintain an environment that values cultural diversity and gender equity among its student-athletes and athletics department staff, as well as comply with federal and state laws regarding gender equity. The association must promote an atmosphere of respect for and sensitivity to the dignity of every person. It is the policy of the Association to refrain from discrimination with respect to its governance policies, educational programs, activities and employment policies including on the basis of age, color, disability, gender, national origin, race, religion, creed or sexual orientation. It is the responsibility of each member school to determine independently its own policy regarding nondiscrimination.

I. Division I – Athletics Certification Program

Division I adopted an athletics certification program at the 1993 NCAA Convention as an effort to ensure the NCAA's fundamental commitment to integrity in intercollegiate athletics. Set forth in Bylaw 22 of the NCAA Manual, the program is structured to achieve its goal in several ways, one of which is by setting standards (called operating principles) for the operation of Division I athletics programs. Three main areas are covered: (1) governance and commitment to rules compliance; (2) academic integrity; and (3) equity and student-athlete well-being. Gender equity is specifically included within the area of equity and student-athlete well-being. Division I is currently in Cycle 3 certification. The certification program is currently being revised, but schools are advised to make sure their gender equity and diversity plans are functioning.

A. Committee on Athletics Certification

The Division I Legislative Council is responsible for appointing an athletics certification committee. The committee is composed of a minimum of 12 members, including at least one president or chancellor, one faculty athletics representative, one director of athletics, one senior woman administrator and one conference commissioner from Division I member institutions or conferences.

Although the requirements of Title IX and the gender equity aspect of the athletics certification program are not the same, it is important to recognize that the athletics certification process asks institutions to review 17 program areas for gender equity, including the 13 program areas set forth in Title IX. The committee will assess whether the institution has (1) ensured a complete study of each program area; (2) compiled complete data demonstrating its current status and commitment to each program area; and (3) established a complete plan for making or maintaining progress with each of the gender equity program areas. Even though the 13 program areas set forth in Title IX will be reviewed, the committee will not be evaluating if an institution is in legal compliance with Title IX. Instead, the focus is on whether the institution can demonstrate that it is committed to and has progressed toward fair and equitable treatment of both male and female student-athletes and athletics department personnel.

The Committee on Athletics Certification's deliberations and its instruction to peer-review teams reflect the committee's position that current circumstances (actions that already have been taken or that currently are under way) and future plans offer evidence of the institution's commitment to equity and that peer-review teams should consider both in evaluating conformity with the operating principles.

B. "Gender Issues" Measurable Standards

The NCAA Division I Committee on Athletics Certification developed these measurable standards to clarify expectations for each NCAA operating principle and to bring more consistency to the athletics certification process for institutions, peer-review teams and the committee.

1. The institution must demonstrate that it has implemented its Cycle 2 gender-issues plan or provide an explanation for partial completion of the plan.
   a. The committee will not accept the following explanations for partial completion or noncompletion:
      1) The institution did not possess sufficient funds to implement the plan.
      2) The institution has had personnel changes since the original development of the plan.
   b. The committee will accept the following explanation for partial completion or noncompletion:
      - The institution has implemented a different plan(s) or taken a different action(s) to achieve or maintain progress toward the same goal outlined in its Cycle 2 gender-issues plan.
2. The institution must analyze its Equity in Athletics Disclosure Act (EADA) report (i.e., participation, head coaches and assistant coaches) and NCAA financial report (specified revenue and expense categories) for the three most recent academic years, explain (using supporting data) any differences, address any deficiencies and comment on any trends.
3. The institution must conduct a thorough and written review of each of the 17 program areas for gender issues. Please see program area definitions located in the Gender, Diversity and Student-Athlete Well-Being attachment of the Self-Study Instrument. If the institution identifies any deficiencies during this review, the deficiencies must be incorporated into the institution's gender-issues plan for improvement. If no deficiency exists, the institution must include a maintenance plan for each program area.

   The review must:
   a. Describe how the institution has ensured a complete study of each of the 17 program areas for gender issues. This study should be conducted as part of the self-study process;

   Please note that for the program area of accommodations of interests and abilities, the use of surveys alone does not constitute a complete study. If an institution chooses to use an interest survey (e.g., a Web survey or hard-copy survey) as one of its sources of data, the committee will require an explanation regarding populations surveyed, the survey response rate and the method used to interpret the data.

   b. Provide data demonstrating the institution's status and commitment, including resource allocation, across each of the areas;
   c. Using the data provided in (b) above, analyze and explain how the institution is meeting the needs of the underrepresented gender within the athletics program. Please note, any differences should be clearly explained in the institution's narrative response, including any deficiencies the institution identifies in its analysis; and
   d. Explain how the institution's written, stand-alone plan for gender issues addresses each of the 17 program areas, including any deficiencies identified in the institution's narrative response as listed in (c) above.
4. The institution must demonstrate that it provides programs and activities for coaches, staff and student-athletes that address gender issues, including programs and activities designed to address the needs of the underrepresented gender within the athletics program (Program Area Nos. 15 and 16).
5. The institution must develop a five-year written, stand-alone plan addressing gender issues that maintains an institution's conformity or moves an institution into conformity with the operating principle.
6. The institution's plan must be active at all times and include a mechanism to ensure the plan is reviewed on an annual basis, including a comparison with its EADA report and NCAA financial report, to determine if the course of action is still appropriate.
7. The institution's plan must extend at least five years into the future and be active at all times. If a plan concludes prior to the commencement of the institution's next self-study, the institution is expected to create a new five-year plan for improvement, even if each of the actions in the institution's original plan were ongoing in nature. The institution must develop a new five-year plan that will maintain conformity with the operating principle. Please note that all institutional plans must contain all of the committee's required elements.
8. The institution's gender-issues plan must:

a. Address all 17 program areas or have mechanism(s) to ensure a periodic evaluation of each program area;

b. Address all deficiencies identified during the self-study;

c. Address issues pertaining to student-athletes, coaches and department of athletics staff;

d. Include measurable goals the institution intends to achieve;

e. Include steps to achieve the goals;

f. Include specific timetables for completing the work;

g. Include individuals and/or offices responsible for carrying out the specific actions identified in the plan;

h. Be developed through a process of broad-based campus participation; and

i. Receive formal institutional approval.

C. Program Review Areas

1. Accommodation of Interests and Abilities. Participation proportionate to enrollment; and/or history and continuing practice of program expansion for the under-represented gender; and/or fully and effectively accommodate the under-represented gender. Equivalent levels of competition. Please note when presenting gender equity plans for the future, institutions must clearly identify methods (for example, proportionality, history of program expansion, etc.) for addressing accommodation of interests and abilities.
2. Athletics Scholarships. Athletics scholarship dollars to be awarded to women and men at the same proportion as their respective rate of participation in the intercollegiate athletics program.
3. Equipment and Supplies. Quality, amount, suitability, maintenance and replacement; availability of equipment and supplies.
4. Scheduling of Contests and Practice Time. Number of contests; number, length and time of day of practices; time of day of contests; preseason and postseason opportunities, including foreign tours.
5. Travel Allowance. Modes of transportation, housing furnished during travel, length of stay before and after competitive events, dining arrangements and per diem for institutional competition and other competitive opportunities (for example, under Bylaw 16.8.1.3).
6. Academic Support Services. Availability of, and equitable access to, academic support services that meet the needs of student-athletes based on individual student-athlete academic profiles and/or performance, and equitable criteria for obtaining assistance.
7. Coaches. Availability – full time, part time, assistant and graduate assistants. Assignment – training, experience, professional standing and other professional qualifications. Compensation – total rate of compensation package, duration of contracts, conditions relating to contract renewal, experience, nature of coaching duties, working conditions, and other terms and conditions of employment.
8. Locker Rooms, Practice and Competitive Facilities. Quality, availability and exclusivity of practice and competitive facilities; quality and availability of locker rooms; maintenance and preparation of practice and competitive facilities.
9. Medical and Training Facilities and Services. Availability of medical personnel; availability and quality of weight training and conditioning facilities; availability and qualifications of athletics trainers; health, accident and injury insurance coverage; provision of medical and training expenses.
10. Housing and Dining Facilities and Services. Housing provided; special services as part of housing; dining arrangements.
11. Publicity and Awards. Availability and quality of sports information personnel; access to other publicity resources; quantity and quality of publications and other promotional devices; availability and quality of institutional awards; opportunity for application and/or nomination for other outside awards (for example, NCAA, national or conference awards).
12. Support Services. Administrative, secretarial, clerical support and office space.
13. Recruitment of Student-Athletes. Equitable opportunities for professional personnel to recruit; availability of financial and other resources for recruitment; equivalent benefits, opportunities and treatment of prospective athletes.
14. Retention. Programs and services to address retention of staff, coaches and student-athletes from the under-represented gender; review of retention and promotion of staff and coaches from the under-represented gender, including professional development opportunities (for example, mentoring programs), rate of compensation, duration of contracts, conditions relating to contract renewal; programs and services to address retention of student-athletes who are members of the under-represented gender.
15. Programs and Activities (Staff and Coaches). Programs and activities that provide opportunities for all athletics department staff and coaches to address gender issues, including those designed to address the needs of the under-represented gender.

16. Programs and Activities (Student-Athletes). Programs and activities that provide opportunities for all student-athletes to address gender issues, including those designed to address the needs of the under-represented gender.

17. Participation in Governance and Decision Making. Involvement of athletics department staff, coaches and student-athletes from the under-represented gender in the governance and decision-making processes of the athletics department; provision of leadership opportunities for all student-athletes (for example, participation on a student-athlete advisory committee) and athletics department staff and coaches (for example, participation at the conference and/or national level).

D. Basic Requirements of an Institutional Plan

As with all "plans for improvement" in the certification program, the committee also reiterated that a gender issues plan must include the following elements:

1. The plan shall be committed in writing to paper and be a stand-alone document.
2. Develop the plan through a process that reflects broad-based campus participation – the plan shall be developed with opportunities for significant input from appropriate constituent groups inside and outside athletics.
3. Identification of the issues/problems – the plan shall state solutions to address problems identified by the institution in its self-study.
4. Measurable goals the institution intends to achieve to address the issues/problems.
5. Steps the institution will take to achieve those goals.
6. Individuals or office responsible for taking specific actions – the plan shall identify specific campus entities or staff members who will carry out the proposed solutions.
7. Specific timetables for completing the work – the plan shall establish proposed deadlines by which the solutions should be in place.
8. Institutional approval – the plan shall be formally adopted by the institution's final authority in such matters to ensure that it carries the commitment and support of the entire institution. Means for funding the implementation of the plan is implied in institutional approval.

Such requirements should help an institution assess and reflect where it is currently, where the institution wants to be and how the institution intends to move from one status to the other.

Finally, please note that an institution's gender issues plan must extend at least five years into the future and be active at all times. The plan must include a mechanism to ensure the plan is reviewed on an annual basis, including a comparison with its Equity in Athletics Disclosure Act (EADA) report and NCAA financial report, to determine if the course of action is still appropriate. If a plan concludes before the commencement of theinstitution's next self-study, the institution is expected to create a new five-year plan for improvement, even if each of the actions in the institution's original plan were ongoing in nature.

E. Student-athlete Well-Being

The NCAA Division I Committee on Athletics Certification developed these measurable standards to clarify expectations for each operating principle and to bring more consistency to the athletics certification process for institutions, peer-review teams and the committee.

1. If the institution developed a plan for improvement for Operating Principle 3.3 during Cycle 2, the institution must demonstrate that it has implemented its Cycle 2 plan or provide an explanation for partial completion of the plan.
   a. The committee will not accept the following explanations for partial completion or noncompletion:
      1) The institution did not possess sufficient funds to implement the plan.
      2) The institution has had personnel changes since the original development of the plan.
   b. The committee will accept the following explanation for partial completion or noncompletion:
      - The institution has implemented a different plan(s) or taken a different action(s) to achieve or maintain progress toward the same goal outlined in its Cycle 2 plan.
2. The institution's instrument used to conduct student-athlete exit interviews must contain questions related to the following: (Note: Institutions should note the list of examples below is not an exhaustive list and institutions are not limited to addressing only those provided.)
   a. The institution's commitment to the academic success of its student-athletes (e.g., academic support services available, priority registration for classes, coaches' support).
   b. The institution's commitment to opportunities for student-athletes to integrate into campus life.
   c. The institution's efforts to measure the extent of time demands encountered by student-athletes.
   d. The institution's efforts to measure the effectiveness of the institution's mechanisms to monitor time demands of its student-athletes (e.g., travel commitments, missed class time, final exam schedules, and summer vacation periods).

e. The institution's efforts to measure the effectiveness of the institution's NCAA Division I Student-Athlete Advisory Committee (SAAC).

f. The institution's commitment to informing student-athletes about the NCAA Special Assistance Fund and NCAA Student-Athlete Opportunity Fund.

g. The institution's efforts to measure the effectiveness of the institution's mechanisms (e.g., annual surveys, exit-interview process) to monitor the well-being of its student-athletes.

h. The institution's commitment to the physical, psychological and emotional health (e.g., athletic training, nutrition, counseling) of student-athletes.

i. The institution's commitment to the safety (e.g., travel policies, emergency medical plans) of student-athletes.

j. The institution's commitment to a safe and inclusive environment for all student-athletes.

k. The institution's commitment to diversity.[1]

l. The value of student-athletes' athletics experience.

m. The opportunity for student-athletes to suggest proposed changes in intercollegiate athletics.

n. The opportunity for student-athletes to express concerns related to the administration of the sport(s) in which student-athletes participate.

- Please note, if an institution develops a plan for improvement in this area, the plan must be implemented prior to the completion of the certification process.

3. The institution must demonstrate that it conducts exit interviews via in-person meetings and/or conference calls in each sport with a sample of student-athletes (as determined by the institution) whose eligibility has expired in accordance with NCAA Constitution 6.3.2. Please note, if an institution develops a plan for improvement in this area, the plan must be implemented prior to the completion of the certification process.

1 For purposes of athletics certification, institutions have discretion to address those areas of diversity that align with the institution's overall mission and culture. However, institutions are reminded the NCAA Division I Committee on Athletics Certification expects a comprehensive and good-faith effort throughout the self-study process. Examples of areas to review for diverse backgrounds or under-represented groups include, but are not limited to, race, ethnicity, creed, color, national origin, age, disability, sexual orientation and gender identity, in addition to other areas such as religion, marital status, education, income, geographic location and work experience.

4. The institution must have established written grievance and/or appeals procedures for areas mandated by NCAA legislation (i.e., financial aid, transfers). Please note, if an institution develops a plan for improvement in this area, the plan must be implemented prior to the completion of the certification process.

5. The institution must demonstrate that grievance and/or appeals procedures for areas mandated by NCAA legislation (i.e., financial aid, transfers) are directly communicated in writing to department of athletics staff members, coaches and student-athletes. Please note, if an institution develops a plan for improvement in this area, the plan must be implemented prior to the completion of the certification process.

6. The institution must have established written grievance and/or appeals procedures for other areas not mandated by NCAA legislation (e.g., harassment, problems with coaches, hazing, abusive behavior). Please note, if an institution develops a plan for improvement in this area, the plan must be implemented prior to the completion of the certification process.

7. The institution must demonstrate that all grievance and/or appeals procedures for other areas not mandated by NCAA legislation (e.g., harassment, problems with coaches, hazing, abusive behavior) are directly communicated in writing to department of athletics staff members, coaches and student-athletes. Please note, if an institution develops a plan for improvement in this area, the plan must be implemented prior to the completion of the certification process.

8. The institution must:

   a. Have written policies and procedures in the areas listed below;

   b. Annually evaluate the policies and procedures listed below for their effectiveness in protecting the health and providing a safe environment for its student-athletes;

   c. Identify the administrator(s) responsible for annually evaluating the policies and procedures listed below for their effectiveness in protecting the health and providing a safe environment for its student-athletes; and

   d. Demonstrate that policies and procedures in the following areas are directly communicated in writing to department of athletics staff members, coaches and student-athletes.

      1) Athletic training.

      2) Sports medicine.

      3) Emergency medical plans for practices and games.

      4) Emergency medical plans for out-of-season workouts, strength training and skills sessions.

5) Travel policies (e.g., passenger vans, buses, permissible drivers, flights, length of trips).

- Please note, if an institution develops a plan for improvement in this area, the plan must be implemented prior to the completion of the certification process.

9. The institution must demonstrate that it has an active SAAC pursuant to Constitution 6.1.4. Please note, if an institution develops a plan for improvement in this area, the plan must be implemented prior to the completion of the certification process.

10. The institution must demonstrate that it has an active CHAMPS/Life Skills program (or an equivalent program) pursuant to NCAA legislation with programming to address nonacademic areas (e.g., career counseling, personal counseling, nutrition, diversity, gambling, alcohol and drug guidelines, sexual orientation, personal development, leadership). Please note, if an institution develops a plan for improvement in this area, the plan must be implemented prior to the completion of the certification process.

11. The institution must conduct a thorough and written review of each of the seven program areas for student-athlete well-being. Please see program area definitions located in Equity and Student-Athlete Well-Being Attachment of the Self-Study Instrument. If the institution identifies any deficiencies during this review, please incorporate these deficiencies into a student-athlete well-being plan for improvement. The review must:

a. Describe how the institution has ensured a complete study of each of the seven program areas for student-athlete well-being. This study should be conducted as part of the self-study process;

b. Provide data demonstrating the institution's commitment and current efforts across each of the seven program areas for all student-athletes;

c. Using the data provided in (b) above, analyze and explain how the institution is meeting the needs of its student-athletes. Please note, any deficiencies should be clearly explained in the institution's narrative response; and

d. Explain, through a plan for improvement, how the institution plans to address any deficiencies identified in its response to item (c) above.

II. Divisions II and III Self-Study Requirements

Divisions II and III institutions are required to conduct a comprehensive self-study and evaluation of their athletics programs at least once every five years using the Institutional Self-Study Guide (ISSG). The ISSG is a tool designed to help institutions sensitize institutional administrators and staff to potential problems; identify potential problems; and guide an institution toward actions to help prevent or minimize the severity of those problems. The ISSG contains negative and positive indicators that have been found to be associated with the presence or absence of problems. As a general rule, the fewer the negative and the more the positive indicators that exist, the lower the potential schools have for ethical and procedural violations within the athletics program. The following importance ratings are assigned to each ISSG question: Minor (indicative of less threatening situations that nevertheless should command some attention in efforts to follow to the study); Serious is indicative of situations that may be a threat to the athletics program integrity; and Very Serious is indicative of situations that already may be or become a major threat to athletics program integrity.

The institution is asked if it has a written statement of philosophy for its athletics program. The statement of philosophy should support "equitable opportunity (as defined under Title IX and the Office of Civil Rights guidelines) for all student-athletes and staff, including women and minorities." It should also include "explicit reference to the physical, emotional and social welfare of student-athletes, including gender issues, ethnic diversity and sexual orientation related issues." Each institution is asked if in the past year it has complied with its equity plan and whether the equity plan has been reviewed, changed or updated within the past two years. The equity plans cover all Title IX review criteria, and are expected to be in writing, to be stand-alone documents and to be developed through broad-based campus participation with measurable goals and timelines for completion of those goals.

Each institution also is asked about inclusion of the senior woman administrator (SWA) on the athletics senior management team. Institutions are expected to provide the SWA with resources (for example, time, authority, administrative support) to support her carrying out her responsibilities. She is also expected to have substantive responsibilities for the conduct and administration of the overall athletics program, with her gender not dictating only gender-specific duties.

III. Emerging Sports

An "emerging sport" is a sport recognized by the NCAA that is intended to provide additional athletics opportunities to female student-athletes and more sport sponsorship options for institutions. The designation is meant to help that sport achieve NCAA championship status. Institutions are allowed to use emerging sports to help meet NCAA minimum sports-sponsorship requirements and also to meet NCAA minimum financial aid awards.

At present, the NCAA recognizes the following as emerging sports: equestrian (Divisions I and II), rugby and sand volleyball (Divisions I and II). Since the inception of this program, bowling, ice hockey, rowing and water polo have emerged as fully sanctioned NCAA championship sports.

The process of NCAA recognition of a sport as an "emerging sport" is a reactive one in that requests for recognition are ordinarily initiated by outside entities through the submission of a request. Assuming that the activity meets the definition of a sport, then a proposal requesting the sport's recognition by the NCAA as an emerging sport and 10 letters of commitment are submitted to the NCAA Committee on Women's Athletics (CWA). Note that a school offering a championship or emerging sport under NCAA regulations

must still ensure that the program meets OCR standards for varsity programs. The program must be conducted like all other varsity programs to be included in the school's gender equity analysis for varsity sports.

The written proposal received by the CWA must contain supporting information that demonstrates that the sport meets the criteria when assessing the viability of the sport. The CWA's criteria are as follows:

- There must be 20 or more varsity teams and/or competitive club teams that currently exist on college campuses in that sport.
- Other data exist that demonstrate support for the sport. For example:
  - Collegiate recreation and intramural sponsorship.
  - High school sport sponsorship.
  - Other data exist that demonstrates support for the sport. For example:
  - Nonscholastic competitive programs.
  - Association and organization support.
    - U.S. Olympic Committee support (for example, classified as an Olympic sport, national governing body support, grants).
    - Conference interest in sports sponsorship.
    - Coach's association support.
    - Professional sports support.
- There is a demonstrated understanding that once identified as an emerging sport; all NCAA institutions wishing to sponsor the sport at the varsity level must abide by all NCAA regulations, which include limits on playing and practice seasons, recruiting regulations and student-athlete eligibility.
- Emerging-sport proposals must include information on general competition rules, suggested NCAA regulations (for example, playing and practice season, financial aid limits, coaching limits, recruiting) and format for the sport (for example, expected facility requirements and costs, minimum and maximum competitions).

As indicated above, in addition to the written proposal, a minimum of 10 letters of commitment must be submitted from member institutions that sponsor or intend to sponsor the sport as an emerging varsity sport. The letters must be signed by the institution's president and the athletics director and dated within one year of the submission of the proposal and letters.

The contact at the NCAA for emerging sports is:

Karen Morrison
Director of Gender Initiatives
NCAA
P.O. Box 6222
Indianapolis, Indiana 46206-6222
E-mail: kmorrison@ncaa.org
Web site: www.NCAA.org/gender_equity

IV. The Equity in Athletics Disclosure Act (EADA), the NCAA Financial Report and the Implications of Each for Purposes of Equity Compliance

The Equity in Athletics Disclosure Act requires colleges and universities that receive federal financial assistance and that sponsor intercollegiate athletics to report annually to the Department of Education on athletics participation, staffing issues, revenues and expenses. The data, reported by sex, is then used by the Department of Education to prepare its annual report on gender equity in intercollegiate athletics to Congress. According to one of the co-authors of the 1996 law, then-Rep. Cardiss Collins, D-Illinois, the intent of the law is to provide a way to determine if schools that receive federal money treat student-athletes equitably. The law requires that the EADA report be made available to the general public October 15 and submitted to the Department of Education by October 30. Each year before the passage of the EADA, there were no athletics financial reporting requirements for private schools.

The NCAA revenues and expenses reporting requires the same institutions to submit similar but not identical information to the NCAA annually. The NCAA report, however, is not due until January 15 annually to allow institutions to have an accounting firm or state auditor complete the financial audit of the most recent fiscal year. The NCAA, in response to growing concerns voiced by the membership about the lack of uniform reporting has refined the financial reporting data to include, by way of example, third-party guaranteed income to staff, an accounting of athletics student aid provided to nonathletes and capital expenditures for athletics facilities – items that are not required to be reported on the federal form. In addition, the NCAA recently set forth new "Agreed-Upon Procedures" in an attempt to impose some standardization in the reporting of expenses and revenues. None of these NCAA-imposed reporting requirements apply to the EADA.

- According to a USA Today report, for example, "some schools pay the athletics department's electricity bill and can't break out athletics' share, let alone what portion was spent for women's teams. So the cost of electricity might be included in one school's EADA report but not in another's. Errors mar equity reports." –USA Today, October 2005
- In the same article, it was reported that one-third of the 119 Division I-A schools had data errors, including one error in the amount of $34 million.
- David Bergeron, policy and budget development director of the Education Department's office of postsecondary education and a past presenter at the NCAA Gender Equity and Inclusion Forum, conceded that the Department of Education does

not have a process to correct inaccurate data and, therefore, does not make changes to the data once it is posted on the Web for purposes of reporting to Congress.

- Although the Department of Education posts EADA data on its Web site, it does not post one of the most critical portions of the EADA report – the comment section. Many schools use the comment section to explain the nondiscriminatory reasons for what may otherwise be perceived to be inequities evidenced by the data. The failure to include a school's commentary seriously impedes an accurate collection of the data for disclosure to the public and for the accounting to Congress.

EADA/NCAA Practice Pointers

1. Ensure that you are using the correct definition of participant and note where there are differences under Title IX and the EADA.

   - Definition of "Participant" under Title IX for Participation Purposes
     A participant is defined under the Policy Interpretation to include those student-athletes:

     a. Who are receiving the institutionally sponsored support normally provided to athletes competing at the institution involved (for example, coaching, equipment, medical and training room services, on a regular basis during a sport's season); and

     b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

     c. Who are listed on the eligibility or squad lists maintained for each sport; or

     d. Who, because of injury, cannot meet a, b or c above but continue to receive financial aid on the basis of athletics ability.

   Each spot occupied counts once. In other words, an athlete who competes on cross country and indoor and outdoor track occupies three participation spots.

   - Definition of "Participant" for Title IX Financial Aid Analysis
     A participant is defined differently when determining equity in the area of athletically related financial aid awards. For financial aid compliance purposes, student-athletes are counted once no matter how many sports they play. If possible, run an alphabetical list of your student-athlete participants as defined above and check for doubles.

   - Definition of Participant under the EADA
     Participant is defined to include students who, as of the day of a varsity team's first scheduled contest:

     a. Are listed by the institution on the varsity team's roster;

     b. Receive athletically related student aid; and

     c. Practice with the varsity team and receive coaching from varsity coach(es).

     Any student who satisfies one or more of the above criteria is a participant. This includes a student on a team the institution designates or defines as junior varsity or freshman or a student withheld from competition to preserve eligibility (red shirt) or for academic, medical or other reasons.

2. Use the comment section when reporting to both the NCAA and the government to explain data that are misleading.

3. Publicize EADA reports using the format that is most easily read and that ensure that the reader is aware of comments. For example, where compensation seems to be very heavily in favor of one program over another but it is the result of seniority, a contract buyout or other nondiscriminatory reason, place the comment directly under the section that contains the compensation data.

4. Where there are troubling discrepancies that cannot be explained, figure out how the institution is going to deal with them before the report is published or at least have a process in place to conduct a review.

5. The Department of Education requires a school secure a letter from OCR if it intends to count cheerleading participants in its analysis.

The contact at the NCAA for EADA/NCAA reporting is:
Mara DeJulio
mdejulio@ncaa.org,
913/397-7668
Websites: NCAA Financial Reporting
Federal government public EADA information

V. The Senior Woman Administrator Designation

An institutional senior woman administrator (SWA) is the highest-ranking female involved with the management of a member institution's intercollegiate athletics program. An institution with a female director of athletics may designate a different female administrator involved with the management of the member's program as a fifth representative to the NCAA governance system.

Some confusion remains about this title. The senior woman administrator was never intended to be the "senior women's administrator." The SWA's job responsibilities can be in any area of athletics – business, fundraising, compliance, academic support, etc. Often the SWA is a coach. However, whatever her day-to-day responsibilities, she must be involved in the management and administration of the athletics department. The senior woman administrator is a designation, not a job title or an employment description.

The intent of the designation is to encourage and promote the involvement of female administrators in meaningful ways in the decision-making process in intercollegiate athletics. The designation is intended to enhance representation of female experience and

perspective at the institutional, conference and national levels and support women's interests. The institution benefits from having a female voice and role model for female staff and student-athletes.

Recent NCAA research revealed that more institutions are assigning administrative titles to the designated SWA. That research also indicated mixed opinions about support of the role:

• Approximately 30 percent of SWAs reported that their AD provided training or a mentorship role in developing them as an administrator prior to their designation as the institutional SWA. (80 percent of ADs reported providing training or a mentorship role).

• Sixty percent of SWAs reported that they have been approved for institutional funds to receive athletics administrative training. (More than 85 percent of ADs report they have approved this funding).
Other findings:

• More than 84 percent of SWAs indicated that they advocate issues important to female student-athletes, coaches and staff.

• Approximately 77 percent of SWAs indicated that they advocate issues important to male student-athletes, coaches and staff.

• More than 75 percent of SWAs indicated that the SWA is involved in the recruitment and hiring of key department personnel.

• Approximately 67 percent of SWAs indicated that they are involved in sport program supervision.

• Approximately 90 percent of ADs indicated that the SWA is part of the senior management team whereas 75 percent of SWAs indicated that they are part of this team.

• Approximately 74 percent of SWAs indicated that they are involved in administration and governance of the athletics program.

• Sixty-five percent of SWAs indicated that they act as a key decisionmaker instrumentally involved with the athletics department.

• More than 57 percent of SWAs indicated that they monitor the implementation of the gender-equity plan.
• Approximately 88 percent of SWA respondents indicated that their roles were gender-neutral (geared toward both men's and women's programs).

• Over 81 percent of SWAs indicated high levels of agreement to the statement that the SWA should have an accompanying title as an athletics administrator (assistant, associate or senior associate AD) within three years of their designation.

Institutions should ensure that the designation carries some combination of senior staff involvement and collaboration on equity issues for men and women in the athletics department or in the conference office. She should not be the only person in the organization advocating for women's issues and equity.

For more information about the SWA, visit the NCAA's resource center for SWAs.

Chapter 4 — Harassment Issues Facing Colleges and Universities under Title IX

I. Introduction

Sexual harassment in educational institutions is a form of sex-based discrimination prohibited by Title IX. The OCR, having "long recognized that sexual harassment of students engaged in by school employees, other students, or third parties" is actionable under Title IX guidance on the subject published March 13, 1997. It then was revised January 19, 2001, in response to interim Supreme Court cases on the subject. (Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 et seq. [2001]). The OCR issued the initial guidance after discovering "that a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remedying sexual harassment in schools is essential to ensure a nondiscriminatory, safe environment in which students can learn" and in which student-athletes can compete.

The OCR's Revised Sexual Harassment Guidance is intended to "inform educational institutions about the standards that should be followed when investigating and resolving claims of sexual harassment of students." It also clarifies the types of claims that fall within Title IX's protection. For example, Title IX governs claims made by students alleging harassment not only by professors, administrators, coaches and peers, but also by third parties including, by way of example, a visiting professional speaker or members of a visiting athletics team. The Revised Guidance further advises that even though discrimination on the basis of sexual orientation is not prohibited by Title IX (although it may be prohibited by municipal or state law and generally is proscribed by school policy), harassment involving conduct of a sexual nature is prohibited by Title IX notwithstanding the sex, gender or sexual orientation of the harasser or the individual experiencing the harassment. The rule of thumb appears to be that when schools become aware of harassing conduct of a sexual nature directed at gay, lesbian or heterosexual students, institutions have an obligation under the law to stop the offensive conduct and remedy the situation promptly.

OCR again issued guidance in 2010 and 2011 on related topics. In October of 2010 OCR issued guidance addressing school policy and obligations to prevent and address complaints of sexual harassment and bullying. The letter reminds institutions that anti-bullying policy must at a minimum comply with the protections afforded in federal and state law. OCR notes that "harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's

ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces." The April 2011 guidance addresses school obligations related to allegations of sexual violence. The letter supplements the 2001 guidance and provides examples of proactive and expedient measures schools are expected to take.

While OCR guidance is instructional, readers should keep in mind that it is merely the OCR's interpretation of how Title IX should be applied to claims of sexual harassment and how the agency will apply it to OCR investigations. Accordingly, the guidance is not necessarily indicative of the way a particular jurisdiction may interpret a school's liability. Provided schools follow the advice contained in these publications, however, they generally will minimize their exposure and, more importantly, protect their students. Many of the conflicts will soon be decided because, although Title IX sexual harassment law is still in its relative infancy (for the most part, claims are resolved internally or settled before litigation), more cases are now reaching the courts – some all the way up to the U.S. Supreme Court. As litigation increases, the issue of sexual harassment in schools will increase media attention. Media attention increases awareness and usually spurs additional litigation. Effective prevention is a school's most effective and least expensive defense. Perhaps the best method of prevention is proper education and awareness training directed to the particular needs and experiences of the target group. Because collegiate athletes and their coaches train and compete in an environment very different from that of the rest of the collegiate community, they should attend specialized sexual harassment awareness training geared toward their unique position in the athletics and educational arena.

II. The Law of Sexual Harassment

Sexual harassment is a form of discrimination that involves conduct of a sexual nature so sufficiently severe, persistent or pervasive that it adversely affects a student's education or a staff member's employment or creates a hostile or abusive educational environment. Because athletics participation is an integral part of a student-athlete's educational or working environment, Title IX prohibits conduct that has the effect of interfering with athletics participation or other areas of a student-athlete's education experience. Title VII prohibits sexual harassment in the employment context. This chapter primarily focuses upon harassment of students. The OCR Guidance specifically notes that Title IX's "prohibition against sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment. Similarly, one student's demonstration of a sports maneuver or technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment." Determining what is prohibited sexual harassment as defined by law is not an easy process. While most people believe they "know it when they see it," real-life situations seldom are so clear cut.

The OCR Guidance provides educational institutions with information regarding the standards that are used by the Office for Civil Rights to investigate and resolve allegations of sexual harassment of students engaged in by school employees, other students or third parties. While recognizing that it "is impossible to provide hard and fast rules applicable to all instances of sexual harassment," the OCR, through all three "Dear Colleague" letters, seeks to provide schools with some aid regarding (1) the proper response to complaints; (2) the determination of the validity of a complaint; and (3) effective discipline and liability.

Under the Revised Guidance, sexual harassment is defined as unwelcome sexual advances, requests for sexual favors and other verbal, nonverbal or physical conduct of a sexual nature when (1) submission of such conduct is made either explicitly or implicitly a term or condition of a student's participation in an educational program or activity; (2) submission to or rejection of unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal or physical conduct of a sexual nature is used as the basis for an educational decision; or (3) such conduct has the purpose or effect of unreasonably limiting a student's ability to participate in or benefit from an educational program or activity or creating an intimidating, hostile or offensive environment.

Actionable sexual harassment traditionally has been defined as either: quid pro quo or hostile environment harassment discrimination. The OCR asks the following:

1. Does harassment exist?
2. If so, does it deny or limit students' ability to participate in or benefit from an educational program or activity?
3. Is it welcome?
4. What is the nature of the relationship between the parties?
5. Did the school have notice?
6. What was the school's response?

A. Quid Pro Quo Harassment

Quid pro quo harassment is the most identifiable type of sexual harassment. It is a demand for sexual favors in exchange for a student's participation in an educational program or activity. This type of harassment occurs in the educational context when express or implied requests of a sexual nature are made a term or condition of, or have an effect on, educational opportunities. For example, quid pro quo harassment encompasses situations in which a coach tells an athlete that he or she will have the inside track on a starting position provided the student sleeps with the coach, or in the alternative, that the athlete will lose his or her position if he or she refuses. Where the harassing conduct is not explicitly

or implicitly conditioned upon a decision or benefit, it is considered a hostile environment and harassment.

B. Hostile Environment Harassment

Hostile environment harassment is the more pervasive type of sexual harassment today. It occurs when verbal, nonverbal or physical conduct of a sexual nature is severe, persistent or pervasive enough to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.

In order to prevail on a claim of hostile environment sexual harassment, one must show that the harassing conduct was objectionable both to the individual and to the "reasonable person." Recognizing that men and women may experience the same conduct differently, some courts have reasoned that the proper means to evaluate each claim of harassment objectively is to determine whether the conduct would be deemed to be offensive in the eyes of the reasonable victim. In other words, a jury would be asked to determine whether a reasonable woman (or man, depending upon the gender of the victim) would be offended. Hence, a male jury member could be asked to review the facts through the eyes of a woman. In addition to establishing objective severity or pervasiveness, the complaining student also must show that he or she subjectively perceived the conduct as threatening or abusive.

The OCR's Guidance provides that the following factors should be considered from both a subjective and objective perspective when determining whether actionable harassing conduct occurred:

- The degree to which the conduct affects the education of one or more students.
- The type, frequency and duration of the conduct.
- The identity of and relationship between the alleged harasser and the subject or subjects of the harassment.
- The number of individuals involved.
- The age and sex of the alleged harasser and the subject or subjects of the harassment.
- The size of the school, location of the incidents and context in which they occurred.
- Other incidents at the school.
- Incidents of gender-based, but nonsexual, harassment.

While both quid pro quo harassment and hostile environment harassment are difficult to monitor, hostile environment harassment is uncommonly dangerous in that it may be perpetrated by a supervisor, coach, peer or even a nonemployee such as an alumna, member of a visiting team, or a fan. Generally, schools will be held liable for both forms of sexual harassment when the school knew about the harassment and failed to put an end to the offensive behavior by taking prompt and effective remedial action. In the employment context (co-worker harassment), schools may be held liable when they "should have known."

C. Welcomeness

No matter what the form, in order to prove harassment, the underlying conduct must be shown to be unwelcome to the victim (the "subjective" test) and to the "reasonable" public at large (the "objective" test). These so-called subjective and objective inquiries are complicated. In particular, a victim's seemingly "voluntary" submission to sexual advances has no bearing on a determination of subjective "welcomeness." In other words, the mere act of compliance does not necessarily indicate consent. In addition, the fact that a student may have willingly participated in the conduct on one occasion does not prevent him or her from charging that similar conduct is unwelcome when encountered at a subsequent time. Conduct is unwelcome if the victim did not request or invite it and regarded the conduct as undesirable or offensive. Unwelcomeness need not be expressed verbally. The issue of welcomeness becomes more complicated in cases where there exists a power differential between the parties (coach/athlete), a prior consensual relationship or questionable conduct on both sides. The OCR Guidance provides that the following factors should be considered when determining welcomeness in all cases involving post-secondary students:

- The nature of the conduct and the relationship of the school employee to the student, including the degree of influence, authority or control the employee has over the student.
- Whether the student was legally or practically unable to consent to the sexual conduct in question.
- Statements by any witnesses to the alleged incident.
- Evidence about the relative credibility of the allegedly harassed student and the alleged harasser.
- The existence or absence of prior validated complaints of harassment against the alleged harasser.
- Evidence of the allegedly harassed student's reaction or behavior after the alleged harassment.
- Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred.
- Other contemporaneous evidence.

D. Retaliation

The law also protects students who file complaints of sexual harassment from unlawful retaliation, even when the initial harassment complaint may later be shown to describe conduct that falls short of constituting actionable sexual harassment. In order to make such a claim, the student must show that (1) he or she engaged in statutorily protected expression (for example, filed a complaint); (2) he or she suffered an adverse action (for example, was fired, cut from the team, benched); and (3) there is a causal link between the protected expression and the adverse action. In order to prevent retaliation and its result-

ing liabilities, a complainant and alleged harasser should be advised that retaliatory conduct shall not be tolerated and that instances of retaliation must be reported immediately.

III. School Liability

There are two distinct avenues of enforcement of Title IX's prohibition against sexual harassment: administrative enforcement and private litigation for monetary damages. Although the OCR assigns responsibility for sexual harassment to school personnel who knew or should have known of the offending conduct constituting a hostile environment and failed to take prompt remedial action to stop the abuse, a Supreme Court decision set forth a more limited liability standard for lawsuits seeking monetary relief. In Gebser v. Lago Vista Independent School District, U.S. Supreme Court No. 96-1866 (June 22, 1998), the court ruled that schools can be held liable for money damages when a teacher harasses a student provided "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measure on the recipient's behalf has actual knowledge of discrimination and is deliberately indifferent to the misconduct." In other words, the court held that "unless an employee who has been invested" by the institution "with supervisory power over the attending employee actually knew of the abuse, had the power to end the abuse, and failed to do so," the institution cannot be charged with actual knowledge of the abuse. To rule otherwise, the court reasoned, would "frustrate the purposes of Title IX" because Title IX was enacted to prohibit the use of federal resources to support an institution's discriminatory practices. Obviously, when a recipient institution is unaware of discrimination, it cannot be held to be using the funds to support such illegal practices and should not be punished with money damages.

