

 **NACUA**

**March 2017 CLE Workshop**

Fairmont Olympic Hotel • Seattle, WA  
March 29 – 31, 2017

**08B** **Athletics and Title IX:  
Grappling with the  
Practical Challenges  
of Compliance**

**THE CHANGING LANDSCAPE OF HIGHER EDUCATION  
DISCRIMINATION LAW: CURRENT AND FUTURE  
CHALLENGES**

**IT'S ALL ABOUT MATH:  
MAINTAINING TITLE IX COMPLIANCE  
WHILE ELIMINATING TEAMS OR LIMITING PARTICIPATION**

March 29 – 31, 2017

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**I. INTRODUCTION**

In an era of increasing financial challenges when most athletic programs lose money, universities may seek to solve budgetary problems by eliminating some teams or limiting participation on existing teams. While these measures may make sense from a financial standpoint, such tactics raise significant legal concerns.

This outline explores the Title IX implications of eliminating teams or limiting participation on existing teams. The outline has three parts. Part I provides an overview of the Title IX Athletics Regulations for both participation and financial assistance. Part II explores how the athletics regulations apply to a decision to eliminate teams or limit participation. Part III identifies potential issues for reinterpretation in a Trump Administration.

**II. OVERVIEW OF THE TITLE IX ATHLETICS REGULATIONS**

Title IX of the Education Amendments of 1972 prohibits public and private educational institutions that receive federal funds from discriminating because of sex in any aspect of their operations.<sup>1</sup> Although there is nothing in statutory text that mentions intercollegiate athletics, the U.S. Department of Education promulgated various regulations regarding the application of Title IX to intercollegiate athletics.<sup>2</sup> Although the regulations cover all aspects of intercollegiate athletics, the regulations concerning participation opportunities and financial assistance pose the most difficult challenges for institutions.<sup>3</sup>

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<sup>1</sup> 20 U.S.C. §1681

<sup>2</sup> See 34 C.F.R. § 106.37(c), 106.41(a)-(c).

<sup>3</sup> In addition to participation opportunities and scholarships, the regulations require “equal athletic opportunity for members of both sexes.” 34 C.F.R. § 106.41(a). In determining whether equal opportunities are available, OCR considers, but is not limited to, the following 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 times; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutors; (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; and (10) Publicity. Although the regulation emphasizes that equal expenditures are not required, the failure to provide “necessary funds for teams of one sex” is relevant.

## A. Participation Opportunities

In a further effort to clarify the Regulation, in 1979, the Department of Health, Education and Welfare issued a policy interpretation of the regulations which was later adopted by the Office for Civil Rights of the U.S. Department of Education, (“OCR”), the agency charged with enforcement of Title IX.<sup>4</sup> Under the OCR’s interpretation, which the federal appellate courts universally have given deference, an institution must do one of three things to comply with Title IX in the context of athletics participation.<sup>5</sup> This is referred to as the “Three-Part” or “Three-Prong” test.

### 1. Substantial Proportionality Prong

Under the “Substantial Proportionality” prong, each sex's representation in varsity athletics must be substantially proportionate to its full-time undergraduate representation in the student body. In 1996, the Clinton Administration clarified that athletic opportunities are “substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.”<sup>6</sup> In plain English, one determines how many additional opportunities are required for the underrepresented sex in order to achieve perfect proportionality.<sup>7</sup> If this number is sufficient to field a viable team, then the institution is not substantially proportionate and must add a team.

To illustrate how this analysis works, suppose a university is 55% female and presently offers 700 athletic participation opportunities. Men have 385 athletic participation opportunities women have 315 participation opportunities. This means women represent 45% of the athletes

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<sup>4</sup> Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (1979).

