

The National Women's Law Center's Legal Network for Gender Equity presents

Using Title IX to End Gender Disparities in Athletics

September 2021

Presenters



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Legal Network for Gender Equity

- The [Legal Network for Gender Equity](#) connects people who have experienced sex discrimination as a **student, worker, or patient** with attorneys like you. Thank you!
- For technical assistance, please contact legalnetwork@nwlc.org



Gender Disparities in School Athletics

Title IX & Athletics

Sarah Axelson

Vice President, Advocacy

 **Women's Sports
Foundation**

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 educational program or activity receiving Federal financial assistance.”

Title IX & Athletics

01

Participation

Schools must offer male and female students equal opportunities to participate.

Schools can comply with this portion of Title IX using one part on the three part test.

02

Athletic Scholarships

Schools must allocate athletic scholarship dollars equitably.

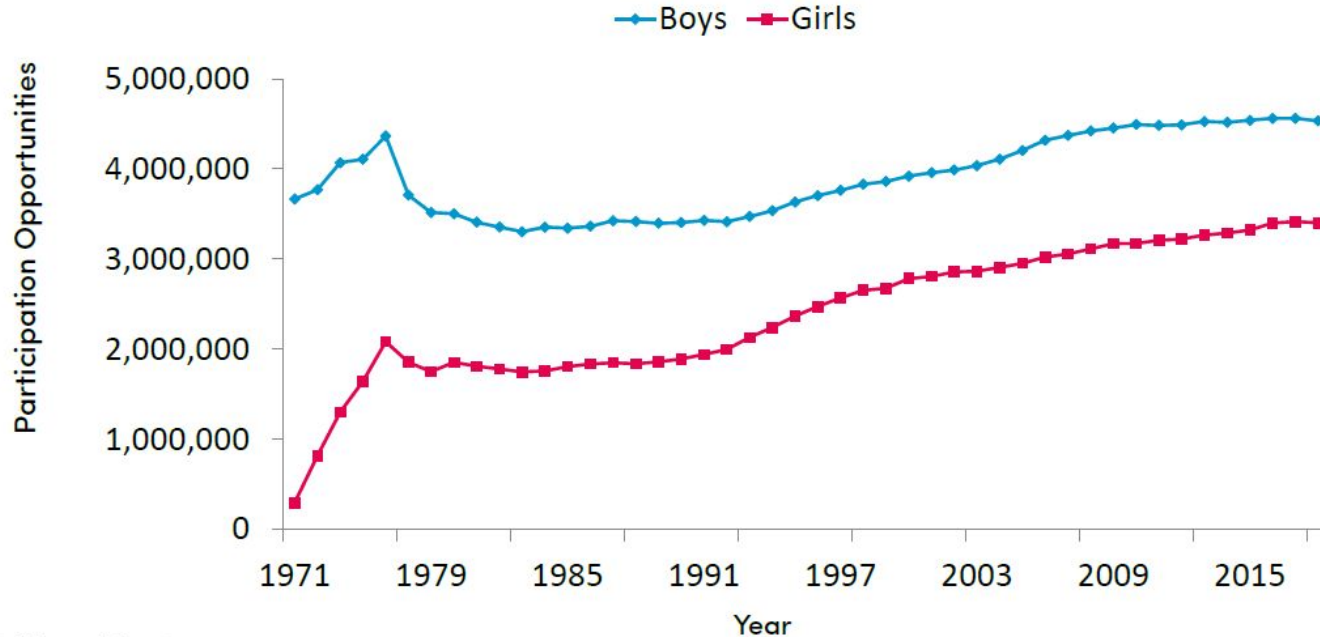
03

Benefits & Services

Schools must provide male and female athletes with equal benefits and services.

