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Leveling the Playing Field: Sex, Race, LGBTQA+, and Pay Equity

TITLE IX AND COLLEGIATE ATHLETICS

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Roberta A. Kaplan
Kaplan Hecker & Fink LLP
New York, NY

I. Title IX in Sports: The 1975 Regulations

A. **34 C.F.R. § 106.37(c):** Addresses equity in athletic scholarships. "The chief goal of this segment of the regulation is to ensure that scholarship monies are awarded in proportion to the number of students of each sex participating in athletic programs."[1]

B. **34 C.F.R. § 106.41(c):** Addresses equal opportunity in athletic participation. This regulation lists 10 factors for "determining whether equal opportunities are available," including:

1. Effective accommodation of the interests and abilities of members of both sexes;
2. Equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Locker rooms, practice and competitive facilities;
8. Medical and training facilities and services;
9. Housing and dining facilities and services; and
10. Publicity.

C. **1979 Policy Interpretation:**[2] Provides a gloss on the 1975 regulations, including clarifying "the meaning of 'equal opportunity' in intercollegiate athletics . . . and providing guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory."[3] This document sets out the framework for the three types of Title IX athletics claims:

Note: These materials are not intended to be, nor should they be interpreted as, legal advice.

[1] *Cohen v. Brown Univ.*, 809 F. Supp. 978, 983 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

[2] 44 Fed. Reg. 71,413 (Dec. 11, 1979), https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html (hereafter "1979 Policy Interpretation").

[3] *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 96 (W.D. Va. 2007) (alterations omitted) (quoting 1979 Policy Interpretation at 71,414).

1. Effective accommodations claims;

2. Equal treatment claims; and

3. Scholarship claims.

II. The "Triumvirate" of Title IX Sports Claims[4]

A. Effective Accommodation — or "Participation" — Claims (34 C.F.R. § 106.41(c)(1))

1. There are **two "benchmarks"** relevant to effective accommodation claims: (1) equity in ***athletic opportunities***; and (2) equity in ***levels of competition***.[5]

   a. **Most Title IX sports cases involve effective accommodation claims concerning equity in athletic opportunities**. This is where the "Three-Part Test" comes into play, which is the most frequently litigated aspect of the Title IX athletics landscape.[6]

2. **The Three-Part Test includes:** (a) "substantial proportionality" in participation opportunities; (b) "a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of [the underrepresented] sex"; and (c) "fully and effectively accommodat[ing]" the "interests and abilities of the [underrepresented sex]." Compliance with any one prong is sufficient to satisfy Title IX.[7]

   a. **Prong 1: "Substantial Proportionality"**

      - **Description:** "Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."[8]

      - **Prong One is a "Safe Harbor" for compliance.**[9] In other words, "a positive showing on prong one terminates the inquiry" and establishes the institution's compliance.[10]

      - **The 1996 Dear Colleague Letter and Clarification is the touchstone** for determining whether an institution complies with Prong One. The analysis proceeds in two steps: (1) counting participation opportunities, as defined

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4 *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 436 (D. Conn. 2013).

5 *Biediger*, 928 F. Supp. 2d at 437.

6 *Biediger*, 928 F. Supp. 2d at 437 ("[M]ost Title IX litigation has centered around application of this test." (citation omitted)).

7 *See* Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, Off. for Civil Rights, U.S. Dep't of Educ., to Colleagues (Jan. 16, 1996) ("1996 Dear Colleague Letter"), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#:~:text=Title%20IX%20provides%20that%20at,and%20abilities%20of%20potential%20students.

8 1979 Policy Interpretation at 71,418.

9 1996 Dear Colleague Letter.

10 *Cohen v. Brown Univ.*, 879 F. Supp. 185, 201-02 (D.R.I. 1995) (*Cohen III)*.

primarily by the 1979 Policy Interpretation;[11] and (2) comparing the gender ratio of participation opportunities to the gender ratio of undergraduate enrollment to determine whether the two ratios are "substantially proportionate."[12]

- As recently articulated by the Biden Administration, whether an institution satisfies the substantial proportionality requirement should not be examined "as a percentage of the size of the athletic program at the school in question." Rather, "[w]hat matters is the size of the school's participation gap and how many opportunities the school would have to add for the underrepresented sex to eliminate the participation gap."[13]

- **Defining and counting "genuine participation opportunities":** In counting participation opportunities, institutions should "count[] the *actual participants* on intercollegiate teams,"[14] rather than "unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes."[15] Participation opportunities should be "real, not illusory."[16]

  - The 1979 Policy Interpretation counts participants if they are: (a) "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"; (b) "participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season"; and either (c) "are listed on the eligibility or squad lists maintained for each sport"; *or* (d) "because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability."[17]

  - Prong One compliance may be challenged by arguing that participation opportunities are not genuine, either because the number of student-athletes

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[11] *See* 1979 Policy Interpretation at 71,415 (listing four subfactors); *see also infra* at text accompanying n.17.

[12] Off. for Civil Rights, U.S. Dep't of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three–Part Test*, at 2–3 (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#:~:text=Title%20IX%20provides%20that%20at,and%20abilities%20of%20potential%20students ("1996 Clarification").

[13] Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants at 14, *Balow v. Mich. State Univ.*, No. 21-1183 (6th Cir. May 26, 2021) (hereafter "*Balow* Amicus").

[14] *Cohen III*, 879 F. Supp. at 202 (emphasis in original).

[15] 1996 Clarification.

[16] 1996 Dear Colleague Letter.