<sup>5</sup> See *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 290-291 (2<sup>nd</sup> Cir. 2004); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6<sup>th</sup> Cir. 2002); *Chalenor v. University of North Dakota*, 291 F.3d 1042, 1047 (8<sup>th</sup> Cir. 2002); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 879 (5<sup>th</sup> Cir. 2000); *Neal v. Board of Trustees*, 198 F.3d 763, 770 (9<sup>th</sup> Cir. 1999); *Kelley v. Board of Trustees, Univ. of Ill.*, 35 F.3d 265, 271 (7<sup>th</sup> Cir. 1994); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10<sup>th</sup> Cir. 1993); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3<sup>rd</sup> Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888, 896-897 (1<sup>st</sup> Cir. 1993)

<sup>6</sup> United States Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

<sup>7</sup> For purposes of this outline, underrepresented sex means the sex that is underrepresented when comparing athletic participation to undergraduate enrollment. Because the undergraduate enrollment numbers have shifted dramatically in recent years, the term is sometimes used in campus discussions to mean the sex that is underrepresented in enrollment. This can create confusion in campus discussion of Title IX issues.

(315 divided by 700) although women represent 55% of the full time undergraduates. The first step is to determine how many opportunities are required for women to achieve perfect proportionality of 55%. If male participation remains constant at 385, which is the assumption, the university must add 156 participation opportunities for women. If the University did so, it would have 471 female opportunities (315 current + 156 additional) and 385 male (all current). The second step is to determine whether the number of new participation opportunities required, 156 in this example, is sufficient to field a viable team. Obviously, it is sufficient. In fact, the University could field seven or eight new women's teams with 156 additional opportunities. In short, if one sex is fifty percent of the student body, its representation among varsity athletes must approximate fifty percent.

To date, Courts have not ruled on what constitutes "substantial proportionality" nor have they adopted the test set forth by OCR. Some individual settlements have included percentage disparities, but the issue itself remains unresolved.

## **2. History & Continuing Practice of Program Expansion Prong**

Under the "History & Continuing Practice of Program Expansion" prong, if an institution has not achieved substantial proportionality, an institution may demonstrate that it has a continuing history of expanding opportunities for the underrepresented sex. In other words, it is acceptable for female representation among athletes to be substantially below their representation in the student body if the institution has consistently added new teams for women and intends to do so in the future. In evaluating "history," the government looks at the institution's record for adding teams, the institution's record of increasing participants on existing teams, and the institution's response to requests to add teams. In assessing "continuing practice," the government examines the institution's current policy for adding teams. While not specifically referenced in the 1996 Clarification, the government presumably will not find a program to be in compliance with this test if its expansion of programs for the underrepresented sex coincides with continued expansion of programs for the overrepresented sex. In practical terms, in order to rely upon this prong, an institution must:

- (1) have consistently added new teams for the underrepresented sex about every three to four years;
- (2) must refrain from eliminating any teams for the underrepresented sex; and
- (3) should not have been concurrently adding programs for the overrepresented sex and must have a plan for adding new teams in the future.

## **3. Fully Accommodating Interests & Abilities Prong**

Under the "Fully Accommodating Interests & Abilities" test, an institution may demonstrate that it is currently meeting all "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.”<sup>8</sup> This aspect of the three-part test is the subject of controversy. During the Bush 43 Administration, via a Policy Clarification issued in 2005, the OCR allowed colleges and universities to demonstrate compliance by relying on surveys of the student body.<sup>9</sup> Critics argued that the “model survey” included in the 2005 Clarification was based on flawed methodology, was burdensome for students to complete, contained misleading information, was drafted to encourage responses of “not interested,” allowed schools to count non-responses as affirmative statements of non-interest, and did not require any minimum response rate in order to validate the survey. In 2010, the Obama Administration withdrew the 2005 Policy Clarification and insisted that the inquiry is broader.<sup>10</sup>

After the 2010 clarification, the Obama Administration determined interest by examining:

- (1) survey data;
- (2) requests by students to add a particular sport;
- (3) participation rates in club or intramural sports;
- (4) participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the school draws its students; and
- (5) interviews with students, coaches, and administrators.<sup>11</sup>

Moreover, in assessing competitive opportunities, the OCR evaluates:

- (1) the athletic experience and accomplishments of students and admitted students interested in playing the sport;
- (2) opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team;

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<sup>8</sup> United States Department of Education, Office for Civil Rights, *Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three* (April 20, 2010) available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>

<sup>9</sup> See United States Department of Education, Office for Civil Rights, *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test, Part Three*, (March 17, 2005). See also United States Department of Education, Office for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding IX Compliance* (July 11, 2003).