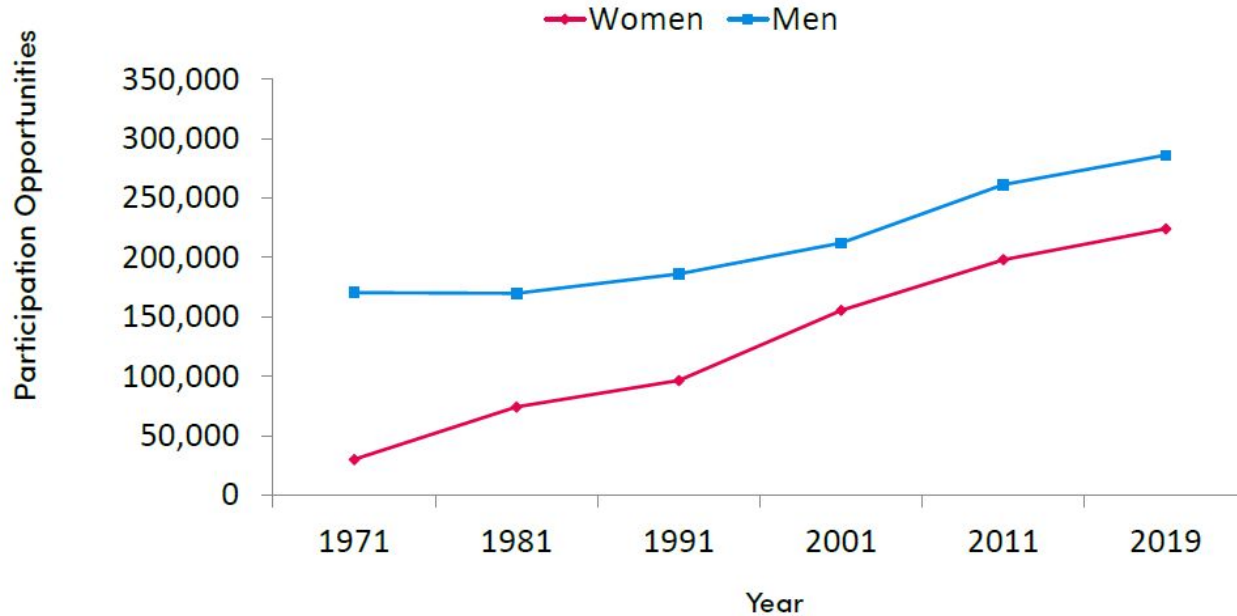
High School Athletics Participation Survey Totals

1971-72 -2018-19



College Participation

Touch Points in History



Source: NCAA Sponsorship & Participation Rates Report 1981-82 - 2019-20
*Figures include Championship & Emerging Sports