Moreover, the Supreme Court opined that the purpose of Title IX is to prohibit prospective discrimination and cited as evidence Title IX's express enforcement mechanisms through the Office for Civil Rights that are "predicated upon notice to all 'appropriate persons' and an opportunity to rectify any violation" (20 U.S.C. §1682). Once informed of the allegedly discriminatory conduct, an institution may avoid liability by taking "prompt and effective remedial action." In fact, the court opined that absent a showing of "deliberate indifference" to the discriminatory conduct (that is, a decision not to act to end the harassment), a school will not be deemed to have violated Title IX's mandates.

Schools will be deemed to have notice of harassment if an agent or responsible employee of a school receives notice through any number of avenues: formal grievance, second-hand complaint, direct observation, news reports or rumors. The court in Gebser ruled that the knowledge of the wrongdoer himself, however, is not sufficient even when he is in a position of power and authority over his victim. A school that takes prompt remedial action upon learning of hostile environment harassment or quid pro quo harassment will be protected even though the "harassment already occurred." Where harassment has occurred, schools may be responsible for costs associated with remedying the effects of harassment including a victim's professional counseling and other necessary services.

The Gebser standard of liability was reaffirmed by the court when deciding Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), a case involving student-on-student sexual harassment. It is important to note, however, that the Gebser notice provision is required in order to obtain monetary damages in a court of law. The court ruled in Gebser that its decision would not interfere with a federal administrative agency's power to write and enforce rules that are consistent with the law's prohibition of sexual discrimination even when the individual circumstance would not otherwise lead to an award of damages in court.

The OCR Guidance is just that – rules that go beyond the case law and provide that as a condition of federal funding, schools must take affirmative and reasonable steps to prevent and eliminate sexual harassment. The administrative remedies are more expansive. The OCR, unlike the courts, will seek to make institutions aware of harassment and will seek voluntary corrective action before pursuing its enforcement options of fund termination or referral to the Justice Department for litigation. Accordingly, the OCR could find an institution responsible for harassment of which it has no actual knowledge, but the OCR always would provide the school with actual notice and opportunity to take appropriate corrective action before issuing a noncompliance finding. When investigating complaints of sexual harassment, the OCR will consider whether:

- The school has disseminated a policy prohibiting sex discrimination under Title IX and effective grievance procedures;
- The school appropriately investigated or otherwise responded to allegations of sexual harassment; and
- The school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence and, as appropriate, remedy its effects.

Procedural Requirements

The 2011 OCR Guidance explains the procedural requirements pertaining to sexual harassment and sexual violence. The federal government requires recipients of federal financial assistance to:

- Disseminate a notice of nondiscrimination;
- Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;
- Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.

A school's published notice of nondiscrimination should state that the school does not discriminate on the basis of sex in its education programs and activities. The notice must also state that questions concerning the application of the law may be referred to the Title IX coordinator or to OCR, and include the name or title, office address, telephone number, and e-mail address for the Title IX coordinator. "The notice must be widely distributed to all students, employees, applicants for admission and employ-

ment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school's services and policies. The notice should be available and easily accessible on an ongoing basis."

The Title IX coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The institution should designate one coordinator as having oversight responsibility, and can select other coordinators, whose titles clearly showing that they are in a deputy or supporting role to the senior coordinator, and explain their responsibilities. These coordinators cannot have other job responsibilities that may create a conflict of interest, and schools must ensure that employees designated to serve as Title IX coordinators have adequate training on the law, and that they understand how the school's grievance procedures operate.

The Guidance states that grievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints. OCR warns, however, "that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (e.g., participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the 2001 Guidance, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints." Additionally, a school should notify a complainant of the right to file a criminal complaint, and must not dissuade a victim from doing so either during or after the school's internal Title IX investigation.

According to the latest guidance, schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and must not delay taking steps to protect the student in the educational setting. OCR's example states that a school should not delay conducting its own investigation or protecting the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. "Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation. Moreover, nothing in an MOU or the criminal investigation itself should prevent a school from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress."

IV. Prevention

Title IX regulations provide that schools must have a policy against sexual discrimination, including sexual harassment. They further provide that the policy must be provided to students and must contain grievance procedures outlining a framework for prompt and equitable resolution of sexual harassment complaints. Finally, the regulations state that schools must designate a Title IX officer – the person charged with coordinating Title IX compliance on campus and investigations into Title IX complaints. Title IX requires a recipient of federal funds to notify students of its policy against discrimination based on sex and have in place a prompt and equitable grievance procedure providing for the resolution of sex discrimination complaints, including complaints of sexual harassment (34 C.F.R. §106.8[a][b] [1997]). Such a policy is a school's best defense. If written properly, it will encourage students and employees to report questionable conduct early on when it is most easily remedied. If enforced consistently and fairly, it will send a strong message to both employees and students that harassment will not be tolerated. At a minimum, the policy should define harassment, give relevant examples, provide notice of the school's complaint procedure and give an assurance that the school will take steps necessary to prevent recurrence of any harassment by taking prompt remedial action. The policy and procedures must be widely distributed, and they must be read. Mere inclusion in a student's college orientation package is not enough. The policy and procedures should be used as the basis for the athletics department's annual sexual harassment awareness training for students and staff.

Research indicates that female college students may be most vulnerable to incidents of sexual violence in their first 90 days on campus. Athletic departments should work closely with campus experts to discuss safety with incoming student-athletes and explain how and where students can get more information and assistance. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available. Schools may want to include these education programs in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and "back to school nights."

V. Responses to Complaints: Prompt and Effective Remedial Action and Privacy Concerns

Once a complaint has been filed or a school has reason to know that harassment is occurring or has occurred, the school is legally obligated to investigate the complaint. Examples include:

- Formal complaint

- Employees witnessed incident
- Media report
- Fliers
- Graffiti in public areas

A school should have known about the harassment if a "reasonable standard" would have revealed it. Many times, colleges and universities have investigative procedures in place. In any event, investigation of harassment that occurs in the athletics arena and/or involves athletics personnel will necessarily include athletics administrative involvement in the investigation. Moreover, it is most likely that the complaint will be filed with someone within the department. Receiving a complaint generally is not an easy task. Many times complaints involve those one knows (or thought one knew) well. Moreover, the filing of a complaint can be an emotional situation, and complainants often seek immediate validation. It is hard not to react one way or the other. People who are hearing complaints should be careful to keep their reactions to themselves. This is not a call for a lack of empathy, but rather a reminder that the rights of the accused and the accuser are put in issue by such a complaint and that an effective investigation suspends judgment until all of the facts are in. When a complaint is filed, the person hearing the complaint should apprise the student of the school's grievance procedures and offer the student the opportunity to use them. Above all else, the complaint should be treated confidentially, and information should be disclosed on a need-to-know basis only. The Revised Guidance provides that "in all cases, a school should discuss confidentiality standards and concerns with the complainant initially."

When a complaint is filed, the person hearing the complaint should apprise the student of the school's grievance procedures and offer the student the opportunity to use them. Above all else, the complaint should be treated confidentially, and information should be disclosed on a need-to-know basis only. The Revised Guidance provides that "in all cases, a school should discuss if, after an investigation, a school determines that sexual harassment has occurred, it has a legal obligation to take prompt remedial action designed to ensure that the offending conduct does not continue. The type of action required will vary with the individual facts involved. The 7th U.S. Circuit Court of Appeals in Doe, supra, recognized that there is seldom only one right answer. Instead, it advised that a school must only choose "one plausibly directed toward putting an end to the known harassment."

OCR provides schools with extensive recommendations for the conduct of investigations and hearings. OCR strongly discourages schools from any attempt to have the parties forced to mediate a settlement or allowing the parties personally to question or cross-examine each other during the hearing. Athletic departments must engage the campus process immediately upon any allegation, rather than attempt to "handle" the situation internally.

In the 2011 Guidance, OCR noted the following possible protective actions: Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to:

- providing an escort to ensure that the complainant can move safely between classes and activities;
- ensuring that the complainant and alleged perpetrator do not attend the same classes;
- moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- providing counseling services;
- providing medical services;
- providing academic support services, such as tutoring;
- arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant's academic record; and
- reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.

Suggested OCR remedies for the broader student population include: recommendations for counseling for students; training for school officials and law enforcement; developing materials on sexual harassment and violence, which should be distributed to students during orientation and upon receipt of complaints, as well as widely posted throughout school buildings and residence halls; requiring the school to create a committee of students and school officials to identify strategies; and making sure policy is updated and distributed.

OCR recommends the following investigation procedures:

- conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school's policies against sexual harassment and violence;
- investigating whether any other students also may have been subjected to sexual harassment or violence;
- investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations;
- conducting, in conjunction with student leaders, a school or campus "climate check" to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school; and

- submitting to OCR copies of all grievances filed by students alleging sexual harassment or violence, and providing OCR with documentation related to the investigation of each complaint, such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries, any final disposition letters, disciplinary records, and documentation regarding any appeals.

As part of the procedure and in order to guard against retaliation, both the accused harasser and the victim should be informed that retaliation will not be tolerated and that severe and specific consequences could result from such behavior. "Informing the victim of those disciplinary steps that have been taken against the harasser is a complicated undertaking. At the very least, the school should inform the complainant of its determination regarding the underlying claim. If the school finds harassment and punishes the harasser, there is some controversy regarding the harasser's privacy rights under the Family Educational Rights and Privacy Act (FERPA). The FERPA prohibits (with some exceptions) the disclosure of information from a student's education record without the consent of the student or parent. It has not yet been decided whether information regarding the outcome of a sexual harassment complaint is an education record covered by FERPA. It is the OCR's position that FERPA prohibits a school from releasing information to a complainant if that information is contained in the other student's education record unless (1) the information directly relates to the complainant (for example, an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a post-secondary institution. In any event, schools should consult with their general counsel before releasing such information." Colleges and universities also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that "both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense." Compliance with this requirement does not constitute a violation of FERPA. Colleges may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.

Conclusion

As is usually the case, active education and investigation are a school's most effective tool to ward off inexcusable and potentially illegal behavior. As the court underscored in Gebser, sexual harassment of students in schools is an all-too-frequent occurrence. Institutions must review their policies, educate their employees and students, and keep an eye out for inappropriate conduct. The stakes, both emotionally and financially, are too high to do anything less. As the Revised Guidance states, "if harassment has occurred, doing nothing is always the wrong response."

Additional information about Title IX, information regarding OCR's policies, and technical assistance, can be obtained by contacting the OCR enforcement office that serves your state or territory. The list of offices is available at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm.

Additional information about addressing sexual violence, including victim resources, settlement agreements OCR has reached with schools, and other information, is available from the U.S. Department of Justice's Office on Violence Against Women (OVW) at http://www.ovw.usdoj.gov/

Chapter 5 — Employment Issues

I. Introduction

Employment discrimination, including retaliation for opposing discriminatory practices, is another equity issue of concern for athletics departments. As the recent U.S. Supreme Court decision in Jackson v. Birmingham demonstrates, the law protects coaches and athletics staff from employment discrimination based upon sex and from retaliatory employment action directed toward one who has raised instances of gender inequity.

II. Title IX, Title VII, the Equal Pay Act and OCR Guidelines

A. Title IX and Employment Discrimination

There are a variety of laws that apply in this area. First, Title IX (which prohibits gender-based discrimination in educational institutions receiving federal financial assistance) prohibits sex-based employment discrimination. The Title IX implementing regulations specifically state that "(n)o person shall, on the basis of sex … be subjected to discrimination in employment" and that recipients of federal funding "shall not make or enforce any policy or practice which, on the basis of sex: (a) makes distinctions in rates of pay or other compensation; (b) results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on the jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions." That said, the regulations specify that claims of employment discrimination will be investigated and enforced by another federal agency, the Equal Employment Opportunity Commission (EEOC), and not the OCR.

As discussed in Chapter 2 of this manual, discrimination in coaching is an area of review under the treatment area of athletics compliance. As discussed more fully therein, the OCR's evaluation is less about the individual coaches and their compensation packages and concerns of discrimination, but rather whether the student-athlete is discriminated against on the basis of gender in the provision of coaches. In other words, are the men's program and the women's program provided coaches of equivalent talent? In making this determination, the OCR concedes that there are a wide variety of nondiscriminatory reasons for pay discrepancies and does not pretend to undertake such a review when addressing treatment. Thus, although the comparative treatment of athletes when it comes to opportunity to receive coaching is reviewed, that area is probed in the context of the impact of that treatment on the operation of the athletics program – as opposed to an analysis of whether the conduct amounts to employment discrimination.

Title IX does protect one area of employment discrimination: retaliation directed toward an employee of either sex because he or she complained of sexual discrimination in violation of Title IX. This was the issue in Jackson v. Birmingham Board of Education when a male coach of a female high school basketball team alleged that he was relieved of his coaching responsibilities after he complained that his team did not receive the same support, benefits and services as those provided to the boys' basketball team. As discussed

more fully in the case law chapter of this manual, both the federal district court and the federal appellate courts dismissed Roderick Jackson's case after finding that he did not have any standing to proceed. Both courts found that Jackson was not a member of the class of people that Title IX was intended to protect, that is, a member of the under-represented sex, but rather an employee. They ruled that Title IX had no provision for Jackson's case. The Supreme Court disagreed. In a 5-4 ruling, the majority ruled that Jackson could proceed with his claim of retaliation because if the employment retaliation was the direct result of Jackson's attempts to ensure that his athletes received the protections of Title IX, he also should receive those same protections because he is the direct victim of sex discrimination. "Moreover," the court ruled, "teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators." To fail to protect them and allow institutions to retaliate against "those who dare to complain" would be to subvert the statute's enforcement scheme.

B. Title VII and Employment Discrimination

Title VII, 42 U.S.C. § 2000e, is the federal law that prohibits gender-based discrimination in all aspects of the employment relationship. Title VII has a comprehensive procedure that covers the filing and investigation of employment-based discrimination claims. The EEOC is the federal government's investigatory agency that processes employment discrimination claims. The law specifies the procedure that must be followed before the commencement of discrimination lawsuits. States have enacted similar laws prohibiting discrimination in employment and generally have analogous procedures that must be followed. Because the procedures governing discrimination claims are so comprehensive and well established, numerous courts have rejected claims of employment discrimination that have been brought under Title IX and required that they use the existing procedures under Title VII. The most significant difference between the two avenues of relief is that Title VII claims must be filed with the EEOC and be processed with that agency at least six months before a lawsuit can be started. In addition, compensatory and punitive damages under Title VII are capped at $300,000. Title IX does not have a similar administrative filing requirement and has no cap on damages. It should be noted that not all courts have adopted this approach; therefore, instances may exist in which a Title IX claim related to an employment decision still can be pursued.

Title VII reaches all aspects of the employment relationship, including pay. In a Title VII compensation discrimination case, a plaintiff must demonstrate four things: (1) that he or she is in a protected class (their sex); (2) that he or she was qualified for and occupied a particular position; (3) that despite his or her qualifications, he or she was treated less favorably than his or her counterpart of the opposite sex; and (4) that the circumstances of the treatment give rise to an inference of unlawful discrimination. If he or she provides this evidence, the institution, as the employer, must be able to articulate a legitimate nondiscriminatory reason for the differing treatment. The plaintiff/employee is then left with the burden of demonstrating that discrimination was the reason for the employer's different compensation levels. In other words, the employee is required to prove that the reasons offered by the employer were not the real reasons for the compensation differential and were just a pretext for discrimination.

In addition, several courts that have dismissed employment discrimination claims under Title IX because of the existence of the remedy under Title VII have nonetheless allowed the plaintiff to pursue a claim of retaliation under Title IX. In a stereotypical retaliation case, either a coach or an administrator would claim that he or she was fired in retaliation for having complained about a Title IX issue. The Jackson v. Birmingham Board of Education case decided by the Supreme Court in 2005 is precisely this type of case.

Regardless of whether a claim may ultimately be brought under Title IX, the fundamental issue that remains is that discrimination on the basis of one's gender in any aspect of the employment relationship is unlawful – whether it deals with hiring, discipline, assignment of duties, compensation or termination. Employers must be able to prove that the employment decisions that they make are based on legitimate and nondiscriminatory reasons. For example, in the hiring context, it is critically important that the most qualified individual be selected and that the employer is able to articulate the reasons that the selected candidate was the best-qualified applicant. This requirement is particularly important to remember as institutions consider the role of diversity in the selection process. Although diversity is always important, an articulated preference for hiring a candidate of a particular sex is a recipe for disaster. Instead, the generation of a diverse and qualified applicant pool is generally where the emphasis on diversity will be placed. From that point forward, the selection of the best-qualified candidate from among the applicants is the objective.

In the termination context, it you terminate a female coach for having had three successive losing seasons, but you have male coaches who have had the same issues and you did not terminate any of them for the same substandard performance, you have a situation in which it appears as if you have treated someone differently based on gender. In other words, you have not uniformly and consistently applied the criteria for terminating coaches. This situation demonstrates how inconsistent treatment – even if it is not meant to be discriminatory – can become problematic in a discrimination case. Similarly, if the termination is based on a purported history of performance or conduct issues, and there is an absence of corroborating documentation in the coach's personnel file, it calls into question the "legitimacy" of the reasons for termination.

In addition, the assignment of duties in anything other than a logical, consistent and equitable manner also can be problematic. For example, when coaches assume administrative or teaching duties as part of their employment, but the female coaches are assigned the more burdensome or substantive assignments, the assignment process could be found discriminatory. This type of concern underscores the need for institutions to review their assignment decisions.

Another frequently recurring concern is when there are differences in the compensation paid to the coaches and administrators that at least on the surface appear to be based on sex. This is an area in which the EADA forms can highlight whatever differentials exist. Among the categories of information that are disclosed on the form are the average sal-

aries paid to head coaches and assistant coaches of each sex. The cold, hard mathematical calculations can easily bring a sharp focus on the compensation practices of an institution. In light of such numbers, if the compensation differences cannot be explained away with legitimate justifications and it is established that the differential is based on gender, a violation of Title VII can be established.

C. The Equal Pay Act and Gender-Based Compensation Discrimination

There is, however, one additional law that is relevant and must be considered in connection with compensation-based differences. The federal Equal Pay Act, 29 U.S.C. §206(d), (along with its analogous state counterparts) prohibits an employer from paying an employee of one sex less than is paid to an employee of another sex when they both perform equal work under similar working conditions on jobs requiring equal skill, effort and responsibility, with some exceptions. Given the wording of the law, male and female coaches of similar sports appear to be prime candidates for the application of the law. As a result, institutions must pay careful attention to the law and its requirements.

The sequence of establishing a violation of the EPA is somewhat detailed and complex. First, the employee must show that he or she (1) worked in the same establishment as another employee of the opposite sex; (2) received a wage unequal to that of his or her co-worker; (3) did work that required equal skill, effort and responsibility; and (4) performed that work under similar working conditions. If the employee can prove these four factors, he or she will have raised an "inference" of gender discrimination.

The institution may rebut the "inference" by submitting evidence that undermines one or more of the four factors presented by the employee. Alternatively, the institution can avoid liability if it can prove one of the four defenses available: that the pay disparity resulted from a seniority system; a merit system; a system that measures earning by quantity or quality of production; or another differential based on "any factor other than sex."

Cases arising under the EPA involve a direct comparison between two or more positions, and thus, coaches of similar sports are ideal comparisons. The jobs do not have to be identical, but merely substantially equal. When analyzing this, the relative skills, efforts and level of responsibility and the working conditions under which the duties are performed are reviewed. Skill involves a consideration of such factors as the employee's experience, training, education and ability. Effort involves a consideration of the physical and mental exertion involved in performing the job. Responsibility involves the consideration of factors such as the level of the employee's accountability and the importance of the job.

D. EEOC Guidance – Bringing the EPA and Title VII Together in a Meaningful Way

In October 1997, the Equal Employment Opportunity Commission (EEOC) published guidance titled "Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions." The EEOC described the guidance as an attempt to describe the proper framework for applying the EPA and Title VII law to claims of pay disparities based on gender. The background for the issuance of the guidance is both interesting and insightful:

Recent studies show substantial differences in salaries paid to head and assistant coaches of women's and men's teams in educational institutions. For example, according to a recent National Collegiate Athletic Association study, men's sports receive 60 percent of the head coaches' salaries and 76 percent of the assistant coaches' salaries in Division I institutions. A confidential survey of 87 universities recently conducted by the University of Texas at Austin athletics department supports these findings, showing dramatic differences in salaries paid to men's and women's coaches. The coaches of men's teams also often receive better benefits than coaches of women's teams. A U.S. General Accounting Office (GAO) survey, for example, found that head coaches for women's basketball earned 25 percent of the average additional benefits earned by head coaches for men's basketball, including such benefits as housing assistance, free transportation, free tickets to sporting events and club memberships.

These demonstrated pay disparities between the coaches of men's and women's teams are of concern to the Equal Employment Opportunity Commission (EEOC) because the overall pattern of employment of coaches by educational institutions is not gender-neutral. Women by and large have been limited to coaching women, while men coach both men and women. For example, in 1996, 47.7 percent of the head coaches of women's intercollegiate teams at NCAA schools were females, but only about two percent of the head coaches of men's teams were females.

At the high school level, as of 1990, more that 40 percent of girls' teams were coached by men, but only two percent of boys' teams were coached by women.

While claims of compensation discrimination in coaching can arise in a number of factual contexts, they often arise when women coaches of women's teams allege that men coaches of men's teams earn greater compensation in violation of the law.

Important questions are raised regarding the proper analysis of these pay disparities under both Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e et seq., and the Equal Pay Act (EPA), 29 U.S.C. § 206 (d)(1). There are only a limited number of cases that apply Title VII and/or the EPA to questions of pay discrimination in coaching and a number of them either present unique facts or, in the Commission's view, include incomplete analyses of the law. Moreover, there are many misconceptions that are often raised in considering these pay disparities. The EEOC is issuing this guidance in order to set out the proper framework for applying the EPA and Title VII to claims of gender inequity in the compensation of coaches.

EEOC Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions, October 29, 1997 (internal footnotes omitted).

The EEOC's guidance sets forth numerous examples under each of the EPA factors that describe the types of situations that the EEOC would not find permissible for compensation differences. When reviewing these examples, however, please keep in mind that every case turns upon its own individual facts. As a result, although these examples are helpful in illustrating the various factors that are involved, they are not determinative of future cases. Instead, the individual facts and the context in which they arise will be criti-

cally important. One final caveat about the examples is in order. In certain instances, they represent slight variations on actual cases in which the outcome may have been different, but the facts have been slightly modified or supplemented in order to highlight a particular point. Please note that the EEOC's intervening commentary and several examples have been eliminated, but everyone is encouraged to read the guidance in its entirety.

1. Comparable Jobs

A woman coaches field hockey. She earns $30,000 per year. She contends that her job is substantially equal to the jobs of the men who coach lacrosse ($40,000 salary), boys' volleyball ($50,000 salary) and baseball ($60,000 salary). The criteria of skill, effort, responsibility and working conditions should be examined for each of the positions to determine whether her job is substantially equal to the job of any or all of the three male coaches.

2. Substantially Equal

a. Equal Responsibility

A woman coaches women's field hockey and a man coaches men's lacrosse. Each team has approximately the same number of athletes. Both coaches train and counsel student-athletes, manage the teams' budgets, organize fundraising, engage in public relations and are responsible for the day-to-day operations for their programs such as supervising equipment and arranging travel. Both spend approximately the same number of hours coaching during the school year. The man also has the title of coordinator of physical education, but has only insignificant additional responsibilities. The coaches have substantially equal responsibility in their jobs under the EPA.

b. Unequal Responsibility

At a large university, a man is head coach of football and a woman is head coach of women's volleyball. Both teams participate at the most competitive level; and there are substantial pressures on both coaches to produce winning teams. The football coach has nine assistants and the team has a roster of 120 athletes. The volleyball head coach has a part-time assistant and coaches 20 athletes. Sixty-thousand spectators attend each football game, while 200 attend each volleyball game. The football games, but not the volleyball games, are televised. In comparing the man and woman, the man supervises a much larger staff and a much larger team. In addition, the football team's far greater spectator attendance and media demands create greater responsibility for the man. The football coach has more responsibility than the volleyball coach, and, as a result, the jobs are not substantially equal under the EPA.

3. Affirmative Defenses

a. Revenue as a Factor Other Than Sex

A man coaches men's basketball, and a woman coaches women's basketball at a large university. The man and woman have similar backgrounds in terms of education and experience. The teams have approximately the same number of athletes and play the same number of games. The university pays the man 50 percent more than the woman. It defends the differential as a factor other than sex on the grounds that the man raises substantially more revenue than the woman. However, an investigation shows that the university provides substantially more support to the man to assist him in raising revenue than it provides to the woman. In addition to three assistant coaches, it provides him with staff dedicated to his team to handle marketing and promotional activities, to schedule media interviews and speaking engagements, and to handle the sports information function. The woman is allocated one less assistant coach and no dedicated marketing or sports information staff although she has requested it. Instead, she must rely on the staff that is generally available in the athletics department. In addition, the man receives a bigger budget for paid advertising than the woman. She has sought to enhance her team's revenue potential by working with her assistant coaches to schedule interviews and speaking engagements, develop promotions for specific games and start a booster club. However, she has not been successful in raising significant additional revenue. Revenue is not a factor other than sex that would justify the wage disparity since the woman is not given the equivalent support to enable her to raise revenue.

b. Marketplace as a Factor Other Than Sex

A midsized college hires a man as head basketball coach for its men's team. It pays him a starting $100,000 base salary because "that is the going rate" and what the salary for that position has "traditionally" been. This is twice the salary earned by the women's basketball coach (a woman) even though the men's and women's coaching jobs are substantially equal. However, the man's higher salary is not justified by any particular type of experience, expertise or skills required to coach the men's team but not the women's team. Nor does the particular man hired have job-related skills that marketplace value would justify the higher salary. The college merely assumed it would need to pay $100,000 to a coach for the men's team. "Marketplace" is not a factor other than sex.

A college is recruiting a coach for its men's gymnastics team, which it is seeking to improve and bring up to the higher competitive level of its women's team. One of the applicants, a man, has had experience at another college in making a success of its previously unsuccessful men's gymnastics team. The college initially offers to pay him the same salary it pays the coach of the women's gymnastics team because the jobs are substantially equal. The applicant reports that he has received higher salary offers from two other schools and is inclined to accept one of those offers. The college may offer him the higher salary because his unique experience and ability make him the best person for the job and because a higher salary is necessary to hire him. "Marketplace" is a factor other than sex.

c. Reliance on the Employee's Prior Salary as a Factor Other Than Sex

A college advertises for coaches for its men's and women's basketball teams. The jobs are substantially equal. A man applies to coach the men's team. The college hires him and pays him $100,000 per year solely because that was the salary he earned in his prior coaching position. It hires a woman for the women's team coaching job and sets her annual salary at $50,000 solely because that was her salary at her last coaching job. The employer did not consult with either the man's or woman's

previous employer to determine the basis for either's initial or final salary or whether either's prior salary accurately reflected the coach's ability based on education, experience or other relevant factors. Based on these facts, prior salary is not a factor other than sex. Moreover, there is evidence that the woman's prior employer prevented women from competing for the higher-paying jobs coaching men's teams. Thus, even if the employer had consulted with the prior employer as to the basis for the man's salary, since the woman's prior salary was influenced by sex discrimination, it is not a factor other than sex.

d. Experience, Education and Ability as a Factor Other Than Sex

At a university, a man coaches the men's baseball team and a woman coaches the women's softball team. Their jobs are substantially equal. Both have had approximately the same number of years of experience as coaches. The man sold insurance for five years after college before becoming a coach. The fact that the man may have developed certain general skills through selling insurance does not put him in a different position from the woman for purposes of setting coaches' pay. The employer is not entitled to pay the man more for this experience.

At a college, a man coaches cross country and track and a woman coaches volleyball. Their jobs are substantially equal. The man has a Bachelor of Arts degree and has coached at the college level for two years. The woman has a Bachelor of Arts degree and has coached at the college level for 10 years. If the employer bases salary on experience, the employer may pay the woman more than the man based on her greater experience.

The breadth of Title VII encompasses a wider variety of claims of discriminatory treatment than would be allowed under the EPA. As a result, the guidance also provides an example of a more expansive compensation issue that would involve Title VII as opposed to the EPA.

4. Disparity in Other Compensation

At a midsized university, the male coaches of the men's baseball and ice hockey teams receive bonuses for winning seasons while none of the female coaches of the women's teams receive bonuses for winning seasons. Even if the jobs are not substantially equal, it is unlawful for an employer to give men and women different benefits unless it can show that the difference is not based on sex.

—EEOC Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions, October 29, 1997.

These examples suggest that in structuring compensation, the EPA can be a very useful guide. Please note that in this area of the law every case is very fact-specific and the smallest of differences can change the outcome. For example, a review of these examples along with the Stanley v. University of Southern California case (contained in the current case law discussion) demonstrates how slightly different facts can lead to a slightly different analysis and outcome. However, based on the law, various cases and these examples, the following nonexclusive list of factors may be considered in structuring the respective compensation packages:

a. Experience
   - In coaching field
   - In related fields

b. Longevity with the university
   - Type, quantity and quality of experience in coaching field

c. Education
d. Special qualifications and skills (such as revenue generation or public image)
e. Degree of skill, effort and responsibility
f. Additional duties and responsibilities
g. Public relations, promotional and fundraising activities to generate revenue
h. Speaking engagements and accessibility for media interviews
i. Intensity and quantitative amount of promotional/revenue-raising activities.
j. Professional involvements/affiliations (such as service on NCAA committees)
k. Public image/relations figure (relative desirability of the person and benefit to the school)
l. Responsibility to generate revenue (based on team performance and other activities)
m. Ability to generate revenue and donations
n. Ability to generate media coverage
o. Productivity
   - Team success
   - Individual student-athlete success
   - Conference/regional/national awards/recognition
   - Academic performance of student-athletes
   - Compliance with university policies and procedures
   - Compliance with conference and NCAA rules
   - Managerial abilities
   - Student-athletes
   - Personnel
   - Budget
   - Performance history

p. Marketplace value of the skills of the particular individual

The law, the guidance and these factors suggest that substantive attention must be paid to the amount of compensation provided to all coaches at an institution. If an educational institution unequally compensates the coaches of the men's and women's teams, the institution must carefully evaluate the basis for those differentials. An even higher level of scrutiny is required when there are differentials among male and female coaches of the same sport. The basis for any differences in compensation that exist must be fully understood and justifiable. Where the differentials are not warranted, the institution should undertake efforts to redress and rectify those disparities.

Chapter 6 — Inclusion Plans, Audits, Policies and Training

I. Inclusion Plans

Although an inclusion plan is not affirmatively required by any federal rule or regulation, its creation and implementation at an institution can be immensely helpful. Division I schools are subject to the certification process and required under NCAA rules to have an active five-year equity plan. Similarly, Divisions II and III self-study guidelines expect equity planning and evaluation. Both the OCR and the courts tend to give such plans deference – particularly if an institution is making progress in accordance with the plan's timeline. Although adherence to the plan's requirements is not an outright excuse for noncompliance with Title IX, both the existence and good-faith progress with a plan could help derail an OCR complaint or a lawsuit. Given such a positive advantage, and because they are helpful in guiding an institution toward compliance, they are highly recommended. At the same time, an institution must understand that a plan must also be viewed as a two-edged sword. In particular, if the institution fails to make progress in accordance with the timeline and/or fails to accomplish some of the specified goals, especially if there is no sound rationale, the lack of progress and these deviations and/or failures will provide further evidence of an institution's noncompliant status.

Plans can be tailored to fit the needs and requirements of the individual institution. They can run from a comprehensive plan that addresses each area within Title IX to being very specific and focused on a particular area or areas of concern. Plans have a variety of different structures and formats. Some institutions prefer them in a chart format and others prefer a standard report format. Regardless of the approach, the plan should contain the following categories within each area of Title IX that is subject to the plan:

- The issue(s) of concern and/or the current status.
- The goal or objective for improvement in that area.
- The timeline for accomplishment.
- The individual(s) responsible for accomplishing the goal or objective.

The time frame for a plan also is flexible. Although the NCAA suggests a five-year plan, each institution is encouraged to structure the duration of the plan so that it is responsive to the particular issues and compliance status at the institution. The concept behind a durational time period for a plan is that short-term, midrange and long-term goals be established, pursued and achieved.

Initially, the plan's content can be compiled and drafted by one or more sources: the athletics department (or selected individuals within it); a campus equity committee; a subcommittee of the campus equity committee that oversees athletics; a committee appointed by the president, the general counsel's office or legal affairs office, the campus equal opportunity office, or an outside consultant, among others. Regardless of the initial source of the document, however, the plan should become a dynamic instrument that is reassessed and modified each year of the plan's existence.

The rationale for any changes throughout the duration of the plan that are made should be fully analyzed and documented. It is understandable that not all deadlines can be met. However, it is critically important that if a deadline is missed or it is concluded that it cannot be met, the reason for not achieving it should be fully documented. This approach serves two objectives: It places accountability on the individuals involved; and it documents the history of the institution's progress toward compliance. Many reasons for missed goals or delays are legitimate, logical and easily accepted. Other reasons, however, are not. Ultimately, when the rationale is written on paper, it provides those responsible for implementing the goals the opportunity to critically assess the validity of the reasons and, if necessary, to modify it accordingly.

Once a plan is in place, it is often helpful to have compliance with the plan overseen by a campuswide committee. The committee's composition is flexible and could include individuals from the offices identified above. In addition, the membership should include the senior woman administrator, the faculty athletics representative, one or more other faculty members, a representative from the campus equal opportunity office, a representative from the legal office and a senior representative from the institution's administration. Inclusion of one or more students is also helpful because of the perspective that they bring. Although such a committee leads to some outside oversight of the athletics department, it also is consistent with the concept that equity in athletics is an institutional – as opposed to just an athletics department – obligation.

The NCAA has developed gender equity planning best practices, available online.

II. Audits

The process of evaluating where an athletics department stands with respect to equity can be a complex and time-consuming undertaking. As a result, it is often useful to have the institution's legal counsel or an outside consultant play a significant role in evaluating the institution's current level of compliance through the performance of an audit and the preparation of a report. The audit can be focused on specific areas or address each of the areas under Title IX. Needless to say, if an audit has not been conducted in the past, it makes sense to have a comprehensive one performed.

Some institutions undertake the audit and resulting analysis on their own. Time pressures, the complexity of the legal analysis and the pressure of other requirements, however, can sometimes interfere with or inhibit these efforts. Frequently, the senior woman administrator, the equal opportunity office or the faculty athletics representative already may have a firm understanding of the compliance level in many of the required areas. Regardless of the initial approach that is used to conduct the audit or assess current compliance, once the committee has the base-line information, it can more easily embark upon its obligation of creating or refining an equity plan.

Once the plan is in place, periodic audits of the institution's compliance level are necessary because they enable an institution to validate its progress, to refocus its efforts on problem areas that may have arisen and to otherwise adapt to changing conditions.

Whether conducted internally or externally, the audits will keep the focus on achieving and/or maintaining equity.

III. Policies, Procedures and Training

Although not situated within the regulatory provision that directly pertains to athletics, the regulations governing Title IX have several critical requirements that often are overlooked by institutions.

- The regulations require that an institution designate a Title IX Coordinator. The occupant of this position is responsible for all compliance responsibilities imposed by Title IX and for coordinating any Title IX complaints that are initiated.
- Each institution must have a policy against sex discrimination. At a minimum, the policy must state the prohibition against sex discrimination in both admissions and employment. In addition, it must contain a statement that any inquiries concerning the subject may be directed to the Title IX coordinator (with that individual's name and contact information). The policy must be included in any documents used to recruit students and employees.
- The institution must have a grievance procedure that is designed for the prompt and equitable resolution of any Title IX complaints.

Given the importance of Title IX within the athletics context, every athletics director should be familiar with the institution's policy and grievance procedures and have regular contact with the institution's Title IX coordinator.

The phrase "education is power" certainly applies with respect to Title IX. A training and education program is an essential component to any comprehensive Title IX compliance effort. Over the years, a significant amount of erroneous information regarding Title IX has surfaced in athletics departments, often creating false impressions, misperceptions and unnecessary friction among students, coaches and staff. To change this dynamic, an institution's implementation of an effective training program can significantly and positively shape the views of an athletics department's staff toward Title IX. An effective program teaches the staff the basics and the practicable application of Title IX, making the requirements more accessible and acceptable as another part of daily athletics administration.

As a result, most myths, rumors and misinformation are replaced with a tangible understanding of Title IX and equity. The better informed the staff is, the better prepared it will be to answer any concerns that are raised by student-athletes or others and to assist in addressing potential legitimate, and nonlegitimate, problems and issues. Finally, an institution's investment in such training demonstrates its top-down commitment to gender equality.

Chapter 7 — Current Case Law

I. Effective Accommodation

Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993); 101 F.3d 155 (1st Cir. 1996).

Faced with budget constraints, Brown decided to demote four sports from varsity to club status: women's volleyball and gymnastics, and men's golf and water polo. The projected savings were approximately $75,000. The decision slightly reduced the percentage of female student-athlete opportunities from 36.7 percent to 36.6 percent, which when compared against the full-time undergraduate student, resulted in an 11 percent participation disparity. In response, members of the women's volleyball and gymnastics' teams filed a class-action Title IX suit against Brown claiming that the program eliminations placed the university even further out of compliance.

A preliminary injunction hearing, which lasted 14 days, resulted in a decision by the district court in which Brown was ordered to reinstate the two women's teams to varsity status pending the outcome of the case, and Brown appealed. On appeal, the 1st Circuit recognized that it was essentially interpreting the requirements of Title IX in the athletics context on a comprehensive basis for the first time.

In its opinion, the court quickly concluded that Brown could not meet parts one and two of the three-part test: An 11 percent differential was too great of a disparity under part one; and the absence of any program expansion in the last 12 years was insufficient under part two. The court turned its focus to part three, which requires a showing by the plaintiffs that the interests and abilities of the under-represented have not been fully and effectively accommodated by the sport offerings within the present athletics program. The courts acknowledged the difficulty for universities to comply under this part of the test and recognized that they must continually focus on the issue and prepare themselves to respond to the developing interests of the under-represented sex by modifying their sport offerings.

Brown relied upon an argument that colleges should only be required to accommodate the students' athletics interests in direct proportion to their comparative level of interest. In other words, Brown wanted compliance to be achieved if athletics opportunities were afforded to women in accordance with the ratio of interested and able women to interested and able men. Brown wanted to disregard the relative percentage that women composed of the full-time undergraduate population and instead use as the comparator the percentage of interested and able women. The court rejected this creative approach to the issue because it would read the term "full" out of "full and effective accommodation." The court observed that that effective accommodation "requires a relatively simple assessment of whether there is unmet need in the under-represented gender that rises to a level sufficient to warrant a new team or the upgrading of an existing team." In the end and after years of litigation, the court concluded that Brown violated Title IX and required that Brown reinstate the two women's programs.

Roberts v. Colorado State University, 814 F. Supp. 1507 (D. Colo.) aff'd in part and rev'd in part sub nom Roberts v. Colorado State Board of Agriculture, 998 F.2d 824 (10th Cir. 1993), cert. denied, 114 S. Ct. 580 (1993)

Members of Colorado State's women's softball team sued after it was announced that due to budgetary cuts, the women's softball and men's baseball programs were going to be eliminated. Colorado State argued that the department's percentage of intercollegiate athletics opportunities available to women (37.7 percent) was substantially proportionate to the percentage of matriculating women (48.2 percent). The court rejected the contention that a 10.5 percent disparity constituted substantial proportionality.

Colorado State's efforts at arguing compliance under part two of the three-part test also were rejected because although it had created a women's program from nothing in the 1970s by adding 11 teams, the percentage of women's participation opportunities declined steadily in the 1980s. Although the court recognized that it was difficult to expand women's programs in times of economic hardship, a school could not satisfy part two if it increased percentages while eliminating men's and women's programs.