<sup>10</sup> United States Department of Education, Office for Civil Rights, *Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three* (April 20, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>

<sup>11</sup> *Id.*

(3) participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport in which there is interest; and

(4) competitive opportunities offered by other schools against which the institution competes and those offered by other schools in the relevant geographic area against which the institution does not now compete.<sup>12</sup>

Still, as noted in the 1996 Clarification and reiterated in the 2010 Clarification, while such indicators may be “helpful to OCR in ascertaining likely interest of an institution’s students and admitted students in particular sports” the actual test remains “whether an institution is meeting the actual interest and abilities of its students and admitted students.”

In sum, the Obama Administration returned to the approach set forth by the Clinton Administration and focused not only on the student body, but also on the experiences of the broader community and the institution’s traditional rivals.

As of February 2017, it is unclear what changes—if any—the Trump Administration will make to the existing interpretation.

## **B. Scholarships**

If an institution provides athletic scholarships, “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 sports.”<sup>13</sup> In effect, if 50% of the athletes are female, then females should receive approximately 50% of total athletic financial assistance.<sup>14</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> 34 C.F.R. § 106.37(c) (emphasis added). *See also* 44 Fed. Reg. 71413, 71415-23 (1979) (Policy Interpretation).

<sup>14</sup> This is a Clinton Administration standard set forth in a 1998 letter to Bowling Green State University (<http://www2.ed.gov/print/about/offices/list/ocr/docs/bowlgrn.html>). In its letter, OCR stated “If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the ‘substantially proportionate’” requirement.” A 1% standard can be difficult to achieve given that it is measured based on scholarship dollars actually spent rather than dollars awarded. In addition, schools are bound by the scholarship limits imposed by their athletic conferences. Depending on the menu of sports offered at an institution, schools may not be able to give the full allotment allowed under the conference rules and still comply with Title IX. The 1998 letter also contains defenses to the 1% standard, including adjustments for in-state and out-of-state tuition rates and last-minute decisions by student athletes not to attend an institution and thereby not spend awarded scholarship monies.

To be sure, the financial assistance regulation and the accommodating interests and ability regulation work in tandem. As a sex's participation increases, its share of scholarship money must also increase. Thus, while adding some extra non-scholarship players may help the institution achieve substantial proportionality in the participation context,<sup>15</sup> it may actually cause non-compliance in the financial context. Conversely, limiting non-scholarship players to achieve financial assistance compliance may cause the university to fail the participation test. It is extremely difficult to meet both standards.

### **III. APPLICATION OF THE REGULATIONS TO A DECISION REGARDING THE ELIMINATION OF A TEAM OR A LIMITATION ON PARTICIPATION**

If an institution needs to cut costs by eliminating a team or limiting participation on an existing team, then the institution must be aware of several considerations.

#### **A. In the Long Term, the Three-Part Test Mandates Substantial Proportionality**

OCR's three-part test for participation has the long-term effect of mandating substantial proportionality. If an institution achieves substantial proportionality, then OCR expects the institution to maintain substantial proportionality. Any elimination of teams must maintain that delicate balance.

Similarly, if an institution is short of substantial proportionality, then OCR expects the institution to take measures to increase participation among the underrepresented sex to achieve substantial proportionality eventually. For example, part two of the three-part test requires expansion of opportunities for the underrepresented sex. This expansion continues until the school achieves substantial proportionality. Similarly, part three of three-part test requires an assessment of the campus, the wider community from which students are drawn, and the practices of traditional rivals in order to gauge the interests of the underrepresented sex. As interest develops, the institution must add teams until it achieves substantial proportionality.