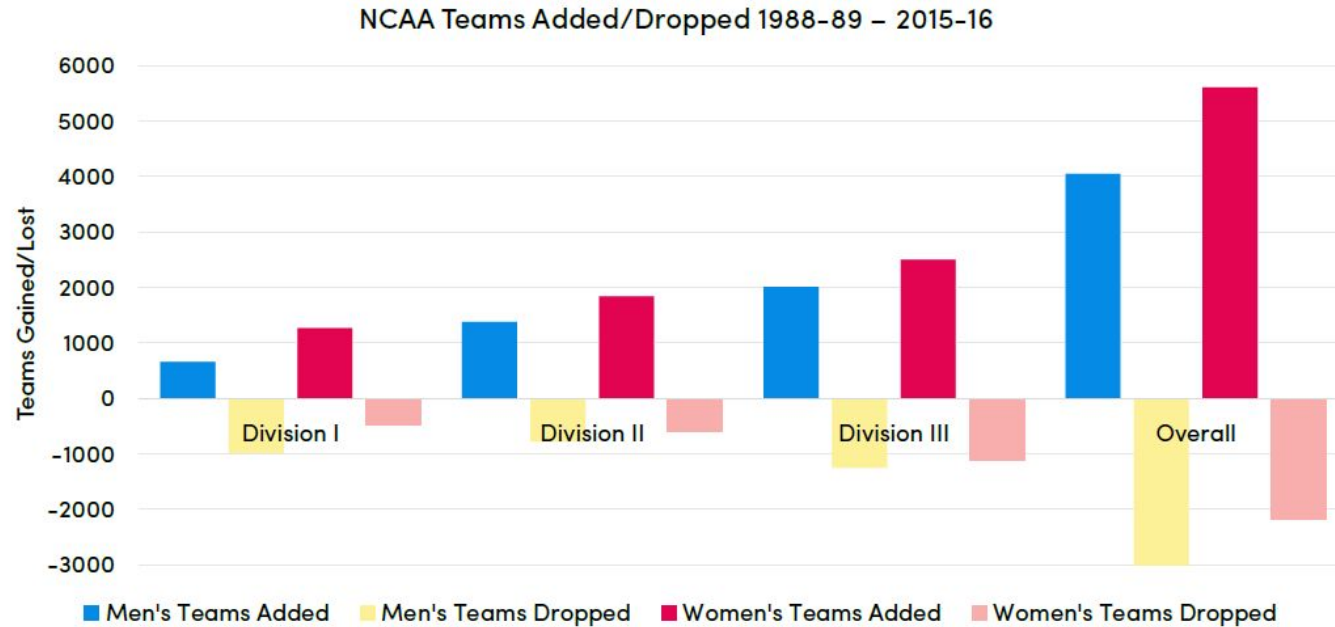
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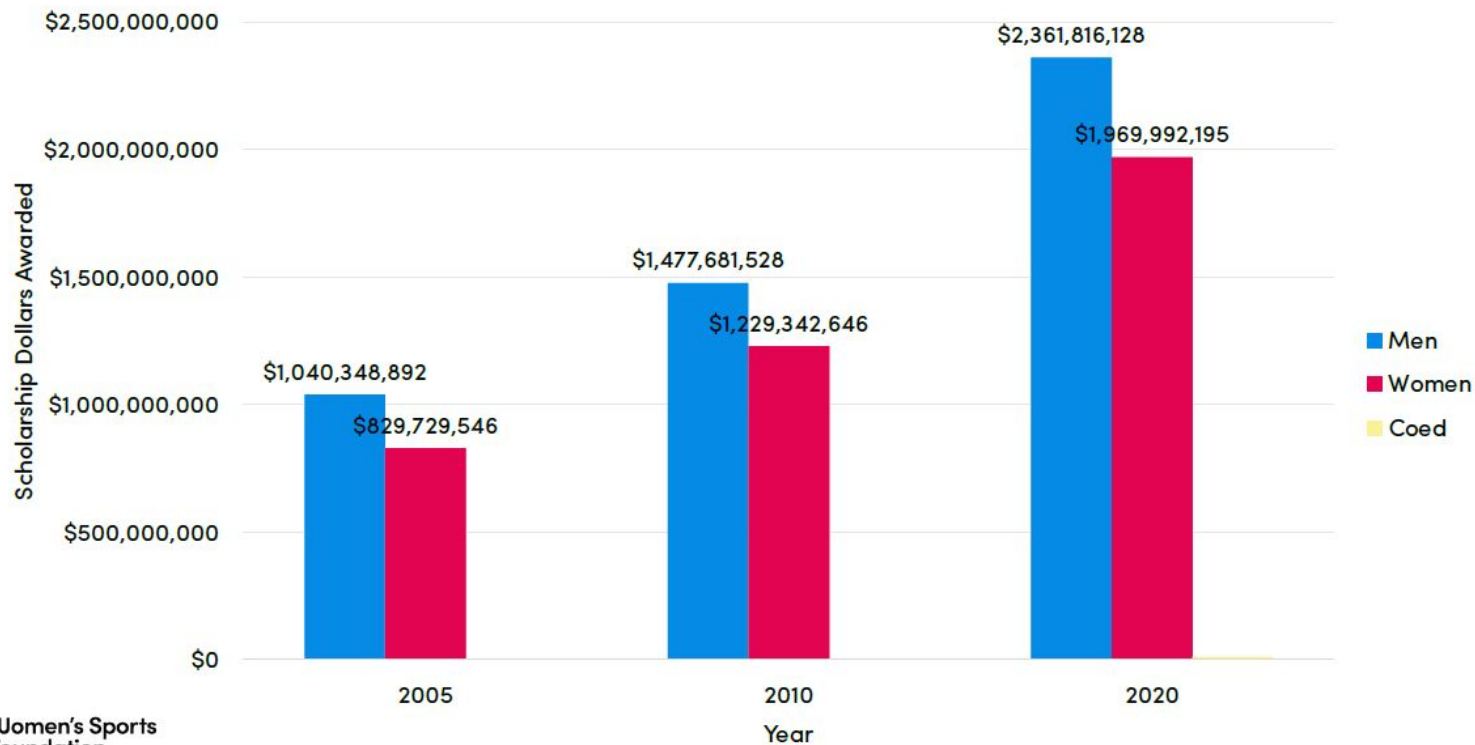
A general rule: scholarship dollars should be +/- one percent or one scholarship, whichever is greater, of a school's participation rates, absent a legitimate nondiscriminatory reason.

03

Benefits & Services

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College Athletic Scholarships



Title IX & Athletics

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A general rule: scholarship dollars should be within +/- 1% point, or one scholarship, whichever is greater of participants. Information available through EADA reports.