The court also made clear that the burden of proof in Title IX cases rests with the plaintiffs. In particular, under part three of the three-part test, the plaintiffs are required to show that the university is not fully and effectively accommodating the interests and abilities of female athletes. With respect to demonstrating compliance, the court observed that if there is interest and ability among the under-represented sex and the institution fails to satisfy it, the university will fail this part of the three-part test.

Cook v. Colgate University, 992 F.2d 17 (2nd Cir. 1993); 802 F. Supp. 737 (N.D.N.Y. 1992).

After the women's club ice hockey team's requests for elevation to varsity status were declined on four different occasions, several team members brought suit under Title IX. The district court analyzed the 12 men's varsity sports and 11 women's varsity sports and concluded that Title IX had been violated. The court found a significant disparity in the budgets for the men's and women's programs overall and with respect to the ice hockey teams. In analyzing the propriety of the university's action in not adding the team, the court rejected Colgate's claim that women's ice hockey is rarely played on the secondary level. Contrary to Colgate's position, the weight of the evidence showed just the opposite. The court also did not credit Colgate's claim that it should not have to add such a team because the NCAA did not sponsor a women's championship. Instead, the court observed that it was enough that the ECAC, a conference to which Colgate belonged, offered such a championship. In response to Colgate's argument that the sport was only played at 16 colleges in the Northeast, the court noted that those colleges were all within one day or overnight travel of Colgate. In addition, the vibrancy of the club program undermined the argument that there was a lack of student interest and ability among the players. Finally, the court rejected the argument that the program would be expensive to add. In response, the court stated that if financial constraints were allowed to justify disparate treatment, Title IX would become meaningless. The court recognized that equity sometimes required difficult choices, particularly in difficult economic times.

Colgate appealed the decision to the 2nd Circuit Court of Appeals, where the court determined that the case had been rendered moot because three of the plaintiffs had graduated, the current hockey season had ended and the remaining two plaintiffs were scheduled to graduate in a few months. Because none of the plaintiffs could benefit from an order requiring equal athletics opportunities for women ice hockey players at Colgate, the action was moot and the case was dismissed. Nonetheless, the district court's decision is instructive.

Grandson v. University of Minnesota Duluth, 272 F. 3d 568 (8th Cir. 2001).

The university initially settled a complaint with the OCR in 1996 that required certain changes and the provision of status reports in each of the next four-year periods. In the midst of this process, the plaintiffs initiated a lawsuit in federal court in 1997 and the court rejected the claim. The court's action appeared to perhaps reflect an underlying concern with litigating a case that was already the subject of a comprehensive settlement with the OCR. Nonetheless, the appeals court upheld the district court's denial of the motion for class certification because it was filed late and denied the request for injunctive relief because the plaintiffs lacked standing (three no longer had NCAA eligibility and the fourth was no longer a student).

Interestingly, the appeals court upheld the district court's rejection of the claim for money damages because the plaintiffs had not put the university on actual notice of the complaints before instituting the suit. This approach is similar to an approach that has been used in sexual harassment cases (see the actual notice requirements that were described by the Supreme Court in Gebser v. Lago Vista Independent School District, 524 U.S. 274, 141 L.Ed.2d 277, 118 S.Ct. 1989 [1998]). Importantly, the court rejected the argument that general Title IX complaints filed by others were sufficient to place the university on notice of the specific problems of these plaintiffs.

Pederson v. Louisiana State University, 201 F.3d 388 (vacated and replaced by); 213 F.3d 858 (5th Cir. 2000).

After Louisiana State University declined a request to add varsity soccer and fast-pitch softball as women's sports, two separate Title IX lawsuits were filed by members of each team, and they were processed as one case. The court ruled that LSU violated Title IX by failing to accommodate effectively the interests and abilities of certain female students. In addition, it concluded that the discrimination was intentional.

The decision also includes a discussion of several complex legal issues involving class certification and subject matter jurisdiction. Among other things, the appeals court focused on standing and ruled that it is assessed at the time a case is initiated. In order to establish standing, all that the plaintiffs had to do was allege that by failing to field the soccer team, the university failed to effectively accommodate the interests and abilities of the female students. The court said that the plaintiffs' skill and ability level was not an issue for standing purposes, but rather was part of their claim in court. In other words, the plaintiff only needs to show that she is able and ready to compete for a position on an unfielded team.

With respect to the claim that LSU violated the "treatment" aspects of Title IX, the appeals court upheld the dismissal of this claim on the basis that the plaintiffs did not have standing to challenge the treatment received by varsity athletes because they were not varsity athletes.

Turning to the substantive Title IX participation claim, the court quickly determined that LSU was unable to demonstrate compliance under each part of the three-part test. The court rejected LSU's argument that part one (under which it had a 20 percent disparity), if followed, imposed a quota requirement because in its view women were less interested in athletics. The court provided no substantive discussion of part two other than to observe that in 1983 LSU had eliminated fast-pitch softball, one of the two teams that it had declined to elevate to varsity status and concluded that LSU had not demonstrated compliance with this part. In analyzing the effective accommodation of athletics interests and abilities, the court determined that there was ample evidence of unmet interest.

The remainder of the decision focused on whether the discrimination was intentional. The appeals court rejected the argument that because the athletics director was ignorant of the university's level of compliance with Title IX, there was no intent to discriminate. In short, the court rejected the "head in the sand defense."

The court based its finding of intentional discrimination on numerous factors including that LSU's treatment and attitudes toward women were "outdated," "archaic" and "outmoded"; the athletics director and others referred to female athletes with deprecatory nomenclature; the athletics director said he would not voluntarily add more women's sports at LSU, but would if he was forced to; the athletics director referred to one of the plaintiffs as "honey," "sweetie" and "cutie" and stated that female soccer players "would look cute running around in their soccer shorts"; the athletics director appointed a low-level male athletics department staff member to the position of senior woman administrator; LSU consistently approved larger budgets for travel, personnel and training facilities for men's teams; and LSU compensated coaches of women's teams at lower rates.

Barrett v. West Chester University of Pennsylvania, 2003 WL 22803477 (E.D.Pa. 2003).

At the end of April 2003, West Chester University of Pennsylvania announced that it would eliminate its women's gymnastics and men's lacrosse teams and that it was adding women's golf. This decision was triggered as a result of a decrease in funding of the university by the state and a direction to the athletics department to operate within a smaller budget. Before this announcement, West Chester had 22 teams – 10 for men and 12 for women. In response, members of the women's gymnastics team wrote to the president and asked him to reconsider. They did not receive a response to the letter. At the beginning of May, one of the parents filed a complaint with the OCR. The complaint was withdrawn, however, at the beginning of July because of the processing delay and the fear that there would be no action before the new school year. The gymnastics team then turned to the Trial Lawyers for Equal Justice, which sent a demand letter to West Chester at the end of July. As with the prior letter, there was no response. Discussions with West Chester's attorney led to a meeting at the end of August. The lawyers for the gymnastics team presented their assessment of the case and set a deadline of three days for West Chester to reinstate the team. When nothing was heard after the passage of one week, they filed a lawsuit in federal court in Pennsylvania and sought a preliminary injunction seeking the reinstatement of the team.

Because the case was framed as a request for a preliminary injunction, the gymnastics team was required to demonstrate a likelihood of success on the merits and a probability of irreparable harm. In addition, a reviewing court is required to consider the effect that a preliminary injunction would have on other interested people and the public interest.

The gymnastics team alleged that West Chester violated Title IX by having failed to provide equal treatment and equal accommodation. With respect to the equal accommodation claim, the court quickly concluded that West Chester failed to meet all three prongs of the accommodation test. Not surprisingly, West Chester stipulated that it did not meet the proportionality requirement of part one of the test. Even with that stipulation, the court still observed that before the team eliminations, West Chester was out of compliance by 16.2 percent and that after the program changes, it still would have a 12 percent to 13 percent disparity.

Although West Chester argued that it complied with the second and third parts of the test, the court disagreed. In support of its argument that it had a history and continuing practice of program expansion, West Chester pointed to its formation of its Sport Equity Committee. The court turned that reliance on its head by highlighting an earlier warning from the committee that West Chester's inaction on Title IX issues could expose the university to litigation or an investigation by the OCR. Specifically, with respect to compliance with part two of the test, the court also cited the committee's 2000 report that stated: "WCU does not have continuing program expansion for women (the under-represented sex)." The court observed that the most recent addition to the women's program was soccer in 1992 and the next most recent addition was cross country in 1979. The court concluded that spans of more than a decade are too long to constitute continued expansion.

The court also discounted the argument that program expansion could somehow be established by improvements that had been made in the coaching for the women's teams, the equalization of space and equipment and creation of a plan to deal with remaining program inequities. Basically, the court found that these improvements were helpful, but were not relevant to an analysis of program expansion.

Focusing on the third part, the gymnastics team was able to demonstrate its relative level of interest by presenting evidence on the numerous gymnastics training hours and their commitment to continuing to compete as a team regardless of any setbacks (such as the absence of a coach for a period of time in the prior year that led to an inability to use the West Chester facilities, during which time they drove one hour each way to a public gym to train at their own expense). They also provided ample evidence of their ability to compete.

The court rejected West Chester's argument that the fact that because West Chester is unable to compete in the Division I-dominated NCAA gymnastics national competition, the team does not accommodate the interests of West Chester's female student-athletes. In this regard, the court recognized that while the gymnasts do not have a realistic opportunity to qualify for the NCAA national competition, they were able to regularly qualify for and compete in the USA Gymnastics national championship. The court concluded that this event provides a sufficient level of quality competition and demonstrates that the gymnasts have the requisite ability to compete.

West Chester attempted to use a 1999 student survey of interest as evidence of its compliance with part three. The court found fault with the survey, however, because it did not follow NCAA guidelines on conducting surveys (and only had a response rate of 39 percent as opposed to the 60 percent level identified by the NCAA). The court also questioned the reliability of the survey because it was conducted before the decision had been made to eliminate women's gymnastics and men's lacrosse.

West Chester also argued that it had simply replaced the participation opportunities in gymnastics with those of the future women's golf team. This argument was soundly rejected because there still remained a significant disparity in proportionality. In addition, the university was replacing a team with significant history and tradition with a new team that had yet to be established and that was to be coached by the men's team coach, who only knew the names of a few female students who might be interested in the team (and their level of ability was unknown).

II. Program Elimination

Kelley v. Board of Trustees of the University of Illinois, 35 F.3d 265 (7th Cir. 1994), cert. denied, 115 S.Ct. 938 (1995).

The University of Illinois, Champaign, eliminated four varsity sports programs, including men's swimming. Former members of the men's swim team subsequently filed suit against the university alleging that its decision to drop the men's program while retaining the women's swimming program violated Title IX. The district court disagreed (Kelley v. Board of Trustees of the University of Illinois, 832 F. Supp. 237 [D.Ill. 1993]), and the court of appeals affirmed the dismissal of the case. The court observed that the university was well within its rights because even after elimination of the program, the men's participation levels in athletics would continue to be more than substantially proportionate.

Harper v. Illinois State University, 35 F.Supp. 2d 1118 (C.D. Ill. 1999), affirmed, **Boulahanis v. Illinois State University**, 198 F.3d 633 (7th Cir. 1999).

In response to the elimination of the men's wrestling and soccer teams, members of those teams brought suit alleging that the action violated Title IX because the underlying decision was made on the basis of sex. They argued that their programs were selected for elimination solely on the basis of sex in order to increase the proportionality ratio of women in athletics. The court rejected their argument and cited Cohen v. Brown, 991 F.2d 888 (1st Cir. 1993), Roberts v. Colorado State Board of Agriculture, 998 F.2d 824 (10th Cir. 1993), and Kelley v. Board of Trustees, 35 F.3d 265 (7th cir. 1994) (and several lower court cases), for the proposition that the elimination of men's programs was an acceptable means of complying with Title IX. Although the court also rejected an additional argument that the institution was required to use the least discriminatory method to achieve compliance because the law did not contain such a requirement, it did credit the internal decision processed that was used. In particular, Illinois State had considered 10 different options before deciding to pursue program elimination.

Chalenor v. University of North Dakota, 291 F.3d 1042 (8th Cir. 2000).

A group of wrestlers initiated this lawsuit in response to the elimination of the program because of gender equity concerns. The court rejected the claim because an institution seeking compliance under part one of the three-part test had the discretion to eliminate a program in order to achieve proportionality. The fact that the institution could have pursued compliance under one of the other parts of the three-part test is irrelevant. In short, because it chose to pursue compliance under part one, the institution was allowed to shape the participation opportunities in the manner that it desired in order to come into compliance.

The wrestlers also argued that the possibility of outside funding that might be used to continue the program should have cast doubt on the reasons given for the program's elimination. However, the court stated that it was unclear how much potential outside funding actually existed and that even if it was donated, under state law, such money immediately became the property of the university as a whole, and not the wrestling program in particular. As a result, those funds would need to be included in the overall assessment and support of the athletics programs as a whole in a manner consistent with Title IX.

Miami University Wrestling Club v. Miami University (Ohio), 302 F.3d 608 (6th Cir. 2002).

The plaintiffs claimed that the elimination of the men's wrestling, tennis and soccer programs constituted discrimination on the basis of gender in violation of Title IX. The university took the action as part of a comprehensive plan to address a statistical imbalance in participation opportunities and to further develop the women's program. The court of appeals upheld the district court's dismissal of the claim observing that Title IX does not bestow rights on the over-represented gender. Because the program eliminations were implemented to bring the university into compliance, they were permissible.

Gonyo v. Drake University, 879 F. Supp. 1000 (S.D. Iowa 1995).

A decision to eliminate the wrestling program triggered a lawsuit by four members of the men's wrestling team that the action violated Title IX and the Equal Protection Clause of the U.S. Constitution. The court disagreed and held that because Drake fell within the safe harbor provision (part one of the three-part test) for males, the university was compliant under Title IX. The court noted that the men's athletics participation ratio actually was disproportionately high. The court also rejected the plaintiffs' constitutional challenge and

concluded that while consideration of gender in the application of Title IX may work to the immediate disadvantage of males under the facts of this case, that fact alone did not support a challenge under the Equal Protection Clause.

Miller v. University of Cincinnati, 2008 WL 203025 (S.D. Ohio Jan. 22, 2008).

Members of the university women's rowing team filed a class action suit, claiming they did not receive adequate facilities, equipment, staff and financial aid to field an intercollegiate team. The university was building an extensive varsity sport facility and had received pledges to build a boathouse, but faced significant budget challenges in projections for 2007. The director of athletics presented a plan to eliminate the rowing team and replace it with a women's lacrosse team, which was accepted by the university president and governing board. Plaintiffs sued seeking reinstatement of the program, claiming Title IX accommodation shortcomings and equal protection failings.

The court analyzed men's and women's undergraduate enrollment and student-athlete participation, finding 47.5 percent of the undergraduate population was female and 48.9 percent of the student-athletes were female, when counting multisport athletes as participants in each of their respective sports. Plaintiffs argued the court should use the unduplicated count of student-athletes, counting participants only once, no matter their participation. Plaintiffs asserted that the university also incorrectly reported the number of male and female athletes by counting indoor track and field, outdoor track and field, and cross country as separate sports. However, the court deferred to Department of Education regulations instructing schools to count participation opportunities rather than individual participants.

Equity in Athletics Inc. v. Department of Education, 2009 WL 5149869 (W.D. Va. Dec. 30, 2009)

The federal district court in Virginia ruling on the merits of the case upheld both Title IX and James Madison University's 2006 decision to eliminate 10 athletics teams (seven men's and three women's), which corrected the under-representation of women in athletics relative to their percentage of the student body. The plaintiff, Equity in Athletics Inc. (EIA), sued the university and the U.S. Department of Education seeking reinstatement of the teams and a ruling of Title IX's invalidity. The plaintiffs had first sought injunctive relief preventing elimination of teams by the university. That relief was denied by federal district and appeals courts, as well as being denied hearing by the U.S. Supreme Court.

The court rejected plaintiff's arguments that the regulatory interpretation of Title IX that contains the proportionality standard is unconstitutional and procedurally invalid. The court emphasized that proportionality is one of three accommodation compliance options and affirmed that both Title IX and the Equal Protection Clause allow schools to take sex into account in order to correct existing discrimination. The court dismissed arguments that "reciprocal teams" (men's and women's swimming, for example) have a First Amendment right to be associated together. As all other courts have ruled, expressed interest of each sex is not the standard for compliance.

The court ruled that James Madison's athletics opportunities after the cuts did not violate the Policy Interpretation because men are now the under-represented sex by 2 percent:

> Citing to the 1996 Clarification, EIA asserts in its initial memorandum that the sole "question," for purposes of determining substantial proportionality, is "whether the 'proportionality gap' is large enough to fit a viable team." EIA's assertion is without merit. The 1996 Clarification repeatedly emphasizes that the determination of compliance should be made on a "case-by-case" basis and that there are a variety of circumstances in which it would be unreasonable to expect a university to achieve exact proportionality. While it cites, as one such example, a situation in which the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, the document in no way mandates a finding of noncompliance if the number of opportunities that would be required would be sufficient. To the contrary, the Clarification identifies a number of variables that affect the determination of substantial proportionality, including natural fluctuations in enrollment and participation rates, the size of the student body, and the average size of the athletic teams offered for the underrepresented sex.

III. Roster Management

Neal v. Board of Trustees of California State University, 198 F.3d 763 (9th Cir. 1999).

This seminal case dealt with the appropriateness of the use of team membership limits or "capping" as a type of roster management. In this case, members of the wrestling team initiated a lawsuit when California State University, Bakersfield, decided to reduce the wrestling team from 34 to 25 male members. Their argument was that the decision was gender-based and therefore violated Title IX. The district court accepted the plaintiff's argument and issued a preliminary injunction barring the university from capping the wrestling team. The district court concluded that relying on proportionality to cap the men's teams constitutes implementation of a quota based on gender in violation of Title IX. Not surprisingly, however, the court of appeals took an entirely different view of the matter. The appeals court observed that several courts had expressly ruled that Title IX permits a university to decrease athletics opportunities for the over-represented sex (in this case men) in order to bring the university into compliance with the requirements of Title IX. Next, the court noted that the district court had failed to give deference to the Policy Interpretation put forth by the OCR and stated that the plain meaning of Title IX does not prohibit remedial actions (such as roster management or program elimination) that are designed to achieve substantial proportionality.

Choike v. Slippery Rock University of Pennsylvania of State System of Higher Education, et al., No. 06-622, 2006 WL 2060576, (W.D.Pa. 2006)

In January 2006, Slippery Rock University of Pennsylvania announced that, for budgetary reasons, it would eliminate eight varsity sports. Those sports consisted of men's and women's swimming, men's and women's water polo, women's field hockey, men's golf, men's wrestling and men's tennis. The plaintiffs were participants on the women's varsity swim

and water polo teams. The class-action suit consisted of two counts: violation of Title IX's equal participation requirement and failure to treat female athletes substantially equally with respect to coaching and training, equipment and supplies, publicity, promotional materials and events, transportation, uniforms, playing fields, locker rooms and other facilities. The plaintiffs also filed a motion requesting preliminary injunctive relief.

Slippery Rock had not been compliant with Title IX and admitted to being fully aware of its failure in this regard. The president of the university, facing revenue shortfalls, decided to eliminate sport programs, but according to the court, refused to consider women's equity and Title IX during the decision process. The president used a spreadsheet that included both financial data, reflecting the costs and revenues associated with each team, and nonfinancial evaluative measures, such as how competitive each team was, the academic performance of the student-athletes, the quality of the coaching staff and the condition of the facilities. The court found that this method resulted in a facially discriminatory academic criterion, in that he set a higher threshold for women athletes to retain their teams. Defendants explained that the grade point average and academic performance would be based on the average for each gender. The women's academic average at Slippery Rock is higher than the men's. The president explained at the hearing that "for a woman's team, they would have to have a higher grade point average (than the men) to be graded exceptional in (his) grid."

The president determined that Slippery Rock would achieve Title IX compliance through "roster management." Slippery Rock had previously, and unsuccessfully, employed "roster limits" as a means to Title IX compliance. In the past, roster limits and targets were set as goals to assist in achieving proportionality, but there were no repercussions for failing to meet a limit or target. The president left the goal of achieving roster limits to the coaches. The coaches' plan called for reinstating women's field hockey, establishing a women's varsity lacrosse team and increasing the number of positions available to female student-athletes on the existing teams. The court found that given the lack of expressed student interest in the creation of a women's varsity lacrosse team, the allotment of 24 positions to this team, and the fact that no coach has been hired, that no players have been recruited and that no scholarship funds have been set aside, Slippery Rock's citation to this team as a means of achieving substantial proportionality is not particularly meaningful and neither was Slippery Rock's plan to achieve proportionality through the use of roster limits. The court also found that Slippery Rock had not been compliant with Title IX in 25 years and "having a plan to ameliorate inequities is not the same as having ameliorated them."

"Further, the increase in roster size for the majority of women's teams appears to be purely artificial." The number of positions allocated was derived, not from any research as to the needs or wants of the female students, but based purely on the number of positions that coaches wanted to make available to the male athletes. There certainly was no indication that there had been a sudden increase of interest by Slippery Rock's female students in these programs. Nor did Slippery Rock proffer any evidence that it had increased the budget for recruiting or the scholarship funds available for these sports.

Additionally, Slippery Rock could not satisfy the second prong of program expansion history (no women's team had been added since 1994) nor the third prong because it has eliminated two viable women's teams, which the student body has demanded be reinstated. The court found that Slippery Rock was not fully and effectively accommodating the interests of its female students. Slippery Rock was preliminarily enjoined from eliminating the women's varsity swimming and the women's varsity water polo teams for the 2006-07 academic year. To the extent that those teams have been eliminated, the court found, Slippery Rock should reinstate them and provide the teams with funding, staffing and all other benefits commensurate with their status as intercollegiate teams. However, should Slippery Rock be able to demonstrate that its roster management approach to Title IX compliance actually has succeeded, the court would consider a modification of its order.

Biediger v. Quinnipiac University, 616 F.Supp.2d 277 (D. Conn. 2009)

Four student-athletes and a varsity coach on the varsity women's volleyball team sued the university after its decision to eliminate the program along with the men's golf and outdoor track teams. The university had announced in its decision that budget constraints caused the reduction, while also announcing a plan to add a women's competitive cheer team to its varsity program in the following academic year. The plaintiffs alleged that Quinnipiac's plan was not sufficient to put it into compliance with the requirements of Title IX and sought a preliminary injunction to prevent elimination of the volleyball team

By eliminating a viable women's team, the university could no longer avail itself of an argument that it was in compliance on participation opportunities via the second- or third-prongs. It could not argue a history and continuing practice of expansion of opportunities, having just eliminated opportunities. Nor could it argue successfully that it was meeting interests and abilities, when it was taking away a program with clear interest and ability. The court stated:

> There is no question that, if Quinnipiac fails to meet prong one of Title IX compliance, it will be out of compliance with Title IX. That is because, by eliminating a women's team while there is sufficient interest to field one, the University will have failed to demonstrate that it is committed to expanding opportunities for the underrepresented gender – women – or that it has fully and effectively accommodated the interests and abilities of that underrepresented gender.

The court also considered and rejected the proposal that indoor and outdoor track athletes should not be counted twice as participants.

According to Quinnipiac's EADA report for 2007-08, its athletic participation opportunities were apportioned 45 percent for men and 54 percent for women. According to its preliminary EADA data for 2008-09, its athletic participation opportunities were apportioned 47.43 percent for men and 52.57 percent for women. Quinnipiac conceded that those percentages were not in proportion to the undergraduate enrollment (approximately 63 percent female) for those years. Quinnipiac expected its 2009-10 varsity participation per-

centages to be in compliance with the first-prong test of accommodation of interests and abilities.

Athletics department administrators testified about the athletics department's decision to implement "roster management" at Quinnipiac in order to achieve greater proportionality between the athletics participation opportunities available to women and the percentage of women undergraduates. Under Quinnipiac's roster management policy, the athletics department sets the size of men's and women's team rosters to create a more proportional balance of athletics opportunities between the genders. The court found that the administrators sought little input on the appropriate size of those roster goals and ignored comment from several men's program coaches who worried that roster sizes were too low and women's program coaches who worried the opposite. During testimony at the hearing for injuctive relief, coaches of men's programs admitted to manipulating rosters to give the appearance of smaller rosters on their EADA. A women's program coach detailed underfunding for adding women to her team's roster goal and that rosters were manipulated to cut women shortly after the EADA roster size report.

Recognizing that cutting both men's and women's varsity sports could push Quinnipiac further out of Title IX compliance, Quinnipiac made the strategic decision to elevate women's competitive cheerleading to varsity status. No Office for Civil Rights analysis was provided directly to the university regarding this decision. In 2008-09, the 31-member Quinnipiac cheer squad had a dual-focus: cheering at the men's and women's basketball games, an activity referred to as "sideline cheer," and also entering cheer competitions in its spare time. The new competitive cheer squad would have an increased budget of $50,000, up from $12,000, and the current head cheer coach would be promoted to a full-time position and given a raise. In addition, the department anticipated the new varsity cheer squad will be supported by two athletics scholarships. The sideline cheer and competitive cheer programs would be independent squads. The court stated:

> Competitive cheer, although not presently an NCAA-recognized sport or emerging sport, has all the necessary characteristics of a potentially valid competitive "sport." The elements and routines performed by competitive cheer teams require rigorous training and a high level of athletic and gymnastic ability, and could be easily described as "group floor gymnastics." Notwithstanding the facts that competitive cheer does not presently have a non-profit governing body and that its schedule lacks the hallmarks of progressive-style competition where a team's season record determines its eligibility to compete in culminating conference and national championships, the gymnastic nature of competitive cheer, its broad popularity, and the high level of national competition, provide a legitimate basis from which competitive leagues can be built.

The roster discrepancies and the failure to meet participation opportunies, as well as the court's determination of potential irreparable harm to the plaintiffs, led to the imposition of an injunction that reinstated the volleyball team to varsity status.

> A roster cap implies the need to cut players who would otherwise qualify for a team based upon interest and ability – players who can meaningfully benefit from and contribute to team play. In contrast, a roster floor implies the need to add players who otherwise would not qualify for a team based upon interest and ability – players whose principal role is to provide a gender statistic, rather than a meaningful contribution to the team. Floors impose an obligation on coaches to pump up roster numbers and to "carry" players otherwise unsuited to further team goals. Not surprisingly, I have found no caselaw or other authority that sanctions the use of floors – in contrast to the use of caps – as a means of satisfying prong one of Title IX compliance.

In arguing that it has satisfied prong one of Title IX compliance, Quinnipiac relies heavily on its EADA roster number reports. Title IX, however, requires more than merely showing gender equity on the EADA report. Although an EADA report can be used to make a prima facie showing of substantial proportionately, plaintiffs are permitted to look behind those numbers, as they have done here, to determine whether those EADA numbers actually represent genuine, not illusory, athletic participation opportunities. The plaintiffs in this case offered credible testimony that the athletic department's roster management numbers did not accurately reflect the actual number of genuine participation opportunities available to both genders at Quinnipiac. Where the focus of prong one of the Title IX compliance test is genuine participation opportunities, it is simply unacceptable for a university to set roster numbers at unsustainably high levels, well above average NCAA squad sizes and the individual coaches' need, in order to "make the numbers" for purposes of claiming to have achieved substantial proportionality. As effectively demonstrated by Fairchild's (coach's) testimony about the players on her team, those students filling the extra roster spots are not receiving genuine opportunities to participate and the roster count on the EADA report fails to capture the numerical reality.

> Moreover, without reaching the issue whether the women's cheer team is a Title IX-eligible sport, it is at least clear that Quinnipiac is relying on a very optimistic estimate of the number of cheerleaders to whom it will be able to offer genuine participation opportunities.

The university and the plaintiffs were continuing trial preparations for this case at the time of printing.

IV. History and Continuing Practice of Program Expansion

Boucher v. Syracuse University, 164 F.3d 113 (2nd Cir. 1999).

Jennifer Boucher and seven other female student-athletes brought suit under Title IX alleging that the university failed to effectively accommodate the interests of the female students and failed to provide equal athletics benefits to female club members. Seven of the eight plaintiffs were members of the club lacrosse team and the other plaintiff was a member of the club softball team. Their club team status undermined their unequal treatment claim because, like the plaintiffs in the LSU case, as club team members, they lacked the required "standing" to complain about the treatment afforded to female varsity student-athletes.

The suit was initiated in 1995. The district court scrutinized the case under part two of the three-part test and entered judgment in favor of Syracuse in 1998 based on its conclusion that the university had a history and continuing practice of program expansion (1998 WL 167296 [N.D.N.Y.] [April 3, 1998]). The court also issued a decision on June 12, 1996 (1996 WL 328441). The court cited the 1996 Clarification's discussion of three relevant factors, the institution's record of adding or upgrading teams for the under-represented sex, its record of increasing the number of participants of the under-represented sex and its affirmative response to requests by students or others for addition or elevation of teams. Unfortunately, this conclusion by the district court was not addressed on appeal.

Nonetheless, the underlying facts of the case are somewhat helpful in attempting to evaluate the circumstances under which part two of the three-part test might be applicable. In 1971, the women's intercollegiate athletics program was established with women's varsity basketball, fencing, swimming, tennis and volleyball. In 1972, field hockey replaced fencing. In 1977, crew was added. In 1981, indoor and outdoor track were added. In 1982, the university merged the separate men's and women's programs into one athletics department. Between 1980 and 1982, the OCR conducted an investigation that resulted in a determination that the university was in compliance with Title IX. As indicated above, in 1995, this suit was commenced. In 1996, women's soccer was added. In 1997, women's lacrosse was added and the university announced plans to add softball in the 1999-2000 academic year.

The district court characterized the university's record between 1971 and 1982 as strong. Although it observed that no new teams were added between 1982 and 1995, the number of women's scholarships was continuously increased, facilities were improved, coaching staffs were enhanced and more support services were provided. In addition, the number of female participants increased by 47 percent from 148 to 217 (while male participation only increased by 3 percent). The court, in its 1998 decision, also noted the addition of two teams since 1995 and the commitment to add a third in 1999. Thus, the court concluded that the university had a sufficient history of expanding opportunities for women student-athletes to satisfy the first element of compliance under part two (history of program expansion).

In discussing the second element (continuing practice of program expansion), the court observed that the existence of formal policies that might indicate that the institution is monitoring the students' interests in other sports would have been helpful – particularly where no expansion is taking place – but not required. However, inasmuch as the university was in the midst of its expansion efforts already, scrutiny of such policies was unnecessary. Instead, the court was able to look at the expansion itself to determine that the university met this element. The court relied on testimony from the athletics director that the additional teams were created in response to his monitoring of interests from club participation at the university, prospective competition with other schools, and the developing interests and abilities at national, regional and local levels of competition, including information from its feeder schools. Collectively, these actions supported a conclusion that there was a continuing practice of program expansion and thus justified the dismissal of the effective accommodation claim.

Earlier in the case, the district court had rejected the plaintiff's unequal treatment claim (dealing with the unequal allocation of benefits and scholarships between varsity men's and women's teams) on the basis that because the plaintiffs were not varsity athletes, they did not have standing to bring this claim.

After the plaintiffs appealed their loss, the federal court of appeals issued a decision in which the lower court decision on unequal treatment (no standing) was upheld, the portion dealing with the lacrosse players' accommodation claim was dismissed as being moot (lacrosse had been added as a sport in the last year), and another portion of the case dealing with the denial of class certification for the softball team was vacated and sent back to the lower court with the suggestion that this part of the case be dismissed as moot if Syracuse followed through on its promise to elevate softball to varsity status. If the university failed to take this action, the lower court was ordered to certify the softball players as a class.

The appeals court's discussion of two other claims is worth noting. First, although the plaintiffs had not raised a claim of inequitable funding of club sports, the lower court nonetheless had granted summary judgment to the university. The appeals court vacated the lower court's decision in this regard on the basis that a court is without power to create and rule on a claim that is not presented to it. Second, the plaintiffs consistently suggested on appeal that their real claim was to represent all women (present and future) who wish to be varsity athletes at Syracuse. However, the appeals court observed that just as the court could not create and rule on a claim, which was not in the case, so too were the plaintiffs unable to create a larger class during the appellate phase of the case. In this regard, the court pointed out that the plaintiffs had not requested such an expansive class when they were in the lower court.

Unfortunately, and as indicated above, the court of appeals did not address the program expansion defense at all in its opinion.

V. Treatment Issues

Barrett v. West Chester University of Pennsylvania, 2003 WL 22803477 (E.D.Pa. 2003).

As indicated above, two claims were advanced in this case: one involving equal accommodation and the other involving equal treatment. The denial of equal treatment claim focused on the disparity in coaching support and recruiting money. With respect to the coaching claim, the court observed that West Chester "fails to not only provide equal coaching services to its male and female athletes, but West Chester also pays the coaches of its women's teams less than the coaches of its men's teams." In particular, the women's teams had 44 percent of the head coaches, and they received approximately 40 percent of the head-coaching dollars. The dollar disparity for assistant coaches was even greater. Men's teams had 21 assistant coaches, while women's teams had only 14. With respect to compensation, assistant coaches of men's teams were paid approximately three times as much as the assistant coaches of the women's teams.

With respect to the disparity in recruiting dollars for the men's and women's programs, the court found that in 2001-02, women's recruiting accounted for less than 38 percent of the amount spent on recruiting male athletes. Based on these two areas, the court determined that the claimed violations of these treatment aspects of Title IX appeared to be correct.

Cook v. Colgate University, 992 F.2d 17 (2nd Cir. 1993); 802 F. Supp. 737 (N.D.N.Y. 1992).

At the district court level, an unequal treatment claim advanced by the Colgate women's club ice hockey team was analyzed. In finding a Title IX violation, the district court analyzed the 12 men's varsity sports and 11 women's varsity sports. Excluding football, the respective budgets for the 1991-92 academic year for the men's sports was $380,861 and for women's sports was $218,970. With football included, the total men's budget was $654,909. Although some of the same sports received comparable funding, the court found it ironic – in view of these statistics – that Colgate attempted to argue that its program as a whole was not discriminatory. Notwithstanding this point and the fact that the men's team was a varsity team and the women's team was a club team, the court engaged in a comparative analysis of the respective hockey teams through the use of several of the factors contained in the "laundry list." With regard to "expenditures," the court noted that the men's hockey team received $238,561 in funding while the women's team received only $4,600. With regard to "equipment," the men's team was supplied with skates, sticks, uniforms, gloves, pads, helmets and unlimited skate sharpening. The women's team had to supply their own skates ($160) and pay someone to sharpen them. They were given old and inadequate equipment and were limited to two hockey sticks per year. The men's locker room was large (50 feet by 50 feet); the women's was small (15 feet by 15 feet) and shared with other teams. The men's team traveled by bus with a commercial driver and stayed in comfortable accommodations. The women's team had to pay the university for the use of a van that was driven by one of the players. On most overnight trips, they stayed at homes of parents and friends. The men's team practiced from 3 to 6 p.m. on weekdays, and the women's team practiced from 7:30 to 9 p.m. Monday, Wednesday and Friday and from 4 to 6 p.m. Sunday. After reviewing these factors, the court observed that the male hockey players were treated as "princes" and the female players were treated as "chimney sweeps."

VI. Financial Aid

Gonyo v. Drake University, 879 F. Supp. 1000 (S.D. Iowa 1995).

Although this case primarily involved the propriety of the university's decision to eliminate the men's wrestling program from a participation perspective, a secondary issue involved the impact that the reduction of scholarships would have on the men's program and whether that was an independent violation of the law. The district court, however, disposed of that argument quickly. The thrust of the court's ruling was that the claim was an attempt to essentially lock in place a financial aid distribution ratio that was already out of proportion. The court recognized the need for an institution to be flexible and to increase its financial aid allocations for women so that it could, in turn, increase their participation level. Needless to say, the case arose before the publication of the 1998 OCR letter on financial aid containing the 1 percent parameter.

VII. Separate Programs

Mercer v. Duke University, 190 F.3d 643 (4th Cir. 1999).

A female football player (place kicker) claimed that Duke violated Title IX when it refused to allow her to continue to participate on the football team. Mercer had been an all-state kicker in high school. She practiced with the football team during her first two years at Duke and then was told that she was no longer on the team. Duke cited the contact sport exception as the basis for its refusal to allow her to participate any longer (34 C.F.R. §106.41[b]). The district court accepted this argument and rejected her claims (Mercer v. Duke University, 32 F. Supp. 2d 836 [M.D.N.C. 1998]).

The court of appeals carefully reviewed the language of the contact sport exemption and reinstated the case. The statutory language was critical to the court's analysis:

> (b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section [prohibiting sex discrimination in athletics], a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex, but operates or sponsors no such team for members of the other sex, and athletics opportunities have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.
>
> 34 C.F.R. §106.41(b).

The court reasoned that if there is a single-sex noncontact sport, the opposite sex, if under-represented, must be allowed to try out. However, the court recognized that the regulation does not address what the requirement is for single-sex contact sports such as football. The court said that there could be two meanings for this provision: (1) members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport, in which case, the prohibition against sex discrimination does not apply; or (2) members of the excluded sex must be allowed to try out for the team offered unless the involved sport is a contact sport, in which case, the excluded sex does not need to be allowed to try out.

The court of appeals said the second one was the intended meaning of the statute. Thus, the court ruled that a university could exclude one sex from trying out for a contact sport. However, once it allowed the opposite sex to try out for a single-sex team in a contact sport, subsection (b) of the regulation is no longer applicable and thus, the general prohi-

bition against discrimination contained in subsection (a) applies. When this analysis was applied to this case, the result was relatively clear: When Duke allowed Mercer to try out, it no longer could claim the contact sport exception. As a result, the court ruled that her Title IX claim should not have been dismissed. The case was returned to the district court and a jury trial was conducted. The jury returned a verdict in favor of Mercer and awarded her $1 in compensatory damages and $2 million in punitive damages. Although the punitive damages award was reversed on appeal, the size of the award suggests that the potential exposure in a Title IX case can be significant. (See Mercer v. Duke University, 181 F.Supp. 2d. 525 [M.D.N.C. 2001], vacated in part and remanded per curiam, 50 Fed.Appx. 643, 2002 WL 31528244 [4th Cir. 2002]). In addition, because Mercer had prevailed in the case, Duke was ordered to pay her attorney's fees of approximately $350,000. (See Mercer v. Duke University, 401 F.3d 199 [4th Cir. 2005]).

VIII. Retaliation

Jackson v. Birmingham Board of Education, 125 S. Ct. 1497 (2005).

In an opinion issued March 29, 2005, the U.S. Supreme Court resolved a conflict among the federal circuit courts by ruling that Title IX protections extend to those who witness and complain about sex discrimination, even if they are not the direct victims of the underlying discrimination. In this case, the court considered the case of Roderick Jackson, a high school teacher and former girls' basketball coach. Jackson alleged that the school board relieved him of his coaching duties because he complained that his girls' basketball team was not being treated or supported equitably by the school district. In particular, Jackson stated that his team did not receive funding or equal access to facilities and equipment when compared with the boys' program.

Jackson filed a complaint in the federal district court alleging that his termination violated Title IX. He argued that he was fired in retaliation for complaining about the inequitable treatment of his team and his players. Both the district court and the 11th Circuit Court of Appeals dismissed Jackson's case. These federal courts found that Title IX does not provide a private right of action for individuals to allege retaliation in court. The 11th Circuit further found that even if retaliation was prohibited by Title IX, the law's protections would not extend to Jackson because he was an indirect, and not the direct, victim of the underlying complaint of discrimination.

The Supreme Court disagreed. In a 5-4 opinion, the court noted that prior decisions made clear that Title IX provides a private cause of action against federal funding recipients who intentionally discriminate on the basis of sex. Retaliation against an individual because he or she complains about sex discrimination, the court reasoned, is by its very nature an intentional act. Finally, the court found retaliation is intentional discrimination "on the basis of sex" in violation of Title IX because it is an intentional response to an allegation of sex discrimination.