#### **B. Any Elimination of a Team or Limitation of Participation Must Result in Substantial Proportionality**

If the institution lacks substantial proportionality and chooses to eliminate an intercollegiate team for the overrepresented sex, then the net effect of the decision is to bring the institution closer to substantial proportionality. However, unless the institution actually achieves substantial proportionality through the cuts, being closer to substantial proportionality does not

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<sup>15</sup> Some schools have opted to ensure compliance via the substantial proportionality test by instituting a system of roster management. Such schools have set target squad numbers for their coaches so that the school can predict the number of male and female participants. Both OCR and the courts have reviewed these target numbers carefully to ensure the rosters are reasonable and consistent with the average squad sizes in the conference and at the national level, and sometimes also with coach expectations and wishes. *See e.g. Biediger v. Quinnipiac University*, 616 F. Supp. 2d 277 (D. Conn. 2009) (Ruling and Order Granting Preliminary Injunction).

guarantee compliance with the three-part test. Elimination of opportunities for the overrepresented sex does not constitute expansion of opportunities for the underrepresented sex. Similarly, denying some of the interests and abilities of the overrepresented sex does not equate with full and effective accommodation of the underrepresented sex.

Moreover, the overrepresented sex may claim discrimination because it bore all of the cuts. If the cuts result in compliance or continued compliance with the three-part test, then the need for the institution to comply with OCR's interpretation likely justifies the disparate treatment. Conversely, if the cuts do not result in compliance, then the institution likely cannot justify singling out the overrepresented sex.

Alternatively, if an institution chooses to eliminate an intercollegiate team from the underrepresented sex, then it must do so in a manner that ensures substantial proportionality. As explained below, part two and part three are not viable options.

If an institution eliminates a team and does not replace it with a team that provides greater participation opportunities, then it is legally impossible to comply with part two of the three-part test.<sup>16</sup> As explained above, part two requires an institution to demonstrate a history and continuing practice of program expansion for the underrepresented sex. Yet, if a college or university is eliminating a team for the underrepresented sex, it is necessarily reducing, not expanding, opportunities.

Similarly, if an institution eliminates a team, it is legally impossible to comply with part three of the three-part test. As detailed previously, part three of the three-part test requires an institution to demonstrate that its current selection of sports fully and effectively accommodates the interests of the underrepresented sex. However, regardless of whether one utilizes the narrow definition of the Bush Administration or the broader definition of the Obama Administration, an institution that has eliminated a team cannot prove full and effective accommodation. Quite simply, the fact that the institution recently fielded an intercollegiate team demonstrates that there is interest and ability in the sport as well as an expectation of reasonable competition. The institution really has no viable claim otherwise.

### **C. Any Elimination of a Team or Limitation of Participation Must Maintain Proportionality in Terms of Financial Assistance**

Regardless of whether an institution is cutting teams from the overrepresented or underrepresented sex and regardless of how it complies with the three-part test, the institution must comply with the financial assistance regulations. This means that the institution must increase or decrease a sex's share of financial assistance to reflect the new reality.

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<sup>16</sup> If an institution eliminates a team from the underrepresented sex, but adds a new team that offers more opportunities for the underrepresented sex, it does expand the opportunities for the underrepresented sex.



#### **IV. POTENTIAL AREAS FOR REINTERPRETATION OR CLARIFICATION**

Although the Executive Branch promulgated the Athletic Regulations in 1975 and adopted the Three-Part Test in 1979, Presidential Administrations have differed in their interpretations. The Clinton Administration was far more aggressive in enforcement than the Bush 41 or Reagan Administration.<sup>17</sup> The Bush 43 administration adopted a somewhat different interpretation than the Clinton Administration and the Obama Administration reversed many of the Bush 43 Administration's pronouncements. As of February 2017, it is unclear what—if any—changes the Trump Administration might make.

With that caveat, below are several areas where the Trump Administration might change the interpretation.