03

Benefits & Services

Schools must provide male and female athletes with equal benefits and services.

This covers everything from uniforms, facilities, coaching and transportation to publicity and scheduling.

Equal Benefits & Services

Men's and women's athletic programs must be equal overall

- Often referred to as "laundry list"
- NO booster club exception
- Total program law



FACILITIES &
EQUIPMENT



TRAVEL &
DAILY
ALLOWANCE



COACHING



SCHEDULING



PUBLICITY



SUPPORT
SERVICES

High School Softball Field

Lexington, SC

Source: WACH and www.thestate.com

 Women's Sports
Foundation



High School Baseball Field

Lexington, SC

Source: WACH and www.thestate.com





2021 NCAA Women's Basketball Tournament



NCAA Men's Basketball Championships

Gender Equity

NCAA Gender Equity Task Force, 1992

“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.”

On the Horizon...

NCAA Name, Image, and Likeness

- No Federal solution....yet
- Unclear if/how Title IX might apply
- More questions than answers



NCAA adopts interim name, image and likeness policy

Interim policy goes into effect Thursday

June 30, 2021 | Michelle Brutlag Hosick

'Blatant sexism': State lawmakers demand equity for female Michigan State University athletes

Female athletes not included in \$500 per month scholarship provided by United Wholesale Mortgage

School-Based Title IX Complaints

Title IX & Athletics

Title IX requires schools to do **ALL** of the following with respect to girls and boys (or women and men) in sports:

1. Equal opportunities to play
2. Equal benefits and services
3. Fair share of athletic scholarship dollars

1. Equal Opportunities to Play

A school must show **ONE** of the following prongs of the “three-part test” to be in compliance:

- Substantial proportionality
- Historical and continuing expansion
- Full and effective accommodation

1.1. Substantial Proportionality

Prong 1: The number of athletics participation opportunities for girls and boys should be substantially proportionate to each gender's enrollment

- **Step 1:** Count # of athletics participation opportunities (# of spots on teams) for girls & boys
 - Use web rosters, [CRDC](#) (K12), and [EADA](#) (higher ed)
- **Step 2:** Participation gap (%) = girls' enrollment (%) MINUS girls' spots (%)
- **Step 3:** Convert participation gap (%) into the # of girls' spots that must be added to reach proportionality
- **Step 4:** Compare that number with the sizes of any "viable teams"
 - A school has a **viable team** in a specific sport if enough students want to join that team and there are other schools to compete with in that sport.
 - If # missing girls' spots \geq size of a viable team, the school is in violation of Title IX
 - To close the participation gap, the school must add 1+ teams.

1.1. Substantial Proportionality - EXAMPLE

There are women at Big State University who want to start a frosh women's basketball team, which, let's say, requires a minimum of 15 players.

- **Step 1:** Count the number of athletics participation opportunities for women and men.
 - Let's say BSU offers 1,000 athletics opportunities, of which 500 are for women (50%)
- **Step 2:** Find the participation gap.
 - Let's say BSU has 50,000 students, of which 26,000 are women (52%)
 - The participation gap is 52% minus 50%, which is 2%.
- **Step 3:** Convert % participation gap to # of women's spots that must be added
 - BSU needs to close the 2% participation gap by adding 42 more women's participation opportunities
 - That way, women would have $(500 + 42) / (1,000 + 42) = 542/1,042$ participation opportunities, which is 52%.
- **Step 4:** Compare that number with the sizes of viable teams
 - Since 42 is larger than the viable women's frosh basketball team size of 15, BSU needs to add the new team (and a few others)

1.2. History and Continuing Expansion

- **Prong 2: Expanded athletic opportunities for girls in the past and continues to do so**
 - *Note: almost no school can meet Prong 2 now*
- **Meets Prong 2:**
 - Has a record and current plan of adding girls' teams or adding girls to existing girls' teams in response to girls' developing interests and abilities
 - Cut a girls' team (e.g., not enough interest or ability) while adding other girls' teams responsive to interest and ability
- **Does not meet Prong 2:**
 - Added girls' opportunities early on but stopped doing so after that
 - Cut girls' teams without adding any
 - Hasn't responded to girls' requests to add teams
 - Promises to increase girls' opportunities in the future, but hasn't done it yet
 - Cut or capped boys' teams (even if boys' teams are cut more than girls' teams)