The court next turned its attention to the 11th Circuit's finding that Jackson could not avail himself of Title IX's protections because he was not the direct victim of the original complaint of sex discrimination. Again, the court disagreed. It found that Title IX's protections extend to those who oppose sex discrimination and who then suffer discriminatory retaliation as a result – regardless of whether they are the direct victims of the original complaint. The court restated the following hypothetical, voiced by the petitioner at oral argument, to illustrate the injustices that would result from the 11th Circuit's reasoning:

> If the male captain of the boys' basketball team and the female captain of the girls' basketball team together approach the school principal to complain about discrimination against the girls' team, and the principal retaliates by expelling them both from the honor society, then both the female and the male captains have been "discriminated" against "on the basis of sex."

To rule otherwise, the court reasoned, would make those in the best position to witness sex discrimination – students, coaches and teachers – "loath to report it." If retaliation against these who witness and seek to remedy sex discrimination were not prohibited, "Title IX's enforcement scheme would unravel."

The Supreme Court sent the case back to the lower court to determine factually whether the school board fired Jackson as the girls' basketball coach because he complained about discrimination against his program. The parties eventually settled, with the school board paying Jackson's attorney fees of $340,000. In the meantime, the Jackson decision applies to all educational institutions in the United States that receive federal funding. In short, Title IX prohibits retaliation against those who file a complaint of Title IX discrimination – because they file the complaint.

Vivas v. California State University, Superior Court of California, Fresno County, Case no. 06CECG00440 (2007).

A jury awarded a former California State University, Fresno, volleyball coach $5.85 million in damages (later reduced to $4.52 million plus $663,615 in attorney fees), ruling that the school retaliated against her for speaking out for equitable treatment of female student-athletes. Vivas worked for the university for two years before being fired in 2004. She claimed that her contract was not renewed because she advocated equal treatment of women athletes and access to facilities on the campus.

The university denied that it retaliated against Vivas because of her advocacy for women athletes and asserted that she lost her job because she could not attract enough fans to games, failed to schedule enough matches with top 25 opponents and won too few post-season matches.

The jury award, which took into account Vivas' back wages, future lost pay and emotional distress, was the largest ever granted to a coach suing for retaliation under Title IX at that time. Two other female ex-employees of the athletics department also sued the school, raising claims similar to Vivas'. The university settled one of those cases with an administrator for $3.5 million before trial.

Johnson-Klein v. California State University, et al, Superior Court of California, Fresno County

A state jury in California awarded $19.1 million to a former women's basketball coach at California State University, Fresno, who sued the university, alleging sexual discrimination. The award, subsequently reduced by the court to $6.6 million, included these award elements: past economic losses; future economic losses; past noneconomic suffering; and future noneconomic suffering. The court's ruling on attorney fees in excess of $2.5 million stated:

> A multiplier "may be inappropriate if the action lacks significant public value or is one in which the plaintiff's injuries are slight." (Chavez v. City of Los Angeles, Cal. App. 4th 418 at 421.) That was not the case here, where the issues of equity not only at CSUF, but in collegiate sports nationally are of significant importance to the University, its students, the Fresno community, and beyond. Plaintiff's injuries were assessed by the jury as severe enough to warrant a multimillion dollar award of compensatory damages.

The coach, who was fired near the end of her third season, argued that she lost her job because she advocated for women's rights. In September 2005, she filed this lawsuit against the university, the university president, the retired athletics director and Fresno State's athletics corporation alleging gender discrimination, sexual harassment, Title IX violations, retaliation and wrongful termination. She claimed that her supervisors sexually harassed her by making inappropriate comments about her breasts and clothing and that she was inappropriately touched by one or more of her supervisors. Stacy Johnson-Klein alleged that she was terminated in retaliation for complaining about harassment, as well as gender inequities in athletics. Lawyers for Fresno State argued that Johnson-Klein was fired because she verbally abused her players and violated university policies. The 12-member jury decided unanimously on all 13 counts for the coach.

The parties eventually agreed to a settlement of approximately $9 million, which still represents the highest monetary award for an intercollegiate athletics Title IX retaliation case.

IX. Employment

Weaver v. Ohio State, 71 F.Supp. 2d 789 (S.D. Ohio. 1998); aff'd, 1999 U.S. App. Lexis 25541 (6th Cir. 1999).

Team members complained about the field hockey coach's competence, effectiveness and coaching ability, and after an investigation, The Ohio State University terminated her. Weaver subsequently filed suit and claimed that the termination was the result of sex discrimination in violation of Title IX and Title VII, that she had been subjected to retaliation for having complained about the condition of their practice field, and that the university had violated the Equal Pay Act by not paying her as much as the men's ice hockey coach.

The court concluded that the retaliation claim failed because there was no connection between her complaints about the field conditions and her termination. In addition, the court observed that the men's lacrosse team used the same field as her team, and it responded to her complaint by having the field evaluated (which resulted in a determination that it was within acceptable standards). Although the university agreed that the replacement of the field was important, it did not want to undertake the project until it found a donor. In the end, the legitimate and nondiscriminatory reasons for the university's termination decision in conjunction with the absence of any causal connection between the coach's complaint and the termination ultimately led to the rejection of the claim.

She also alleged that she was terminated because she had complained to an NCAA committee about the university's level of Title IX compliance. However, this claim also was rejected because this information was never shared with the university and therefore could not have been the basis for any type of retaliation.

In analyzing her claim of sex discrimination, the court concluded that the university's reason for firing her was both legitimate and nondiscriminatory. Like many courts, this court observed that the reason for a termination does not have to be good or fair as long as it is not discriminatory. Weaver claimed that she was treated differently from two men's coaches who had team disciplinary problems or performance issues. However, the court found those other instances sufficiently separate and distinct from Weaver's case because they did not involve the ongoing student-athlete complaints that were the justification for her termination.

Finally, in assessing the Equal Pay Act claim, the court determined that the ice hockey coach's position to which she wanted to be compared was not substantially equivalent to her position as field hockey coach. In addition, the comparators that the court felt most appropriate (men's lacrosse and soccer) were paid less than she was. As a result, her Equal Pay Act claim also failed.

Lamb-Bowman v. Delaware State University, 1999 U. S. Dist. Lexis 19648 (D. Del. 1999).

Mary Lamb-Bowman, the women's basketball coach, was notified that her current contract would be her last if she did not significantly improve her performance. In particular, she was placed on notice that each of these areas needed improvement: poor academic performance of her student-athletes; poor conference and nonconference record; difficulties in student-coach relations; and failure to strictly follow the spirit of NCAA rules. After assessing her performance over a period of time, the university decided not to renew her contract. In response to this action, Lamb-Bowman ultimately initiated a suit in November 1998 claiming that she was subjected to sex discrimination in violation of Title VII and that she was subjected to retaliation in violation of Title IX for having complained about inadequate funding, facilities and equipment for the female teams and inequitable coaching assignments and compensation. Due to the passage of time, however, the court ruled that Lamb-Bowman's claims (other than her Title VII claim that had just concluded the administrative process with the EEOC) were barred by the statute of limitations. Although the Title IX claim was dismissed, the court suggested that the university might wish to review its Title IX obligations. The balance of the case was later disposed of when the court entered summary judgment in favor of the university. (See, 152 F. Supp. 2d 553 [D. Del. 2001]).

Stanley v. University of Southern California, 178 F.3d 1069 (9th Cir. 1999).

The coach of the women's basketball team filed suit alleging violations of the Equal Pay Act and Title IX. The district court granted summary judgment to Southern California. The focus of the case was the Equal Pay Act claim. The court analyzed the relative experience of Marianne Stanley (as the coach of the women's basketball team) and George Raveling (as the coach of the men's basketball team) was sufficiently different to justify a disparity in compensation. The court focused on the fact that Raveling had 31 years of coaching experience, was a two-time national coach-of-the-year recipient, a two-time Pacific-10 Conference coach-of-the-year recipient, was regarded as one of the best recruiters in the nation, was an Olympic coach, had nine years of marketing experience and was the author of books on basketball. In contrast, Stanley had only 17 years of experience, had never coached an Olympic team and was not an author. The court concluded that these differences were a legitimate basis upon which to differentiate their respective salaries. As a result, Stanley's claims failed.

Humphreys v. Regents of University of California, et al., U.S. District Court, Northern District of California, Case No. C 04-03808

A former assistant athletic director at the University of California, Berkeley, was reinstated to employment with back pay after settling a 3-year-old federal lawsuit in which she said she had been improperly dismissed because she accused the university of sex discrimination.

Karen Moe Humphreys, a 1972 Olympic gold medalist in swimming and coach of the women's swim team from 1978 to 1992, was dismissed in 2004 as an assistant athletic director for student services. She said she had been fired for complaining about working conditions for women.

Her lawsuit said the university had a history of sex discrimination that led to women being overlooked for key jobs and promotions and leaving the athletics department. The university denied her accusation, and the settlement announced included no admission of liability. According to the terms of the settlement, the university will pay Humphreys $3.5 million in lawyers' fees and other litigation costs, and also reimburse her full back salary and benefits, the total of which was not disclosed in the joint statement announcing the settlement.

Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S.Ct. 2162, 2178 (2007)

Lilly Ledbetter was a supervisor at Goodyear Tire & Rubber Co.'s plant in Gadsden, Alabama, from 1979 until her retirement in 1998. For most of those years, she worked as an area manager, a position largely occupied by men. Initially, Ledbetter's salary was in line with the salaries of men performing substantially similar work. Over time, however, her pay slipped in comparison to the pay of male area managers with equal or less seniority. By the end of 1997, Ledbetter was the only woman working as an area manager, and the pay discrepancy between her and her 15 male counterparts was stark: Ledbetter was paid $3,727 per month. The lowest-paid male area manager received $4,286 per month, the highest-paid, $5,236. She suspected that she was getting fewer and lower pay raises than the male supervisors, but Goodyear did not allow its employees to discuss their pay. Ledbetter had no proof until she received an anonymous note revealing the salaries of three of the male managers.

Ledbetter brought charges of discrimination before the Equal Employment Opportunity Commission (EEOC) in March 1998. In accord with the jury's liability determination, the district court entered judgment for Ledbetter for back pay and damages (approximately $3.3 million), plus counsel fees and costs. The Court of Appeals for the 11th Circuit reversed the jury verdict, holding that her case was filed too late – even though Ledbetter continued to receive discriminatory pay – because the company's original decision on her pay had been made years earlier. In a 5-4 decision, the Supreme Court upheld the 11th Circuit decision and ruled that employees cannot challenge ongoing pay discrimination if the employer's original discriminatory pay decision occurred outside the statute of limitations period, even when the employee continues to receive paychecks that have been discriminatorily reduced.

On January 29, 2009, President Barack Obama signed the Lilly Ledbetter Fair Pay Act, a bill that restored the law to the way it had always been, allowing workers to be able to bring their pay discrimination claims to court. The act had a limited and targeted focus: to reinstate the law stripped away by the Supreme Court's decision in Ledbetter and make clear that pay discrimination claims on the basis of sex, race, national origin, age, religion and disability "accrue" whenever an employee receives a discriminatory paycheck, as well as when a discriminatory pay decision or practice is adopted, when a person becomes subject to the decision or practice, or when a person is otherwise affected by the decision or practice. The law is retroactive to May 28, 2007, the day before the court issued its ruling in Ledbetter.

X. Sexual Harassment

Morrison v. Northern Essex Community College, 56 Mass. App. Ct. 784, 780 N.E. 2d 132 (2002).

Two female student-athletes alleged that their college basketball coach, in violation of Title IX, harassed them. In particular, Morrison alleged that the male coach asked her details about her sex life and whether she had orgasms, injected sexual innuendo into their conversations and made fun of her when she would not answer. The coach invited her to lunch at a nearby home of the assistant coach and while there alone, massaged her back and reached around and massaged her breasts. When he was interrupted by the arrival of someone else, he said that her breasts felt big and he hoped to see them the next time. Morrison attempted to avoid him after this incident, but he kept up the verbal assault by making comments about her breasts and saying things such as, if she had not had an orgasm yet, he would give her one. He also bet her that she would "get laid" during the summer vacation period. Upon her return in the fall, he asked Morrison if he had won his bet. Morrison was so distraught with him that she decided not to return to the basket-

ball team and instead played on the softball team. The basketball coach would show up at softball games and speak to the softball coach, and Morrison would be removed from the game. She complained to school officials about the conduct in early 1994 and left the college without completing her degree in May 1994.

Santiago, the other student-athlete, also was subjected to a verbal barrage of sexual innuendo and comments from the coach and soon sought to avoid him. The coach confronted her about the avoidance and suggested they have lunch together. He bought sandwiches and beer and drove her to his condominium. While there he lay down on his bed and told her that he wanted a massage, but did not have to "do it." Instead, he just wanted it in her underwear. She responded that she did not do massages, and he mentioned another student who regretted having rejected him. After some further discussion, they left and returned to the college. During basketball season, he benched her for increasingly longer periods of time. Before one game, he called Santiago to the middle of the court and in the presence of both teams that were warming up told her that she was not getting playing time, that it was his decision and that if she did not like it, she could turn in her uniform. He repeated this statement a second time, and she left the team. She also reported his actions to the college and left the college in May 1994. The college subsequently investigated the complaints and within six months suspended the coach.

Before these events, the coach had a significant and well-documented history of sexually inappropriate conduct with student-athletes that was so extreme that he had previously been removed as the basketball coach. However, within 2? years of that action, he was allowed to return when the coach who had replaced him left the college.

The appeals court first addressed a statute of limitations issue and concluded that the acts of having Morrison pulled from the softball field and Santiago having her playing time reduced constituted acts of "quid pro quo" harassment and were timely filed. The court also observed that the conduct was of such a continuing and ongoing nature that they could be considered continuing violations and therefore even the older events were viewed as being timely filed.

The court turned its attention to the substance of the Title IX claim and concluded that a plaintiff must show that an official who had the authority to address the alleged harassment and to implement corrective measures had actual knowledge of the harassment and failed to adequately respond. In other words, such an individual must act with "deliberate indifference" based on the Supreme Court's holding in Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998). However, the educational institution can avoid liability if it takes timely and reasonable measures to end the harassment.

On appeal, the college argued that the lower court properly dismissed the case because it took action when it received the complaints from Morrison and Santiago and ultimately suspended the coach. Under those circumstances, the college argued that it had acted reasonably and swiftly. The appeals court, however, was unwilling to quickly agree with the college's position. Instead, the court reversed the lower court's ruling and concluded that it was for a jury to decide if, given the coach's well-documented history of sexual

improprieties, the college was effectively on notice even before these two specific complaints of sexual harassing conduct by the coach; and thus, whether it acted in a deliberately indifferent manner.

Simpson v. University of Colorado, Boulder, et al., U.S. Court of Appeals, 10th Cir., Nos. 06-1184, 07-1182, Sept. 6, 2007

Two female students alleged that they were sexually harassed/assaulted in violation of Title IX by football players and recruits while at a party. They brought action against the university, and the district court granted summary judgment for Colorado, (see Simpson v. University of Colorado, Boulder, 372 F. Supp. 2d 1229, 1246 [D. Colo. 2005]) and later denied motions to alter or amend the judgment and to reopen discovery. Plaintiffs appealed these rulings and a second motion for relief from judgment. The 10th Circuit Court unanimously found the evidence presented to the district court on Colorado's motion for summary judgment "is sufficient to support findings (1) that CU had an official policy of showing high-school football recruits a 'good time' on their visits to the CU campus, (2) that the alleged sexual assaults were caused by CU's failure to provide adequate supervision and guidance to player-hosts chosen to show the football recruits a 'good time' and (3) that the likelihood of such misconduct was so obvious that CU's failure was the result of deliberate indifference."

The central question in this case is whether the risk of such an assault during recruiting visits was obvious. In the court's opinion, the evidence could support such a finding.

To proceed with a Title IX claim, the plaintiffs needed to show that the university had received complaints of sexual harassment of female students by football players and recruits before the alleged sexual assaults and had reacted to such complaints with indifference. In its 2005 summary judgment ruling, the U.S. District Court in Denver had said that, although "the sexual assaults described by the plaintiffs constitute severe and offensive sexual harassment," no reasonable person could conclude that the Boulder campus knew about past, similar incidents and had deliberately ignored such complaints. In reversing that ruling, however, the 10th Circuit panel said there was evidence that might lead a jury to the opposite conclusion.

The court devoted considerable space in the decision to a discussion of what distinguished this case from two Supreme Court cases that have addressed the contours of Title IX damages suits for sexual harassment. In Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998), the complaint alleged sexual harassment of a student by a teacher. In Davis ex rel. LaShonda D. v. Monroe County Board of Education, 526 U.S. 629 (1999), the complaint alleged student-on-student harassment. The appeals court found that the alleged sexual assaults were not simply misconduct that happened to occur at Colorado among its students. Plaintiffs allege that the assaults arose out of an official school program, the recruitment of high school athletes. They allege that the assaults were the natural, perhaps inevitable, consequence of an officially sanctioned but unsupervised effort to show recruits a "good time."

The gist of the complaint is that Colorado sanctioned, supported, even funded, a program (showing recruits a "good time") that, without proper control, would "encourage young men to engage in opprobrious acts." The appellate court found that the notice standards established for sexual-harassment claims in Gebser and Davis did not necessarily apply in this circumstance. In the context of Gebser or Davis, the school district could not be said to have intentionally subjected students to harassment unless it knew of the harassment and deliberately decided not to take remedial action. But the standard changes when the claim "involve(s) official policy" (Gebser, 524 U.S. at 290). The 10th Circuit determined that a school can be said to have "intentionally acted in clear violation of Title IX" (Davis, 526 U.S. at 642) when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient. Implementation of an official policy can certainly be a circumstance in which the recipient exercises significant "control over the harasser and the environment in which the harassment occurs." Id. at 644.

In December 2007, the parties announced a settlement of $2.85 million plus fees to the two defendants.

Zimmer v. Ashland University, 2001 U.S. Dist. LEXIS 15075 (E.D. Ohio 2001).

This case involved a swimmer who alleged that her coach touched her in an inappropriate manner and made inappropriate comments. She alleged that the coach felt her back and legs when she had an outbreak of hives, unnecessarily phoned her dorm room, posted an e-mail on the bulletin board that referred to pigs having orgasms, told her she had nice legs and looked good in a blue bathing suit, stared at her chest several times, massaged her shoulder instead of letting the trainer do it, kept her after practice so he could be alone with her and referred to her as "honey, sweetheart, sunshine and dear." He also allegedly engaged in similar treatment with other swimmers.

The team eventually complained to the coach, and for a time he modified his behavior. When the conduct returned, they complained to the athletics director, who in turn met with the coach and warned him in a letter about the inappropriate nature of that type of conduct. The coach was undeterred and continued to make inappropriate comments. Zimmer ultimately decided to transfer. In response to this move, Ashland promised that the swim team would be a harassment-free environment if she stayed. Notwithstanding this promise by the university, she transferred and struggled academically at her new school.

Zimmer's sexual harassment claim was analyzed under Title IX. She had to prove that the university had actual knowledge of the problematic conduct. Although no formal harassment complaint actually had been filed, the court easily concluded that the university had been put on notice of the problem and that a jury should decide the matter.

Second, she was required to show that the university acted with deliberate indifference to the complaint. The university's position was that it had acted appropriately because it had previously issued a warning letter to the coach. However, the letter did not specifically reference the alleged harassment and only contained veiled references to inappropriate conduct. Because of the absence of a concrete response, the court concluded that the issue of "deliberate indifference" should be decided by a jury. In addition, even though Zimmer did not report her concerns to the person identified in the university's sexual harassment policy, she still reported them to the athletics director. As a result and because he failed to follow the policy once the report was made, the court concluded that this evidence could be considered in determining whether there was deliberate indifference to the complaint.

The court also concluded that these facts, if established at trial, would constitute a sexually hostile environment, particularly given the specific nature of the allegations, the frequency of the alleged harassment and the fact that a coach was the alleged harasser.

Jennings v. University of North Carolina, 340 F. Supp. 2d 666 (M.D.N.C. 2004)

Jennings was a member of the University of North Carolina, Chapel Hill, women's soccer team from August 1996 until May 1998 when she was dismissed from the team. She brought suit alleging among other things that she was subjected to sexual harassment in violation of Title IX. The essence of her claim was that she was present and/or overheard the coach make comments about the student-athletes' physical attributes, including their legs and breasts, and he called one student-athlete a "fat ass." He referred to another by masculine names based on his assumption that she was a lesbian. He talked about an "Asian threesome," which she interpreted as something involving the coach and two members of the team. He referred to one team member as the team slut, and she heard from teammates that he said he would like to be a fly on the wall the first time that one particular team member has sex. The coach participated in some discussions among the team members during warm-up periods about their social activities and once asked Jennings what she was going to be up to over a particular weekend. On one occasion, she met with the coach in his hotel room alone while they were away at a tournament. He spoke with her about her grades and the possibility of her becoming academically ineligible to play. He then allegedly asked, "Who are you f---ing?" She allegedly replied that it was none of his business, and the conversation returned to her performance on the team.

One of the original two plaintiffs settled the case. The second plaintiff appealed the lower court ruling of summary judgment for the defense. On April 9, 2007, the 4th Circuit Court of Appeals reinstated the case, finding that the plaintiff had proffered sufficient facts for a jury to find that the coach's degrading and humiliating conduct was sufficiently severe or pervasive to create a sexually hostile environment. "This conclusion takes into account the informal, sometimes jocular, college sports team atmosphere that fosters familiarity and close relationships between coaches and players. A male coach might use sexual slang in front of his women players, and the players might do the same in front of the coach. Title IX is not a civility code for the male coach who coaches women, and it is not meant to punish such a coach for off-color language that is not aimed to degrade or intimidate. What happened in this case, if Jennings's version of the facts is believed, is that Dorrance took advantage of the informal team setting to cross the line and engage in real sexual harassment that created a hostile or abusive environment."

"A Title IX plaintiff completes her hostile environment showing at the summary judgment stage if, based on her proffered evidence, the sexual harassment 'can be said to deprive (her) of access to ... educational opportunities or benefits' (Davis, 526 U.S. at 650 [emphasis added]). Davis explains that a sexual harassment victim 'can be said' to have been deprived of access to educational opportunities or benefits in several circumstances, including when the harassment (1) results in the physical exclusion of the victim from an educational program or activity; (2) 'so undermines and detracts from the victim('s) educational experience' as to 'effectively den(y her) equal access to an institution's resources and opportunities'; or (3) has 'a concrete, negative effect on (the victim's) ability' to participate in an educational program or activity."

The U.S. Supreme Court declined to hear arguments in this case in October 2007, leaving in place the federal appeals court's decision that the case could proceed to trial. Ultimately, the parties settled; the university agreed to pay the remaining plaintiff $385,000. The settlement also required the university to review its sexual harassment policies and procedures, and the defendant coach to write an apology letter, though without requiring admission of guilt.

Turner v. McQuarter, 79 F. Supp. 2d 911 (N.D. Ill. 1999).

Turner sued her former basketball coach, Chicago State University and the trustees for several claims, including sexual harassment in violation of Title IX arising from an alleged coerced sexual relationship with her basketball coach.

Turner was a student at Chicago State in February 1996 until she graduated in January 1997 and played on the women's basketball team in February and March of 1996. In February, McQuarter, her coach, allegedly initiated a sexual relationship with her that lasted throughout her enrollment. Turner claimed that she would not have entered into or continued a sexual relationship with her coach, but feared that a refusal would have resulted in the loss of her athletics and academic scholarships, among other things. The pivotal issue in the case was whether the school had even been placed on notice of the harassment. In this regard, Turner claimed that the athletics director and board of trustees knew of the inappropriate relationship because official school records indicated that she and her coach had the same home address. The court, however, said this evidence alone was insufficient and dismissed the case.

Williams v. Board of Regents of the University System of Georgia, 477 F.3d 1282 (11th Cir. Ga. 2007).

A federal appellate court reversed the trial court's dismissal of the plaintiff's Title IX complaint. Williams, a student at the University of Georgia, had consensual sex with a basketball student-athlete. In her complaint, Williams alleged the following: that she did not know that a football player was hiding in the closet of the dorm room; that by prearrangement, when the basketball player left the room, the football player emerged from the closet, allegedly sexually assaulted the plaintiff and attempted to rape her; that during the alleged sexual assault, the basketball player urged other students to come to his room and gang rape plaintiff Williams; and that an alleged rape followed. She withdrew from the university shortly thereafter. Although the university charged the student-athletes with disorderly conduct under the university's Code of Conduct, due to a variety of circumstances, nearly a year elapsed before the judiciary panel held a hearing. None of the students was sanctioned. All three assailants were indicted on criminal sexual assault charges. One was acquitted by a jury, and charges against the other two were dismissed.

Williams asserted that the basketball coach, athletics director and university president knew that the first alleged assailant had prior disciplinary problems and had been accused of harassing and assaulting women at schools he previously attended. Nevertheless, he was admitted on a full scholarship, and no action was taken to monitor his behavior or warn him that he must follow institutional rules. Williams also alleged that several student-athletes had asked university officials to educate team members about the university's sexual harassment policy. According to Williams, the university's response to these requests was inadequate.

Although the trial court dismissed Williams' Title IX case for failure to allege sufficient facts, the 11th Circuit Court of Appeals granted a rehearing in order to address the issue of factual sufficiency. In reversing the lower court's dismissal of Williams' case, the appellate court said the plaintiff was alleging deliberate indifference by the university that the assault occurred, rather than complaining solely that the university's response to a complaint of harassment was indifferent when it occurred. Interpreting Supreme Court decisions in Gebser and Davis, that panel stated that institutional liability under Title IX for acts of sexual harassment requires (1) an act of discrimination against the plaintiff, (2) to which the university responded with deliberate indifference, which (3) exposed the plaintiff to further discrimination. The court clarified that, if proven at trial, the fact that the university decided to recruit this basketball student-athlete (whom Williams alleges had orchestrated the rape) even though it had knowledge of his prior sexual misconduct constitutes an initial act of discrimination against Williams. Next, the fact that the university had not responded to suggestions by student-athletes that the University of Georgia Athletic Association needed to do a better job informing all student-athletes of the sexual harassment policy would constitute deliberate indifference to that initial act of discrimination. Finally, this indifference exposed Williams to further discrimination, the alleged rape incident itself.

The court stated that because there was no evidence that the coach or athletics director increased supervision of student-athletes after the assault, and because no charges had been brought against the assailants until nearly 11 months after the assault, it was reasonable for Williams to conclude that she could not safely return to campus. The court rejected Williams' attempt to hold the coach, athletics director and president personally liable under Title IX, noting that only the institutional recipient of funding is bound by Title IX.

As part of the settlement in the case, the university paid the victim substantial damages, established an Office for Violence Prevention and created a new Relationship and Sexual Violence Policy.

XI. Challenge to the Three-Part Test

National Wrestling Coaches Association v. U.S. Department of Education, 263 F. Supp. 2d 82 (D.D.C. 2003); 366 F.3d 930 D.C.Cir. 2004, reh'g denied, 383 F.3d 1047 (D.C. Cir. 2004); cert. denied, 125 S.Ct. 2537 (U.S. Jun 06, 2005) (NO. 04-922); reh'g denied, 125 S.Ct. 2537 (U.S. Jun 06, 2005) (NO. 04-922); reh'g denied, 126 S.Ct. 12 (U.S. Aug 01, 2005) (NO. 04-922).

The plaintiffs were a group of membership organizations that represent the interests of collegiate men's wrestling coaches, athletes and alumni. They claimed that they had been injured by the elimination of the men's varsity wrestling programs at certain universities. In this case, they sought to challenge the three-part test set forth in the 1979 Policy Interpretation and explained in the 1996 Clarification on the grounds that the three-part test violates the Constitution, Title IX, the 1975 regulations and the Administrative Procedure Act (APA).

The district court dismissed the case on the basis that the plaintiffs lacked standing and rejected the separate claim under the APA that the department unlawfully denied their petition for amendment or repeal of the enforcement policies.

The court of appeals affirmed the district court's decision. The court concluded that the alleged injury resulted from independent decisions of educational institutions that chose to eliminate or reduce the size of men's wrestling teams in order to comply with Title IX. Even assuming that this allegation constituted an injury-in-fact, the court also ruled that the plaintiffs lacked standing because they were unable to demonstrate how a favorable judicial decision could redress their alleged injury. The court noted that the plaintiffs only offered speculation that a favorable decision might somehow cause educational institutions to make different decisions on wrestling programs in the future. Importantly, because they did not challenge the constitutionality of Title IX or the regulations, those mandates would remain in effect. Under the law and the regulations, all schools would still have the discretion to eliminate men's wrestling programs in order to comply with Title IX. As a result, a decision striking down the 1979 Policy Interpretation and the 1996 Clarification would not effectively change that possible outcome.

Alternatively, the court held that even if the plaintiffs had standing, their claims were barred by §704 of the APA because the availability of a private cause of action under Title IX directly against a university is an adequate remedy that precludes judicial review under §704. The court also rejected the claim that the department unlawfully denied the plaintiffs' petition for repeal or amendment of the enforcement policies.

The College Sports Council tried a similar tactic and it was rejected by the district court (College Sports Council v. Department of Education, 357 F. Supp. 2d 311 [D.D.C. 2005]).

Equity in Athletics Inc. v. Department of Education, 2009 WL 5149869 (W.D. Va. Dec. 30, 2009)

This case is described fully under the Program Elimination section earlier in this chapter. The court rejected plaintiff's arguments that the regulatory interpretation of Title IX that contains the proportionality standard is unconstitutional and procedurally invalid. The court emphasized that proportionality is one of three accommodation compliance options and affirmed that both Title IX and the Equal Protection Clause allow schools to take sex into account in order to correct existing discrimination.

XII. Adequate Notice

Mansourian v. Regents of University of California, 2010 WL 430944, No. 08-16330, (9th Cir. Feb. 8, 2010)

Three former student-athletes, female wrestlers, filed suit against the university after it eliminated women from the men's wrestling team and then required them to compete against men for a spot on the roster. The district court found summary judgment for the defendants, holding that the plaintiffs failed to give the campus adequate notice that they were making an allegation against the entire women's intercollegiate athletics program. In their original complaint, the women alleged that UC Davis failed to provide equal athletics participation and scholarship opportunities for its female students and exacerbated this failure by discontinuing the women's wrestling program in 2001. The female wrestlers originally sought reinstatement of women's wrestling and scholarship opportunities.

The former student-athletes first filed complaint with the Office for Civil Rights (OCR). OCR investigated their complaints about the wrestling team, and the parties reached a resolution to allow the women to try out for the men's team. Their former coach supported their OCR complaint, lost his job subsequently and later filed a wrongful termination lawsuit. The parties settled that dispute out of court with a $725,000 payment to the former coach. The lower court judge held that a complaint filed by the former students with the Office for Civil Rights in 2001 was not sufficient to give the campus notice of the broad-scale discrimination allegations they made in the lawsuit and to give them an opportunity to cure any problems.

The Circuit Court overturned that decision, analyzing both adequate notice and second-prong compliance. UC Davis' notice argument, adopted by the district court, advanced by analogy to the Supreme Court's holding that notice and an opportunity to cure a violation is an essential precursor to a sexual harassment suit for damages under Title IX.

However, the panel in this case stated that the Supreme Court has made clear that no notice requirement is applicable to Title IX claims that rest on an affirmative institutional decision.

> Decisions to create or eliminate teams or to add or decrease roster slots for male or female athletes are official decisions, not practices by individual students or staff. Athletic programs that fail effectively to accommodate students of both sexes thus represent "official policy of the recipient entity" and so are not covered by Gebser's notice requirement. … Moreover, a judicially imposed notice requirement would be superfluous in light of universities' ongoing obligations to certify compliance with Title IX's athletics requirements and to track athletics gender equity data. OCR regulations require

funding recipients to evaluate their policies and certify, as a condition for receiving funds, that they are "tak[ing] whatever remedial action is necessary … to eliminate … discrimination." 34 C.F.R. § 106.4; see also id. § 106.3. UCD and other funding recipients therefore have an affirmative obligation to ensure compliance with at least one prong of the three-part effective accommodation test.

Thus, where the alleged harm is unequal provision of athletic opportunity, the notice requirement would not supply universities with information of which they are legitimately unaware. See Gebser, 524 U.S. at 289.

This court joined the 5th Circuit in reasoning that pre-litigation notice and opportunity to cure are not necessary in cases alleging unequal provision of athletics opportunities. Universities have affirmative obligations to provide nondiscriminatory athletics participation opportunities and continually to assess and certify compliance with Title IX.

The court also ruled that the university's reliance upon the second prong for compliance with accommodation of interests and abilities requirements was not supported by the evidence.

In late 2010 the Court held that the former chancellor, the former associate vice chancellor, the current athletic director, and a former associate athletic director might be personally liable for unconstitutional conduct after determining that the law requiring equal opportunity in athletics was settled at the time, leaving the officials no qualified immunity defense.

Chapter 8 — An Athletics Director's Summary Guide

Every athletics director is encouraged to read this publication carefully and to put the principles set forth in these chapters into practice. However, sometimes a handy reference is helpful. Accordingly, the following is intended to be a summary of key issues, not the sole or complete reference guide on Title IX compliance. The issues have been simplified and in some cases presented in a shorthand manner. Nothing replaces a thorough and complete understanding of the issues, and this reference tool is not meant to understate the issues. Rather, we hope to provide the athletics director with a quick and handy, yet useful, summary guide to the major points contained within this manual.

Women's Equity – Summary Guide

I. Effective Accommodation of Athletics Interests

1. Is the student-athlete participation rate of each sex proportional to its corresponding full-time undergraduate enrollment percentage? If the difference is 3 percent or less, check with counsel to determine if the program is compliant. If not, consider options 2 and 3 below.
2. Have you been adding sports for women in recent years? (History and Continuing Practice of Program Expansion).
3. Do the current sport offerings satisfy the interests of the women at the school or are there unmet interests that may require the addition of a new sport? Relevant evidence includes surveys of the student body and incoming students, club and intramural sports participation levels, student requests to add or elevate sports, and sport participation levels in high schools in the recruitment area.

II. Financial Aid

1. Is the percentage of the athletically related financial aid awarded to female student-athletes within 1 percent of their student-athlete participation rate?
2. If not, are there some nondiscriminatory reasons that would explain the difference such as the impact of out-of-state tuition rates or decisions to stagger a team's award of scholarships?

III. Equivalency of Treatment in Support of the Respective Programs

1. You do not have to provide mirror images of benefits to each sex. Benefits may be better for one sex in one area and better for the other sex in another area. Overall, however, the benefits should be relatively equal for both sexes. Although you make team-by-team comparisons, you are ultimately assessing the athletics programs for men and women as a whole. Differences justified by nondiscriminatory reasons (such as event management) are permissible.
2. Remember that student-athletes see every difference among the benefits provided to the teams.

3. If you see a difference in any treatment area from one sport or team to another, ask why it exists.
4. Treatment areas: Review the availability, quality and kinds of benefits, opportunities and treatment provided to members of both sexes in each of these areas.
   a. Equipment, Uniforms and Supplies
   b. Scheduling of Games and Practice Times
   c. Travel and Per Diem Allowance
   d. Tutoring
   e. Coaching
   f. Locker Rooms, Practice and Competitive Facilities
   g. Medical and Training Facilities and Services
   h. Housing and Dining
   i. Publicity
   j. Support Services
   k. Recruiting

IV. Gender Inclusion Plans

1. Good-faith progress under an inclusion plan can save an athletics department.
2. Ask – Do I have a plan and does it address each area under Title IX?
3. Ask – When was the last time it was updated? When was the last time we audited our compliance level? Can we justify deviations from the plan?
4. Sample Inclusion Plan
5. NCAA Gender Equity Planning Best Practices

V. Equity in Athletics Disclosure Act (EADA) Forms

1. Use the comment section to put any issues into the proper context and/or to explain a participation disparity.
2. Review the form for apparent problem areas and address them.
3. NCAA Financial Reporting Web site

VI. Training

1. Education and training on equity issues and obligations to department staff reflect the department's commitment in this area.

VII. Employment

1. Always hire the most qualified person for the job regardless of gender.
2. The market is a valid factor in establishing salaries.
3. Review duties and responsibilities among coaches.
4. Review basis for salary and contract differences among coaches.

Chapter 9 — Frequently Asked Questions

The following questions and answers addressing contemporary issues regarding equity and the effects of Title IX on intercollegiate athletics were featured in a series of installments in The NCAA News. The feature appeared in the membership information section of The NCAA News and was designed to help athletics administrators understand institutional equity and Title IX-related issues.

Answers are provided by Christine Grant, associate professor emeritus at the University of Iowa, and Janet Judge, attorney with Sports Law Associates. For additional inclusion resources, visit the NCAA Gender Equity Web site and the NCAA Title IX Resource site, which includes the NCAA's Title IX and Gender Equity Instructional Videos.

Topics

- **Dropping sports to reach Title IX compliance**
- **Using the second and third prongs for Title IX participation compliance efforts**
- **Is it possible to determine compliance with Title IX through statistics on the men's and women's athletics programs?**
- **The advantages and disadvantages to "roster management"**
- **The consequences of not meeting Title IX**
- **How does cheerleading fit with Title IX?**
- **Tiering analysis**
- **Junior varsity teams**
- **The concept of proportionality**
- **Does Title IX protect those who raise concerns about equity in their athletics programs?**
- **Title IX and sexual harassment**
- **Treatment issues or the "laundry list"**
- **Is Title IX the only law that imposes equity requirements on colleges and universities?**

Q: There appears to be a trend toward dropping men's nonrevenue sports in order to achieve equity for women. What is the stance of the Office for Civil Rights (OCR) on dropping these sports and what are the facts about this trend?

A: In the 1996 Letter of Clarification, Norma Cantu, assistant secretary for civil rights, noted that the OCR has never required nor recommended institutions to eliminate or cap men's teams to comply with Title IX. In the 2003 Report of the Commission on Opportunity in Athletics, it is also clearly stated that cutting men's sports is "a disfavored practice" (Recommendation 5).

The following quote from the clarification letter supports that notion: "OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. 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."

Despite the perception that men's teams are being eliminated in record numbers, the latest NCAA statistics indicate that there was a net gain of 61 men's teams between 1988 and 2002:

NCAA all divisions

Men's teams dropped and added 1988-2002

Added teams: 1,938 Dropped teams: 1,877

Net gain: 61 teams

Further research, however, identified that while net gains for men's teams were made in both Divisions II and III, there was a net loss of men's teams in Division I:

Men's teams dropped and added 1988-2002

Division III

Added: 1,002 Dropped: 790

Net gain: 212 teams

Division II

Added: 494 Dropped: 471

Net gain: 23 teams

Division I

Added: 442 Dropped: 616

Net loss: 174 team

When Division I data are further analyzed, the greatest losses are found in Division I-A:

Division I-AAA net loss: 31 teams

Division I-AA net loss: 38 teams

Division I-A net loss: 109 teams

In addition, an analysis of NCAA revenues and expenses data shows that expenditures for football and men's basketball in Division I-A over the years have consumed an increasing portion of the men's athletics budget and left the men's nonrevenue sports with much smaller allocations.

Also contributing to the financial problem is the pattern of increasing deficits occurring in every division:

In an October 2004 speech titled, "Achieving Fiscal Responsibility in Athletics," NCAA President Myles Brand noted, "If there are not concrete solutions brought forth within a reasonable time frame, financial pressures will reshape college sports in ways that will threaten the integrity of the college game and distort the collegiate model beyond recognition. It will mean lower operating budgets for every sport with a possible exception of football and men's basketball. College sports will take on the characteristics of professional sports, and, with that, its place on university campuses will be lost."

It also is key to point out that there would be strong legal ramifications on any campus where football and men's basketball are the only sports protected from budgetary cutbacks.

This growing financial problem in athletics could have severe future consequences for both men's nonrevenue sports and also for the continued development of truly gender-equitable sports programs

Q: What specific evidence would an institution have to present to satisfy Prong 2 of the three-prong test? What is acceptable evidence that an institution is "fully and effectively" accommodating interests of students (Prong 3)?