##### **A. Focus on the Interests and Abilities of the Current Student Population Rather than External Factors**

As explained above, in evaluating Prong 3, the Obama Administration insisted that schools examine factors, such as “participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the school draws its students” and “competitive opportunities offered by other schools against which the institution competes and those offered by other schools in the relevant geographic area against which the institution does not now compete.” Yet, these are external factors. They offer no insight into the interests and abilities of the current student body.

Implicit in the mandate to consider external factors is the notion that an institution has an obligation to create new interest and ability rather than simply *accommodating existing* interest and ability. Certainly, if you choose to add a new sport and give the maximum number of scholarships allowed by the NCAA, you can create interest and ability. However, this does little for the students who are already on campus.

##### **B. Recognize that Interests and Abilities Is Context Specific**

To date, the federal government has determined interest and ability at all educational levels. It evaluates public middle schools in the same manner as NCAA Division I Power Conference Programs. Yet, one who has “interest” in playing at the NCAA Division I Power Conference level must agree to make a significant time commitment, accept many limitations on personal freedom, and significant reductions in privacy. An assessment of the willingness to make these commitments and sacrifices is a key measure of “interest.”

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<sup>17</sup> Although the regulations were in place during the Reagan Administration, the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984) precluded enforcement of the regulations to an intercollegiate athletic program that did not receive federal funds. The Civil Rights Restoration Act of 1987 overruled *Bell* and made the regulations applicable to all aspects of university operations.

Similarly, to play intercollegiate athletics at any level, but particularly at the NCAA Division I level, requires extraordinary ability. The mere fact one played in a youth league or even high school is meaningless. Any assessment of ability must measure whether you have the ability to play at the appropriate level.

**C. Recognize that NCAA Scholarship Limitations Are a Non-Discriminatory Reason for Disparities in Financial Assistance**

In order to maintain competitive balance, the NCAA limits the number of scholarships that institutions in Division I and II may give in a particular sport. For a variety of reasons—including a desire to offset the large number of scholarships offered in football—those limitations are about 10% higher in women sports than comparable men’s sports. For example, at the Division I level, a school may give 15 scholarships for women’s basketball, but only 13 scholarships in men’s basketball.

If an institution funds the maximum number of scholarships in all sports, the institution may have situation where women receive a higher proportion of scholarship money than their representation among varsity athletes. In effect, compliance with the NCAA scholarship limits causes a Title IX violation.

**A PEEK INTO AN OFFICE FOR CIVIL RIGHTS’  
INITIAL TITLE IX ATHLETICS EQUITY REVIEW NOTIFICATION**

March 29 – 31, 2017

**Janet P. Judge**  
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**I. INTRODUCTION**

The Department of Education’s Office for Civil Rights (OCR) is charged with enforcing Title IX of the Education Amendments of 1972,<sup>1</sup> as the law applies to all public and private institutions that receive federal funding. More specifically, for purposes of this paper, OCR is the agency charged with evaluating an institution’s intercollegiate athletics program’s compliance with the law.<sup>2</sup> This paper summarizes the three overarching athletics compliance areas of Title IX and provides an example of the information OCR may request in its initial notification letter to the president or chancellor of a school under investigation.

**II. BRIEF OVERVIEW OF THE LAW**

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in any program or activity that receives federal financial assistance. Specifically, Title IX 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.*<sup>3</sup>

The law’s reach extends to all university programs and activities, including, but not limited to, intercollegiate athletics. The framework for applying Title IX to athletics programs is drawn from the text of the law, its implementing regulations, clarifications and interpretative guidance published by the Department of Education’s Office of Civil Rights, federal case law, and experiences gleaned from past OCR Title IX reviews. Title IX’s implementing regulations prohibit sex discrimination in athletics programs offered by recipients of federal financial assistance.<sup>4</sup>

Title IX mandates equal opportunity in three distinct athletics program areas: athletics participation, athletics scholarships, and the treatment of existing athletics teams. Title IX requires an independent and full showing of equity in each of these three areas for an institution to demonstrate compliance. For example, OCR does not allow schools to offset a showing of disparate participation opportunities for males by awarding a disproportionate amount of athletically-related financial aid to females.