1.3 Accommodation

- **Prong 3: Offer all sports that a sufficient number of girls want to play and for which there is available competition.**
- **Interest**
 - Does the school use some method (e.g., survey, coach interviews, athlete questionnaires)?
 - Are there requests to add new girls' teams or upgrade IM/club teams to interscholastic?
 - Is there a process for requesting new teams or opportunities?
 - *A school can't use just a survey to meet prong 3*
 - *A school can't just point to non-responsiveness to a survey to meet prong 3*
- **Competition**
 - Do other schools in the school's league or geographical area offer teams in the sport?
- **If a school cuts a girls' team that had a full roster, then it does not meet prong 3.**

2. Equal Benefits & Services

- Fair treatment means making sure that girls and boys receive equal benefits and services from their school **overall**.
 - Gender disparities in one sport often indicate a program-wide Title IX violation
- Schools do not have to spend equal amounts of money or provide identical benefits and services to girls and boys, **as long as one group does not receive second-class treatment**.
 - OK: spend more on men's uniforms than women's uniforms if men's just cost more
 - Not OK: buy top-of-the-line uniforms for men and bargain-basement uniforms for women
- **** No booster club exception ****
 - If a school accepts booster club money for a pitching machine for the boys' team, it must:
 - Give both teams equal time with the machine
 - Buy a similar machine for the girls' team with school funds
 - Solicit outside funding for the girls' team

2. Equal Benefits & Services - CATEGORIES

- **Overall budgets**
 - Income from booster clubs, concession stand profits, and fundraisers
 - School-sponsored athletic banquets and social events for athletes
- **Quality and quantity of equipment and supplies**
 - Athletic uniforms, equipment, swag
- **Scheduling of games and practice time**
 - Durations, times, and seasons of practices and competitions
 - Loss of academic time due to practices and competitions
 - Division levels and post-season opportunities
- **Financial support for travel and expenses**
 - Meals, snacks, transportation, lodgings
- **Coaches**
 - Quantity, quality, salaries, non-coaching duties of coaches
 - Quality and quantity of assistant coaches, support staff, referees / umpires, linespeople, etc.

2. Equal Benefits & Services - CATEGORIES

- **Facilities**
 - Practice and competitive facilities (e.g., fields, courts, pools), locker rooms, weight training / conditioning, spectator seating, scoreboards
 - Trainers, medical personnel, health/injury insurance
- **Publicity**
 - Coverage in school paper, access to publicity staff, provision of cheer/pep/drill teams
 - Quality and quantity of press releases, game programs, etc.
 - Athletic awards/recognition
- **Mostly college:**
 - Recruitment staff, trips, budgets, prospective athlete visits
 - Access to tutoring, tutor pay
 - Housing and dining facilities and services
 - Any additional monies being given to athletes through the school

3. Scholarships

- **The % of total athletic scholarship dollars awarded to men and women in sports must be within 1% of their participation rates OR 1 scholarship, whichever is greater.**
 - Focus on total scholarship **dollars**, not number of scholarships or individual dollar amounts.
 - Example: If women are 50% of athletes, they should get 49%-51% of total athletic scholarship dollars
- **EXCEPTION**
 - A school can have a gap larger than 1% or one scholarship if they can show why the larger gap is not discriminatory.
 - Example: A school may give more out-of-state scholarships to men. Since out-of-state scholarships typically cost more than in-state scholarships, the dollar gap could be larger.
 - But it would have to show that it does not discriminate based on sex when recruiting out-of-state athletes and therefore is not discriminating by awarding more out-of-state scholarship dollars to men.

Mythbusting

- **Title IX does not require quotas.**
 - Quotas don't make sense: men and women don't compete for the same spots (courts agree!)
- **Title IX does not require or encourage schools to cut men's sports.**
 - Schools choose to cut smaller men's teams vs reducing football / men's basketball budgets
 - A school can't comply with Prong 2 (expansion) or 3 (accommodation) by only cutting boys' teams
- **Most football and men's basketball programs spend more money than they bring in**
 - Typical losing programs have annual deficits of \$4.2M and \$1.3M, respectively.
- **Title IX does not require equal spending on girls' and boys' sports.**
 - Title IX recognizes that a football uniform costs more than a swimsuit. But girls cannot be given second-class treatment.