A: To satisfy the second prong of Title IX, an institution needs to provide evidence of its past and continuing practice of expanding participation opportunities for the under-represented sex. When an institution is assessing whether it has been historically responsive to the developing interests and abilities of women, some of the factors to consider include

- The record of upgrading teams from club or intramural status.
- The record of adding teams.
- The increase in the number of participants (that is, on current teams).
- The number of positive responses to requests to add teams or upgrade.

Factors to be considered when evaluating whether there is a continuing practice of program expansion include:

- Clear policies for requesting the addition or upgrade of a sport.
- Effective dissemination of these policies to appropriate groups (for example, club sports, intramural teams).
- Up-to-date implementation of a plan of program expansion.
- Efforts to gauge the developing interests and abilities through regular assessments of enrolled and incoming female students.

- Timely actions taken based on the results of the assessments.

It is unlikely that an institution would be found in compliance with Prong 2 by only reducing the participation opportunities for the over-represented sex. Nor would it be in compliance by promising the addition of a sport sometime in the future.

Prong 3 tests whether the institution is fully and effectively accommodating the interests and abilities of the under-represented sex. The women whose interests and abilities are being assessed include currently enrolled female students and women who have been admitted but are not yet enrolled.

It is quite possible that an imbalance of participation opportunities exists (compared with enrollment figures) on a given campus, but that the imbalance may not reflect discrimination. In this instance, an institution must provide evidence that women's interests and abilities are truly being fully and effectively accommodated.

The responses to three questions will determine whether the institution is in compliance with Prong 3:

1. Is there sufficient unmet interest to support an intercollegiate team?
Factors to be considered include the following:

- Requests to add or upgrade a team.
- Results of questionnaires to determine interests.
- Previous participation in interscholastic sports by women already admitted to the institution.
- Participation in amateur athletics sports or community leagues.

Questionnaires need not be elaborate or time-consuming, but they should be given periodically and the results dealt with in a fair and timely fashion. An open forum also may be used for potentially interested students.

2. Is there sufficient ability to sustain an intercollegiate team?
Factors that would be considered to provide indications of ability include:

- Past experiences of individuals in interscholastic, club or intramural sports.
- Past experiences of club or intramural teams.

(A poor competitive record or inability to play at the same competitive level as other current varsity teams is not enough to deny an expansion of opportunities for the under-represented sex. It is sufficient to determine that interested students have the ability to sustain an intercollegiate team.)

3. Is there a reasonable expectation of competition for the team?
Generally, an evaluation will look at the competitive opportunities in the geographic area in which the current varsity teams compete (for example, the offerings at institutions in a conference and the offerings in institutions in the area in which the varsity teams generally compete).

The interest at a specific university could be considered met when surveys indicate no interest to add or upgrade a sport to varsity status. Surveys should be conducted for the enrolled female student body, and especially among female club sport participants and intramural participants. The OCR also would expect surveys to include women already admitted to the university, but as yet not enrolled. If no individuals or no teams file the appropriate request to elevate or add a sport, and there is no other interest based on survey results, the interests are said to have been fully and effectively accommodated by the current varsity program.

It is a common misconception that ultimately an institution must be in compliance with Prong 1 (that is, when the athletics population ratio is similar to the undergraduate population). This is incorrect. It is true that an institution may be in compliance with Prong 2 (history and continuing practice of program expansion) and eventually become in compliance with Prong 1. However, this is not inevitable.

It is possible for an institution to be in compliance with Prong 2 but then find that, despite an imbalance of participation opportunities, there are no unmet interests and abilities in the female population. In this instance, the institution would then be in compliance with Prong 3. Providing that regular assessments continue to confirm this fact, that institution would remain in compliance with Prong 3.

Q: Is it possible to determine compliance with Title IX through statistics on the men's and women's athletics programs?

A: The Office for Civil Rights (OCR) would likely begin an investigation with a review of pertinent statistics before moving into a greater in-depth analysis of all factors. For example, if the male/female athletics participants in an institution's athletics program reflected a similar percentage to the male/female undergraduate population, there would be a presumption of compliance in the area of participation without the need for further inquiry. If, however, an institution claimed to be in compliance with Prong 2 (a history and continuing practice of program expansion) or Prong 3 (fully meeting the interests and abilities of the under-represented sex), the OCR would conduct additional nonstatistical investigations to determine compliance.

Generally speaking, statistics alone are not enough to determine if an institution is in compliance with Title IX, although the availability of annual statistical reports over a period of time can present an overall indication of an institution's commitment to and progress toward equal opportunity.

An analysis of the NCAA statistical data on men's and women's athletics programs also sheds light on national trends

In the area of participation, playing opportunities for women at the collegiate level have certainly increased over the years. Title IX was passed in 1972 and enacted in 1975. High schools were to be in compliance by June 1976 and universities by 1978.

In 2001-02, 30 years later, college women in NCAA institutions constituted 54.5 percent of the undergraduate population and about 42 percent of the athletics population, a difference of 12.5 percent.

Table 1
Undergraduate – Female population – Athletics participation

Division I-A	52%	43%
Division I-AA	55%	42%
Division I-AAA	58%	50%
Division II	56%	39%
Division III	56%	40%

Source: 2001-02 NCAA Gender Equity Report

Some of the disparity in participation opportunities may be because of the number of institutions that are legally in compliance with Prong 3 (that is, institutions that are fully and effectively accommodating the interests and abilities of the under-represented sex despite an imbalance of participation opportunities for men and women).

On the other hand, an analysis of women's participation during the past 30 years has shown a steady increase in the number of female student-athletes. To date, there has been no indication that a plateau in interest may be developing. Hence, one may anticipate that at some institutions, there will be a need to continue to comply with Prong 2 (that is, to exhibit a history and a continuing practice of program expansion for women).

At these institutions, it should be noted that a university athletics population is replaced about every five years. Thus, at some schools, six generations of women have been affected by a lack of real equal opportunity to compete. As a result, some young women have turned to the courts for relief and in those instances, women have seldom lost. As parents become more educated about the rights of their talented daughters and more aware of the disparities that exist between men's and women's sports at some institutions, the likelihood of legal action will increase

In the area of financial aid, the law requires the athletics scholarship allocation for women to be not less that 1 percent from the participation percentage unless there is a legal and legitimate reason for the disparity. For example, if there are more out-of-state scholarships awarded to men, and if the coaches of women's teams have been given appropriate scholarship money and equal opportunity to recruit out-of-state female student-athletes, a difference of more than 1 percent in scholarship expenses for women may well be acceptable. Legitimate and non-discriminatory reasons for any differences will be fairly considered by the OCR. In the latest data collection, only in Division I-A is the allocation less than what is required by law.

Although per capita expenditures are not required to be allocated according to the participation proportionality, the differences between male and female resource distributions in recruiting and total expenses in Division I-A have been consistently and significantly well below participation figures. The allocations in the other divisions have been more equitable:

Table 2
Female percentages of expenses

	Participation %	Scholarships %	Recruiting %	Total expenses %
I-A	43	41	30	30
I-AA	42	43	35	39
I-AAA	50	55	44	48
II	39	42	36	41
III	40	NA	34	4

Source: 2001-02 NCAA Gender Equity Report

According to NCAA researcher Daniel Fulks' statistics, in 1989 the average expense per male student-athlete in Division I-A was $24,000, compared with $13,000 for the average female student-athlete; a difference of $11,000. By 2001, that difference in per capita spending had increased to $14,000

Table 3
Per capita expenditures on student-athletes

Division	Male	Female	Difference
I-A	$34,000	$20,000	$14,000
I-AA	$11,000	$10,000	$1,000
I-AAA	$15,000	$13,000	$2,000
II With Football	$6,000	$6,000	$0
II Without Football *NA	NA	NA	

*Not available

Source: 2001 NCAA Revenues and Expenses of Division I and II Intercollegiate Athletics Programs

One year later, in 2002, the difference in Division I-A had increased to $15,000. Thus, in Division I-A, the disparities in the expenditures on men and women are actually increasing rather than diminishing over the years.

The following data show not only the disparity in spending between men's and women's entire programs, they also demonstrate the priorities of budget allocations:

Table 4
2002 NCAA Gender Equity Report

Division I-A – Men / Average Cost

	Average # Participants	Average Budget	Per Student Athlete

Football	118	$6,533,100	$55,365
Basketball	16	$2,113,200	$132,075
Other Sports	196	$2,951,200	$15,057
Totals	330	$11,597,500	$35,144

Women / Average Cost

	Average # Participants	Average Budget	Per Student Athlete
Basketball	16	$1,203,300	$75,206
Other Sports	234	$3,846,300	$16,437
Totals	250	$5,049,600	$20,198

There are several important points to be made with regard to this table. First of all, the OCR does not conduct a comparison of expenses on a sport-by-sport basis; the comparison is made between the expenses of the total men's program and the total women's program. In this comparison, the expenses of football and men's basketball must be included. Further, any disparities in expenditures on men and women must not be the result of discriminatory practices.

For example, if an institution decides to "tier" sports (that is, to make resource allocations to sports in a disparate fashion), there must be overall equity for women. What is clear in Table 4 is that football, men's basketball and women's basketball are the high-priority sports (that is, they receive significantly higher resource allocations than other sports). What will be of concern to the OCR is the imbalance of men and women enjoying the benefits of being in these high-priority sports.

Since in Division I-A, women constitute 43 percent of the athletics population, according to the law, women should have 43 percent of the slots in the high-priority sports. So, if football and men's basketball on average have 134 male slots (football 118, men's basketball 16), then there should be 101 women (43 percent) in high-priority sports rather than the 16 percent they currently have. This would necessitate elevating 85 additional women into the top-priority classification.

In summary, although statistics cannot determine an institution's compliance with Title IX, both the individual institution and the Association itself can benefit from an analysis of annual reports over the years that provide statistics on the treatment of male and female student-athletes in athletics programs.

Q: What are the advantages and disadvantages to "roster management"?

A: Unfortunately, there currently appears to be a negative connotation when the term "roster management" is used. However, it should be stressed that roster management has been used for decades because it has not been possible in most instances to allow all who wish to participate in intercollegiate athletics to do so; hence, the reason for tryouts.

Today, roster management most often refers to setting caps on the number of young men who can participate in each varsity sport. In some institutions, roster management may also set minimum numbers for each varsity team in the women's program.

The benefits of using a program like this is that money saved from the elimination of some spots on men's teams can be used to fund more opportunities for women. Because men traditionally have enjoyed a much higher percentage of participation slots than their percentage of the undergraduate population, the transfer of opportunities would boost the number available to women without eliminating any men's sports.

Additionally, the practice of adding spots to current women's teams increases women's opportunities without adding a new women's sports team, which carries the challenge of securing money for salaries for a new staff, operating budget and sometimes new facilities. However, if additional slots are allocated to larger teams such as rowing, more funds also must be transferred to support more assistant coaches, support personnel and team expenses (travel costs, pregame meals, equipment, uniforms, etc.).

The negatives of roster management include the fact that, overall, some opportunities are lost for men. It also is possible that so many roster spots are eliminated that a team may be rendered noncompetitive. A way to solve this problem would be to use the divisional team average of roster spots as a method to reasonably and fairly cap men's teams.

The opposite problem could occur in women's teams. Roster-management minimums for women's teams may be so high that there are too many people on a team for it to be a meaningful experience for all. Using the divisional average could be a way to reasonably and fairly construct roster management numbers for women's teams as well.

In summary, if maximums for men and minimums for women are truly fair, this practice can assist administrators in predicting more accurately future expenditures in each sport, while simultaneously permitting a more equitable distribution of the financial resources between men and women. Additionally, such a practice is infinitely preferable to the elimination of men's teams, which seems to be the expedient route taken by some Division I-A institutions at which escalating salaries and other rising costs are causing severe budget problems.

Q: Do all schools have to be compliant by a certain date? What are the consequences of not meeting Title IX, and are they different across divisions?

A: Title IX regulations were finalized in 1975. At that time, K through 12 educational institutions were to be in compliance by June 1976; colleges and universities by June 1978. The penalty for noncompliance for any institution was removal of all federal funds. That action has never been taken.

Consequences include the possibility of a complaint being filed with the Office for Civil Rights (OCR) or a lawsuit being filed against the institution. The latter action became more prevalent after 1992 when the Franklin v. Gwinnett lawsuit ruled that monetary damages could be awarded in Title IX cases.

It also should be noted that equity is a cornerstone in the NCAA certification program for all Division I schools. It is important to note that "the (athletics certification) committee will not be evaluating ... whether an institution is in legal compliance with Title IX; rather it and peer reviewers will be evaluating the institution in terms of whether the school has thoroughly addressed its standing in each Title IX area.

Failure to become certified can mean severe penalties, including ineligibility for NCAA championships or removal from active membership. Equity also must be evaluated in the Divisions II and III self-studies that must be completed every five years. The NCAA Committee on Women's Athletics has attempted to make the questions on equity similar across all divisions.

Q: Across the country, cheerleading squads operate as a part of their respective athletics departments and are treated like all of the other teams. These squads provide athletics opportunities for young women and some men, but are not recognized as a sport, although they generally use university (athletics) funds for expenses. How does cheerleading fit with Title IX?

A: Over the years, several institutions have inquired about the possibility of counting cheerleading squads or dance teams as varsity sports. The abbreviated response is that if such groups exist primarily to support varsity teams (as spirit activities), then these groups will not be recognized as varsity sports. However, it is possible under certain circumstances to have them accepted as bona fide varsity teams.

The following is excerpted from the Department of Education Office for Civil Rights' April 11, 2000, letter on the definition of varsity sport:

"In determining whether an activity is a sport OCR will consider on a case-by-case basis:

- Whether selection for the team is based upon factors related primarily to athletic ability; and,
- Whether the activity is sponsored for the primary purpose of preparing for and engaging in athletic competition against other similar teams; and
- Whether the team prepares for and engages in competition in the same way as other teams in the athletic program (for example, receives coaching, conducts tryouts, engages in regular practice sessions, and has regularly scheduled athletics competitions); and,
- Whether national, state and conference championships exist for the activity; and
- Whether the activity is administered by the athletics department.

By contrast, if the purpose of the team is primarily to support and promote other athletes, then the team will not be considered to be engaged in a sport.

The OCR also may consider other evidence relevant to the activity, which might demonstrate that it is part of an institution's athletics program.

A nonexhaustive list of the evidence that may be considered includes:

- Whether the activity is recognized as part of the interscholastic or intercollegiate athletics program by the athletics conference to which the institution belongs and by organized state and national interscholastic or intercollegiate athletics associations;
- Whether organizations knowledgeable about the activity agree that it should be recognized as an athletic sport;
- Whether there is a specified season for the activity that has a recognized commencement and ends in a championship;
- Whether there are specified regulations for the activity governing the activity such as coaching, recruitment, eligibility, and length and number of practice sessions and competitive opportunities;
- Whether a national, state or conference rules book or manual has been adopted for the activity;
- Whether there is national, conference or state regulation of competition officials along with standardized criteria upon which the competition may be judged; and
- Whether participants in the activity/sport are eligible to receive athletics awards (for example, varsity awards)."

The OCR's position on cheerleading is supported by the Universal Cheerleaders Association, the American Association of Cheerleading Coaches & Advisors and the National Federation of State High School Associations.

Q: An institution has "declared" football and men's basketball as its tier 1 men's sports and has declared women's basketball and volleyball as its tier 1 women's sports. The number of female participants is about 100 fewer than the male participants on these combined tier 1 teams. Will the institutions have to raise other women's teams to tier 1 to account for the same number of males and females on the tier 1 level?

A: A tier system means that an institution treats sports in significantly different ways. For example, tier 1 sports may have maximum NCAA scholarships, a nationally competitive schedule and expenses that allow for national and even international recruiting. Tier 2 sports may have 50 percent of the maximum NCAA scholarships, regional competition and expenses for regional recruiting. Tier 3 sports may have 25 percent scholarships, competition primarily in the state or within driving distance and expenses primarily for in-state recruiting.

For the situation in the above question, let's assume that there are 130 men in tier 1 (115 football and 15 basketball players) and 30 women (15 basketball and 15 volleyball players). If the institution's athletics population is 50 percent male and 50 percent female, then an additional 100 women would have to be upgraded to tier 1 status. In other words, the number of men and women in tier 1 should reflect about the same ratio that exists in the

entire athletics program. For example, assuming that the number of male student-athletes in tier 1 remains constant (that is, together the number of football and basketball players constitute 130), then the number of women in tier 1 would change according to the percentage of female student-athletes in the entire athletics population:

TIER 1

Total program ratio	**Men**	**Women**
60% male/40% female	130	87
55% male/45% female	130	106
50% male/50% female	130	130

Participants in all other tiers also should reflect the overall male/female athletics ratio.

Q: Some schools in our conference are questioning whether JV numbers (and costs) should be counted for Title IX purposes. According to EADA instructions, we are not to count them. Where does the OCR come down on this?

A: As we have discussed before, Title IX compliance may be measured and achieved in a number of different ways. Each method of compliance requires that an institution count all of its student-athletes accurately and consistently. As described more fully below, the Title IX and the EADA definitions of participant, although similar, are not identical. These differences have led to some misunderstandings when people or organizations have relied on the data set forth in the EADA forms to assess an institution's Title IX compliance. This is one of many reasons why it is so important to make use of the comment section on the EADA forms.

Moreover, the EADA provides that the comments may be placed within the EADA form itself when the information is distributed by the institution. In this way, explanatory information can follow the section that it explains. If the information is presented in this way, it is more likely to be read and incorporated in the reader's assessment of the program than if it is placed in a summary form at the end of the document.

For purposes of Title IX, a participant is defined under the Policy Interpretation and the Clarification Letter to include those athletes who:

- Receive the institutionally sponsored support normally provided to athletes competing at the institution involved (for example, coaching, equipment, medical and training room services) on a regular basis during a sport's season; and
- Participate in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- Are listed on the eligibility or squad lists maintained for each sport; or
- Because of injury, cannot meet the three points above, but continues to receive financial aid on the basis of athletics ability.

Each spot a student-athlete occupies counts one time. In other words, an athlete who competes on cross country, indoor and outdoor track occupies three participation spots.

Where junior varsity athletes meet these criteria, they may be counted for Title IX purposes. However, the OCR has made it clear that it will look at JV programs closely to ensure that varsity participants are not offset by junior varsity participants of the other sex. Accordingly, schools with junior varsity programs should use the tiering model as a guideline to determine how junior varsity athletes fit within a program's overall Title IX compliance review.

In addition, the reader is correct in stating that the EADA definition of participant generally does not include junior varsity athletes. Junior varsity athletes may be included, however, where they routinely practice with the varsity and are listed on the varsity squad list. The EADA defines participants as including those students who, as of the day of a varsity team's first scheduled contest:

- Are listed by the institution on the varsity team's roster;
- Receive athletically related student aid; or
- Practice with the varsity team and receive coaching from one or more varsity coaches.

Any student who satisfies one or more of those criteria is a participant, including a student on a team the institution designates or defines as junior varsity, freshman or novice, or a student withheld from competition to preserve eligibility (that is, a redshirt), or for academic, medical or other reasons (see 34 CFR 668.47).

As discussed above, junior varsity student-athletes who do not meet this definition should be included on the comment section of the EADA form to let prospective student-athletes and their families know that junior varsity opportunities are available.

The EADA defines varsity teams as those that are designated or defined by its institution or an athletics association as varsity teams or those that primarily compete against other teams that are designated or defined by their institutions or athletics associations as varsity teams.

Q: How did the concept of proportionality in relationship to the student body male/female population originate, and why is it still being included in the "three-prong test" for equity when very few schools choose this as a means to measure their attempt to comply with Title IX?

A: The easiest way to justify using the undergraduate population as the standard in Prong 1 is to note that athletics ability, like intelligence, is equally distributed between males and females.

That being the case, it is logical to establish the male/female undergraduate ratio at a given university as the appropriate measure for the establishment of athletics opportunities at that institution.

Lawyers in their explanation of the Prong 1 standard would stress that the Title IX standard is consistent with the essence of other civil-rights legislation in that it ensures equal

access without regard to irrelevant characteristics such as race, nationality, religion and gender.

It is important to point out that institutions fully control and predetermine the male/female student-athlete ratios on their campuses. They do so by the types of sports they offer. For example, an institution offering football in Division I can anticipate having at least 100 male student-athletes in that sport; a school adding women's golf can predict that about eight women will be on that team. The institutions also control the ratio by the depth of commitment to the recruitment of student-athletes in each sport, as well as their commitment to provide athletics scholarships. Since institutions control these factors, proportionality is the best evidence that those decisions are being made in a nondiscriminatory way.

Prong 1 is necessary because there has to be a specific limit to having a "continuing practice" of expanding the opportunities for the under-represented sex (Prong 2). An institution cannot keep adding teams ad infinitum.

It is important to note again that an institution is not required to comply with Prong 1. If an institution is complying with Prong 2 (history and continuing practice of program expansion), that institution may end up complying with Prong 1 or it may finish by complying with Prong 3 (fully and effectively accommodating the interests and abilities of the under-represented sex) before it reaches proportionality.

It may be the perception of some that "few schools" aspire to comply with Prong 1. That perception is inaccurate. According to the 2004 data in the Chronicle of Higher Education database, 61 percent of the institutions in the Big Ten, Pacific-10 and Big 12 Conferences are within 5 percent of the undergraduate male/female population; and fewer than one-quarter have a greater than 7 percentage point difference with the undergraduate population.

Q: Does Title IX protect those who raise concerns about equity in their athletics programs?

A: In an opinion issued March 29, 2005, the U.S. Supreme Court resolved a conflict among the federal circuit courts by ruling that Title IX protections extend to those who witness and complain about sex discrimination, even if they are not the direct victims of the underlying discrimination.

In Jackson v. Birmingham Board of Education, the court considered the case of Roderick Jackson, a high school teacher and former girls' basketball coach. Jackson alleged that the school board relieved him of his coaching duties because he complained that his girls' basketball team was not being treated or supported equitably by the school district. In particular, Jackson stated that his team did not receive equal funding or equal access to facilities and equipment when compared with the boys' program.

Jackson filed a complaint in the federal district court alleging that his termination violated Title IX. He argued that he was fired in retaliation for complaining about the inequitable treatment of his team and his players. Both the district court and the 11th Circuit Court of Appeals dismissed the case. Those federal courts found that Title IX does not provide a private right of action for individuals to allege retaliation in court. The 11th Circuit further found that even if retaliation was prohibited by Title IX, the law's protections would not extend to Jackson because he was an indirect, and not the direct, victim of the underlying complaint of discrimination.

The Supreme Court disagreed. In a 5-4 opinion, the court noted that prior decisions made clear that Title IX provides a private cause of action against federal funding recipients who intentionally discriminate on the basis of sex. Retaliation against an individual because he or she complains about sex discrimination, the court reasoned, is by its very nature an intentional act. Finally, the court found, retaliation is intentional discrimination "on the basis of sex" in violation of Title IX because it is an intentional response to an allegation of sex discrimination.

The Supreme Court next turned its attention to the 11th Circuit's finding that Jackson could not avail himself of Title IX's protections because he was not the direct victim of the original complaint of sex discrimination. Again, the Supreme Court disagreed. It found that Title IX's protections extend to those who oppose sex discrimination and who then suffer discriminatory retaliation as a result — regardless of whether they are the direct victims of the original complaint. The court restated the following hypothetical, voiced by the petitioner at oral argument, to illustrate the injustices that would result from the 11th Circuit's reasoning:

- If the male captain of the boys' basketball team and the female captain of the girls' basketball team together approach the school principal to complain about discrimination against the girls' team, and the principal retaliates by expelling them both from the honor society, then both the female and the male captains have been "discriminated" against "on the basis of sex."

To rule otherwise, the Supreme Court reasoned, would make those in the best position to witness sex discrimination — students, coaches and teachers — "loath to report it." If retaliation against these who witness and seek to remedy sex discrimination were not prohibited, "Title IX's enforcement scheme would unravel."

The Supreme Court sent the case back to the lower court to determine factually whether the school board fired Jackson as the girls' basketball coach because he complained about discrimination against his program. In the meantime, the Jackson decision applies to all educational institutions in the United States that receive federal funding. In short, retaliation against someone who files a complaint of Title IX discrimination — because they file the complaint — is prohibited by Title IX.

Q: What does Title IX have to do with sexual harassment?

A: Both the Department of Education and the U.S. Supreme Court have found that sexual harassment is a form of sexual discrimination prohibited by Title IX. In January 2001, the department published "Revised Sexual Harassment Guidance: Harassment of Students by

School Employees, Other Students or Third Parties." That Title IX guidance updates and revises the original 1997 guidelines to incorporate and discuss important Supreme Court cases that were decided on the subject in the interim: Gebser v. Lago Vista Independent School District (a claim involving a teacher and student); Davis v. Monroe County Board of Education (student-on-student sexual harassment); and Oncale v. Sundowner Offshore Services Inc. (same-sex sexual harassment). The guidance is designed to help schools chart a course through what can sometimes be a very complicated area of the law.

Schools have an obligation under Title IX to have a well-publicized policy against sexual discrimination, including sexual harassment, effective grievance procedures for the prompt and equitable resolution of complaints and the designation of a Title IX officer. The Title IX officer should know enough about Title IX to ensure compliance with the law generally, including oversight of investigations into noncompliance complaints. While the Title IX officer must be knowledgeable about harassment investigations, he or she also must be the point person for other Title IX compliance concerns such as equitable athletics participation, athletics scholarships and the host of treatment areas commonly known as the laundry list (for example, equipment, facilities, travel, publicity, etc.).

So what is sexual harassment anyway? It is defined as "unwelcome conduct of a sexual nature" that may include "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." Sexual harassment also encompasses nonsexual conduct, provided the behavior is unwelcome, is based on sex or sexual stereotyping, and has the effect of interfering with a student's ability to participate in or benefit from a school program, such as participation in athletics. Traditionally, courts have recognized two types of sexual harassment: quid pro quo and hostile-environment sexual harassment. Where compliance is linked, either directly or indirectly, to a benefit or detriment (for example, increased playing time or increased bench time), the harassment is considered to be quid pro quo. Other forms of harassment generally fall into the hostile-environment area. Harassment may include behavior between students, between staff and students, and between staff, and may occur between members of the opposite sex or between members of the same sex.

Once a school learns that a complaint of harassment exists, it has an obligation to investigate the incident(s) promptly. When determining whether hostile-environment harassment has occurred, a school should (and OCR will) consider the totality of the circumstances surrounding the alleged incidents including, but not limited to, the following factors:

- The degree to which the conduct affected one or more students' education.
- The type, frequency and duration of the conduct.
- The identity of and relationship between the alleged harasser and the subject(s) of the harassment.
- The number of individuals involved.
- The age and sex of the alleged harasser and the subject(s) of the harassment.
- The size of the school, location of the incidents and the context in which they occurred.
- Other incidents at the school.
- Incidents of gender-based, but nonsexual harassment.

Where a school determines that harassing behavior occurred, it still must determine whether the behavior was welcome. For example, if a student normally tells sexually explicit stories or jokes, it would be difficult for that student to show that similar stories or jokes told by others are "unwelcome." That said, a student who does not tell the jokes or stories but merely is present can show that the behavior was "unwelcome" even if he or she did not object to the language at the time.

If a school determines that sexual harassment is in violation of Title IX (or its own school policy, which may be more restrictive than Title IX), the institution has an obligation to take immediate and effective corrective action. It must stop the harassment, take reasonable steps to prevent its recurrence, and where warranted, remedy its effects. The guidance contains good examples to help those who are responsible for investigating and resolving complaints of sexual harassment. It also contains a thoughtful discussion of the implications of other concerns that may be implicated in a harassment investigation, such as student-record confidentiality, due process and freedom of speech, that certainly are beyond the scope of this discussion.

Sexual harassment continues to be a concern on college campuses. Policies and grievance procedures are great, but they typically do not prevent harassment. Relevant and thought-provoking in-person training usually does. Sexual harassment is a subject often misunderstood by students and staff members. Accordingly, athletics departments should consider conducting annual training on the subject using actual cases from the athletics world. Staff and students who are trained in a way that permits men and women to ask questions without being judged, to voice opinions, to work through difficult hypothetical situations, to discuss policies and the reasons behind them, and to work through potential penalties for violations are better equipped to make informed decisions in this area.

Q: What does OCR evaluate to determine Title IX compliance?

A: The following factors, also collectively referred to as the "laundry list," are those identified by the Department of Education's Office for Civil Rights as the areas to be evaluated for purposes of Title IX compliance:

- Equipment and supplies
- Scheduling of games and practice times
- Travel and per diem expenses
- Academic tutors
- Coaches
- Facilities
- Medical and training services
- Housing
- Publicity
- Support services

- Recruiting

Although complaints often are filed under only one area, both the men's and women's programs must be evaluated overall to determine whether a Title IX problem exists. Although sport-to-sport comparisons may indicate disparities, the differences become problematic only if they are not offset by differences occurring elsewhere.

For example, differences in equipment between the men's and women's basketball teams that benefit the women may be offset by the difference between the equipment provision for men's and women's ice hockey that benefit the men. In short, the test is whether the differences in benefits or services have a negative impact on athletes of one sex when compared with the benefits or services available to athletes of the other sex.

Keep in mind, however, that some differences are permissible. It would be reasonable, for example, for the men's basketball team to need additional recruiting funds in a year when all of the starting players are graduating as compared with the women's team composed that year of sophomore and junior standouts. To be actionable, the differences must be so substantial as to deny equal opportunity to members of one sex.

Both OCR guidance and case law have set forth those components to be evaluated under each factor. Of course, no one list can cover all of the unique circumstances that occur on campuses across the country.

Q: Is Title IX the only law that imposes equity requirements on colleges and universities?

A: The answer in a word is "no." Many state laws also apply to athletics programs offered by colleges and universities. Because the language contained in those laws may differ from Title IX, it is important for athletics administrators and general counsels to be familiar with the laws of their state to ensure that they are in compliance with all of the laws that affect their programs. Where state and federal laws differ, schools generally must comply with the most generous provisions of both, even if one requires a lower standard of compliance.

For example, in 1989, the state of Washington passed two laws relating to gender equality in higher education. Both laws apply to intercollegiate athletics programs in the state. One prohibits discrimination based on gender in athletics, among other areas, and the second provides a method whereby four-year institutions may access tuition waivers to comply with the law. The first law further requires schools to provide copies of the legislation to all students, and it requires the higher education coordinating board to report every four years to the legislature and governor on gender equity. It also states that complaints may be filed with Washington's Human Rights Commission. Finally, the law requires institutions to "attempt to provide some coaches and administrators of each gender to act as role models for male and female athletes."

Florida's laws require that each community college and state university develop and file a gender equity plan. The law expressly states that the plan must consider "equity in sports offerings, participation, availability of facilities, scholarship offerings, and funds allocated for administration, recruitment, comparable coaching, publicity and promotion, and other support costs." Florida's commissioner of education is charged with assessing compliance annually and forwarding the findings to the state board of education. Where institutions are found not to be in compliance with Title IX and the Florida Educational Equity Act, the state board of education has the authority to declare the institution ineligible for state grants and withhold funds sufficient to obtain compliance until the school comes into compliance or develops an approved compliance plan.

Additional examples include:

- Maine law requires equal opportunity in athletics programs at public institutions and provides that state grants of financial assistance shall not be provided to any recipient engaged in discriminatory practices.
- Discrimination on the basis of sex is prohibited in all extracurricular activities including athletics and athletics grants-in-aid by Rhode Island law.

In addition, as the following laws demonstrate, it pays — literally — to know the state laws that apply in this area:

- Illinois' Sport Equity in Intercollegiate Athletics law extends grant tuition waivers in an amount not to exceed 1 percent of all tuition income to help schools attend gender equity in athletics.
- Tuition waivers are available for female student-athletes under Louisiana law.
- Public institution of higher learning in Arkansas may access additional state funding to provide gender equity in intercollegiate athletics.
- In Utah, state institutions of higher education "shall annually use for the purposes described in Title IX ... an amount of revenue equal to the total amount of sales and use tax" collected on admission to athletics events.

Obviously, it is beyond the scope of this piece to set forth and analyze the myriad of state laws that regulate the provision of gender-equitable athletics programs and the case law and administrative opinions that interpret them. The laws set forth here do not even begin to scratch the surface of the variety of areas covered by state law that apply to intercollegiate athletics. There are many state laws that apply to the areas of hazing, harassment and employment in athletics as well

Suffice it to say that Title IX is not the only law determining whether men's and women's athletics programs compete on a level playing field. It simply is a good place to start when discussing obligations that apply across the board.

Appendix A

[Code of Federal Regulations]
[Title 34, Volume 1, Parts 1 to 299]
[Revised as of July 1, 1999]

From the U.S. Government Printing Office via GPO Access
[CITE: 34CFR106.41]
[Page 386]
TITLE 34—EDUCATION

CHAPTER I—OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE—Table of Contents

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited Sec. 106.41 Athletics.

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) Equal opportunity. A recipient that operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the assistant secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) Adjustment period. A recipient that operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient that operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484) [Page 387]

Appendix B

A Policy Interpretation: Title IX and Intercollegiate Athletics
Federal Register, Vol.44, No. 239 - Tuesday, December 11, 1979

Intercollegiate athletics policy interpretation; provides more specific factors to be reviewed by OCR under program factors listed at Section 106.41 of the Title IX regulation; explains OCR's approach to determining compliance in inter-collegiate athletics; adds two program factors, recruitment and support services to be reviewed; clarifies requirement for athletic scholarships - 34 C.F.R. Section 106.37(C). The document contains dated references, and footnote 6 is out of date; however, the policy is still current.

Federal Register / Vol. 44, No. 239 / Tuesday, December 11, 1979 / Rules and Regulations

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 26

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW.

ACTION: Policy interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits

EFFECTIVE DATE: December 11, 1979

FOR FURTHER INFORMATION CONTACT: Colleen O'Connor, 330 Independence Avenue, Washington, D.C., 202/245-6671

SUPPLEMENTARY INFORMATION:

1.Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

> 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.

Section 844 of the Education Amendments of 1974 further provides:

> The Secretary of [of HEW] shall prepare and publish proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

- Compliance in Financial Assistance (Scholarships) Based on Athletic Ability: Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.
- Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem, coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.
- Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-

part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- "Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and
- Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or
- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

(1) Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilitate an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of stating actual compliance factors would be more useful to all concerned.

(3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditure patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

VI. Historic Patterns of Intercollegiate Athletics Program Development and Operations

In its proposed Policy Interpretation of December 11, 1978, the Department published a summary of historic patterns affecting the relative status of men's and women's athletic programs. The Department has modified that summary to reflect additional information obtained during the comment and consultation process. The summary is set forth at Appendix A to this document.

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 88.37(c) and 88.4a(c).

A. Athletic Financial Assistance (Scholarships)

1. The Regulation. Section 86.37(c) of the regulation provides:

   [Institutions] must provide reasonable opportunities for such award (of financial assistance) for member of each sex in proportion to the number of students of each sex participating in inter-collegiate athletics.

2. The Policy - The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the

members of each sex by the numbers of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

a. At public institutions, the higher costs of tuition for students from out-of state may in some years be unevenly distributed between men's and women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require spreading scholarships over as much as a full generation (four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

3. Application of the Policy -

   a. This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.

   b. When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

4. Definition - For purposes of examining compliance with this Section, the participants will be defined as those athletes:

   a. 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

   b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

   c. Who are listed on the eligibility or squad lists maintained for each sport; or

   d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

B. Equivalence in Other Athletic Benefits and Opportunities

1. The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club or intramural athletics "provide equal athletic opportunities for members of both sexes." In determining whether an institution is providing equal opportunity in intercollegiate athletics the regulation requires the Department to consider, among others, the following factors:

   (1) Provision and maintenance of equipment and supplies;

   (2) Scheduling of games and practice times;

   (3) Travel and per diem expenses;

   (4) Opportunity to receive coaching and academic tutoring;

   (5) Assignment and compensation of coaches and tutors;

   (6) Provision of locker rooms, practice and competitive facilities;

   (7) Provision of medical and training services and facilities;

   (8) Provision of housing and dining services and facilities; and

   (9) Publicity

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.

2. The Policy - The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effects of any differences is negligible.

   If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors. Some of the factors that may justify these differences are as follows:

   a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits' Amendment" to Title IX which instructed HEW to make "reasonable (regulatory) provisions considering the nature of particular sports" in intercollegiate athletics.

Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable.

b. Some aspects of athletic programs may not be equivalent for men and women because of legitimately sex-neutral factors related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Such differences are justifiable to the extent that they do not reduce overall equality of opportunity.

c. The activities directly associated with the operation of a competitive event in a single-sex sport may, under some circumstances, create unique demands or imbalances in particular program components. Provided any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree, the resulting differences may be found nondiscriminatory. At many schools, for example, certain sports, notably football and men's basketball, traditionally draw large crowds. Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind. These differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in spectator appeal and if the levels of event management support available to both programs are based on sex-neutral criteria (e.g., facilities used, projected attendance, and staffing needs).

d. Some aspects of athletic programs may not be equivalent for men and women because institutions are undertaking voluntary affirmative actions to overcome effects of historical conditions that have limited participation in athletics by the members of one sex. This is authorized at ' 86.3(b) of the regulation.

3. Application of the Policy - General Athletic Program Components C

a. Equipment and Supplies (86.41(c)(2)). Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment.

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) The quality of equipment and supplies:
(2) The amount of equipment and supplies;
(3) The suitability of equipment and supplies:
(4) The maintenance and replacement of the equipment and supplies; and
(5) The availability of equipment and supplies.

b. Scheduling of Games and Practice Times (86.41(c)(3)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
(1) The number of competitive events per sport;
(2) The number and length of practice opportunities;
(3) The time of day competitive events are scheduled;
(4) The time of day practice opportunities are scheduled; and
(5) The opportunities to engage in available pre-season and post-season competition.

c. Travel and Per Diem Allowances (86.41(c)(4)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
(1) Modes of transportation;
(2) Housing furnished during travel;
(3) Length of stay before and after competitive events;
(4) Per diem allowances; and
(5) Dining arrangements.

d. Opportunity to Receive Coaching and Academic Tutoring (' 86.41(c)(5)).
(1) Coaching Compliance will be assessed by examining, among other factors:
(a) Relative availability of full-time coaches;
(b) Relative availability of part-time and assistant coaches; and
(c) Relative availability of graduate assistants.
(2) Academic tutoring-Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
(a) The availability of tutoring; and
(b) Procedures and criteria for obtaining tutorial assistance.

e. Assignment and Compensation of Coaches and Tutors (86.41(c)(6)). In general, a violation of Section 86.41(c)(6) will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.

Nondiscriminatory factors can affect the compensation of coaches. In determining whether differences are caused by permissible factors, the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition will be considered.

Where these or similar factors represent valid differences in skill, effort, responsibility or working conditions they may, in specific circumstances, justify differences in compensation. Similarly, there may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary.

(1) Assignment of Coaches - Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:
  (a) Training, experience, and other professional qualifications;
  (b) Professional standing.

(2) Assignment of Tutors-Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:
  (a) Tutor qualifications;
  (b) Training, experience, and other qualifications.

(3) Compensation of Coaches - Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:
  (a) Rate of compensation (per sport, per season);
  (b) Duration of contracts;
  (c) Conditions relating to contract renewal;
  (d) Experience;
  (e) Nature of coaching duties performed;
  (f) Working conditions; and
  (g) Other terms and conditions of employment.