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<sup>1</sup> 20 U.S.C. § 1681 (2016).

<sup>2</sup> See 34 C.F.R. §§ 106.37(c), 106.41(a)-(c) (2016).

<sup>3</sup> 20 U.S.C. § 1681(a) (2016).

<sup>4</sup> 34 C.F.R. § 106.41(a) (2016).

In its initial equity document request, OCR will seek information to determine if a school complies with (1) at least one of Title IX's three participation equity tests, (2) OCR's very exacting scholarship equity test, and (3) the law's expectation that schools provide goods and services equitably to their overall male versus their overall female student-athlete population in each of the eleven areas that collectively comprise an institution's overall equal treatment obligation.

### **III. SAMPLE DOCUMENT REQUEST**

#### **A. General Information**

1. OCR will seek general information regarding an institution's commitment to self-assessment and compliance, areas the school has determined may need improvement, and descriptions of improvements the school has implemented or plans to implement to further its compliance efforts, including copies of any equity studies conducted by or on behalf of the institution since the implementation of Title IX in 1972, and any resulting reports and/or plans.
2. OCR will also seek the identity of all individuals who may be able to provide OCR with important information during the review. This includes organizational charts showing lines of authority and job responsibilities for athletics staff, as well as all individuals with compliance responsibilities and/or those responsible for assisting in the submission of the school's Equity in Athletics Disclosure Act of 1994 (EADA) annual reports.<sup>5</sup>
3. OCR often includes a catch-all request for any additional information that may aid in understanding the institution's intercollegiate athletics program and its compliance status.

#### **B. Participation:**

1. While the Department of Education automatically populates a school's full-time undergraduate rates by sex on a school's EADA submission, OCR will request this data separately. Schools should ensure that the enrollment information submitted in response to this request matches the data set forth in its annual EADA filings, or provide an explanation for any differences.
2. OCR will request a list of all intercollegiate athletics teams, conference affiliations, and NCAA (or NAIA) divisions, along with the number of participants of each sex on each team.<sup>6</sup> Institutions are routinely required to provide eligibility and/or squad lists to confirm their participation counts,

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<sup>5</sup> 20 U.S.C. § 1092(g) (2016).

<sup>6</sup> Counting participants has become increasingly complicated as eligibility rules regarding transfers, redshirt players, exhausted eligibility, permanent medical determinations, non-championship season play, and the growing practice of including male practice players on women's teams have evolved. Although male practice players are included in counts on an institution's EADA forms as female participants, they are not counted as male or female student-athletes for purposes of Title IX participation counts.

including the date on which each list was completed. OCR will use this data and the full-time undergraduate data to determine if an institution provides substantially proportionate athletics participation opportunities for its male and female student-athletes.

3. Institutions may be asked to describe any changes to their intercollegiate athletics program over the last three years, as well as any anticipated changes in the upcoming academic years. This includes the addition or discontinuation of athletics teams in order to track normal fluctuations and shed light on any imminent plans that may help or hurt the institution's compliance efforts.

4. To assess whether a school has a history and ongoing practice of expanding athletics participation for the underrepresented sex, OCR will request a full history of the athletics department's offerings. This information includes the initial date of competition for all current sports, the dates of team suspensions (if any), the dates that sports were discontinued (if any), the reasons for any changes in team status, and the number of student-athletes affected. Although OCR has begun asking for historical sport-by-sport participation data dating back to 1972, few institutions possess the records to fully comply with this request.