[17] 1996 Clarification (quoting 1979 Policy Interpretation at 71,415); *see also Biediger*, 928 F. Supp. 2d at 441 & n.35.

on a team roster is allegedly inflated[18] or the sport is allegedly not a true varsity sport for purposes of Title IX.[19]

- **There is no specific mathematical quota/formula for "substantial proportionality."** "[T]he 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."[20]

  - Schools have flexibility in achieving substantial proportionality. A school "may achieve compliance with Title IX in a number of ways. It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies."[21]

- **Caselaw has suggested that a deviation of a few percentage points or less might generally satisfy Prong One.** "Substantial proportionality is a fact-specific inquiry, . . . 'although a deviation of less than 3.5 percentage points typically keeps the ratios substantially proportionate.'"[22]

  - But the Biden Administration has recently reaffirmed that there is no numerical "bright-line rule," contending that even a participation gap less than or equal to 2% will not always satisfy Prong One.[23]

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[18] *See, e.g.*, *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 100 (2d Cir. 2012); *see also Portz v. St. Cloud State Univ.*, 401 F. Supp. 3d 834, 863 (D. Minn. 2019) ("[H]ad SCSU further increased roster minimums for women's teams, SCSU may very well have created non-genuine participation opportunities."), *appeal docketed*, No. 19-2921 (8th Cir. Sept. 6, 2019); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 106 (D. Conn. 2010) (finding athletes "quitting or being cut shortly after the first day of competition, when the school's EADA reporting data was collected" was evidence of roster inflation).

[19] *Biediger*, 728 F. Supp. 2d at 89 (relevant factors to whether an activity counts as a varsity sport include the "structure, administration, team preparation, and competition" (quoting Letter from Stephanie Monroe, Assistant Sec'y for Civil Rights, Off. for Civil Rights, U.S. Dep't of Educ., to Colleagues (Sept. 17, 2008), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html)); *see also id.* at 94 ("Competitive cheerleading is not a sport recognized by the NCAA, and the members of the NCSTA have yet to apply to the NCAA for designation of competitive cheer as an emerging sport. Thus, competitive cheer is not entitled to any presumption in favor of it being considered a sport under Title IX.").

[20] 1996 Dear Colleague Letter.

[21] *Cohen III*, 879 F. Supp. at 214; *see also id.* ("I leave it entirely to Brown's discretion to decide how it will balance its program to provide equal opportunities for its men and women athletes."); *Equity in Athletics, Inc.*, 504 F. Supp. 2d at 100 ("Title IX does not establish a right to participate in any particular sport in one's college and there is no constitutional right to participate in intercollegiate . . . athletics." (quoting *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 994 (S.D. Iowa 1993))).

[22] *Ohlensehlen v. Univ. of Iowa*, No. 20 Civ. 80, 2020 WL 7651974, at *5 (S.D. Iowa Dec. 24, 2020) (citing *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 975 (D. Minn. 2016) (surveying cases on permissible and impermissible variances)).

[23] *Balow* Amicus at 15-16.

- **Existence of a viable team to fill the gap precludes substantial proportionality:** "As a general rule, there is substantial proportionality if the number of additional participants . . . required for exact proportionality would not be sufficient to sustain a viable team."[24] Where a team has been cut, a court might compare the size of the eliminated team to the gap between men's and women's participation.[25]

    - While OCR has suggested that it may consider "the average size of teams offered for the underrepresented sex, a number which would vary by institution" when assessing whether a participation gap precludes substantial proportionality,[26] the Biden Administration has specified that what matters "is whether the participation gap is large enough to sustain a *viable* team, not an average-size team."[27]

- **Warning: Equity in Athletics Disclosure Act (EADA)[28] counting and Title IX counting are not the same,** even though "EADA reports are regularly relied upon in Title IX cases."[29] For example, while "[t]he EADA instructs universities to report the number of people on the school's varsity teams 'as of the day of the first scheduled contest for the team,'" [30] as explained above, "the 1996 Clarification . . . provides a different method of counting a school's participation opportunities, which indicates that a more nuanced method is appropriate."[31]

b. **Prong 2: A "History and Continuing Practice of Program Expansion"**

- **Description:** "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."[32]

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24 *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 856 (9th Cir. 2014) (quoting *Biediger,* 691 F.3d at 94).

25 *See Ohlensehlen*, 2020 WL 7651974, at *5 ("[T]he 35 members of the University of Iowa women's swimming and diving team easily fits within any of these participation gaps as a viable team for which there is obviously great interest.").

26 1996 Clarification; *see also Biediger*, 691 F.3d at 107-08 ("[T]he district court noted that, insofar as the gap reflected 38 positions, each of Quinnipiac's women's varsity teams had 30 or fewer roster spots, making it certain that an independent sports team could be created from the shortfall of participation opportunities." (citation omitted)).

27 *Balow* Amicus at 18.

28 20 U.S.C. § 1092(g)(1)(A)-(B)(i); *see also* 34 C.F.R. § 668.47.

29 *Robb v. Lock Haven Univ. of Penn.*, No. 17 Civ. 964, 2019 WL 2005636, at *7 (M.D. Pa. May 7, 2019).

30 *Robb*, 2019 WL 2005636, at *7; *see also Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 297 (D. Conn. 2009) ("Although an EADA report can be used to make a prima facie showing of substantial proportionality, 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.").

31 *Robb*, 2019 WL 2005636, at *7; *Ohlensehlen*, 2020 WL 7651974, at *6-7 (describing the differences).

32 1979 Policy Interpretation at 71,418.