(4) Compensation of Tutors - Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:
  (a) Hourly rate of payment by nature subjects tutored;
  (b) Pupil loads per tutoring season;
  (c) Tutor qualifications;
  (d) Experience;
  (e) Other terms and conditions of employment.

f. Provision of Locker Rooms, Practice and Competitive Facilities (86.41(c)(7)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  (1) Quality and availability of the facilities provided for practice and competitive events;
  (2) Exclusivity of use of facilities provided for practice and competitive events;
  (3) Availability of locker rooms;
  (4) Quality of locker rooms;
  (5) Maintenance of practice and competitive facilities; and
  (6) Preparation of facilities for practice and competitive events.

g. Provision of Medical and Training Facilities and Services (‘ 86.41(c)(8)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  (1) Availability of medical personnel and assistance;
  (2) Health, accident and injury insurance coverage;
  (3) Availability and quality of weight and training facilities;
  (4) Availability and quality of conditioning facilities; and
  (5) Availability and qualifications of athletic trainers.

h. Provision of Housing and Dining Facilities and Services (‘ 86.41(c)(9)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  (1) Housing provided;
  (2) Special services as part of housing arrangements (e.g., laundry facilities, parking space, maid service).

i. Publicity (‘ 86.41(c)(10)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
  (1) Availability and quality of sports information personnel;
  (2) Access to other publicity resources for men's and women's programs; and
  (3) Quantity and quality of publications and other promotional devices featuring men's and women's programs.

4. Application of the Policy-Other Factors (‘ 86.41(c)).

  a. Recruitment of Student Athletes. The athletic recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes. Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.

    Such examinations will review the following factors:
    (1) Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;
    (2) Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and
    (3) Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

  b. Provision of Support Services. The administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to

male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions.

In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:

(1) The amount of administrative assistance provided to men's and women's programs;

(2) The amount of secretarial and clerical assistance provided to men's and women's programs.

5. Overall Determination of Compliance. The Department will base its compliance determination under ' 86.41(c) of the regulation upon an examination of the following:

   a. Whether the policies of an institution are discriminatory in language or effect; or

   b. Whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole; or

   c. Whether disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.

C. Effective Accommodation of Student Interests and Abilities.

1. The Regulation. The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

   Specifically, the regulation, at ' 86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are available.

   Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

   Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. The Policy. The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

   a. The determination of athletic interests and abilities of students;

   b. The selection of sports offered; and

   c. The levels of competition available including the opportunity for team competition.

3. Application of the Policy C Determination of Athletic Interests and Abilities.

   Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

   a. The processes take into account the nationally increasing levels of women's interests and abilities;

   b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

   c. The methods of determining ability take into account team performance records; and

   d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. Application of the Policy - Selection of Sports.

   In the selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

   a. Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

      (1) The opportunities for members of the excluded sex have historically been limited; and

      (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

   b. Non-Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

      (1) The opportunities for members of the excluded sex have historically been limited;

      (2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

      (3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. Application of the Policy - Levels of Competition.

   In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

   a. Compliance will be assessed in any one of the following ways:
      (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
      (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
      (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

   b. Compliance with this provision of the regulation will also be assessed by examining the following:
      (1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or
      (2) Whether the institution can demonstrate 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.

   c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. Overall Determination of Compliance.

   The Department will base its compliance determination under 86.41(c) of the regulation upon a determination of the following:

   a. Whether the policies of an institution are discriminatory in language or effect; or

   b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or

   c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

VIII. The Enforcement Process

The process of Title IX enforcement is set forth in 88.71 of the Title IX regulation, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights Act of 1964. The enforcement process prescribed by the regulation is supplemented by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.

- According to the regulation, there are two ways in which enforcement is initiated: Compliance Reviews - Periodically the Department must select a number of recipients (in this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX (45 CFR 80.7(a))

- Complaints - The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. (45 CFR 80.7(b))

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.

The Department has 90 days to conduct an investigation and inform the recipient of its findings, and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between the Department and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance. Sometimes the violation is relatively minor and can be corrected immediately. At other times, however, the negotiations result in a plan that will correct the violations within a specified period of time. To be acceptable, a plan must describe the manner in which institutional resources will be used to correct the violation. It also must state acceptable time tables for reaching interim goals and full compliance. When agreement is reached, the Department notifies the institution that its plan is acceptable. The Department then is obligated to review periodically the implementation of the plan.

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate. If the plan is not adequate to

correct the violations (or to correct them within a reasonable period of time) the recipient will be found in noncompliance and voluntary negotiations will begin. However, if the institutional plan is acceptable, the Department will inform the institution that although the institution has violations, it is found to be in compliance because it is implementing a corrective plan. The Department, in this instance also, would monitor the progress of the institutional plan. If the institution subsequently does not completely implement its plan, it will be found in noncompliance.

When a recipient is found in noncompliance and voluntary compliance attempts are unsuccessful, the formal process leading to termination of Federal assistance will be begun. These procedures, which include the opportunity for a hearing before an administrative law judge, are set forth at 45 CFR 80.8-80.11 and 45 CFR Part 81.

IX. Authority

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374, 20 U.S.C. 1681, 1682; sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612; and 45 CFR Part 86)

Dated December 3, 1979.

Roma Stewart,

Director, Office for Civil Rights, Department of Health, Education, and Welfare.

Dated December 4, 1979.

Patricia Roberts Harris,

Secretary, Department of Health, Education, and Welfare.

Appendix A-Historic Patterns of Intercollegiate Athletics Program Development

1. Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. During the 1977-78 academic year women students accounted for 48 percent of the national undergraduate enrollment (5,496,000 of 11,267,000 students). Yet, only 30 percent of the intercollegiate athletes are women.

   The historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women. One source indicates that, on the average, colleges and universities are providing twice the number of sports for men as they are for women.

2. Participation by women in sports is growing rapidly. During the period from 1971-1978, for example, the number of female participants in organized high school sports increased from 294,000 to 2,083,000, an increase of over 600 percent. In contrast, between Fall 1971 and Fall 1977, the enrollment of females in high school decreased from approximately 7,600,000 to approximately 7,150,000, a decrease of over 5 percent.

   The growth in athletic participation by high school women has been reflected on the campuses of the nation's colleges and universities. During the period from 1971 to 1976 the enrollment of women in the nation's institutions of higher education rose 52 percent, from 3,400,000 to 5,201,000. During this same period, the number of women participating in intramural sports increased 108 percent from 276,167 to 576,167. In club sports, the number of women participants increased from 16,386 to 25,541 or 55 percent. In intercollegiate sports, women's participation increased 102 percent from 31,852 to 64,375. These developments reflect the growing interest of women in competitive athletics, as well as the efforts of colleges and universities to accommodate those interests.

3. The overall growth of women's intercollegiate programs has not been at the expense of men's programs. During the past decade of rapid growth in women's programs, the number of intercollegiate sports available for men has remained stable, and the number of male athletes has increased slightly. Funding for men's programs has increased from $1.2 to $2.2 million between 1970 and 1977 alone.

4. On most campuses, the primary problem confronting women athletes is the absence of a fair and adequate level of resources, services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that are members of both the National Collegiate Athletic Association (NCAA) and the Association for Intercollegiate Athletics for Women (AIAW), the average annual scholarship budget is $39,000. Male athletes receive $32,000 or 78 percent of this amount, and female athletes receive $7,000 or 22 percent, although women are 30 percent of all the athletes eligible for scholarships.

   Likewise, substantial amounts have been provided for the recruitment of male athletes, but little funding has been made available for recruitment of female athletes.

   Congressional testimony on Title IX and subsequent surveys indicates that discrepancies also exist in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities.

5. At several institutions, intercollegiate football is unique among sports. The size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports, both men's and women's. Title IX requires that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity." However, the unique size and cost of football programs have been taken into account in developing this Policy Interpretation.

Appendix B—Comments and Responses

The Office for Civil Rights (OCR) received over 700 comments and recommendations in response to the December 11, 1978, publication of the proposed Policy Interpretation. After the formal comment period, representatives of the Department met for additional discussions with many individuals and groups including college and university officials, athletic associations, athletic directors, women's rights organizations and other interested parties. HEW representatives also visited eight universities in order to assess the potential of the proposed Policy Interpretation and of suggested alternative approaches for effective enforcement of Title IX.

The Department carefully considered all information before preparing the final policy. Some changes in the structure and substance of the Policy Interpretation have been made as a result of concerns that were identified in the comment and consultation process.

Persons who responded to the request for public comment were asked to comment generally and also to respond specifically to eight questions that focused on different aspects of the proposed Policy Interpretation.

Question No. 1: Is the description of the current status and development of intercollegiate athletics for men and women accurate? What other factors should be considered?

Comment A: Some commentors noted that the description implied the presence of intent on the part of all universities to discriminate against women. Many of these same commentors noted an absence of concern in the proposed Policy Interpretation for those universities that have in good faith attempted to meet what they felt to be a vague compliance standard in the regulation.

Response: The description of the current status and development of intercollegiate athletics for men and women was designed to be a factual, historical overview. There was no intent to imply the universal presence of discrimination. The Department recognizes that there are many colleges and universities that have been and are making good faith efforts, in the midst of increasing financial pressures, to provide equal athletic opportunities to their male and female athletes.

Comment B: Commentors stated that the statistics used were outdated in some areas, incomplete in some areas, and inaccurate in some areas.

Response: Comment accepted. The statistics have been updated and corrected where necessary.

Question No. 2: Is the proposed two-stage approach to compliance practical? Should it be modified? Are there other approaches to be considered?

Comment: Some commentors stated that Part II of the proposed Policy Interpretation "Equally Accommodating the Interests and Abilities of Women" represented an extension of the July 1978, compliance deadline established in ' 86.41(d) of the Title IX regulation.

Response: Part II of the proposed Policy Interpretation was not intended to extend the compliance deadline. The format of the two stage approach, however, seems to have encouraged that perception; therefore, the elements of both stages have been unified in this Policy Interpretation.

Question No. 3: Is the equal average per capita standard based on participation rates practical? Are there alternatives or modifications that should be considered?

Comment A: Some commentors stated it was unfair or illegal to find noncompliance solely on the basis of a financial test when more valid indicators of equality of opportunity exist.

Response: The equal average per capita standard was not a standard by which noncompliance could be found. It was offered as a standard of presumptive compliance. In order to prove noncompliance, HEW would have been required to show that the unexplained disparities in expenditures were discriminatory in effect. The standard, in part, was offered as a means of simplifying proof of compliance for universities. The widespread confusion concerning the significance of failure to satisfy the equal average per capita expenditure standard, however, is one of the reasons it was withdrawn.

Comment B: Many commentors stated that the equal average per capita standard penalizes those institutions that have increased participation opportunities for women and rewards institutions that have limited women's participation.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumptive compliance, the question of its effect is no longer relevant. However, the Department agrees that universities that had increased participation opportunities for women and wished to take advantage of the presumptive compliance standard would have had a bigger financial burden than universities that had done little to increase participation opportunities for women.

Question No. 4: Is there a basis for treating part of the expenses of a particular revenue producing sport differently because the sport produces income used by the university for non-athletic operating expenses on a non-discriminatory basis? If, so, how should such funds be identified and treated?

Comment: Commentors stated that this question was largely irrelevant because there were so few universities at which revenue from the athletic program was used in the university operating budget.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumed compliance, a decision is no longer necessary on this issue.

Question No. 5: Is the grouping of financially measurable benefits into three categories practical? Are there alternatives that should be considered? Specifically, should recruiting expenses be considered together with all other financially measurable benefits?

Comment A: Most commentors stated that, if measured solely on a financial standard, recruiting should be grouped with the other financially measurable items. Some of these commentors held that at the current stage of development of women's intercollegiate athletics, the amount of money that would flow into the women's recruitment budget as a result of separate application of the equal average per capita standard to recruiting expenses, would make recruitment a disproportionately large percentage of the entire women's budget. Women's athletic directors, particularly, wanted the flexibility to have the money available for other uses, and they generally agreed on including recruitment expenses with the other financially measurable items.

Comment B: Some commentors stated that it was particularly inappropriate to base any measure of compliance in recruitment solely on financial expenditures. They stated that even if proportionate amounts of money were allocated to recruitment, major inequities could remain in the benefits to athletes. For instance, universities could maintain a policy of subsidizing visits to their campuses of prospective students of one sex but not the other. Commentors suggested that including an examination of differences in benefits to prospective athletes that result from recruiting methods would be appropriate.

Response: In the final Policy Interpretation, recruitment has been moved to the group of program areas to be examined under ' 86.41(c) to determine whether overall equal athletic opportunity exists. The Department accepts the comment that a financial measure is not sufficient to determine whether equal opportunity is being provided. Therefore, in examining athletic recruitment, the Department will primarily review the opportunity to recruit, the resources provided for recruiting, and methods of recruiting.

Question No. 6: Are the factors used to justify differences in equal average per capita expenditures for financially measurable benefits and opportunities fair? Are there other factors that should be considered?

Comment: Most commentors indicated that the factors named in the proposed Policy Interpretation (the "scope of competition" and the "nature of the sport") as justifications for differences in equal average per capita expenditures were so vague and ambiguous as to be meaningless. Some stated that it would be impossible to define the phrase "scope of competition," given the greatly differing competitive structure of men's and women's programs. Other commentors were concerned that the "scope of competition" factor that may currently be designated as "nondiscriminatory" was, in reality, the result of many years of inequitable treatment of women's athletic programs.

Response: The Department agrees that it would have been difficult to define clearly and then to quantify the "scope of competition" factor. Since equal average per capita expenditures has been dropped as a standard of presumed compliance, such financial justifications are no longer necessary. Under the equivalency standard, however, the "nature of the sport" remains an important concept. As explained within the Policy Interpretation, the unique nature of a sport may account for perceived inequities in some program areas.

Question No 7: Is the comparability standard for benefits and opportunities that are not financially measurably fair and realistic? Should other factors controlling comparability be included? Should the comparability standard be revised? Is there a different standard which should be considered?

Comment: Many commentors stated that the comparability standard was fair and realistic. Some commentors were concerned, however, that the standard was vague and subjective and could lead to uneven enforcement.

Response: The concept of comparing the non-financially measurable benefits and opportunities provided to male and female athletes has been preserved and expanded in the final Policy Interpretation to include all areas of examination except scholarships and accommodation of the interests and abilities of both sexes. The standard is that equivalent benefits and opportunities must be provided. To avoid vagueness and subjectivity, further guidance is given about what elements will be considered in each program area to determine the equivalency of benefits and opportunities.

Question No. 8: Is the proposal for increasing the opportunity for women to participate in competitive athletics appropriate and effective? Are there other procedures that should be considered? Is there a more effective way to ensure that the interest and abilities of both men and women are equally accommodated?

Comment: Several commentors indicated that the proposal to allow a university to gain the status of presumed compliance by having policies and procedures to encourage the growth of women's athletics was appropriate and effective for future students, but ignored students presently enrolled. They indicated that nowhere in the proposed Policy Interpretation was concern shown that the current selection of sports and levels of competition effectively accommodate the interests and abilities of women as well as men.

Response: Comment accepted. The requirement that universities equally accommodate the interests and abilities of their male and female athletes (Part II of the proposed Policy Interpretation) has been directly addressed and is now a part of the unified final Policy Interpretation.

Additional Comments

The following comments were not responses to questions raised in the proposed Policy Interpretation. They represent additional concerns expressed by a large number of commentors.

(1) Comment: Football and other "revenue producing" sports should be totally exempted or should receive special treatment under Title IX.

Response: The April 18, 1978, opinion of the General Counsel, HEW, concludes that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulation in the administration of any revenue producing activity." Therefore, football or other "revenue producing" sports cannot be exempted from coverage of Title IX.

In developing the proposed Policy Interpretation the Department concluded that although the fact of revenue production could not justify disparity in average per capita expenditure between men and women, there were characteristics common to most revenue producing sports that could result in legitimate nondiscriminatory differences in per capita expenditures. For instance, some "revenue producing" sports require expensive protective equipment and most require high expenditures for the management of events attended by large numbers of people. These characteristics and others described in the proposed Policy Interpretation were considered acceptable, nondiscriminatory reasons for differences in per capita average expenditures.

In the final Policy Interpretation, under the equivalent benefits and opportunities standard of compliance, some of these non-discriminatory factors are still relevant and applicable.

(2) Comment: Commentors stated that since the equal average per capita standard of presumed compliance was based on participation rates, the word should be explicitly defined.

Response: Although the final Policy Interpretation does not use the equal average per capita standard of presumed compliance, a clear understanding of the word "participant" is still necessary, particularly in the determination of compliance where scholarships are involved. The word "participant" is defined in the final Policy Interpretation.

(3) Comment: Many commentors were concerned that the proposed Policy Interpretation neglected the rights of individuals.

Response: The proposed Policy Interpretation was intended to further clarify what colleges and universities must do within their intercollegiate athletic programs to avoid discrimination against individuals on the basis of sex. The Interpretation, therefore, spoke to institutions in terms of their male and female athletes. It spoke specifically in terms of equal, average per capita expenditures and in terms of comparability of other opportunities and benefits for male and female participating athletes.

The Department believes that under this approach the rights of individuals were protected. If women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby. Under the proposed Policy Interpretation, for example, if female athletes as a whole were receiving their proportional share of athletic financial assistance, a university would have been presumed in compliance with that section of the regulation. The Department does not want and does not have the authority to force universities to offer identical programs to men and women. Therefore, to allow flexibility within women's programs and within men's programs, the proposed Policy Interpretation stated that an institution would be presumed in compliance if the average per capita expenditures on athletic scholarships for men and women were equal. This same flexibility (in scholarships and in other areas) remains in the final Policy Interpretation.

(4) Comment: Several commentors stated that the provision of a separate dormitory to athletes of only one sex, even where no other special benefits were involved, is inherently discriminatory. They felt such separation indicated the different degrees of importance attached to athletes on the basis of sex.

Response: Comment accepted. The provision of a separate dormitory to athletes of one sex but not the other will be considered a failure to provide equivalent benefits as required by the regulation.

(5) Comment: Commentors, particularly colleges and universities, expressed concern that the differences in the rules of intercollegiate athletic associations could result in unequal distribution of benefits and opportunities to men's and women's athletic programs, thus placing the institutions in a posture of noncompliance with Title IX.

Response: Commentors made this point with regard to ' 86.6(c) of the Title IX regulation, which reads in part:

"The obligation to comply with (Title IX) is not obviated or alleviated by any rule or regulation of any * * * athletic or other * * * association * * *"

Since the penalties for violation of intercollegiate athletic association rules can have a severe effect on the athletic opportunities within an affected program, the Department has reexamined this regulatory requirement to determine whether it should be modified. Our conclusion is that modification would not have a beneficial effect, and that the present requirement will stand.

Several factors enter into this decision. First, the differences between rules affecting men's and women's programs are numerous and change constantly. Despite this, the Department has been unable to discover a single case in which those differences require members to act in a discriminatory manner. Second, some rule differences may permit decisions resulting in discriminatory distribution of benefits and opportunities to men's and women's programs. The fact that institutions respond to differences in rules by choosing to deny equal opportunities, however, does not mean that the rules themselves are at fault; the rules do not prohibit choices that would result in compliance with Title IX. Finally, the rules in question are all established and subject to change by the membership of the association. Since all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve collectively any widespread Title IX compliance problems resulting from association rules. To the extent that this has not taken place, Federal intervention on behalf of statutory beneficiaries is both warranted and required by the law. Consequently, the Department can follow no course other than to continue to disallow any defenses against findings of noncompliance with Title IX that are based on intercollegiate athletic association rules.

(6) Comment: Some commentors suggested that the equal average per capita test was unfairly skewed by the high cost of some "major" men's sports, particularly football, that have no equivalently expensive counterpart among women's sports. They suggested that a certain percentage of those costs (e.g., 50% of football scholarships) should be excluded

from the expenditures on male athletes prior to application of the equal average per capita test.

Response: Since equality of average per capita expenditures has been eliminated as a standard of presumed compliance, the suggestion is no longer relevant. However, it was possible under that standard to exclude expenditures that were due to the nature of the sport, or the scope of competition and thus were not discriminatory in effect. Given the diversity of intercollegiate athletic programs, determinations as to whether disparities in expenditures were nondiscriminatory would have been made on a case-by-case basis. There was no legal support for the proposition that an arbitrary percentage of expenditures should be excluded from the calculations.

(7) Comment: Some commentors urged the Department to adopt various forms of team-based comparisons in assessing equality of opportunity between men's and women's athletic programs. They stated that well-developed men's programs are frequently characterized by a few "major" teams that have the greatest spectator appeal, earn the greatest income, cost the most to operate, and dominate the program in other ways. They suggested that women's programs should be similarly constructed and that comparability should then be required only between "men's major" and "women's major" teams, and between "men's minor" and "women's minor" teams. The men's teams most often cited as appropriate for "major" designation have been football and basketball, with women's basketball and volleyball being frequently selected as the counterparts.

Response: (H)ere are two problems with this approach to assessing equal opportunity. First, neither the statute nor the regulation calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.

Second, no subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the "major/minor" classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women's volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to the members of one sex.

(8) Comment: Some commenters suggest that equality of opportunity should be measured by a "sport-specific" comparison. Under this approach, institutions offering the same sports to men and women would have an obligation to provide equal opportunity within each of those sports. For example, the men's basketball team and the women's basketball team would have to receive equal opportunities and benefits.

Response: As noted above, there is no provision for the requirement of identical programs for men and women, and no such requirement will be made by the Department. Moreover, a sport-specific comparison could actually create unequal opportunity. For example, the sports available for men at an institution might include most or all of those available for women; but the men's program might concentrate resources on sports not available to women (e.g., football, ice hockey). In addition, the sport-specific concept overlooks two key elements of the Title IX regulation.

First, the regulation states that the selection of sports is to be representative of student interests and abilities (86.41(c)(1)). A requirement that sports for the members of one sex be available or developed solely or the basis of their existence or development in the program for members of the other sex could conflict with the regulation where the interests and abilities of male and female students diverge.

Second, the regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities (86.41(c)). As implied above, Title IX protects the individual as a student-athlete, not all a basketball player, or swimmer.

(9) Comment: A coalition of many colleges and universities urged that there are no objective standards against which compliance with Title IX in intercollegiate athletics could be measured. They felt that diversity is so great among colleges and universities that no single standard or set of standards could practicably apply to all affected institutions. They concluded that it would be best for individual institutions to determine the policies and procedures by which to ensure nondiscrimination in intercollegiate athletic programs.

Specifically, this coalition suggested that each institution should create a group representative of all affected parties on campus.

This group would then assess existing athletic opportunities for men and women, and, on the basis of the assessment, develop a plan to ensure nondiscrimination. This plan would then be recommended to the Board of Trustees or other appropriate governing body.

The role foreseen for the Department under this concept is:

(a) The Department would use the plan as a framework for evaluating complaints and assessing compliance;

(b) The Department would determine whether the plan satisfies the interests of the involved parties; and

(c) The Department would determine whether the institution is adhering to the plan.

These commenters felt that this approach to Title IX enforcement would ensure an environment of equal opportunity.

Response: Title IX is an antidiscrimination law. It prohibits discrimination based on sex in educational institutions that are recipients of Federal assistance. The legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions. The Department accepts that colleges and universities are sincere in their intention to ensure equal opportunity in intercollegiate athletics to their male and female students. It cannot, however, turn over its responsibility for interpreting and enforcing the law. In this case, its responsibility includes articulating the standards by which compliance with the Title IX statute will be evaluated.

The Department agrees with this group of commenters that the proposed self-assessment and institutional plan is an excellent idea. Any institution that engages in the assessment/planning process, particularly with the full participation of interested parties as envisioned in the proposal, would clearly reach or move well toward compliance. In addition, as explained in Section VIII of this Policy Interpretation, any college or university that has compliance problems but is implementing a plan that the Department determines will correct those problems within a reasonable period of time, will be found in compliance.

Appendix C

1990 Title IX Athletics Investigators Manual can be found on the NCAA Web site under the headings: GENDER EQUITY PLANNING: AUDIT MATERIALS

This manual is designed to assist investigators of the Office for Civil Rights OCR) in the investigations of interscholastic and intercollegiate athletics programs offered by educational institutions required to comply with Title IX of the Education Amendments of 1972. Title IX prohibits sex discriminations in programs and activities that receive Federal financial assistance from the Department of Education. The regulation implementing Title IX contains specific provisions for athletics programs and athletic scholarships. In addition, the December 11, 1979 Intercollegiate Athletics Policy Interpretations, referred to throughout this manual as the Policy Interpretation, provides further clarification of the requirements for athletics programs under Title IX. The general principles of the Policy Interpretations also apply to interscholastic athletics.

This manual updates and supersedes the guidance developed by OCR for its investigators in the Interim Title IX Intercollegiate Athletics Manual issued July 28, 1980, and the memorandum entitled "Guidance for Writing Title IX Intercollegiate Athletics Letters of Findings," issued March 26, 1982.

This manual is organized into several sections to assist investigators from the time a complaint is received, or a compliance review scheduled, to the issuance of a letter of findings. The first section, entitled Approach to Athletics Investigations, explains some general approaches to athletics investigations and the differences between interscholastic and intercollegiate athletics investigations. It provides further detail on the organization of the manual and the intent for its use and address the determination of compliance for athletics programs. This section should be reviewed prior to initiating an investigation.

The next 13 sections address each of the program components that may be investigated for athletics programs. Each of these 13 sections includes pre-on-site data request questions, interview questions, directions for analyzing the information collected, charts on which to record
information and compare programs, and cautions regarding differences between men's and women's athletics programs that may be acceptable under the Title IX regulation.

Following these 13 sections addressing the program components are appendices containing models for an investigative plan, data request, and letter of findings. An explanation of the "Z" test and the "T" test used in the determination of athletic financial assistance, and a policy memorandum providing clarification regarding coaches' compensation.

This manual assumes that the investigator is familiar with the OCR's Investigation Procedures Manual (IPM) and, therefore, does not detail procedures outlined in the IPM. The manual also does not address specific requirements for club or intramural sports, although many of the same principles apply for determining equal opportunity in club and intramural programs.

Appendix D

UNITED STATES DEPARTMENT OF EDUCATION
Office of Civil Rights
January 16, 1996

Dear Colleague:

It is my pleasure to send you the enclosed Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the Clarification).

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

Accordingly, on September 20, 1995, the OCR circulated to more than 4,500 interested parties a draft of the proposed Clarification, soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX. As indicated when circulating the draft of the Clarification, the objective of the Clarification is to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics. Further, the Clarification is limited to an elaboration of the "three-part test." This test, which has generated the majority of the questions that have been raised about Title IX compliance, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation.

The OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped the OCR's consideration of these comments. The Policy Interpretation has guided the OCR's enforcement in the area of athletics for more than 15 years, enjoying the bipartisan support of Congress. The Policy Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

The draft has been revised to incorporate suggestions that the OCR received regarding how to make the document more useful and clearer. For instance, the Clarification now has additional examples to illustrate how to meet part one of the three-part test and

makes clear that the term "developing interests" under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires the OCR to count participation opportunities and why Title IX does not require an institution, under part three of the test, to accommodate the interests and abilities of potential students.

The OCR also received requests for clarification that relate primarily to fact- or institution-specific situations that only apply to a small number of athletes or institutions. These comments are more appropriately handled on an individual basis and, accordingly, the OCR will follow-up on these comments and questions in the context of the OCR's ongoing technical assistance efforts.

It is important to outline several points about the final document.

The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes. The first part of the test – substantial proportionality – focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The second part – history and continuing practice – is an examination of an institution's good-faith expansion of athletics opportunities through its response to developing interests of the under-represented sex at that institution. The third part – fully and effectively accommodating interests and abilities of the under-represented sex – centers on the inquiry of whether there are concrete and viable interests among the under-represented sex that should be accommodated by an institution.

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case and fact specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways to comply. Opponents of the test assert, therefore, that the test improperly establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title IX because it measures gender discrimination by under-representation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

First, it is clear from the Clarification that there are three different avenues of compliance. Institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and the OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, the OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the under-represented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletics opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated. The fact that each part of the three-part test considers participation rates does not mean, as some opponents of the test have suggested, that the three parts do not provide different ways to comply with Title IX.

Second, it is appropriate for parts two and three of the test to focus only on the under-represented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX athletics provisions are unique in permitting institutions – notwithstanding the long history of discrimination based on sex in athletics programs – to establish separate athletics programs on the basis of sex, thus allowing institutions to determine the number of athletics opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletics programs on the basis of race or national origin.)

The OCR focuses on the interests and abilities of the under-represented sex only if the institution provides proportionately fewer athletics opportunities to members of one sex and has failed to make a good-faith effort to expand its program for the under-represented sex. Thus, the Policy Interpretation requires the full accommodation of the under-represented sex only to the extent necessary to provide equal athletics opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the under-represented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

What is clear then – because, for example, part three of the three-part test permits evidence that under-representation is caused not by discrimination but by lack of interest – is that under-representation alone is not the measure of discrimination. Substantial proportionality merely provides institutions with a safe harbor. Even if this were not the case and proportional opportunities were the only test, the "quota" criticism would be misplaced. Quotas are impermissible where opportunities are required to be created without regard to sex. However, schools are permitted to create athletics participation opportunities based on sex. Where they do so unequally, that is a legitimate measure of unequal opportunity under Title IX. The OCR has chosen to make substantial proportionality only one of three alternative measures.

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, the OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but that are not filled by actual athletes. The OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, the OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletics opportunity. In this context, the OCR must consider actual benefits provided to real students.

The OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the under-represented sex. Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.

Finally, several parties suggested that the OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however, that it might be useful to share ideas on good assessment strategies. Accordingly, the OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

The OCR recognizes that the question of how to comply with Title IX and to provide equal athletics opportunities for all students is a significant challenge that many institutions face today, especially in the face of increasing budget constraints. It has been the OCR's experience, however, that institutions committed to maintaining their men's program have been able to do so – and comply with Title IX – notwithstanding limited athletics budgets. In many cases, the OCR and these institutions have worked together to find creative solutions that ensured equal opportunities in intercollegiate athletics. The OCR is similarly prepared to join with other institutions in assisting them to address their own situations.

The OCR is committed to continuing to work in partnership with colleges and universities to ensure that the promise of Title IX becomes a reality for all students. Thank you for your continuing interest in this subject.

Sincerely,

Norma V. Cantu

Assistant Secretary for Civil Rights

Appendix E

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

July 23, 1998
Ms. Nancy S. Footer
General Counsel
Bowling Green State University
308 McFall Center
Bowling Green, Ohio 43403-0010

Dear Ms. Footer:

This is in response to your letter requesting guidance in meeting the requirements of Title IX, specifically as it relates to the equitable apportionment of athletics financial aid. Please accept my apology for the delay in responding. As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. ? 1682, which prohibits discrimination on the basis of sex in education programs and activities.

The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979 – both of which followed publication for notice and the receipt, review and consideration of extensive comments – specifically address intercollegiate athletics. You have asked us to provide clarification regarding how educational institutions can provide intercollegiate athletes with nondiscriminatory opportunities to receive athletics financial aid. Under the Policy Interpretation, the equitable apportioning of a college's intercollegiate athletics scholarship fund for the separate budgets of its men's and women's programs – which Title IX permits to be segregated – requires that the total amounts of scholarship aid made available to the two budgets are "substantially proportionate" to the participation rates of male and female athletes. [44 Fed. Reg. 71413, 71415 (1979)].

In responding, I wish (1) to clarify the coverage of Title IX and its regulations as they apply to both academic and athletics programs, and (2) to provide specific guidance about the existing standards that have guided the enforcement of Title IX in the area of athletics financial aid, particularly the Policy Interpretation's "substantially proportionate" provision as it relates to a college's funding of the athletics scholarships budgets for its men's and women's teams. At the outset, I want to clarify that, wholly apart from any obligation with respect to scholarships, an institution with an intercollegiate athletics program has an independent Title IX obligation to provide its students with nondiscriminatory athletics participation opportunities. The scope of that separate obligation is not addressed in this letter, but was addressed in a Clarification issued

January 16, 1996.

Title IX Coverage: Athletics versus Academic Programs

Title IX is an anti-discrimination statute that prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance, including athletics programs. Thus, in both academics and athletics, Title IX guarantees that all students, regardless of gender, have equitable opportunities to participate in the education program. This guarantee does not impose quotas based on gender, either in classrooms or in athletics programs. Indeed, the imposition of any such strict numerical requirement concerning students would be inconsistent with Title IX itself, which is designed to protect the rights of all students and to provide equitable opportunities for all students.

Additionally, Title IX recognizes the uniqueness of intercollegiate athletics by permitting a college or university to have separate athletics programs, and teams, for men and women. This allows colleges and universities to allocate athletics opportunities and benefits on the basis of sex. Because of this unique circumstance, arguments that the OCR's athletics compliance standards create quotas are misplaced. In contrast to other antidiscrimination statutes, Title IX compliance cannot be determined simply on the basis of whether an institution makes sex-specific decisions, because invariably they do. Accordingly, the statute instead requires institutions to provide equitable opportunities to both male and female athletes in all aspects of its two separate athletics programs. As the court in the Brown University case stated, "[i]n this unique context, Title IX operates to ensure that the gender-segregated allocation of athletic opportunities does not disadvantage either gender. Rather than create a quota or preference, this unavoidable gender-conscious comparison merely provides for the allocation of athletic resources and participation opportunities between the sexes in a non-discriminatory manner." Cohen v. Brown University, 101 F.3d 155, 177 (1st Cir. 1996), cert. denied, 117 S. Ct. 1469 (1997). The remainder of this letter addresses the application of Title IX only to athletics scholarships.

Athletics: Scholarship Requirements

With regard to athletics financial assistance, the regulations promulgated under Title IX provide that, when a college or university awards athletics scholarships, these scholarship awards must be granted to "members of each sex in proportion to the number of students of each sex participating in ... intercollegiate athletics." 34 C.F.R. 106.37(c). Since 1979, the OCR has interpreted this regulation in conformity with its published "Policy Interpretation: Title IX and Intercollegiate Athletics," 44 Fed. Reg. 71413 (December 11, 1979). The Policy Interpretation does not require colleges to grant the same number of scholarships to men and women, nor does it require that individual scholarships be of equal value. What it does require is that, at a particular college or university, "the total amount of scholarship aid made available to men and women must be substantially proportionate to their [overall] participation rates" at that institution. Id. at 71415. It is important to note that the Policy Interpretation only applies to teams that regularly compete in varsity competition. Id. at 71413 and n. 1.

Under the Policy Interpretation, OCR conducts a "financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletics programs." Id. The Policy Interpretation goes on to state that "[i]nstitutions may be found in compliance if this comparison results in substantially equal amounts or if a disparity can be explained by adjustments to take into account legitimate nondiscriminatory factors." Id.

A "disparity" in awarding athletics financial assistance refers to the difference between the aggregate amount of money athletes of one sex received in one year, and the amount they would have received if their share of the entire annual budget for athletics scholarships had been awarded in proportion to their participation rates. Thus, for example, if men account for 60 percent of a school's intercollegiate athletes, the Policy Interpretation presumes that – absent legitimate nondiscriminatory factors that may cause a disparity – the men's athletics program will receive approximately 60 percent of the entire annual scholarship budget and the women's athletics program will receive approximately 40 percent of those funds. This presumption reflects the fact that colleges typically allocate scholarship funds among their athletics teams, and that such teams are expressly segregated by sex. Colleges' allocation of the scholarship budget among teams, therefore, is invariably sex-based, in the sense that an allocation to a particular team necessarily benefits one sex to the exclusion of the other. See Brown, 101 F.3d at 177. Where, as here, disparate treatment is inevitable and a college's allocation of scholarship funds is "at the discretion of the institution," Brown, 101 F.3d at 177, the statute's nondiscrimination requirement obliges colleges to ensure that men's and women's separate activities receive equitable treatment. Cf. United States v. Virginia, 518 U.S. 515, 554 (1996).

Nevertheless, in keeping with the Policy Interpretation's allowance for disparities from "substantially proportionate" awards to the men's and women's programs based on legitimate nondiscriminatory factors, the OCR judges each matter on a case-by-case basis with due regard for the unique factual situation presented by each case. For example, the OCR recognizes that disparities may be explained by actions taken to promote athletics program development, and by differences between in-state and out-of-state tuition at public colleges. 44 Fed. Reg. at 71415. Disparities might also be explained, for example, by legitimate efforts undertaken to comply with Title IX requirements, such as participation requirements. See, e.g., Gonyo v. Drake Univ., 879 F. Supp. 1000, 1005-06 (S.D. Iowa 1995). Similarly, disparities may be explained by unexpected fluctuations in the participation rates of males and females. For example, a disparity may be explained if an athlete who had accepted an athletics scholarship decided at the last minute to enroll at another school. It is important to note that it is not enough for a college or university merely to assert a nondiscriminatory justification. Instead, it will be required to demonstrate that its asserted rationale is in fact reasonable and does not reflect underlying discrimination. For instance, if a college consistently awards a greater number of out-of-state scholarships to men, it may be required to demonstrate that this does not reflect discriminatory recruitment practices. Similarly, if a university asserts the phase-in of scholarships for a new team as a justification for a disparity, the university may be required to demonstrate that the time frame for phasing-in of scholarships is reasonable in light of college sports practices to aggressively recruit athletes to build start-up teams quickly.

In order to ensure equity for athletes of both sexes, the test for determining whether the two scholarship budgets are "substantially proportionate" to the respective participation rates of athletes of each sex necessarily has a high threshold. The Policy Interpretation does not, however, require colleges to achieve exact proportionality down to the last dollar. The "substantially proportionate" test permits a small variance from exact proportionality. The OCR recognizes that, in practice, some leeway is necessary to avoid requiring colleges to unreasonably fine-tune their scholarship budgets.

When evaluating each scholarship program on a case-by-case basis, the OCR's first step will be to adjust any disparity to take into account all the legitimate nondiscriminatory reasons provided by the college, such as the extra costs for out-of-state tuition discussed earlier. If any unexplained disparity in the scholarship budget for athletes of either gender is one percent or less for the entire budget for athletics 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 one percent is in violation of the "substantially proportionate" requirement.

Thus, for example, if men are 60 percent of the athletes, the OCR would expect that the men's athletics scholarship budget would be within 59 to 61 percent of the total budget for athletics scholarships for all athletes, after accounting for legitimate nondiscriminatory reasons for any larger disparity. Of course, the OCR will continue to judge each case in terms of its particular facts. For example, at those colleges where one percent of the entire athletics scholarship budget is less than the value of one full scholarship, the OCR will presume that a disparity of up to the value of one full scholarship is equitable and nondiscriminatory. On the other hand, even if an institution consistently has less than a one percent disparity, the presumption of compliance with Title IX might still be rebutted if, for example, there is direct evidence of discriminatory intent.

The OCR recognizes that there has been some confusion in the past with respect to the Title IX compliance standards for scholarships. The OCR's 1990 Title IX Investigator's Manual correctly stated that one would expect proportionality in the awarding of scholarships, absent a legitimate, nondiscriminatory justification. But that manual also indicated that compliance with the "substantially proportionate" test could depend, in part, upon certain statistical tests. In some cases, application of such a statistical test would result in a determination of compliance despite the existence of a disparity as large as three to five percent.

We would like to clarify that use of such statistical tests is not appropriate in these circumstances. Those tests, which are used in some other discrimination contexts to determine whether the disparities in the allocation of benefits to different groups are the result of chance, are inapposite in the athletics scholarship context because a college has direct control over its allocation of financial aid to men's and women's teams, and because such decisions necessarily are sex-based in the sense that an allocation to a particular team will affect only one sex. See Brown, 101 F.3d at 176-78 (explaining why college athletics "presents a distinctly different situation from admissions and employment," and why athletics require a different analysis than that used in such other contexts "in order to determine the existence vel non of discrimination"). In the typical case where aid is expressly allocated among sex-segregated teams, chance simply is not a possible explanation for disproportionate aid to one sex. Where a college does not make a substantially proportionate allocation to sex-segregated teams, the burden should be on the college to provide legitimate, nondiscriminatory reasons for the disproportionate allocation. Therefore, the use of statistical tests will not be helpful in determining whether a disparity in the allocations for the two separate athletics scholarship budgets is nondiscriminatory.

While a statistical test is not relevant in determining discrimination, the confusion caused by the manual's inclusion of a statistical test resulted in misunderstandings. Therefore, the OCR is providing this clarification regarding the substantial proportionality provision found in the 1979 Policy Interpretation to confirm the substance of a longstanding standard. In order to ensure full understanding, the OCR will apply the presumptions and case-by-case analysis described in this letter for the 1998-99 academic year. The OCR strongly encourages recipients to award athletics financial assistance to women athletes in the 1997-98 academic year consistent with this policy clarification, both as a matter of fairness and in order to ensure that they are moving toward the policy clarification stated in this letter.