5. To determine whether a school can demonstrate that its current athletics offerings exhaust the interest and ability of the underrepresented sex, notwithstanding a lack of substantial proportionality,<sup>7</sup> OCR may ask for:

- Written and/or oral requests to add or expand programs made since 1972, and a description of the institution's response, including the underlying reasoning for its response, the name of the sport/team, the submission date of the request, the decision made regarding the request, the reason for the decision, and the names of any personnel involved in reviewing and responding to each request.
- Surveys and assessments that were administered and designed to measure the athletics interests and abilities of the institution's current and/or accepted students, including the results and any associated reports and action plans.
- A copy of the results of any research conducted for or by the institution during the last three years to determine regional and/or national interest among interscholastic students or other youth in sports not

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<sup>7</sup> For purposes of a Title IX review, "underrepresented sex" refers to a comparison of the undergraduate versus athletics participation percentages by sex. Where, e.g., women make up 54% of the full-time undergraduate population at the school but only occupy 51% of the athletics participation opportunities, they would be the underrepresented sex for purposes of a Title IX athletics equity review.

currently offered by the institution.

- Copies of any policies that set forth factors the school may consider when determining whether teams will be added to or eliminated from the intercollegiate athletics program and/or deciding which sport or team to add or eliminate. If no policy exists, OCR may request a description of the process used.
- In order to help determine if there exists unmet interest and ability, OCR will ask for a list of all club and intramural sports, and the number of men and women participating in each.

### **C. Scholarship Information**

1. Copies of policies, procedures, and criteria for awarding athletics financial assistance to male and female athletes, and a description of how determinations are made regarding the amount and type of need-based or merit-based financial assistance awarded to male and female athletes, if the institution's policies, practices, or criteria are different for athletes as compared to the general student body.
2. A summary of all athletics financial assistance or grants-in-aid awarded to each student-athlete by team. This includes the amount of aid the institution awarded and a description of expenses the aid covered.
3. A description of the expenses that are or were covered by a full athletics scholarship for men and women and the dollar value of each of these expenses, including the cost of in-state and out-of-state tuition, as well as cost of attendance determinations, if applicable. If the amount budgeted for athletics financial assistance or grants-in-aid prior to each year differs from the amount expended, provide team-by-team budgets versus actual expenditures and an explanation of any differences.
4. The anticipated athletics financial aid expenditures for the upcoming academic year, including the amount of aid that is budgeted for each athlete by team, the expenses the award will cover, and the in-state and out-of-state tuition rates for the academic year.

### **D. Treatment Information**

OCR generally asks for all policies relevant to each of the treatment areas, or, where policies do not exist, a description of how goods and services are provided to the institution's male and female student-athletes. The following is a limited sampling, based on actual cases, of the types of information OCR has requested previously in each of the treatment areas.

1. Equipment and Supplies
  - List of all equipment and supplies provided to student-athletes on each team.
  - Describe how items are maintained, how frequently they are replaced, and where they are stored.
  - Describe all equipment room and laundry services provided to each team.
2. Scheduling
  - Describe how competitive and practice schedules are determined.
  - Provide the competitive and practice schedules for each intercollegiate athletics team including the date of the first practice for each team. Explain why any team did not compete in the maximum number of contests permitted.
  - Describe whether each team used the full complement of pre-season, regular season, and non-championship season practice opportunities. If these were not used, explain why.
  - Provide a list of teams by sex that competed in post-season events, a list of events, the schedule of competition, and a list of those teams by sex that qualified for such competition but did not compete. Where post-season competition was offered for individual participants, provide similar information.
  - List all teams, by sex, that had the opportunity to compete in scrimmages and/or exhibition games, whether they engaged in the competition, and a description of why eligible teams, if any, did not compete.
  - Describe any policies or practices regarding whether teams are permitted to engage in pre-season practice and/or post-season competition.
3. Travel and Per Diem
  - Describe how each team is housed, including roommate expectations, and is provided meals on the road, including per diem

amounts by team.

- List the modes or methods of transportation used by each team for each competition. Be specific as to whether the mode of transportation is an institutionally-owned vehicle (car, van, bus, or plane), a privately-owned vehicle, or a commercial vehicle (bus, train, or plane). Additionally, for each away competition, indicate whether the team stayed overnight.

- For each team, indicate how many student-athletes travel and list the names and positions of additional personnel (including student assistants) who travel with the team to away games.