- **Establishing compliance with Prong 2:**

  "Factors that may indicate a **history of program expansion** include:

  - An institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
  - An institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
  - An institution's affirmative responses to requests by students or others for addition or elevation of sports."[33]

  "Factors that indicate an institution's **continuing practice of program expansion** include:

  - An institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
  - An institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities."[34]

- **Cutting teams makes compliance with Prong Two unlikely:** "Generally speaking, a defendant-university is unlikely to satisfy prong two's requirement of demonstrating a 'history and continuing practice of program expansion' for women where, as here, the university recently sought to eliminate an existing varsity women's sport."[35]

- **Case Study – Applying Prong 2:** In *Mayerova*, the court rejected the university's Prong Two defense based on the following conclusions:

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[33] *Mayerova v. E. Mich. Univ.*, 346 F. Supp. 3d 983, 992 (E.D. Mich. 2018) (emphasis added) (citing 1996 Clarification at 3-4).

[34] *Mayerova*, 346 F. Supp. 3d at 992-93 (emphasis added) (citing 1996 Clarification at 3-4).

[35] *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 458 n.48 (D. Conn. 2013) (quoting 1996 Clarification at 7); *see also Portz*, 196 F. Supp. 3d at 975 ("In this case, the parties agree that SCSU cannot comply under either Prong 2 or 3 if it eliminates the women's tennis team because SCSU would then be neither 'expan[ding]' its athletics program to respond to the interests of SCSU's women or fully and effectively accommodating SCSU women."); *Mansourian v. Bd. of Regents of Univ. of Cal. at Davis*, 816 F. Supp. 2d 869, 925-26 (E.D. Cal. 2011) (characterizing as "problematic" the idea of "credit[ing]" added teams against historical program cuts, because "the gravamen of Prong Two compliance is an ever-increasing number of actual participation opportunities for the underrepresented sex"); 1996 Policy Clarification ("In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. . . . [A]n institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion for that sex.").

- Historical "participation numbers [did] not provide clear support" for defendant's contention that it had a "history of expanding athletic opportunities for women";

- Defendants did not "articulate how they ha[d] attempted to respond to the developing interests and abilities of" female students by, for example, "conduct[ing] interest surveys to gauge student interest in athletics for the past few years";

- Defendants had "no recent record of adding women's teams and ha[d] not provided evidence regarding whether students have requested such opportunities"; and

- Defendants made "no showing regarding a policy for requesting new sports . . . [and did] not establish that such a policy is effectively communicated to students."[36]

c. **Prong 3: "Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex"**

o **Description:** "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."[37]

o **Establishing compliance with Prong 3**: The touchstone for Prong 3 compliance is the 2010 Dear Colleague Letter,[38] which withdrew the 2005 Additional Clarification[39] relating to Prong 3. If "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."[40]

o **Three factors under Prong 3**:[41]

(1) **Is there unmet interest in a particular sport?** Relevant subfactors include whether: (a) "an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students;" (b) "a

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36 *Mayerova*, 346 F. Supp. 3d at 995.

37 1979 Policy Interpretation at 71,418.

38 Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Off. for Civil Rights, U.S. Dep't of Educ., to Colleagues (Apr. 20, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf ("2010 Dear Colleague Letter").

39 Letter from James F. Manning, Assistant Sec'y for Civil Rights, Off. for Civil Rights, U.S. Dep't of Educ., to Colleagues (Mar. 17, 2005), https://www2.ed.gov/about/offices/list/ocr/letters/200503017-additional-clarification-three-part-test.pdf.

40 2010 Dear Colleague Letter at 13.

41 2010 Dear Colleague Letter at 4.

viable team for the underrepresented sex recently was eliminated;" (c) there are "multiple indicators of unmet interest;"[42] (d) there are "multiple indicators of ability;"[43] and (e) there is "frequency in conducting assessments."[44]

(2) **Is there sufficient ability to sustain a team in the sport?** Relevant subfactors include: "[1] [the] minimum number of participants needed for a particular sport; [2] opinions of athletic directors and coaches concerning the abilities required to field an intercollegiate team; and [3] the 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."[45]

(3) **Is there a reasonable expectation of competition for the team?** Relevant subfactors include: "[1] competitive opportunities offered by other schools against which the institution competes; and [2] 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."[46]

- **There is a presumption against Prong 3 compliance after a team has been cut:** Cutting a team of the underrepresented sex creates a rebuttable presumption that Prong Three is not satisfied.[47]

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[42] The 2010 Dear Colleague Letter provides the "following list of non-exhaustive indicators" of unmet athletic interest: "[1] requests by students and admitted students that a particular sport be added; [2] requests for the elevation of an existing club sport to intercollegiate status; [3] participation in club or intramural sports; [4] interviews with students, admitted students, coaches, administrators and others regarding interests in particular sports; [5] results of surveys or questionnaires of students and admitted students regarding interests in particular sports; [6] participation in interscholastic sports by admitted students; and [7] 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; and [8] participation in intercollegiate sports in the institution's normal competitive regions." 2010 Dear Colleague Letter at 5-6.

[43] Indicators of ability may include: (1) "the athletic experience and accomplishments — in interscholastic, club or intramural competition — of underrepresented 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 an intercollegiate team"; (3) "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"; (4) "participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered"; and (5) "tryouts or other direct observations of participation in the particular sport in which there is interest." 2010 Dear Colleague Letter at 6-7.

[44] 2010 Dear Colleague Letter at 4.

[45] 2010 Dear Colleague Letter at 12.

[46] 2010 Dear Colleague Letter at 13.