I trust that this letter responds to the questions the university has regarding the "substantially proportionate" provision of the Policy Interpretation in the context of the funding for an institution's two separate athletics scholarship budgets for male and female athletes. I am sending a copy of this letter as technical assistance to the complainants and the other 24 recipients also currently involved with the OCR on the issue of awarding athletics financial assistance. We will be in contact with you shortly to continue to work with the university regarding this matter and to discuss other points raised in your letter. If you have any questions regarding this letter, please contact me at 312/886-8387.

Sincerely yours,

Dr. Mary Frances O'Shea

National Coordinator for Title IX Athletics

Appendix F

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
THE ASSISTANT SECRETARY

July 11, 2003

Dear Colleague:

It is my pleasure to provide you with this Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.

Since its enactment in 1972, Title IX has produced significant advancement in athletics opportunities for women and girls across the nation. Recognizing that more remains to be done, the Bush Administration is firmly committed to building on this legacy and continuing the progress that Title IX has brought toward true equality of opportunity for male and female student-athletes in America.

In response to numerous requests for additional guidance on the Department of Education's (Department) enforcement standards since its last written guidance on Title IX in 1996, the Department' s Office for Civil Rights (OCR) began looking into whether additional guidance on Title IX requirements regarding intercollegiate athletics was needed. On June 27, 2002, Secretary of Education Rod Paige created the Secretary's Commission on Opportunities in Athletics to investigate this matter further, and to report back with recommendations on how to improve the application of the current standards for measuring equal opportunity to participate in athletics under Title IX. On February 26, 2003, the Commission presented Secretary Paige with its final report, "Open to All: Title IX at Thirty," and in addition, individual members expressed their views.

After eight months of discussion and an extensive and inclusive fact-finding process, the Commission found very broad support throughout the country for the goals and spirit of Title IX. With that in mind, the OCR today issues this Further Clarification in order to strengthen Title IX's promise of non-discrimination in the athletics programs of our nation's schools.

Title IX establishes that: "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."

In its 1979 Policy Interpretation, the Department established a three-prong test for compliance with Title IX, which it later amplified and clarified in its 1996 Clarification. The test provides that an institution is in compliance if 1) the intercollegiate-level participation opportunities for male and female students at the institution are "substantially proportionate" to their respective full-time undergraduate enrollments 2) the institution has a "history and continuing practice of program expansion" for the under-represented sex or 3) the institution is "fully and effectively" accommodating the interests and abilities of the under-represented sex.

First, with respect to the three-prong test, which has worked well, the OCR encourages schools to take advantage of its flexibility and to consider which of the three prongs best suits their individual situations. All three prongs have been used successfully by schools to comply with Title IX, and the test offers three separate ways of assessing whether schools are providing equal opportunities to their male and female students to participate in athletics. If a school does not satisfy the "substantial proportionality" prong, it would still satisfy the three-prong test if it maintains a history and continuing practice of program expansion for the under-represented sex, or if "the interests and abilities of the members of [the under-represented] sex have been fully and effectively accommodated by the present program." Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.

The transmittal letter accompanying the 1996 Clarification issued by the Department described only one of these three separate prongs – substantial proportionality – as a "safe harbor" for Title IX compliance. This led many schools to believe, erroneously, that they must take measures to ensure strict proportionality between the sexes. In fact, each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. The Department will continue to make clear, as it did in its 1996 Clarification, that "[i]nstitutions have flexibility in providing nondiscriminatory participation opportunities to their students, and the OCR does not require quotas."

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, the OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law, to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.

In the 1996 Clarification, the Department provided schools with a broad range of specific factors, as well as illustrative examples, to help schools understand the flexibility of the three-prong test. The OCR reincorporates those factors, as well as those illustrative examples, into this Further Clarification, and OCR will continue to assist schools on a case-by-case basis and address any questions they have about Title IX compliance. Indeed, the OCR encourages schools to request individualized assistance from the OCR as they consider ways to meet the requirements of Title IX. As the OCR works with schools on Title IX compliance, the OCR will share information on successful approaches with the broader scholastic community.

Second, the OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. 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 athletics teams. Therefore, in negotiating compliance agreements, the OCR's policy will be to seek remedies that do not involve the elimination of teams.

Third, the OCR hereby advises schools that it will aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. At the same time, the OCR will also work with schools to assist them in avoiding such sanctions by achieving Title IX compliance.

Fourth, private sponsorship of athletics teams will continue to be allowed. Of course, private sponsorship does not in any way change or diminish a school's obligations under Title IX.

Finally, the OCR recognizes that schools will benefit from clear and consistent implementation of Title IX. Accordingly, the OCR will ensure that its enforcement practices do not vary from region to region.

The OCR recognizes that the question of how to comply with Title IX and to provide equal athletics opportunities for all students is a challenge for many academic institutions. But the OCR believes that the three-prong test has provided, and will continue to provide, schools with the flexibility to provide greater athletics opportunities for students of both sexes.

The OCR is strongly reaffirming today its commitment to equal opportunity for girls and boys, women and men. To that end, the OCR is committed to continuing to work in partnership with educational institutions to ensure that the promise of Title IX becomes a reality for all students.

Thank you for your continuing interest in this subject.

Sincerely,

Gerald Reynolds

Assistant Secretary for Civil Rights

Appendix G

Title IX Grievance Procedures, Postsecondary Education
OFFICE OF THE ASSISTANT SECRETARY

August 4, 2004

Dear Colleague:

On behalf of the Office for Civil Rights of the United States Department of Education (OCR), I am writing to highlight aspects of the responsibilities of recipients of federal financial assistance to comply with the requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. (Title IX) and its implementing regulations, 34 C.F.R. Part 106. As you are aware, Title IX prohibits discrimination on the basis of sex in education programs or activities by recipients of federal financial assistance. Specifically, this letter is to remind postsecondary institutions that the Title IX regulations require recipients to designate a Title IX coordinator, adopt and disseminate a nondiscrimination policy, and put grievance procedures in place to address complaints of discrimination on the basis of sex in educational programs and activities.

OCR recently reviewed the Title IX compliance status of selected recipients and found in several instances that recipients have not complied with some of the above requirements of the Title IX implementing regulations. Examples of deficiencies identified during OCR reviews include the failure to designate and/or adequately train at least one employee to coordinate the recipient's Title IX responsibilities, the failure to have and/or disseminate notice of the nondiscrimination policy, and the failure to adopt or publish required Title IX grievance procedures to address sex discrimination claims. The most frequently cited problem was the failure to effectively disseminate notice of the Title IX coordinator's identity and contact information as required by the Title IX regulations. These are all things that OCR looks for in conducting investigations on these issues.

Recipients of federal financial assistance, including postsecondary institutions, must comply with the Title IX implementing regulations. The Title IX implementing regulations at 34 C.F.R. § 106.8(a) require that each recipient designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX. The coordinator's responsibilities include investigating complaints communicated to the recipient alleging noncompliance with Title IX. Section 106.8(a) also requires the recipient to notify all students and employees of the name, address, and telephone number of the designated coordinator. Section 106.8(b) requires that each recipient adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints under Title IX.

The Title IX regulations at 34 C.F.R. § 106.9 require that each recipient publish a statement (notice) that it does not discriminate on the basis of sex in the education programs or activities it operates. The notice must state, at a minimum, that the recipient does not discriminate on the basis of sex in admission to or employment in its education programs or

activities. The notice must further state that inquiries to recipients concerning the application of Title IX and its implementing regulations may be referred to the Title IX coordinator or to OCR.

Section 106.9(b) requires that the notice of nondiscrimination be displayed prominently in each announcement, bulletin, catalog, or application form used in connection with recruitment of students or employees. The notice should also include the name, office address, and telephone number for the designated Title IX coordinator.

The Department is committed to enforcing Title IX aggressively. The compliance problems OCR noted during our recent investigations suggest that some recipients may not have been vigilant in ensuring compliance with the above-mentioned procedural requirements of the regulations implementing Title IX. OCR will continue to identify potential sites for additional compliance reviews, particularly at the postsecondary level. My goal is that, by focusing attention on this issue, recipients will re-evaluate their policies and practices in this area, increase their compliance with these requirements, and improve access to educational benefits and services for all beneficiaries. If you need additional information about Title IX, have questions regarding the Department's policies, or seek guidance, please contact the OCR enforcement office that serves your state or territory for further assistance. I have enclosed the addresses and telephone numbers of those offices.

Thank you for your attention to these matters.

Sincerely,

Kenneth L. Marcus

Deputy Assistant Secretary for Enforcement

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Secretary for Civil Rights

Appendix H

Office for Civil Rights Notice

May 2008

OCR is now posting its revised Case Processing Manual (CPM), which replaces the Case Resolution and Investigation Manual (CRIM). The CPM was revised with the goal of ensuring due process and of providing greater flexibility in resolution. In particular, you will note the following revisions in the new CPM:

- OCR will open the complaint for investigation if the complainant has alleged facts that, if true, would constitute a violation of one of the laws OCR enforces.
- Opening a complaint for investigation in no way implies that OCR has made a determination with regard to its merits. During the investigation, OCR is a neutral fact-finder, collecting and analyzing relevant evidence from the complainant, the recipient, and other sources, as appropriate.
- OCR will continue to ensure that its investigation is legally sufficient and is dispositive of the allegations.

The new CPM also provides more opportunity for resolution of complaints prior to the conclusion of OCR's investigation by placing new emphasis on the Early Complaint Resolution (ECR) process. If both parties are willing to use this approach, and if OCR determines that ECR is appropriate, OCR will facilitate settlement discussions between the parties and assist them in understanding the legal standards and possible remedies.

In addition to ECR, the new CPM provides that a complaint may be resolved before the conclusion of an investigation if the recipient asks to do so. The CPM has eliminated the requirement that the recipient must admit liability in order to resolve the complaint.

OCR Case Processing Manual (CPM)

http://www.ed.gov/about/offices/list/ocr/docs/ocrcpm.html

Appendix I

Dear Colleague Letter:

Intercollegiate Athletics Policy Clarification: The Three-Part Test - Part Three
OFFICE OF THE ASSISTANT SECRETARY

April 20, 2010

Dear Colleague:

Title IX of the Education Amendments of 1972 [1] (Title IX) prohibits discrimination on the basis of sex in education programs and activities by recipients of Federal financial assistance, which include schools, colleges and universities. Since its passage, Title IX has dramatically increased academic, athletic and employment opportunities for women and girls. Title IX stands for the proposition that equality of opportunity in America is not rhetoric, but rather a guiding principle.

Although there has been indisputable progress since Title IX was enacted, notably in interscholastic and intercollegiate athletic programs, sex discrimination unfortunately continues to exist in many education programs and activities. I am committed to the vigorous enforcement of Title IX to resolve this discrimination and to provide clear policy guidance to assist a recipient institution (institution) in making the promise of Title IX a reality for all.

To that end, on behalf of the Office for Civil Rights (OCR) of the U.S. Department of Education (Department), it is my pleasure to provide you with this "Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three." With this letter, the Department is withdrawing the "Additional Clarification of Intercollegiate Athletics Policy: Three Part Test – Part Three" (2005 Additional Clarification) and all related documents accompanying it, including the "User's Guide to Student Interest Surveys under Title IX" (User's Guide) and related technical report, that were issued by the Department on March 17, 2005.

OCR enforces Title IX and its implementing regulation. [2] The regulation contains specific provisions governing athletic programs [3] and the awarding of athletic scholarships. [4] Specifically, the Title IX regulation provides that if an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes. [5] In determining whether equal athletic opportunities are available, the regulation requires OCR to consider whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes. [6]

The "Intercollegiate Athletics Policy Interpretation" [7] (1979 Policy Interpretation), published on December 11, 1979, provides additional guidance on the Title IX intercollegiate athletic regulatory requirements. [8] The 1979 Policy Interpretation sets out a three-part test that OCR uses to assess whether an institution is effectively accommodating the athletic interests and abilities of its students to the extent necessary to provide equal athletic opportunity. [9] On January 16, 1996, OCR issued the "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (1996 Clarification) to provide additional

clarification on all parts of the three-part test, including the specific factors that OCR uses to evaluate compliance under the third part of the three-part test (Part Three).[10]

In 2005, OCR issued the Additional Clarification regarding application of the indicators in the 1996 Clarification that guided OCR's analysis of Part Three. The accompanying User's Guide included a prototype survey instrument (model survey) that institutions could use to measure student interest in participating in intercollegiate athletics and included specific guidance on its implementation. The Additional Clarification and User's Guide changed OCR's approach from an analysis of multiple indicators to a reliance on a single survey instrument to demonstrate that an institution is accommodating student interests and abilities in compliance with Part Three. After careful review, OCR has determined that the 2005 Additional Clarification and the User's Guide are inconsistent with the nondiscriminatory methods of assessment set forth in the 1979 Policy Interpretation and the 1996 Clarification and do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys, under Part Three. Accordingly, the Department is withdrawing the 2005 Additional Clarification and User's Guide, including the model survey. All other Department policies on Part Three remain in effect and provide the applicable standards for evaluating Part Three compliance.

Given the resource limitations faced by institutions throughout the nation and the effect on institutions' athletics programs, I recognize the importance of assisting institutions in developing their own assessment methods that retain the flexibility to meet their unique circumstances, but are consistent with the nondiscrimination requirements of the Title IX regulation. Therefore, this Dear Colleague letter reaffirms, and provides additional clarification on, the multiple indicators discussed in the 1996 Clarification that guide OCR's analysis of whether institutions are in compliance with Part Three, as well as the nondiscriminatory implementation of a survey as one assessment technique.

The Three-Part Test

As discussed above, OCR uses the three-part test to determine whether an institution is providing nondiscriminatory athletic participation opportunities in compliance with the Title IX regulation.The test provides the following three compliance options:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[11]

The three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs consistent with Title IX's nondiscrimination requirements. As stated in the 1996 Clarification," [T]he three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement."

Part Three of the Three-Part Test — Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex

This letter focuses on Part Three — whether an institution is fully and effectively accommodating the athletic interests and abilities of the underrepresented sex. As the 1996 Clarification indicates, while disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy Part Three if it can show that the underrepresented sex is not being denied opportunities, i.e., that the interests and abilities of the underrepresented sex are fully and effectively accommodated. This letter provides information that guides OCR in its evaluation of compliance with Part Three and the nondiscriminatory implementation of assessments of students' athletic interests and abilities under it.

Under Part Three, the focus is on full and effective accommodation of the interests and abilities of the institution's students who are members of the underrepresented sex — including students who are admitted to the institution though not yet enrolled.[12] As stated in the 1996 Clarification, and as further discussed below, in determining compliance with Part Three, OCR considers all of the following three questions:

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

If the answer to all three questions is "Yes," OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three.

A. Unmet Interest and Ability — OCR Evaluation Criteria

In determining whether an institution has unmet interest and ability to support an intercollegiate team in a particular sport, OCR evaluates a broad range of indicators, including:

- whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students;

- whether a viable team for the underrepresented sex recently was eliminated;
- multiple indicators of interest;
- multiple indicators of ability; and
- frequency of conducting assessments.

Each of these five criteria is described below. Following the discussion of these criteria, this section provides technical assistance recommendations for effective assessment procedures and the nondiscriminatory implementation of a survey as one component of assessing the interests and abilities of students of the underrepresented sex. This section concludes with a discussion of the multiple indicators OCR evaluates to determine whether there are a sufficient number of students with unmet interest and ability to sustain a new intercollegiate team.

1. Nondiscriminatory Methods of Assessment

Under Part Three, OCR evaluates whether an institution uses processes and methods for assessing the athletic interests and abilities of its students of the underrepresented sex that are consistent with the nondiscrimination standards set forth in the 1979 Policy Interpretation. The 1979 Policy Interpretation states that institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an under-represented sex.[13]

An institution should document its assessment of students' interests and abilities.

2. Assessments Not Used To Eliminate Viable Teams

As discussed in the 1996 Clarification, if an institution recently has eliminated a viable team for the underrepresented sex from the intercollegiate athletics program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport and thus there would be a presumption that the institution is not in compliance with Part Three. This presumption can be overcome if the institution can provide strong evidence that interest, ability, or competition no longer exists.

Accordingly, OCR does not consider the failure by students to express interest during a survey under Part Three as evidence sufficient to justify the elimination of a current and viable intercollegiate team for the underrepresented sex. In other words, students participating on a viable intercollegiate team have expressed interest by active participation, and OCR does not use survey results to nullify that expressed interest.

3. Multiple Indicators Evaluated to Assess Interest

OCR considers a broad range of indicators to assess whether there is unmet athletic interest among the underrepresented sex. These indicators guide OCR in determining whether the institution has measured the interests of students of the underrepresented sex using nondiscriminatory methods consistent with the 1979 Policy Interpretation. As discussed in the 1996 Clarification, OCR evaluates the interests of the underrepresented sex by examining the following list of non-exhaustive indicators:

- requests by students and admitted students that a particular sport be added;
- requests for the elevation of an existing club sport to intercollegiate status;
- participation in club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interests in particular sports;
- results of surveys or questionnaires of students and admitted students regarding interests in particular sports;[14]
- participation in interscholastic sports by admitted students; and
- participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.[15]

In accordance with the 1996 Clarification, OCR also will consider the likely interest[16] of the underrepresented sex by looking at participation in intercollegiate sports in the institution's normal competitive regions.

4. Multiple Indicators Evaluated to Assess Ability

As discussed in the 1996 Clarification, OCR considers a range of indicators to assess whether there is sufficient ability among interested students of the underrepresented sex to sustain a team in the sport. When making this determination, OCR examines indicators such as:

- the athletic experience and accomplishments — in interscholastic, club or intramural competition — of underrepresented students and admitted students interested in playing the sport;

- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team; and
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Additionally, because OCR recognizes that students may have a broad range of athletic experiences and abilities, OCR also examines other indications of ability such as:

- participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamen-tal to the particular sport being considered; and
- tryouts or other direct observations of participation in the particular sport in which there is interest.

As the 1996 Clarification indicated, neither a poor competitive record, nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes, is conclusive evidence of lack of ability. For the purposes of assessing ability, it is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

5. Frequency of Assessments

As discussed in the 1996 Clarification, OCR evaluates whether an institution assesses interest and ability periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. There are several factors OCR considers when determining the rate of frequency for conducting an assessment. These factors include, but are not limited to:

- the degree to which the previous assessment captured the interests and abilities of the institution's students and admitted students of the underrepresented sex;
- changes in demographics or student population at the institution;[17] and
- whether there have been complaints from the underrepresented sex with regard to a lack of athletic opportunities or requests for the addition of new teams.

Further, OCR will consider whether an institution conducts more frequent assessments if a previous assessment detected levels of student interest and ability in any sport that were close to the minimum number of players required to sustain a team.

6. Effective Procedures for Evaluating Requests to Add Teams and Assessing Participation

An institution has a continuing obligation to comply with Title IX's nondiscrimination requirements; thus, OCR recommends that institutions have effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of students of the underrepresented sex, including easily understood policies and procedures for receiving and responding to requests for additional teams, and wide dissemination of such policies and procedures to existing and newly admitted students, as well as to coaches and other employees.

OCR also recommends that institutions develop procedures for, and maintain documentation from, routine monitoring of participation of the underrepresented sex in club and intramural sports as part of their assessment of student interests and abilities. OCR further recommends that institutions develop procedures for, and maintain documentation from, evaluations of the participation of the underrepresented sex in high school athletic programs, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students. This is the type of documentation that may be needed in order for an institution to demonstrate that it is assessing interests and abilities in compliance with Part Three.

The Title IX regulation requires institutions to designate at least one employee to coordinate their efforts to comply with and carry out their Title IX responsibilities.[18] Therefore, institutions may wish to consider whether the monitoring and documentation of participation in club, intramural, and interscholastic sports and the processing of requests for the addition or elevation of athletic teams should be part of the responsibilities of their Title IX coordinators in conjunction with their athletic departments. Another option an institution may wish to consider is to create a Title IX committee to carry out these functions. If an institution chooses to form such a committee, it should include the Title IX coordinator as part of the committee and provide appropriate training on the Title IX requirements for committee members.

7. Survey May Assist in Capturing Information on Students' Interests and Abilities

As discussed in the 1996 Clarification, institutions may use a variety of techniques to identify students' interests and abilities. OCR recognizes that a properly designed and implemented survey is one tool that can assist an institution in capturing information on students' interests and abilities. OCR evaluates a survey as one component of an institution's overall assessment under Part Three and will not accept an institution's reliance on a survey alone, regardless of the response rate, to determine whether it is fully and effectively accommodating the interests and abilities of its underrepresented students. If an institution conducts a survey as part of its assessment, OCR examines the content, implementation and response rates of the survey, as well as an institution's other methods of measuring interest and ability.

Under Part Three, OCR evaluates the overall weight it will accord the conclusions drawn by an institution from the results of a survey by examining the following factors, among others:

- content of the survey;
- target population surveyed;

- response rates and treatment of non-responses;
- confidentiality protections; and
- frequency of conducting the survey.

Sport	**Interest in Future Participation:** At what level do you wish to participate in this sport at [Institution]?	**Current Participation:** At what level are you participating in this sport?	**Prior Experience:** At what level did you participate in this sport or any other relevant sport in high school, college, or in another capacity?	
Basketball	☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational	☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational ☐ Other _____	College ☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational	High School ☐ Varsity ☐ Junior Varsity ☐ Club ☐ Intramural ☐ Recreational ☐ Other _____
Lacrosse	☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational	☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational ☐ Other _____	College ☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational	High School ☐ Varsity ☐ Junior Varsity ☐ Club ☐ Intramural ☐ Recreational ☐ Other _____
Other sport identified by student [22]	☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational	☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational ☐ Other _____	College ☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational	High School ☐ Varsity ☐ Junior Varsity ☐ Club ☐ Intramural ☐ Recreational ☐ Other _____

OCR also considers whether a survey is implemented in such a way as to maximize the possibility of obtaining accurate information and facilitating responses. A properly designed survey should effectively capture information on interest and ability [19] across multiple sports, without complicating responses with superfluous or confusing questions.

OCR has not endorsed or sanctioned any particular survey; however, for technical assistance purposes, this letter contains information that an institution may wish to consider in developing its own survey.

a. Content of the Survey

i. Purpose

To ensure students understand the importance of responding to the survey, OCR evaluates whether a survey clearly states its purpose. For technical assistance purposes, an example of a purpose statement might be:

Purpose: This data collection is being conducted for evaluation, research, and planning purposes and may be used along with other information to determine whether [Institution] is effectively accommodating the athletic interests and abilities of its students, including whether to add additional teams.

ii. Collect information regarding all sports

In addition, OCR evaluates whether the survey lists all sports for the underrepresented sex recognized by the three primary national intercollegiate athletic associations, [20] and contains an open-ended inquiry for other sports to allow students to write in any sports that are not listed. [21] OCR considers whether the survey allows students to identify their interest in future or current participation in all of the sports they identify and general athletic experience. OCR also considers whether the survey allows students to provide additional information or comments about their interest, experience, and ability. For technical assistance purposes, the types of questions an institution could ask regarding interest in future participation, current participation, and prior athletic experience might be:

iii. Contact Information

OCR also looks at whether an institution requests contact information, to allow the institution to follow-up with students who wish to be contacted regarding their interests and abilities.

b. Target Population Surveyed

OCR considers the target population surveyed at the institution. Under Part Three, OCR evaluates whether the survey is administered as a census to all full-time undergraduate students of the underrepresented sex and admitted students of the underrepresented sex.23 Using a census of all students can avoid several issues associated with sample surveys including, but not limited to: selection of the sampling mechanism, selection of the sample size, calculation of sampling error, and using sample estimates. If an institution intends to administer a survey to a sample population to gauge an estimate of interests and abilities, the larger the sample, the more weight OCR will accord the estimate.

c. Responses: Rates and Treatment of Non-Responses

OCR evaluates whether the survey is administered in a manner designed to generate high response rates and how institutions treat responses and non-responses.

OCR looks at whether institutions provide the survey in a context that encourages high response rates, and whether institutions widely publicize the survey; give students, including those participating in club or intramural sports, advance notice of the survey; and provide students adequate time to respond. Generally, OCR accords more weight to a survey with a higher response rate than a survey with a lower response rate, and institutions may want to distribute the survey through multiple mechanisms to increase the response rate.

For example, for enrolled students, an institution may want to administer the survey as part of a mandatory activity, such as during course registration. If administered as part of a mandatory activity, students also should have the option of completing the survey at a later date in order to ensure that they have adequate time to respond. Students who indicate that they wish to complete the survey at a later time should be given the opportunity to provide their contact information to enable the institution to take steps to ensure that they complete the survey. An institution should follow-up with those students who indicate that they wish to respond in the future.

An institution also may choose to send an email to the entire target population that includes a link to the survey. If an institution's assessment process includes email, OCR considers whether the institution takes appropriate cautionary measures, such as ensuring that it has accurate email addresses and that the target population has access to email.24 OCR also expects institutions to take additional steps to follow-up with those who do not respond, including sending widely publicized reminder notices.

If institutions administer the survey through a web-based distribution system, students who indicate that they have no current interest25 in athletic participation should be asked to confirm their lack of interest before they exit the system. If response rates using the methods described above are low, an institution should consider administering the survey in another manner to obtain higher response rates.

OCR does not consider non-responses to surveys as evidence of lack of interest or ability in athletics. As discussed above, regardless of whether students respond to a survey, OCR also evaluates whether students' interest and abilities are assessed using the multiple indicators described above.

d. Confidentiality Protections

OCR also looks at whether institutions notify students that all responses as well as any personally identifiable information they provide will be kept confidential, although the aggregate survey information will be shared with athletic directors, coaches, and other staff, as appropriate. When requesting any personal or personally identifiable data, protecting the respondents' confidentiality helps to ensure that institutions obtain high-quality data and high response rates. If a student has expressed interest in being contacted when responding to the survey, an institution should continue to maintain the student's confidentiality except to the extent needed to follow-up with the student.

e. Frequency of Conducting the Survey

As discussed above, OCR evaluates whether an institution periodically conducts an assessment of interest and abilities. In addition to the factors OCR considers when determining the rate of frequency for conducting an assessment, OCR also will consider factors such as the size of the previously assessed survey population and the rate of response to the immediately preceding survey(s) conducted by the institution, if any.

8. Multiple Indicators Evaluated to Assess Sufficient Number of Interested and Able Students to Sustain a Team

Under Part Three, institutions are not required to create an intercollegiate team or elevate a club team to intercollegiate status unless there are a sufficient number of interested and able students to sustain a team. When OCR evaluates whether there are a sufficient number of students, OCR considers such indicators as the:

- minimum number of participants needed for a particular sport;
- opinions of athletic directors and coaches concerning the abilities required to field an intercollegiate team; and
- size of a team in a particular sport at institutions in the governing athletic association or conference to which the institution belongs or in the institution's competitive regions.

When evaluating the minimum number of athletes needed, OCR may consider factors such as the:

- rate of substitutions necessitated by factors such as length of competitions, intensity of play, or injury;
- variety of skill sets required for competition; and
- minimum number of athletes needed to conduct effective practices for skill development.

B. Reasonable Expectation of Competition — OCR Evaluation Criteria

Lastly, as indicated in the 1996 Clarification, OCR evaluates whether there is a reasonable expectation of intercollegiate competition for the team in the institution's normal competitive regions. In evaluating available competition, OCR considers available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

- competitive opportunities offered by other schools against which the institution competes; and
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.26

If the information or documentation compiled by the institution during the assessment process shows that there is sufficient interest and ability to support a new intercollegiate team and a reasonable expectation of intercollegiate competition in the institution's normal competitive region for the team, the institution is under an obligation to create an intercollegiate team within a reasonable period of time in order to comply with Part Three.

Conclusion

The three-part test gives institutions flexibility and affords them control over their athletics programs. This flexibility, however, must be used consistent with Title IX's nondiscrimination requirements. OCR will continue to work with institutions to assist them in finding ways to address their particular circumstances and comply with Title IX. For technical assistance, please contact the OCR enforcement office that serves your area, found at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm.

Sincerely,

Russlynn Ali

Assistant Secretary for Civil Rights

Footnotes

[1] 20 U.S.C. § 1681 et seq.

[2] 34 C.F.R. Part 106.

[3] 34 C.F.R. § 106.41.

[4] 34 C.F.R. § 106.37(c).

[5] 34 C.F.R. § 106.41(c).

[6] 34 C.F.R. § 106.41(c)(1). The Title IX regulation at 34 C.F.R. § 106.41(c) provides that OCR also will consider other factors when determining whether equal athletic opportunity is available at an institution. This Dear Colleague letter only addresses the regulatory requirement, at 34 C.F.R. § 106.41(c)(1), to effectively accommodate interests and abilities.

[7] 44 Fed. Reg.71413 (1979). The 1979 Policy Interpretation was published by the former Department of Health, Education, and Welfare, and was adopted by the Department of Education when it was established in 1980.

[8] Although the 1979 Policy Interpretation is designed for intercollegiate athletics, its general principles, and those of this letter, often will apply to interscholastic, club, and intramural athletic programs. 44 Fed. Reg. at 71413. Furthermore, the Title IX regulation requires institutions to provide equal athletic opportunities in intercollegiate, interscholastic, club, and intramural athletics. 34 C.F.R. § 106.41(c).

[9] As discussed in the 1979 Policy Interpretation, OCR also considers the quality of competitive opportunities offered to members of both sexes in determining whether an institution effectively accommodates the athletic interests and abilities of its students. 44 Fed. Reg. at 71418.

[10] OCR's "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance," which was issued as a Dear Colleague letter on July 11, 2003, also reincorporated the 1996 Clarification's broad range of specific factors and illustrative examples.

[11] 44 Fed. Reg. at 71418.

[12] OCR examines an institution's recruitment practices under another part of the 1979 Policy Interpretation. See 44 Fed. Reg. at 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that its women's teams are provided with substantially equal opportunities to recruit potential student athletes.

[13] 44 Fed. Reg. at 71417.

[14] OCR evaluates all of the indicators discussed here so OCR does not consider survey results alone as sufficient evidence of lack of interest under Part Three.

[15] As discussed in the 1996 Clarification, this indicator may be helpful to OCR in ascertaining likely interest of an institution's students and admitted students in particular sports, especially in the absence of more direct indicia. However, in conducting its investigations, OCR determines whether an institution is meeting the actual interests and abilities of its students and admitted students.

[16] See Footnote 15 above.

[17] For example, in a typical four-year institution, the student body population will change substantially each year, by approximately 25 percent annually.

[18] 34 C.F.R. § 106.8(a).

[19] Experience in sports generally is one indicator of ability.

[20] These associations are the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association. A current list of these sports for both sexes is: baseball, basketball, bowling, cross country, fencing, field hockey, football, golf, gymnastics, ice hockey, lacrosse, rifle, rowing, skiing, soccer, softball, swimming and diving, tennis, indoor track and field, outdoor track and field, volleyball, water polo, and wrestling.

[21] An open-ended inquiry for other sports should be prominent or otherwise readily visible and contain a line or other mechanism for students to write in the sport for which they wish to express interest and ability.

[22] If the survey is provided in paper form, an institution should provide a surplus of rows to ensure that a respondent can provide information for all sports for which there is interest.

[23] For example, institutions may distribute surveys to all admitted students of the underrepresented sex with acceptance letters.

[24] OCR also evaluates whether the survey is administered in a manner designed to ensure the accurate identity of the respondent and to protect against multiple responses by the same individual.

[25] Students may have, or may be unaware of whether they will have, a future interest in athletic participation.

[26] Under the 1979 Policy Interpretation, an institution also may be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex. 44 Fed. Reg. at 71418.

Appendix J

Title IX Harassment

Full text can be found at: www.ed.gov/about/offices/list/ocr/docs/shguide.html

Revised Sexual Harassment Guidance
REVISED SEXUAL HARASSMENT GUIDANCE:
HARASSMENT OF STUDENTS
BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES
TITLE IX

January 19, 2001
Preamble
Guidance

PREAMBLE

Summary

The Assistant Secretary for Civil Rights, U.S. Department of Education (Department), issues a new document (revised guidance) that replaces the 1997 document entitled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," issued by the Office for Civil Rights (OCR) on March 13, 1997 (1997 guidance). We revised the guidance in limited respects in light of subsequent Supreme Court cases relating to sexual harassment in schools.

The revised guidance reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX of the Education Amendments of 1972 (Title IX) regarding sexual harassment. The revised guidance re-grounds these standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages and clarifying their regulatory basis as distinct from Title VII of the Civil Rights Act of 1964 (Title VII) agency law. In most other respects the revised guidance is identical to the 1997 guidance. Thus, we intend the revised guidance to serve the same purpose as the 1997 guidance. It continues to provide the principles that a school [1] should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance. Purpose and Scope of the Revised Guidance

In March 1997, we published in the Federal Register "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties." 62 FR 12034. We issued the guidance pursuant to our authority under Title IX, and our Title IX implementing regulations, to eliminate discrimination based on sex in education programs and activities receiving Federal financial assistance. It was grounded in longstanding legal authority establishing that sexual harassment of students can be a form of sex discrimination covered by Title IX. The guidance was the product of extensive consultation

with interested parties, including students, teachers, school administrators, and researchers. We also made the document available for public comment.

Since the issuance of the 1997 guidance, the Supreme Court (Court) has issued several important decisions in sexual harassment cases, including two decisions specifically addressing sexual harassment of students under Title IX: Gebser v. Lago Vista Independent School District (Gebser), 524 U.S. 274 (1998), and Davis v. Monroe County Board of Education (Davis), 526 U.S. 629 (1999). The Court held in Gebser that a school can be liable for monetary damages if a teacher sexually harasses a student, an official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment. In Davis, the Court announced that a school also may be liable for monetary damages if one student sexually harasses another student in the schools program and the conditions of Gebser are met.

The Court was explicit in Gebser and Davis that the liability standards established in those cases are limited to private actions for monetary damages. See, e.g., Gebser, 524 U.S. 283, and Davis, 526 U.S. at 639. The Court acknowledged, by contrast, the power of Federal agencies, such as the Department, to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate," even in circumstances that would not give rise to a claim for money damages. See, Gebser, 524 U.S. at 292.

In an August 1998 letter to school superintendents and a January 1999 letter to college and university presidents, the Secretary of Education informed school officials that the Gebser decision did not change a school's obligations to take reasonable steps under Title IX and the regulations to prevent and eliminate sexual harassment as a condition of its receipt of Federal funding. The Department also determined that, although in most important respects the substance of the 1997 guidance was reaffirmed in Gebser and Davis, certain areas of the 1997 guidance could be strengthened by further clarification and explanation of the Title IX regulatory basis for the guidance.

On November 2, 2000, we published in the Federal Register a notice requesting comments on the proposed revised guidance (62 FR 66092). A detailed explanation of the Gebser and Davis decisions, and an explanation of the proposed changes in the guidance, can be found in the preamble to the proposed revised guidance. In those decisions and a third opinion, Oncale v. Sundowner Offshore Services, Inc. (Oncale), 523 U.S. 75 (1998) (a sexual harassment case decided under Title VII), the Supreme Court confirmed several fundamental principles we articulated in the 1997 guidance. In these areas, no changes in the guidance were necessary.

A notice regarding the availability of this final document appeared in the Federal Register on January 19, 2001.

Enduring Principles from the 1997 Guidance

It continues to be the case that a significant number of students, both male and female, have experienced sexual harassment, which can interfere with a student's academic performance and emotional and physical well-being. Preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn. As with the 1997 guidance, the revised guidance applies to students at every level of education. School personnel who understand their obligations under Title IX, e.g., understand that sexual harassment can be sex discrimination in violation of Title IX, are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs.

One of the fundamental aims of both the 1997 guidance and the revised guidance has been to emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.

A critical issue under Title IX is whether the school recognized that sexual harassment has occurred and took prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects. If harassment has occurred, doing nothing is always the wrong response. However, depending on the circumstances, there may be more than one right way to respond. The important thing is for school employees or officials to pay attention to the school environment and not to hesitate to respond to sexual harassment in the same reasonable, commonsense manner as they would to other types of serious misconduct.

It is also important that schools not overreact to behavior that does not rise to the level of sexual harassment. As the Department stated in the 1997 guidance, a kiss on the cheek by a first grader does not constitute sexual harassment. School personnel should consider the age and maturity of students in responding to allegations of sexual harassment.

Finally, we reiterate the importance of having well-publicized and effective grievance procedures in place to handle complaints of sex discrimination, including sexual harassment complaints. Nondiscrimination policies and procedures are required by the Title IX regulations. In fact, the Supreme Court in Gebser specifically affirmed the Department's authority to enforce this requirement administratively in order to carry out Title IX's nondiscrimination mandate. 524 U.S. at 292. Strong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it.

Analysis of Comments Received Concerning the Proposed Revised Guidance and the Resulting Changes

In response to the Assistant Secretary's invitation to comment, OCR received approximately 11 comments representing approximately 15 organizations and individuals. Commenters provided specific suggestions regarding how the revised guidance could be clarified. Many of these suggested changes have been incorporated. Significant and recurring issues are grouped by subject and discussed in the following sections:

Distinction between Administrative Enforcement and Private Litigation for Monetary Damages

In Gebser and Davis, the Supreme Court addressed for the first time the appropriate standards for determining when a school district is liable under Title IX for money damages in a private lawsuit brought by or on behalf of a student who has been sexually harassed. As explained in the preamble to the proposed revised guidance, the Court was explicit in Gebser and Davis that the liability standards established in these cases are limited to private actions for monetary damages. See, e.g., Gebser, 524 U.S. At 283, and Davis, 526 U.S. At 639. The Gebser Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX. In Gebser, the Court was concerned with the possibility of a money damages award against a school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.

Commenters uniformly agreed with OCR that the Court limited the liability standards established in Gebser and Davis to private actions for monetary damages. See, e.g., Gebser, 524 U.S. 283, and Davis, 526 U.S. At 639. Commenters also agreed that the administrative enforcement standards reflected in the 1997 guidance remain valid in OCR enforcement actions.[2] Finally, commenters agreed that the proposed revisions provided important clarification to schools regarding the standards that OCR will use and that schools should use to determine compliance with Title IX as a condition of the receipt of Federal financial assistance in light of Gebser and Davis.

Harassment by Teachers and Other School Personnel

Most commenters agreed with OCR's interpretation of its regulations regarding a school's responsibility for harassment of students by teachers and other school employees. These commenters agreed that Title IX's prohibitions against discrimination are not limited to official policies and practices governing school programs and activities. A school also engages in sex-based discrimination if its employees, in the context of carrying out their day-to-day job responsibilities for providing aid, benefits, or services to students (such as teaching, counseling, supervising, and advising students) deny or limit a student's ability to participate in or benefit from the schools program on the basis of sex.' Under the Title IX regulations, the school is responsible for discrimination in these cases, whether or not it knew or should have known about it, because the discrimination occurred as part of the school's undertaking to provide nondiscriminatory aid, benefits, and services to students. The revised guidance distinguishes these cases from employee harassment that, although taking place in a school's program, occurs outside of the context of the employee's provision of aid, benefits, and services to students. In these latter cases, the school's responsibilities are not triggered until the school knew or should have known about the harassment.

One commenter expressed concern that it was inappropriate ever to find a school out of compliance for harassment about which it knew nothing. We reiterate that, although a school may in some cases be responsible for harassment caused by an employee that occurred before other responsible employees of the school knew or should have known about it, OCR always provides the school with actual notice and the opportunity to take appropriate corrective action before issuing a finding of violation. This is consistent with the Court's underlying concern in Gebser and Davis.

Most commenters acknowledged that OCR has provided useful factors to determine whether harassing conduct took place "in the context of providing aid, benefits, or services." However, some commenters stated that additional clarity and examples regarding the issue were needed. Commenters also suggested clarifying references to quid pro quo and hostile environment harassment as these two concepts, though useful, do not determine the issue of whether the school itself is considered responsible for the harassment. We agree with these concerns and have made significant revisions to the sections "Harassment that Denies or Limits a Student's Ability to Participate in or Benefit from the Education Program" and "Harassment by Teachers and Other Employees" to clarify the guidance in these respects.