4. Academic Services

- Describe how the institution provides tutoring services to male and female athletes, including the qualifications, experience, and rate of pay for tutors.

5. Coaching

- Determine the number of coaches (full-time, part-time, head, assistant, and graduate or student assistants) assigned to each team.

- List the names of all varsity coaches (head, associate, assistant, and graduate or student assistant) by team, and indicate the full-time equivalency (FTE) spent on: coaching duties; the length of contract or assignment; any non-coaching duties at the institution; salary; and a brief biographical summary detailing the coach's experience and qualifications, any championships, awards, or honors earned by the head coach or the team (including individual player honors), and the coach's win/loss record overall and win/loss record at the institution.

6. Facilities

- Describe the use and availability of locker rooms and practice and competitive facilities for each team.

- List the locker rooms and practice and competitive facilities used by each team, indicating the name and general age of the facility, whether it is on or off campus, and whether the facility is used exclusively by a team or program.

- List all amenities provided at the competition facilities, including videoboards or scoreboards, press facilities, concession



facilities, seating, and bathroom facilities.

- Provide a schedule showing when facilities are used for practice.
- Indicate the length of time the locker rooms are assigned for use by each team (e.g., competitive season only, all year, etc.) and the distance between the locker room and the practice and competitive facilities. Indicate how many lockers are provided, the quality of the lockers, the number of bathrooms and shower facilities, and whether any of the facilities are shared-use.
- Describe in detail any improvements or upgrades made to any of the facilities in the last five years.

7. Medical and Training Services

- Provide a copy of any health, accident, and injury insurance policies available to athletes of both sexes, and the cost of each policy to the athletes (if any) above and beyond the policies available to all students.
- Describe the medical and training facilities and services provided for male and female athletes.
- Describe the weight, training, and conditioning facilities available to athletes, including the name and type of equipment in each facility. Indicate the teams, by sex, that use each the facility, the schedule of their use, and the location of the facility relative to their locker rooms and practice and competitive facilities.
- For each team, list the names of any athletic trainers and medical personnel assigned to the team. Include each trainer's certification, experience, and whether the trainer is present during practice, games, and away competitions.

8. Housing and Dining

- List the special housing and dining facilities (if any), provided to athletes including locations, capacity, and the teams, by sex, that use the facilities.
- List, by team, facilities provided for athletes during school breaks or early return to campus.

- Indicate where and for which teams the institution provides meals, fueling stations, and/or meals before or after home competition.

9. Communications and Publicity Services

- Describe the publicity services provided to men's and women's intercollegiate athletics programs.
- Describe the types of publicity or promotional services the institution makes available to the men's and women's intercollegiate athletics programs, including the name and title of any personnel responsible for providing such services.
- Indicate whether sports information personnel are present during home contests and championship events and whether they travel with individual teams.

10. Administrative and Clerical Support

- Describe the administrative, secretarial, and clerical support service to the men's and women's intercollegiate athletics programs.
- Describe the office space provided for each team, including whether the institution provides coaches with private office space, and the office equipment provided to each program, including computers, phones, and other electronic devices.

11. Recruiting

- Describe the recruitment support provided to men's and women's programs, including any differences in recruiting services provided to prospective male and female athletes.
- For the preceding three academic years, provide each team's recruiting budget, list the geographic area of recruitment, the name and position of each recruiter, and the recruitment trips made by each recruiter.
- For the last three academic years, provide the number of prospective athletes who were invited to and/or visited campus as part of a recruitment effort for each team and how many of the campus visits were subsidized by the institution.

- Identify the names and titles of all athletics personnel who receive courtesy cars or car subsidies.
- Include the anticipated recruiting budget by team for the upcoming academic year.

#### **IV. Conclusion**

OCR notification letters often differ in significant ways, depending on the scope of the complaint or the agency-initiated compliance review. This discussion is intended to provide a non-exhaustive sampling of some of the types of information that OCR has requested at the outset an athletic equity review.