[47] *Portz*, 401 F. Supp. 3d at 858 ("Where an institution has recently eliminated a viable team for the underrepresented sex from its intercollegiate athletics program, the Court will find that [there is] sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport." (citing 2010 Dear Colleague Letter at 5)); *see also Biediger*, 928 F. Supp. 2d at 458 n.48 ("[I]t is unlikely that a defendant-university could demonstrate, for purposes of prong three, that the interests and abilities of female students have been 'fully and effectively accommodated by the present program' where, as here, the university has sought to eliminate, over its athletes' objections, an existing varsity women's sport." (quoting 2010 Dear Colleague Letter at 5)).

- **Case Study – Applying Prong 3:** In *Portz*, the court concluded that "unmet need exist[ed]" at the university for the following reasons:

  - (a) The defendant "failed to show that it had a method of assessment of athletic interests and abilities of its students, much less one that is nondiscriminatory," as it had only conducted two surveys of student interest in athletics "since the passage of Title IX," and its most recent (2015) survey failed to account for any "nationally increasing levels of women's interests and abilities";

  - (b) The most recent (2015) survey showed that there was student athletic interest in Nordic skiing, tennis, and bowling;

  - (c) The defendant had "received multiple requests to add women's teams"; and

  - (d) There was evidence of sufficient ability to potentially convert women's lacrosse from club to varsity (and regional interest in lacrosse was rising), and to create a varsity women's bowling team.[48]

3. **Equity in Levels of Competition**

   a. **Description:** "Compliance with [the effective accommodation] 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."[49]

   b. **Much less guidance, and rarely any litigation:** "Although the OCR has published considerable guidance on the meaning and purpose of the three-part test, the agency has offered almost no additional direction on the levels-of-competition test. . . . [F]rom all accounts, the levels-of-competition test is seldom used today and rarely if ever litigated. The test's dormancy in recent years is attributed not to regulatory inertia, but to evolving NCAA standards on competitive scheduling among member schools."[50]

   c. **Four-factor analysis applies**:[51]

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48 401 F. Supp. 3d at 861-62.

49 1979 Policy Interpretation at 71,418.

50 *Biediger*, 928 F. Supp. 2d at 446.

51 *Biediger*, 928 F. Supp. 2d at 449.

- "[C]alculate the total number of 'competitive opportunities' afforded to the members of each team at their declared division level"[52] (i.e., the number of competitive events at the declared level multiplied by the number of participants on the team);

- "[C]alculate the number of 'competitive opportunities' *below* the declared division level"[53] (i.e., the number of events against non-division-level opponents multiplied by the number of participants on the team);

- "[A]dd up the total number of division-level and non-division-level competitive opportunities across all teams for each sex, and determine what percentage of overall competitive opportunities were played against opponents below the school's declared division level"[54]; and

- "[C]ompar[e] the overall percentage of below-division-level competitive opportunities for male athletes versus . . . female athletes." [55]

d. **No numerical threshold, as with Prong One:** "Neither the 1979 Policy Interpretation nor the Investigator's Manual specify a threshold percentage that will constitute a violation of the equivalent-competition requirement. . . . in the absence of specific OCR guidance on point, the phrase 'proportionally similar,' as used in the first prong of the levels-of-competition test, should be given a construction roughly analogous to the phrase 'substantial proportionality,' as used in the first prong of the three-part test."[56]

e. **Case Studies:**

- *Biediger v. Quinnipiac University*: A 6.3 percent difference between men's and women's sports in the percentage of below-division-level competitive opportunities was noncompliant.[57]

- *Portz v. St. Cloud University*: "Because SCSU has substantially equivalent numbers of men and women competing at the Division I level—25 and 27 respectively—and all other teams compete at the Division II level, SCSU is substantially in compliance with Title IX's levels-of-competition requirement."[58]

B. **Unequal Treatment Claims (34 C.F.R. § 106.41(a)(2)-(10))**

1. **Description:** Allegations relate to sex-based differences in factors like schedules, equipment, coaching, coaches' salaries, budgets, facilities, training, and travel affecting

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52 *Biediger*, 928 F. Supp. 2d at 449.

53 *Biediger*, 928 F. Supp. 2d at 449.

54 *Biediger*, 928 F. Supp. 2d at 449.

55 *Biediger*, 928 F. Supp. 2d at 449.

56 *Biediger*, 928 F. Supp. 2d at 450-51.

57 *Biediger*, 928 F. Supp. 2d at 470-71.

58 401 F. Supp. 3d at 863.

participants in athletics.[59] "[T]he governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities."[60]

2. **Infrequent Litigation:** "Notably, there are few cases . . . involving student athletes' disparate-treatment claims."[61]

3. **Two Steps:** "The Department will assess compliance . . . 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":

    - "**[E]quivalent, that is, equal or equal in effect.** Under this standard, identical benefits, opportunities, or treatment are not required, provided the *overall effect of any differences is negligible*." [62]

    - "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**."[63]

        - **Disparities can be offset program-wide:** "[T]he Policy Interpretation contemplates that a disparity disadvantaging one sex in one part of a school's athletics program can be offset by a comparable advantage to that sex in another area. . . . [C]ompliance should not be measured by a 'sport-specific comparison' but rather by examining 'program-wide benefits and opportunities.'"[64] Courts evaluate whether "disadvantages that one team may experience are offset by advantages to other teams of the same sex" *within* a particular area (*i.e.*, equipment and supplies, or travel and per diem, etc.).[65]

4. **Case Study:** ***McCormick v. School District of Mamaroneck***

    - **Existence of a negative disparity**: "In the present case, scheduling girls' soccer in the spring clearly creates a disparity—boys can strive to compete in the Regional and State Championships in soccer and girls cannot."[66]

    - **Substantiality of disparity:** "[T]he fact that boys have a chance to compete at the Regional and State Championships for soccer, and girls are denied this opportunity,

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59 *See Biediger*, 928 F. Supp. 2d at 436; *Pederson v. La. State Univ.*, 213 F.3d 858, 864-65 (5th Cir. 2000).