Gender-based Harassment, Including Harassment Predicated on Sex-stereotyping

Several commenters requested that we expand the discussion and include examples of gender-based harassment predicated on sex stereotyping. Some commenters also argued that gender-based harassment should be considered sexual harassment, and that we have "artificially" restricted the guidance only to harassment in the form of conduct of a sexual nature, thus, implying that gender-based harassment is of less concern and should be evaluated differently.

We have not further expanded this section because, while we are also concerned with the important issue of gender-based harassment, we believe that harassment of a sexual nature raises unique and sufficiently important issues that distinguish it from other types of gender-based harassment and warrants its own guidance.

Nevertheless, we have clarified this section of the guidance in several ways. The guidance clarifies that gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity. Although this type of harassment is not covered by the guidance, if it is sufficiently serious, gender-based harassment is a school's responsibility, and the same standards generally will apply. We have also added an endnote regarding Supreme Court precedent for the proposition that sex stereotyping can constitute sex discrimination.

Several commenters also suggested that we state that sexual and non-sexual (but gender-based) harassment should not be evaluated separately in determining whether a hostile environment exists. We note that both the proposed revised guidance and the final revised guidance indicate in several places that incidents of sexual harassment and non-sexual, gender-based harassment can be combined to determine whether a hostile environment has been created. We also note that sufficiently serious harassment of a sexual nature remains covered by Title IX, as explained in the guidance, even though the hostile environment may also include taunts based on sexual orientation.

Definition of Harassment

One commenter urged OCR to provide distinct definitions of sexual harassment to be used in administrative enforcement as distinguished from criteria used to maintain private actions for monetary damages. We disagree. First, as discussed in the preamble to the proposed revised guidance, the definition of hostile environment sexual harassment used by the Court in Davis is consistent with the definition found in the proposed guidance. Although the terms used by the Court in Davis are in some ways different from the words used to define hostile environment harassment in the 1997 guidance (see, e.g., 62 FR 12041, "conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment"), the definitions are consistent. Both the Court's and the Department's definitions are contextual descriptions intended to capture the same concept - that under Title IX, the conduct must be sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program. In determining whether harassment is actionable, both Davis and the Department tell schools to look at the "constellation of surrounding circumstances, expectations, and relationships" (526 U.S. At 651 (citing Oncale)), and the Davis Court cited approvingly to the underlying core factors described in the 1997 guidance for evaluating the context of the harassment. Second, schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.

Several commenters suggested that we develop a unique Title IX definition of harassment that does not rely on Title VII and that takes into account the special relationship of schools to students. Other commenters, by contrast, commended OCR for recognizing that Gebser and Davis did not alter the definition of hostile environment sexual harassment found in OCR's 1997 guidance, which derives from Title VII caselaw, and asked us to strengthen the point. While Gebser and Davis made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the Davis Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX. We also believe that the factors described in both the 1997 guidance and the revised guidance to determine whether sexual harassment has occurred provide the necessary flexibility for taking into consideration the age and maturity of the students involved and the nature of the school environment.

Effective Response

One commenter suggested that the change in the guidance from "appropriate response" to "effective response" implies a change in OCR policy that requires omniscience of schools. We disagree. Effectiveness has always been the measure of an adequate response under Title IX. This does not mean a school must overreact out of fear of being judged inadequate. Effectiveness is measured based on a reasonableness standard. Schools do not have to know beforehand that their response will be effective. However, if their initial steps are ineffective in stopping the harassment, reasonableness may require a series of escalating steps.

The Relationship between FERPA and Title IX

In the development of both the 1997 guidance and the current revisions to the guidance, commenters raised concerns about the interrelation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and Title IX. The concerns relate to two issues: (1) the harassed student's right to information about the outcome of a sexual harassment complaint against another student, including information about sanctions imposed on a student found guilty of harassment; and (2) the due process rights of individuals, including teachers, accused of sexual harassment by a student, to obtain information about the identity of the complainant and the nature of the allegations.

FERPA generally forbids disclosure of information from a student's "education record" without the consent of the student (or the student's parent). Thus, FERPA may be relevant when the person found to have engaged in harassment is another student, because written information about the complaint, investigation, and outcome is part of the harassing student's education record. Title IX is also relevant because it is an important part of taking effective responsive action for the school to inform the harassed student of the results of its investigation and whether it counseled, disciplined, or otherwise sanctioned the harasser. This information can assure the harassed student that the school has taken the student's complaint seriously and has taken steps to eliminate the hostile environment and prevent the harassment from recurring.

The Department currently interprets FERPA as not conflicting with the Title IX requirement that the school notify the harassed student of the outcome of its investigation, i.e., whether or not harassment was found to have occurred, because this information directly relates to the victim. It has been the Department's position that there is a potential conflict between FERPA and Title IX regarding disclosure of sanctions, and that FERPA generally prevents a school from disclosing to a student who complained of harassment information about the sanction or discipline imposed upon a student who was found to have engaged in that harassment. [3]

There is, however, an additional statutory provision that may apply to this situation. In 1994, as part of the Improving America's Schools Act, Congress amended the General Education Provisions Act (GEPA) - of which FERPA is a part - to state that nothing in GEPA "shall be construed to affect the applicability of ... title IX of the Education Amendments of 1972. ..."[4] The Department interprets this provision to mean that FERPA continues

to apply in the context of Title IX enforcement, but if there is a direct conflict between requirements of FERPA and requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions. The Department is in the process of developing a consistent approach and specific factors for implementing this provision. OCR and the Department's Family Policy Compliance Office (FPCO) intend to issue joint guidance, discussing specific areas of potential conflict between FERPA and Title IX.

FERPA is also relevant when a student accuses a teacher or other employee of sexual harassment, because written information about the allegations is contained in the student's education record. The potential conflict arises because, while FERPA protects the privacy of the student accuser, the accused individual may need the name of the accuser and information regarding the nature of the allegations in order to defend against the charges. The 1997 guidance made clear that neither FERPA nor Title IX override any federally protected due process rights of a school employee accused of sexual harassment.

Several commenters urged the Department to expand and strengthen this discussion. They argue that in many instances a school's failure to provide information about the name of the student accuser and the nature of the allegations seriously undermines the fairness of the investigative and adjudicative process. They also urge the Department to include a discussion of the need for confidentiality as to the identity of the individual accused of harassment because of the significant harm that can be caused by false accusations. We have made several changes to the guidance, including an additional discussion regarding the confidentiality of a person accused of harassment and a new heading entitled "Due Process Rights of the Accused," to address these concerns.

Footnotes

[1] As in the 1997 guidance, the revised guidance uses the term "school" to refer to all schools, colleges, universities, and other educational institutions that receive Federal funds from the Department.

[2] It is the position of the United States that the standards set out in OCR's guidance for finding a violation and seeking voluntary corrective action also would apply to private actions for injunctive and other equitable relief. See brief of the United States as Amicus Curiae in Davis v. Monroe County.

[3] Exceptions include the case of a sanction that directly relates to the person who was harassed (e.g., an order that the harasser stay away from the harassed student), or sanctions related to offenses for which there is a statutory exception, such as crimes of violence or certain sex offenses in postsecondary institutions.

[4] 20 U.S.C. 1221(d). A similar amendment was originally passed in 1974 but applied only to Title VI of the Civil Rights Act of 1964 (prohibiting race discrimination by recipients). The 1994 amendments also extended 20 U.S.C. 1221(d) to Section 504 of the Rehabilitation Act of 1973 (prohibiting disability-based discrimination by recipients) and to the Age Discrimination Act.

Appendix K

2010 Sexual Harassment and Bullying Guidance

October 26, 2010

Dear Colleague:

In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students. I am writing to remind you, however, that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department's Office for Civil Rights (OCR). As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.

The statutes that OCR enforces include Title VI of the Civil Rights Act of 19641 (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 19722 (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 19733 (Section 504); and Title II of the Americans with Disabilities Act of 19904 (Title II). Section 504 and Title II prohibit discrimination on the basis of disability.5 School districts may violate these civil rights statutes and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.6 School personnel who understand their legal obligations to address harassment under these laws are in the best position to prevent it from occurring and to respond appropriately when it does. Although this letter focuses on the elementary and secondary school context, the legal principles also apply to postsecondary institutions covered by the laws and regulations enforced by OCR.

Some school anti-bullying policies already may list classes or traits on which bases bullying or harassment is specifically prohibited. Indeed, many schools have adopted anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil rights laws enforced by OCR—race, color, national origin, sex, and disability—to include such bases as sexual orientation and religion. While this letter concerns your legal obligations under the laws enforced by OCR, other federal, state, and local laws impose additional obligations on schools. And, of course, even when bullying or harassment is not a civil rights violation, schools should still seek to prevent it in order to protect students from the physical and emotional harms that it may cause.

Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.

A school is responsible for addressing harassment incidents about which it knows or reasonably 9should have known. In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice. In other situations, the school may become aware of misconduct, triggering an investigation that could lead to the discovery of additional incidents that, taken together, may constitute a hostile environment. In all cases, schools should have well-publicized policies prohibiting harassment and procedures for reporting and resolving 10complaints that will alert the school to incidents of harassment.

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial.

If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.

Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (e.g., not requiring the target to change his or her class schedule).

In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district's Title IX and Section 504/Title II coordinators.

Finally, a school should take steps to stop further harassment and prevent any retaliation against the person who made the complaint (or was the subject of the harassment) or against those who provided information as witnesses. At a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

When responding to incidents of misconduct, schools should keep in mind the following:

- The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications. So, for example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR.

- When the behavior implicates the civil rights laws, school administrators should look beyond simply disciplining the perpetrators. While disciplining the perpetrators is likely a necessary step, it often is insufficient. A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur. Put differently, the unique effects of discriminatory harassment may demand a different response than would other types of bullying.

Below, I provide hypothetical examples of how a school's failure to recognize student misconduct as discriminatory harassment violates students' civil rights.12 In each of the examples, the school was on notice of the harassment because either the school or a responsible employee knew or should have known of misconduct that constituted harassment. The examples describe how the school should have responded in each circumstance.

Title VI: Race, Color, or National Origin Harassment

- Some students anonymously inserted offensive notes into African-American students' lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school's racial groups.

  In this example, school officials failed to acknowledge the pattern of harassment as indicative of a racially hostile environment in violation of Title VI. Misconduct need not be directed at a particular student to constitute discriminatory harassment and foster a racially hostile environment. Here, the harassing conduct included overtly racist behavior (e.g., racial slurs) and also targeted students on the basis of their race (e.g., notes directed at African-American students). The nature of the harassment, the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the students' ability to participate in the school's education programs and activities.

  Had the school recognized that a racially hostile environment had been created, it would have realized that it needed to do more than just discipline the few individuals whom it could identify as having been involved. By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school's policy against discrimination (including racial harassment), publicizing the means to report allegations of racial harassment, training faculty on constructive responses to racial conflict, hosting class discussions about racial harassment and sensitivity to students of other races, and conducting outreach to involve parents and students in an effort to identify problems and improve the school climate. Finally, had school officials responded appropriately and aggressively to the racial harassment when they first became aware of it, the school might have prevented the escalation of violence that occurred.

- Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, "You Jews have all of the money, give us some." When school administrators investigated the incident, they determined that the seventh-graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth-graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student "Drew the dirty Jew." The responsible eighth-graders were reprimanded for teasing the Jewish student.

  The school administrators failed to recognize that anti-Semitic harassment can trigger responsibilities under Title VI. While Title VI does not cover discrimination based solely on religion,14 groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (e.g., Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices. A school also has responsibilities under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.

  In this example, school administrators should have recognized that the harassment was based on the students' actual or perceived shared ancestry or ethnic identity as Jews (rather than on the students' religious practices). The school was not relieved of its responsibilities under Title VI because the targets of one of the incidents were not actually Jewish. The harassment was still based on the perceived ancestry or ethnic characteristics of the targeted students. Furthermore, the harassment negatively affected the ability and willingness of Jewish students to participate fully in the school's education programs and activities (e.g., by causing some Jewish students to avoid the library and computer lab). Therefore, although the discipline that the school imposed on the perpetrators was an important part of the school's response, discipline alone was likely insufficient to remedy a hostile environment. Similarly, removing the graffiti, while a necessary and important step, did not fully satisfy the school's responsibilities. As discussed above, misconduct that is not directed at a particular student, like the graffiti in the bathroom, can still constitute discriminatory harassment and foster a hostile environment. Finally, the fact that school officials considered one of the incidents "teasing" is irrelevant for determining whether it contributed to a hostile environment.

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school's policy against discrimination, and publicizing the means by which students may report harassment. Providing teachers with training to recognize and address anti-Semitic incidents also would have increased the effectiveness of the school's response. The school could also have created an age-appropriate program to educate its students about the history and dangers of anti-Semitism, and could have conducted outreach to involve parents and community groups in preventing future anti-Semitic harassment.

Title IX: Sexual Harassment

- Shortly after enrolling at a new high school, a female student had a brief romance with another student. After the couple broke up, other male and female students began routinely calling the new student sexually charged names, spreading rumors about her sexual behavior, and sending her threatening text messages and e-mails. One of the student's teachers and an athletic coach witnessed the name calling and heard the rumors, but identified it as "hazing" that new students often experience. They also noticed the new student's anxiety and declining class participation. The school attempted to resolve the situation by requiring the student to work the problem out directly with her harassers.

Sexual harassment is unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature. Thus, sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.

In this example, the school employees failed to recognize that the "hazing" constituted sexual harassment. The school did not comply with its Title IX obligations when it failed to investigate or remedy the sexual harassment. The conduct was clearly unwelcome, sexual (e.g., sexual rumors and name calling), and sufficiently serious that it limited the student's ability to participate in and benefit from the school's education program (e.g., anxiety and declining class participation).

The school should have trained its employees on the type of misconduct that constitutes sexual harassment. The school also should have made clear to its employees that they could not require the student to confront her harassers. Schools may use informal mechanisms for addressing harassment, but only if the parties agree to do so on a voluntary basis. Had the school addressed the harassment consistent with Title IX, the school would have, for example, conducted a thorough investigation and taken interim measures to separate the student from the accused harassers. An effective response also might have included training students and employees on the school's policies related to harassment, instituting new procedures by which employees should report allegations of harassment, and more widely distributing the contact information for the district's Title IX coordinator. The school also might have offered the targeted student tutoring, other academic assistance, or counseling as necessary to remedy the effects of the harassment.

Title IX: Gender-Based Harassment

- Over the course of a school year, a gay high school student was called names (including anti-gay slurs and sexual comments) both to his face and on social networking sites, physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices). As a result, the student dropped out of the drama club to avoid further harassment. Based on the student's self-identification as gay and the homophobic nature of some of the harassment, the school did not recognize that the misconduct included discrimination covered by Title IX. The school responded to complaints from the student by reprimanding the perpetrators consistent with its anti-bullying policy. The reprimands of the identified perpetrators stopped the harassment by those individuals. It did not, however, stop others from undertaking similar harassment of the student.

As noted in the example, the school failed to recognize the pattern of misconduct as a form of sex discrimination under Title IX. Title IX prohibits harassment of both male and female students regardless of the sex of the harasser—i.e., even if the harasser and target are members of the same sex. It also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity. Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also, as this example illustrates, be subjected to forms of sex discrimination prohibited under Title IX. The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment. In this example, the harassing conduct was based in part on the student's failure to act as some of his peers believed a boy should act. The harassment created a hostile environment that limited the student's ability to participate in the school's education program (e.g., access to the drama club). Finally, even though the student did not identify the harassment as sex discrimination, the school should have recognized that the student had been subjected to gender-based harassment covered by Title IX.

In this example, the school had an obligation to take immediate and effective action to eliminate the hostile environment. By responding to individual incidents of misconduct on an ad hoc basis only, the school failed to confront and prevent a hostile environment from continuing. Had the school recognized the conduct as a form of sex discrimination, it could have employed the full range of sanctions (including progressive discipline) and remedies designed to eliminate the hostile environment. For example, this approach would have included a more comprehensive response to the situation that involved notice to the student's teachers so that they could ensure the student was not subjected to any further harassment, more aggressive monitoring by staff of the places where harassment occurred, increased training on the scope of the school's harassment and discrimination policies, notice to the target and harassers of available counseling services and resources, and educating the entire school community on civil rights and expectations of tolerance, specifically as they apply to gender stereotypes. The school also should have taken steps to clearly communicate the message that the school does not tolerate harassment and will be responsive to any information about such conduct.

Section 504 and Title II: Disability Harassment

- Several classmates repeatedly called a student with a learning disability "stupid," "idiot," and "retard" while in school and on the school bus. On one occasion, these students tackled him, hit him with a school binder, and threw his personal items into the garbage. The student complained to his teachers and guidance counselor that he was continually being taunted and teased. School officials offered him counseling services and a psychiatric evaluation, but did not discipline the offending students. As a result, the harassment continued. The student, who had been performing well academically, became angry, frustrated, and depressed, and often refused to go to school to avoid the harassment.

In this example, the school failed to recognize the misconduct as disability harassment under Section 504 and Title II. The harassing conduct included behavior based on the student's disability, and limited the student's ability to benefit fully from the school's education program (e.g., absenteeism). In failing to investigate and remedy the misconduct, the school did not comply with its obligations under Section 504 and Title II.

Counseling may be a helpful component of a remedy for harassment. In this example, however, since the school failed to recognize the behavior as disability harassment, the school did not adopt a comprehensive approach to eliminating the hostile environment. Such steps should have at least included disciplinary action against the harassers, consultation with the district's Section 504/Title II coordinator to ensure a comprehensive and effective response, special training for staff on recognizing and effectively responding to harassment of students with disabilities, and monitoring to ensure that the harassment did not resume.

I encourage you to reevaluate the policies and practices your school uses to address bullying19 and harassment to ensure that they comply with the mandates of the federal civil rights laws. For your convenience, the following is a list of online resources that further discuss the obligations of districts to respond to harassment prohibited under the federal antidiscrimination laws enforced by OCR:

- Sexual Harassment: It's Not Academic (Revised 2008):http://www.ed.gov/about/offices/list/ocr/docs/ocrshpam.html
- Dear Colleague Letter: Sexual Harassment Issues (2006):http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html
- Dear Colleague Letter: Religious Discrimination (2004):http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html
- Dear Colleague Letter: First Amendment (2003):http://www.ed.gov/about/offices/list/ocr/firstamend.html
- Sexual Harassment Guidance (Revised 2001): http://www.ed.gov/about/offices/list/ocr/docs/shguide.html
- Dear Colleague Letter: Prohibited Disability Harassment (2000): http://www.ed.gov/about/offices/list/ocr/docs/disabharassltr.html
- Racial Incidents and Harassment Against Students (1994): http://www.ed.gov/about/offices/list/ocr/docs/race394.html

Please also note that OCR has added new data items to be collected through its Civil Rights Data Collection (CRDC), which surveys school districts in a variety of areas related to civil rights in education. The CRDC now requires districts to collect and report information on allegations of harassment, policies regarding harassment, and discipline imposed for harassment. In 2009-10, the CRDC covered nearly 7,000 school districts, including all districts with more than 3,000 students. For more information about the CRDC data items, please visit http://www2.ed.gov/about/offices/list/ocr/whatsnew.html.

OCR is committed to working with schools, students, students' families, community and advocacy organizations, and other interested parties to ensure that students are not subjected to harassment. Please do not hesitate to contact OCR if we can provide assis–tance in your efforts -to address harassment or if you have other civil rights concerns.

For the OCR regional office serving your state, please visit: http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm, or call OCR's Customer Service Team at 1-800-421-3481.

I look forward to continuing our work together to ensure equal access to education, and to promote safe and respectful school climates for America's students.

Sincerely,

Russlynn Ali

Assistant Secretary for Civil Rights

Appendix L

2011 Dear Colleague Sexual Violence

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 et seq., and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence. Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

The statistics on sexual violence are both deeply troubling and a call to action for the nation. A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college.3 The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.4 According to data collected under the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f), in 2009, college campuses reported nearly 3,300 forcible sex offenses as defined by the Clery Act.5 This problem is not limited to college. During the 2007-2008 school year, there were 800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools.6 Additionally, the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population. The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities.

This letter begins with a discussion of Title IX's requirements related to student-on-student sexual harassment, including sexual violence, and explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence. These requirements are discussed in detail in OCR's Revised Sexual Harassment Guidance issued in 2001 (2001 Guidance). This letter supplements the 2001 Guidance by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence. This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects. Although some examples contained in this letter are applicable only in the postsecondary context, sexual harassment and violence also are concerns for school districts. The Title IX obligations discussed in this letter apply equally to school districts unless otherwise noted.

Title IX Requirements Related to Sexual Harassment and Sexual Violence

Schools' Obligations to Respond to Sexual Harassment and Sexual Violence

Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.

As explained in OCR's 2001 Guidance, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.

Title IX protects students from sexual harassment in a school's education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip.

If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects. Schools also are required to publish a notice of nondiscrimination and to adopt and publish grievance procedures. Because of these requirements, which are discussed in greater detail in the following section, schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.

Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.

Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation. As discussed later in this letter, the school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct. The specific steps in a school's investigation will vary depending upon the nature of the allegations, the age of the student or students involved (particularly in elementary and secondary schools), the size and administrative structure of the school, and other factors. Yet as discussed in more detail below, the school's inquiry must in all cases be prompt, thorough, and impartial. In cases involving potential criminal conduct, school personnel must determine, consistent with State and local law, whether appropriate law enforcement or other authorities should be notified.

Schools also should inform and obtain consent from the complainant (or the complainant's parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited. The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

As discussed in the 2001 Guidance, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an "education record" under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99. The school should inform the complainant if it cannot ensure confidentiality. Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence. Examples of such steps are discussed later in this letter.

Compliance with Title IX, such as publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures, can serve as preventive measures against harassment. Combined with education and training programs, these measures can help ensure that all students and employees recognize the nature of sexual harassment and violence, and understand that the school will not tolerate such conduct. Indeed, these measures may bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment. Training for administrators, teachers, staff, and students also can help ensure that they understand what types of conduct constitute sexual harassment or violence, can identify warning signals that may need attention, and know how to respond. More detailed information and examples of education and other preventive measures are provided later in this letter.

Procedural Requirements Pertaining to Sexual Harassment and Sexual Violence

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations. Specifically, a recipient must:

(A) Disseminate a notice of nondiscrimination;16

(B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;

(C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints. and

These requirements apply to all forms of sexual harassment, including sexual violence, and are important for preventing and effectively responding to sex discrimination. They are discussed in greater detail below. OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the 2001 Guidance. Recipients should then implement changes as needed.

(A) Notice of Nondiscrimination

The Title IX regulations require that each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities, and that Title IX requires it not to discriminate in such a manner. The notice must state that inquiries concerning the application of Title IX may be referred to the recipient's Title IX coordinator or to OCR. It should include the name or title, office address, telephone number, and e-mail address for the recipient's designated Title IX coordinator.

The notice must be widely distributed to all students, parents of elementary and secondary students, employees, applicants for admission and employment, and other relevant persons. OCR recommends that the notice be prominently posted on school Web sites and at various locations throughout the school or campus and published in electronic and printed publications of general distribution that provide information to students and employees about the school's services and policies. The notice should be available and easily accessible on an ongoing basis.

Title IX does not require a recipient to adopt a policy specifically prohibiting sexual harassment or sexual violence. As noted in the 2001 Guidance, however, a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if, because of the lack of a specific policy, students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. OCR therefore recommends that a recipient's nondiscrimination policy state that prohibited sex discrimination covers sexual harassment, including sexual violence, and that the policy include examples of the types of conduct that it covers.

(B) Title IX Coordinator

The Title IX regulations require a recipient to notify all students and employees of the name or title and contact information of the person designated to coordinate the recipient's compliance with Title IX. The coordinator's responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed. If a recipient designates more than one Title IX coordinator, the notice should describe each coordinator's responsibilities (e.g., who will handle complaints by students, faculty, and other employees). The recipient should designate one coordinator as having ultimate oversight responsibility, and the other coordinators should have titles clearly showing that they are in a deputy or supporting role to the senior coordinator. The Title IX coordinators should not have other job responsibilities that may create a conflict of interest. For example, serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest.

Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient's grievance procedures operate. Because sexual violence complaints often are filed with the school's law enforcement unit, all school law enforcement unit employees should receive training on the school's Title IX grievance procedures and any other procedures used for investigating reports of sexual violence. In addition, these employees should receive copies of the school's Title IX policies. Schools should instruct law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents. The school's Title IX coordinator or designee should be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence. The Title IX coordinator also should be given access to school law enforcement unit investigation notes and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.

(C) Grievance Procedures

The Title IX regulations require all recipients to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints.The grievance procedures must apply to sex discrimination complaints filed by students against school employees, other students, or third parties.

Title IX does not require a recipient to provide separate grievance procedures for sexual harassment and sexual violence complaints. Therefore, a recipient may use student disciplinary procedures or other separate procedures to resolve such complaints. Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.22 These requirements are discussed in greater detail below. If the recipient relies on disciplinary procedures for Title IX compliance, the Title IX coordinator should review the recipient's disciplinary procedures to ensure that the procedures comply with the prompt and equitable requirements of Title IX.

Grievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (e.g., participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator). In addition, as stated in the 2001 Guidance, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. Moreover, in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis. OCR recommends that recipients clarify in their grievance procedures that mediation will not be used to resolve sexual assault complaints.

Prompt and Equitable Requirements

As stated in the 2001 Guidance, OCR has identified a number of elements in evaluating whether a school's grievance procedures provide for prompt and equitable resolution of sexual harassment complaints. These elements also apply to sexual violence complaints because, as explained above, sexual violence is a form of sexual harassment. OCR will review all aspects of a school's grievance procedures, including the following elements that are critical to achieve compliance with Title IX:

- Notice to students, parents of elementary and secondary students, and employees of the grievance procedures, including where complaints may be filed;
- Application of the procedures to complaints alleging harassment carried out by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence;
- Designated and reasonably prompt time frames for the major stages of the complaint process;

- Notice to parties of the outcome of the complaint;24
- An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate. and

As noted in the 2001 Guidance, procedures adopted by schools will vary in detail, specificity, and components, reflecting differences in the age of students, school sizes and administrative structures, State or local legal requirements, and past experiences. Although OCR examines whether all applicable elements are addressed when investigating sexual harassment complaints, this letter focuses on those elements where our work indicates that more clarification and explanation are needed, including:

(A) Notice of the grievance procedures

The procedures for resolving complaints of sex discrimination, including sexual harassment, should be written in language appropriate to the age of the school's students, easily understood, easily located, and widely distributed. OCR recommends that the grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs for students, parents of elementary and secondary students, faculty, and staff.

(B) Adequate, Reliable, and Impartial Investigation of Complaints

OCR's work indicates that a number of issues related to an adequate, reliable, and impartial investigation arise in sexual harassment and violence complaints. In some cases, the conduct may constitute both sexual harassment under Title IX and criminal activity. Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation. In addition, a criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.

A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report.

Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation. Moreover, nothing in an MOU or the criminal investigation itself should prevent a school from notifying complainants of their Title IX rights and the school's grievance procedures, or from taking interim steps to ensure the safety and well-being of the complainant and the school community while the law enforcement agency's fact-gathering is in progress. OCR also recommends that a school's MOU include clear policies on when a school will refer a matter to local law enforcement.

As noted above, the Title IX regulation requires schools to provide equitable grievance procedures. As part of these procedures, schools generally conduct investigations and hearings to determine whether sexual harassment or violence occurred. In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints. The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e et seq. Like Title IX, Title VII prohibits discrimination on the basis of sex. OCR also uses a preponderance of the evidence standard when it resolves complaints against recipients. For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX. OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings. Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing. For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant's statement without also allowing the complainant to review the alleged perpetrator's statement.

While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally. OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment. OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.

All persons involved in implementing a recipient's grievance procedures (e.g., Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the recipient's grievance procedures. The training also should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker also should have adequate training or knowledge regarding sexual violence. Additionally, a school's investigation and hearing processes cannot be equitable unless they are impartial. Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.

Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

(C) Designated and Reasonably Prompt Time Frames

OCR will evaluate whether a school's grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident thatoccurred in a classroom during school hours with a single complainant.

(D) Notice of Outcome

Both parties must be notified, in writing, about the outcome of both the complaint and any appeal, i.e., whether harassment was found to have occurred. OCR recommends that schools provide the written determination of the final outcome to the complainant and the alleged perpetrator concurrently. Title IX does not require the school to notify the alleged perpetrator of the outcome before it notifies the complainant.

Due to the intersection of Title IX and FERPA requirements, OCR recognizes that there may be confusion regarding what information a school may disclose to the complainant.32 FERPA generally prohibits the nonconsensual disclosure of personally identifiable information from a student's "education record." However, as stated in the 2001 Guidance, FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student. This includes an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall. Disclosure of other information in the student's "education record," including information about sanctions that do not relate to the harassed student, may result in a violation of FERPA.

Further, when the conduct involves a crime of violence or a non-forcible sex offense,FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a disciplinary proceeding against the alleged perpetrator, regardless of whether the institution concluded that a violation was committed. Additionally, a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution's rules or policies.

Postsecondary institutions also are subject to additional rules under the Clery Act. This law, which applies to postsecondary institutions that participate in Federal student financial aid programs, requires that "both the accuser and the accused must be informed of the outcome. Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others Accordingly, postsecondary institutions may not require a complainant to abide by a nondisclosure agreement, in writing or otherwise, that would prevent the redisclosure of this information.

Steps to Prevent Sexual Harassment and Sexual Violence and Correct its Discriminatory Effects on the Complainant and Others

Education and Prevention

In addition to ensuring full compliance with Title IX, schools should take proactive measures to prevent sexual harassment and violence. OCR recommends that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available. Schools may want to include these education programs in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and "back to school nights." These programs should include adiscussion of what constitutes sexual harassment and sexual violence, the school's policies and disciplinary procedures, and the consequences of violating these policies.

The education programs also should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities. Schools should be aware that victims or third parties may be deterred from reporting incidents if alcohol, drugs, or other violations of school or campus rules were involved. As a result, schools should consider whether their disciplinary policies have a chilling effect on victims' or other students' reporting of sexual violence offenses. For example, OCR recommends that schools inform students that the schools' primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence.

OCR also recommends that schools develop specific sexual violence materials that include the schools' policies, rules, and resources for students, faculty, coaches, and administrators. Schools also should include such information in their employee handbook and any handbooks that student athletes and members of student activity groups receive. These materials should include where and to whom students should go if they are victims of sexual violence. These materials also should tell students and school employees what to do if they learn of an incident of sexual violence. Schools also should assess student activities regularly to ensure that the practices and behavior of students do not violate the schools' policies against sexual harassment and sexual violence.

Remedies and Enforcement

As discussed above, if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school's overall services or policies. Examples of these actions are discussed in greater detail below.

Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation. The school should undertake these steps promptly once it has notice of a sexual harassment or violence allegation. The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school's investigation. When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain. In addition, schools should ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services, and their right to file a complaint with local law enforcement.

Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates. For instance, friends of the alleged perpetrator may subject the complainant to name-calling and taunting. As part of their Title IX obligations, schools must have policies and procedures in place to protect against retaliatory harassment. At a minimum, schools must ensure that complainants and their parents, if appropriate, know how to report any subsequent problems, and should follow-up with complainants to determine whether any retaliation or new incidents of harassment have occurred.

When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population. When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.

Schools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases.

Depending on the specific nature of the problem, remedies for the complainant might include, but are not limited to:

- providing an escort to ensure that the complainant can move safely between classes and activities;
- ensuring that the complainant and alleged perpetrator do not attend the same classes;
- moving the complainant or alleged perpetrator to a different residence hall or, in the case of an elementary or secondary school student, to another school within the district;
- providing counseling services;

- providing medical services;
- providing academic support services, such as tutoring;
- arranging for the complainant to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not adversely affect the complainant's academic record; and
- reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.

Remedies for the broader student population might include, but are not limited to:

Counseling and Training

- offering counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services;
- designating an individual from the school's counseling center to be "on call" to assist victims of sexual harassment or violence whenever needed;
- training the Title IX coordinator and any other employees who are involved in processing, investigating, or resolving complaints of sexual harassment or sexual violence, including providing training on:
    - the school's Title IX responsibilities to address allegations of sexual harassment or violence
    - how to conduct Title IX investigations
    - information on the link between alcohol and drug abuse and sexual harassment or violence and best practices to address that link;
- training all school law enforcement unit personnel on the school's Title IX responsibilities and handling of sexual harassment or violence complaints;
- training all employees who interact with students regularly on recognizing and appropriately addressing allegations of sexual harassment or violence under Title IX; and
- informing students of their options to notify proper law enforcement authorities, including school and local police, and the option to be assisted by school employees in notifying those authorities.

Development of Materials and Implementation of Policies and Procedures

- developing materials on sexual harassment and violence, which should be distributed to students during orientation and upon receipt of complaints, as well as widely posted throughout school buildings and residence halls, and which should include:
    - what constitutes sexual harassment or violence
    - what to do if a student has been the victim of sexual harassment or violence
    - contact information for counseling and victim services on and off school grounds
    - how to file a complaint with the school
    - how to contact the school's Title IX coordinator
    - what the school will do to respond to allegations of sexual harassment or violence, including the interim measures that can be taken
- requiring the Title IX coordinator to communicate regularly with the school's law enforcement unit investigating cases and to provide information to law enforcement unit personnel regarding Title IX requirements;44
- requiring the Title IX coordinator to review all evidence in a sexual harassment or sexual violence case brought before the school's disciplinary committee to determine whether the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee;
- requiring the school to create a committee of students and school officials to identify strategies for ensuring that students:
    - know the school's prohibition against sex discrimination, including sexual harassment and violence
    - recognize sex discrimination, sexual harassment, and sexual violence when they occur
    - understand how and to whom to report any incidents
    - know the connection between alcohol and drug abuse and sexual harassment or violence
    - feel comfortable that school officials will respond promptly and equitably to reports of sexual harassment or violence;

- issuing new policy statements or other steps that clearly communicate that the school does not tolerate sexual harassment and violence and will respond to any incidents and to any student who reports such incidents; and
- revising grievance procedures used to handle sexual harassment and violence complaints to ensure that they are prompt and equitable, as required by Title IX.

School Investigations and Reports to OCR

- conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school's policies against sexual harassment and violence;
- investigating whether any other students also may have been subjected to sexual harassment or violence;
- investigating whether school employees with knowledge of allegations of sexual harassment or violence failed to carry out their duties in responding to those allegations;
- conducting, in conjunction with student leaders, a school or campus "climate check" to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school; and
- submitting to OCR copies of all grievances filed by students alleging sexual harassment or violence, and providing OCR with documentation related to the investigation of each complaint, such as witness interviews, investigator notes, evidence submitted by the parties, investigative reports and summaries, any final disposition letters, disciplinary records, and documentation regarding any appeals.

Conclusion

The Department is committed to ensuring that all students feel safe and have the opportunity to benefit fully from their schools' education programs and activities. As part of this commitment, OCR provides technical assistance to assist recipients in achieving voluntary compliance with Title IX.

If you need additional information about Title IX, have questions regarding OCR's policies, or seek technical assistance, please contact the OCR enforcement office that serves your state or territory. The list of offices is available at http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm. Additional information about addressing sexual violence, including victim resources and information for schools, is available from the U.S. Department of Justice's Office on Violence Against Women (OVW) at http://www.ovw.usdoj.gov/.46

Thank you for your prompt attention to this matter. I look forward to continuing our work together to ensure that all students have an equal opportunity to learn in a safe and respectful school climate.

Sincerely,

Russlynn Ali

Assistant Secretary for Civil Rights

Appendix M

Employment

The U.S. Equal Employment Opportunity Commission

FOR IMMEDIATE RELEASE
October 31, 1997

CONTACT: Ellen J. Vargas
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EEOC ISSUES GUIDANCE ON APPLICATION OF ANTI-DISCRIMINATION LAWS TO COACHES' PAY AT EDUCATIONAL INSTITUTIONS

WASHINGTON — The U.S. Equal Employment Opportunity Commission (EEOC) announced today the release of the Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions (http://www.eeoc.gov/policy/docs/coaches.html). The guidance, which was approved by the bi-partisan Commission, clarifies how the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 apply to sex-based differences in the compensation of sports coaches.

According to EEOC Legal Counsel, Ellen J. Vargyas, "Although Congress outlawed sex-discrimination in school-sponsored athletics programs over twenty-five years ago with the passage of Title IX, recent studies show that the overall pattern of the employment and compensation of coaches by educational institutions is still far from gender-neutral." Not only do these studies show that barely two percent of the coaches of men's teams are women, they also show that men's coaches, overall, substantially out-earn women's coaches in both salaries and benefits.

Vargyas further explained that, "Because jobs coaching male athletes appear to have been effectively limited to men, the pay disparities between coaches of men's and women's teams raise serious sex discrimination concerns under the employment discrimination laws." She continued, "The Commission has issued this guidance to assist both educational institutions and coaches in better understanding their rights and responsibilities under the laws."

The text of the policy statement will be available on EEOC's web site at www.eeoc.gov shortly after the release of the document. You can also obtain a copy by writing to EEOC's Office of Communications and Legislative Affairs, 1801 L Street, N.W., Washington, D.C. 20507.

In addition to enforcing the Equal Pay Act, and Title VII of the Civil Rights Act, which prohibits discrimination in employment based on race, color, religion, sex, or national origin, EEOC enforces the Age Discrimination in Employment Act; Title I of the Americans with Disabilities Act, which prohibits discrimination against individuals with disabilities in the private sector and state and local governments; prohibitions against discrimination affecting persons with disabilities in the federal government; and sections of the Civil Rights Act of 1991.

This page was last modified on November 3, 1997.

Appendix N

Resource Links

List of organizations working in women's sports and education follows; also included are the links to the offices of the Office for Civil Rights and research articles and web pages.

Links of Interest

NCAA Gender Equity Resource Center

NCAA Title IX Resource Center

NCAA Inclusion Resources

National Association of Collegiate Women's Athletic Administrators (NACWAA)

Women's Sports Foundation

It Takes a Team (GLBT issues in Sports)

National Association for Girls and Women in Sport

Fairplaynow.org

National Women's Law Center (NWLC)

The Chronicle of Higher Education

Gender Equity in Sports

The Institute for Diversity and Ethics in Sports

United States Olympic Committee (USOC)

Save Title IX Resource Page

NCAA Diversity and Inclusion

25 Years of NCAA Women's Championships

U.S. Department of Education

Title IX Home Page

Title IX Publications

Office for Civil Rights Contact information

Research

NCAA Gender Equity Reports

NCAA Sports Sponsorship and Participation Reports

1988-89 -- 2003-04 Supplement on the Decline in Sponsorship in Olympic Sports

NCAA Diversity Research

Acosta & Carpenter, Women in Intercollegiate Sport – Longitudinal Study

Women Sports Foundation Report: Who's Playing College Sports: Trends in Participation

Life and Work Balance in Athletics

Coalition for Girls and Women in Education – TITLE IX ATHLETICS POLICIES - Issues and Data for Education Decision Makers, May 10, 2007; Title IX at 35: Beyond the Headlines, 2008

Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams. GAO 01-297, March 8, 2001

GAO Report - Intercollegiate Athletics: Recent Trends in Teams and Participants in National Collegiate Athletic Association Sports, July 2007

National Women's Law Center 35th Anniversary of Title IX

NWLC Legal Guide to Athletics Title IX Compliance

NCAA Gender Equity Manual – through the NCAA Gender Equity Homepage

NCAA Gender Equity Planning Best Practices

NCAA Emerging Sports for Women

NCAA Gender Equity & Issues Forums

NCAA Committee on Women's Athletics

Senior Woman Administrator Resource Page

The NCAA salutes the more than

400,000 student-athletes

participating in **23 sports** at

more than **1,000** member institutions