Resources for School Complaints

- [**NWLC's Check It Out: Is the Playing Field Level for Women and Girls at Your School?**](#)
- **OCR Guidance**
 - [1979: Title IX Policy Interpretation: Intercollegiate Athletics](#)
 - [1996: Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test](#)
 - [1998: Funding of Athletic Scholarships](#)
 - [2008: Guidance on Determining which Athletic Activities Can Be Counted for Purposes of Title IX Compliance](#)
 - [2010: Guidance on Accommodating Students' Athletic Interests and Abilities: Standards for Part Three of the "Three-Part Test"](#)
 - [2010: Q&A on Accommodating Students' Athletic Interests and Abilities: Standards for Part Three of the "Three-Part Test"](#)

OCR Complaints & Other Pre-litigation Strategies

Title IX Athletic Equity Enforcement Options

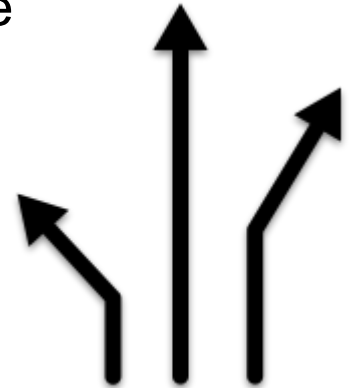
- **Multiple Routes to Spur Enforcement of Title IX in Athletics - File Complaint With:**

- Dept. of Education, Office for Civil Rights
- State Department of Education
- State Athletic Association / Governing Body
- Demand Letter Directly to the District
- Lawsuit (Note: *No exhaustion requirements*)



Title IX Athletic Equity Enforcement Options

- **Practice / Approach Pointers for Non- or Pre-Litigation Options**
 - Review menu of options / approaches with athlete and family as athletes/families have misc. goals
 - Review timelines of different approaches that vary (pre-litigation demand letter to settlement; OCR complaint; etc.)
 - Consider the importance of instilling lasting and comprehensive athletic equity across an entire athletic program
 - Note privacy concerns in light of minors being involved



Athletics Litigation

K-12 Athletics Litigation Under Title IX

- **Nuts and Bolts of K-12 Title IX Athletics-Oriented Litigation**

- Total Program Analysis -
review all sports aspects for girls and boys



- Few cases have been litigated, compared to other civil rights areas of law (pros and cons)
- Often educating about Title IX athletics *during the case*: school + district leadership; counsel; judges; community; press
- Review cases + materials (e.g., NWLC *Check it Out* guide; OCR Dear Colleague Letters; Policy Interpretation; Code of Federal Regulations)

K-12 Athletics Litigation Under Title IX

- **Key Cases**

Ollier v. Sweetwater

Class Action (2007-'24)

Participation, Treatment
& Benefits, Retaliation



Communities for Equity v.

Michigan HS Athletic Assoc.

Class Action (~1998 to 2010); Scheduling of Sports Seasons

- **Take-Aways:** No intent / knowledge requirement at all; injunctive and declaratory relief goals; obtain site visits / photos / video; monitoring key

College Litigation: Recent Developments, Key Issues, and What's Ahead

- Continuing nationwide violation and enforcement by litigation
- Covid-19 and financial pressures prompting cut-backs
- Covid-19 and making or losing money are not valid defenses
- Schools making the mistake of eliminating teams
- Litigation strategy and approach yielding quick results

College Litigation: Recent Developments

- Brown University settlement violated, enforced, and enhanced
- Schools agree to reinstate teams, develop gender equity plan, and get into compliance *without* litigation:
 - William & Mary
 - East Carolina University
 - UNC-Pembroke
 - Dartmouth College
 - Clemson University
 - University of St. Thomas
 - LaSalle University
 - Dickinson College?
- Quick reinstatements won in Iowa and UConn litigation
- Quick reinstatements lost in MSU and Fresno State litigation, battles continue, with OCR supporting women against MSU

College Litigation: Key Issues

- Equal participation opportunities: how do you measure “substantial proportionality” under part one of the three-part test?
 - The law: if gap not large enough to support a viable team
 - D’s argue: more than 2% enrollment and participation difference and/or gap larger than average team size
 - OCR *amicus* brief forcefully rejects D’s arguments
- Should athletes be counted more than once and, if so, when?
- How do we get schools to provide equal athletic financial aid?
- How do we get schools to provide equal treatment and benefits?

College Litigation: What's Ahead

- 50th Anniversary of Title IX
- Government enforcement action?
- Increased awareness and enforcement, including against NCAA
- Key issues addressed in litigation
- Increased resistance and need to fight

Questions?