60 *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 291 (2d Cir. 2004) (quoting 1979 Policy Interpretation at 71,414).

61 *Clemons as next friend of T.W. v. Shelby Cty. Bd. of Educ.*, 818 F. App'x 453, 462 n.9 (6th Cir. 2020).

62 *Parker v. Franklin Cty. Cmty. Sch. Corp.*, 667 F.3d 910, 919 (7th Cir. 2012) (bolded emphasis added) (quoting 1979 Policy Interpretation at 71,415).

63 *Parker*, 667 F.3d at 919 (emphasis added) (quoting 1979 Policy Interpretation at 71,415).

64 *McCormick*, 370 F.3d at 293 (quoting 1979 Policy Interpretation at 71,422).

65 *Portz*, 401 F. Supp. 3d at 865.

66 *McCormick*, 370 F.3d at 294.

constitutes a disparity that is substantial enough to deny equality of athletic opportunity to girls at the Pelham and Mamaroneck high schools."[67]

- **No nondiscriminatory justification:** The school district offered "several reasons" why it believed a nondiscriminatory justification existed as to why girls' soccer needed to be scheduled in the spring, all of which were rejected by the court. First, "the fact that money needs to be spent to comply with Title IX is obviously not a defense to the statute."[68] Second, the fact that moving soccer "will force [girls] to choose between soccer and other fall sports" was meaningless, as "all student athletes must make choices about which sports to play."[69] Third, there was "no reason why soccer and field hockey cannot be played in the same season," even if field hockey is popular.[70] And fourth, moving soccer to the fall would not result in a dearth of girls' spring sports, which include lacrosse, softball, golf, and track. [71]

C. Scholarship Claims (34 C.F.R. § 106.37(c)(1))

1. **Description:** "To the extent that a recipient awards 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."[72]

   - **Note:** The regulation applies to *all* "athletic-based financial aid,"[73] including not only financial aid covering the cost of attendance, but also "grant-in-aid" scholarships and any other athletics-based aid payments.[74]

2. **Substantial proportionality is the applicable criterion:** The scholarship regulation "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."[75]

3. **Magnitude of disparity—aim for 1% or less:** "The 'substantially proportionate' test permits a small variance from exact proportionality. OCR recognizes that, in practice, some leeway is necessary to avoid requiring colleges to unreasonably fine-tune their scholarship budgets." If a disparity cannot be explained by "legitimate nondiscriminatory reasons provided by the college, such as the extra costs for out-of-

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67 *McCormick*, 370 F.3d at 296.

68 *McCormick*, 370 F.3d at 297.

69 *McCormick*, 370 F.3d at 298.

70 *McCormick*, 370 F.3d at 298.

71 *McCormick*, 370 F.3d at 299.

72 34 C.F.R. § 106.37(c).

73 *See Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 955 (D. Minn. 2018).

74 *See generally* 2020-21 NCAA DIVISION I MANUAL 206-18 (Aug. 21, 2020) (Article 15 Financial Aid), https://web3.ncaa.org/lsdbi/reports/getReport/90008.

75 1979 Policy Interpretation at 71,415.

state tuition," then "there will be a strong presumption that a[] . . . disparity of more than 1% is in violation of the 'substantially proportionate' requirement."[76]

4. **Case Study: *Ohlensehlen v. University of Iowa*:** Based on data provided under the EADA, the court determined that scholarships were not provided in a gender proportionate manner, as viewed in light of evidence of a larger trend of inequitable treatment: "The publicly-available EADA data upon which Plaintiffs relied in their Motion for Preliminary Injunction shows that the University of Iowa awarded $6,399,154 (48.8%) to females for athletic scholarships in 2018–19 even though females comprised 50.8% of its student athletes."[77]

[76] Letter from Dr. Mary Frances O'Shea, National Coordinator for Title IX Athletics, Office of Civil Rights, U.S. Dep't of Educ., to Colleagues (July 23, 1998), https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html.

[77] 20 Civ. 80, 2021 WL 1257554, at *2 (S.D. Iowa Feb. 23, 2021).

LEVELING THE TITLE IX ATHLETICS PLAYING FIELD: SEX, RACE, LGBTQA+ AND PAY EQUITY

Transgender Student Athletes: The Current Legal Landscape

June 21-25, 2021

Shannon Price Minter
Legal Director
National Center for Lesbian Rights

I. INTRODUCTION

Transgender students have been participating in school sports for years with little notice or fanfare; lately, however, their participation has taken on heightened visibility due to the efforts of anti-LGBTQ organizations to bring lawsuits and promote the passage of state laws seeking to ban transgender students from playing sports consistent with their gender identities.[1] As a result of those efforts, the participation of transgender students in school sports has become a topic of national conversation and, to some degree, controversy. This memo provides a brief overview of the current state of the law with respect to transgender student athletes, with the caveat that this is a complex and rapidly evolving area, and one in which many questions have not yet been addressed.

II. POLICIES AND STATE LAWS

Since 2011, the National Collegiate Athletics Association (NCAA) has had a policy on the participation of transgender student athletes,[2] which provides:

1. A transgender man (i.e., a person assigned female at birth but whose gender identity is male) who is taking testosterone as a treatment for gender dysphoria may compete on a men's team but may not compete on a women's team without changing that team status to a mixed team.

2. A transgender woman (i.e., a person assigned male at birth but whose gender identity is female) who has completed one calendar year of testosterone suppression medication for

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[1] *See*, *e.g.*, Jo Yurcaba, 'State of crisis': Advocates warn of 'unprecedented' wave of anti-LGBTQ bills, NBC News, April 26, 2021 11:48AM PDT, https://www.nbcnews.com/feature/nbc-out/statecrisis-advocates-warn-unprecedented-wave-anti-lgbtq-bills-n1265132; Gillian R. Brassil, How Some States Are Moving to Restrict Transgender Women in Sports, N.Y. Times, Apr. 12, 2021, https://www.nytimes.com/2021/03/11/sports/transgender-athletes-bills.html.

[2] NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes, Transgender_Handbook_2011_Final.pdf (ncaa.org).

> the treatment of gender dysphoria may compete on a women's team. Prior to the completion of one year of testosterone suppression treatment, she may compete on a men's team but may not compete on a women's team without changing it to a mixed team status.

In 2013, California enacted a law expressly requiring that transgender students in K through 12 schools be permitted to participate in school sports based on their gender identity. The law provides: "a pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records." California Education Code Section 221.5(f).

No other state has enacted a similar law that *specifically* addresses sports; however, some states have adopted similar regulations. In Massachusetts, for example, the Massachusetts Department of Education has issued guidance providing that: "Where there are sex-segregated classes or athletic activities, including intramural and interscholastic athletics, all students must be allowed to participate in a manner consistent with their gender identity."[3]

Many other states broadly prohibit discrimination against transgender students in their state education laws, which encompass school sports. According to the Movement Advancement Project, seventeen states plus the District of Columbia currently have such laws.[4]

In addition, many state high school athletic associations have established policies about transgender students. Some of these policies require that transgender students must be permitted to play based on their gender identity. For example, the Connecticut Interscholastic Athletic Conference (CIAC) policy provides:

> The CIAC has concluded that it would be fundamentally unjust and contrary to applicable state and federal law to preclude a student from participation on a gender specific sports team that is consistent with the public gender identity of that student for all other purposes. Therefore, for purposes of sports participation, the CIAC shall defer to the determination of the student and his or her local school regarding gender identification. In this regard, the school district shall determine a student's eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season. Accordingly, when a school district submits a roster to the CIAC, it is verifying that it has determined that the students listed on a gender specific sports team are entitled to participate on that team due to their gender identity and that the school district has

[3] Guidance for MA Public Schools Creating a Safe and Supportive School Environment - Student and Family Support (mass.edu)

[4] https://www.lgbtmap.org/equality-maps/safe_school_laws/discrimination

determined that the expression of the student's gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics.[5]

Some high school athletic association policies require transgender students to meet certain medical requirements before being able to play on teams consistent with their gender identity. For example, the Idaho High School Activities Association provides:

1. A female-to-male transgender student athlete who is taking a medically prescribed hormone treatment under a physicians' care for the purposes of gender transition may participate only on a boys team.

2. A male-to-female transgender student athlete is not taking hormone treatment related to gender transition may participate only on a boys team.

3. A male-to-female transgender student athlete who is taking medically prescribed hormone treatment under a physicians' care for the purposes of gender transition may participate on a boys team at any time, but must complete one year of hormone treatment related to the gender transition before competing on a girls team.[6]

Other high school athletic association policies effectively bar transgender students from school sports by requiring them to play based on the sex designated on their original birth certificates or to have undergone genital reconstructive surgery, which is not performed on minors.[7]

In 2020, three high school students filed a federal lawsuit challenging the Connecticut Interscholastic Athletic Conference (CIAC) policy on transgender athletes, alleging that permitting transgender girls to participate in girls' sports violated Title IX. *Soule v. Conn. Ass'n of Sch*., No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021). The lawsuit named both the CIAC and two transgender girls who had competed on the girls' track team. As explained below, the lawsuit was ultimately dismissed as moot because both of the transgender girls had graduated.

In 2020, Idaho became the first state to enact a law barring transgender girls from playing on school-based female teams. Shortly thereafter, a federal district court enjoined enforcement of the law, finding that it likely violated the federal Equal Protection Clause. *Hecox v. Little*, 479 F. Supp. 3d 930, 943 (D. Idaho 2020) (enjoining Idaho Code Ann. § 33-6201-6206).

In 2021, eight more states enacted laws virtually identical to Idaho's ban, including: Alabama, Arkansas, Florida, Mississippi, Montana, North Dakota, Tennessee, and West

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[5] 2bc3fc_a86a597d90a84de690bb2349e0b3cdba.pdf (filesusr.com)

[6] Microsoft Word - Rules and Regs.docx (idhsaa.org)

[7] *See generally* TRANSATHLETE High school transgender athlete policies

Virginia.[8] In addition, South Dakota Governor Kristi Noem issued an executive order imposing a similar ban.[9]

On May 26, 2021, the ACLU and Lambda Legal filed a lawsuit challenging West Virginia's law on behalf of an eleven-year-old transgender girl who wants to try out for the girls' track team.[10] The suit alleges that West Virginia's ban violates both Title IX and the Equal Protection Clause.

III. CASELAW ADDRESSING TRANSGENDER STUDENT ATHLETES

A. Equal Protection

For public schools, any policies relating to transgender students' participation in school sports must comply with the Equal Protection Clause of the Fourteenth Amendment. In *Bostock v. Clayton Cnty., Ga*., 140 S. Ct. 1731 (2020), the Supreme Court held that discrimination based on transgender status is sex discrimination. While *Bostock* involved a Title VII claim, courts both before and after *Bostock* have held that laws that discriminate against transgender people classify based on sex and are therefore subject to intermediate scrutiny under the Equal Protection Clause. *See*, *e.g*., *Adams ex rel. Kasper v. Sch. Bd. of St. Johns City*, 968 F.3d 1286, 1296 (11th Cir. 2020); *Whitaker v. Kenosha Unified Sch. Dist*. No. 1, 858 F. 3d 1034, 1051 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004).

In addition, a number of courts have held that even considered as an independent classification rather than as a type of sex discrimination, discrimination against transgender people meets all the criteria for heightened scrutiny. *See*, *e.g*., *Karnoski v. Trump*, 926 F.3d 1180, 1200-1201 (9th Cir. 2019).

Accordingly, a policy that discriminates against transgender student athletes is subject at least to intermediate scrutiny. Such a policy may be upheld only if it is supported by "an exceedingly persuasive justification." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (internal citation omitted). The challenged classification must "serve[] important government objectives" and "the discriminatory means employed [must be] substantially related to the achievement of those objectives." *Id*. at 723-24 (citations and internal quotation marks omitted). The justification must also be "genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Thus far, the only case to rule on a policy that excludes transgender students from school-based sports is *Hecox*, which found that a state law excluding transgender girls from playing on girls' teams failed that equal protection test. According to its findings and purpose section,

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[8] Transgender School Athletes Barred in Growing Number of States (bloomberglaw.com)

[9] South Dakota governor kills transgender sports bill, but orders restrictions | PBS NewsHour

[10] bpj_v_west_virginia_state_board_of_education_-_memo_in_support_of_preliminary_injunction.pdf

Idaho's law sought "to promote sex equality" and to provide "opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors." *Hecox*, 2020 WL 4760138 at *37. But as the district court found: "In the absence of any empirical evidence that sex inequality or access to athletic opportunities are threatened by transgender women athletes in Idaho, the Act's categorical bar against transgender women athletes' participation appears unrelated to the interests the Act purportedly advances." *Id*. at *31.

The State of Idaho sought to defend the law by comparing it to policies that exclude boys from girl's teams, but the court found that it could not be justified by the same interests used to justify sex-segregated teams. In *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982), the Ninth Circuit held that sex-specific teams may be justified as a means of "redressing past discrimination against women in athletics" and "promoting equality of athletic opportunity between the sexes." The court found that Idaho's law did not advance any interest in redressing past discrimination against women in athletics because "like women generally, women who are transgender have historically been discriminated against, not favored." *Hecox*, 2020 WL4760138 at *28.

The court also found that excluding transgender girls and women does not promote equality of athletic opportunity between the sexes. In *Clark*, the Ninth Circuit upheld a policy preventing male students from playing on a girls' volleyball team based in part on a concern that, absent that policy, "males would displace females to a substantial extent," given that there are roughly equal numbers of males and females and that, on average, males have a physiological advantage. *Clark*, 695 F.2d at 1131. But as the district court found: "It is inapposite to compare the potential displacement allowing approximately half of the population (cisgender men) to compete with cisgender women, with any potential displacement one half of one percent of the population (transgender women) could cause cisgender women." *Hecox*, 2020 WL 4760138 at *29. In light of the miniscule number of transgender girls, the court found it implausible "that allowing transgender women to compete on women's teams would substantially displace female athletes." *Id*.

The court also found no basis to assume that transgender girls and women have a physiological advantage over other girls and women. First, "it is not clear that transgender women who suppress their testosterone have significant physiological advantages over cisgender women." *Id*. at * 30. In addition, many transgender girls medically transition before puberty, thereby never gaining any potential advantages that exposure to testosterone may create. Many others suppress their testosterone. As a result, being transgender is not "a legitimate accurate proxy" for physiological advantage, as the Ninth Circuit required to uphold a sex-based classification in *Clark*, 695 F.2d at 1129. In sum, "the incredibly small percentage of transgender women athletes in general, coupled with the significant dispute regarding whether such athletes actually have physiological advantages over cisgender women when they have undergone hormone suppression in particular, suggest the Act's categorical exclusion of transgender women athletes has no relationship to ensuring equality and opportunities for female athletes in Idaho." *Hecox*, 2020 WL 4760138 at *33. The State of Idaho appealed, and the case is pending in the Ninth Circuit.

B. Title IX

Thus far, federal courts have uniformly held that Title IX prohibits discrimination against transgender students. No case brought by a transgender plaintiff has yet specifically addressed sports; however, courts have held that Title IX requires schools to treat transgender students consistent with their gender identity, including in the context of sex-segregated facilities and activities. *See Grimm v. Gloucester Cty. Sch. Bd.*.972 F.3d 586 (4th Cir. 2020), *cert. pending*; *Adams ex rel. Kasper v. Sch. Bd. of St. Johns City*, 968 F.3d 1286 (11th Cir. 2020); *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe by & through Doe v. Boyertown Area Sch. Dist*., 897 F.3d 518 (3d Cir. 2018); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Dodds v. United States Dep't of Educ*., 845 F.3d 217 (6th Cir. 2016).

In *Soule*, a federal district court dismissed a case brought by cisgender female students alleging that Connecticut's policy of permitting transgender girls to compete on girls' teams violated Title IX. In effect, the plaintiffs argued that transgender girls should be considered male for purposes of Title IX and that permitting them to play on girls' teams therefore deprived other girls of athletic opportunities. WL 1617206 at *1.

The court ruled that the motion to enjoin transgender athletes from competing was moot given that both transgender athletes named in the complaint had already graduated from high school and would no longer be competing within CIAC. *Id*. at *4. Additionally, although one of the plaintiffs had not yet graduated, the court noted that mere speculative possibility that she might have to compete against another transgender athlete did not give her a legally cognizable interest. *Id*. at *5-6.

The court also held that the plaintiffs had failed to state a viable claim for Title IX damages because they could not show that the defendants had notice that a policy permitting transgender girls to play on girls' teams violated Title IX. *Id*. at *9. Instead, the district court cited "an unbroken line of authority" to the contrary. *Id*. at *10. As the court noted: "Courts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity." *Id*.

IV. CONCLUSION

Colleges and universities must comply with Title IX and the Equal Protection Clause when adopting and enforcing policies about the participation of transgender students in school sports. With respect to competitive intercollegiate sports, the NCAA permits transgender students to play based on their gender identity so long as they meet specified requirements for doing so. While no federal court has yet ruled on a claim by a transgender student challenging a discriminatory sports policy, federal courts have generally ruled that Title IX and the Equal Protection Clause require schools to treat transgender students consistent with their gender identity, including in the context of sex-segregated facilities and activities. In addition, while the only case seeking to invalidate a transgender-inclusive sports policy was dismissed as moot, the opinion strongly suggested that the court would have rejected the claim on the merits.

LEVELING THE TITLE IX ATHLETICS PLAYING FIELD: SEX, RACE, LBTQA+ AND PAY EQUITY

June 21-25, 2021

Lucy T. France
University of Montana
Missoula, Montana

I. Introduction

NACUA has some excellent resources on pay equity in higher education[1], including athletics[2]. These materials should be consulted for a deeper and more detailed dive. The notes below offer a summary of the legal framework for analyzing pay equity of coaches in intercollegiate athletics. Also included are some practical suggestions for working with colleges and universities to prevent such claims.

II. Legal Framework

Although over a decade old, the EEOC's *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions*[3]is still applicable. It provides a detailed outline for analyzing equal pay claims of collegiate coaches. The guidance provides practical examples to assist in analyze the various factors discussed below. It notes that the EEOC will analyze charges involving compensation of sports coaches in educational institutions under both the EPA and Title VII.

Under the Equal Pay Act (EPA), a plaintiff must show that employees of the opposite sex were paid different wages for substantially equal work.[4] Importantly, "'[s]ubstantially equal' does not necessarily mean 'identical.'"[5] The Ninth Circuit Court of Appeals has noted that "the crucial finding on the equal work issues is whether the jobs to be compared have a 'common core' of tasks."[6] If there is a finding of a common core of

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[1] *See* Kris D. Meade, Richard Weitzner, Jillian Ambrose, and Laura Offenbacher Aradi, NACUANOTES, Jan. 24, 2020, Vol. 18 No.3, *Pay Equity in Higher Education – A Changing Landscape*. (hereinafter, "NACUANOTES Vol. 18, No. 3").

[2] Gender-Based Pay Disparities in Intercollegiate Coaching: The Legal Issues, 28 J.C. & U.L 519 (2002).

[3] *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions*, Equal Employment Opportunity Commission, EEOC-CVG-1998-1 (Oct. 29, 1997), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-sex-discrimination-compensation-sports-coaches-educational. (hereinafter "EEOC Guidance").

[4] *Freyd v. University of Oregon*, 990 F.3d 1211, 1220 (9th Cir. 2020)(citing *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1074 (9th Cir. 1999)).

[5] *Id.* at 1220 (citations omitted).

[6] *Id.*at 1220 (quoting *Stanley*, 178 F.3d at 1074).

tasks, the next step in the analysis is to look at whether "any additional tasks" for one job and not the other make the jobs substantially different.[7]

The EEOC guidance, similarly states that jobs should be analyzed, "not simply with regard to the particular physical skills which are being taught or coached," rather they "should be analyzed functionally." The guidance states that "it is possible for jobs coaching different sports to be appropriate comparators."

Claims of unequal pay may be brought under either or both the EPA and Title VII. Under Title VII, plaintiffs must first exhaust their administrative remedies prior to filing suit in district court.[8] Under the EPA, a plaintiff may proceed to sue in court without filing a claim either with the EEOC or the applicable state enforcement agency. A violation of the EPA, is also deemed a violation of Title VII.[9]

In addition to federal laws prohibiting discrimination in compensation, many states have statutes addressing pay equity. Any analysis of pay equity in an intercollegiate athletic program should include an analysis of relevant state laws. NACUA colleagues have noted trends in state legislation to expand the definition of equal work; eliminating exceptions for allowable pay disparities; requiring employers to be transparent about sharing employee salary information; and prohibiting employers from using prior salary information in setting wages.[10]

A. **The EPA and Title VII: Establishing an Appropriate Comparator**

Pay discrimination claims under the EPA and Title VII generally involve the same burdens of proof and legal analysis.[11] To establish a *prima facie* case of pay discrimination the plaintiff has the burden of first identifying an appropriate comparator who is of a different sex and who receives a higher salary.[12] A comparator is "appropriate" if they are in a position that requires equal skills, effort, responsibility, and working conditions.[13] Each factor is described below in more detail.

1. **Equal Skills**

[7] *Stanley*, 178 F.3d at 1074.

[8] 42 U.S.C. § 2000e-5.

[9] EEOC Guidance (citing 29 C.F.R. § 1620.27(a).

[10] Brittney L. Denley, Rachel Pereira, Ryan P. Poscablo, Erin Gasparka, Fatimah Stone, *Equal Pay for Equal Work: The Current State of the Equal Pay Act and How Various States are Demanding Pay Equity*, NACUA April 2019 CLE Workshop.

[11] *See* EEOC Guidance.

[12] *Id.*

[13] *Id.*

The "equal skills" analysis includes looking at "such factors as experience, training, education, and ability."[14] Skills that an employee might have but that they do not use in their job duties are not included when comparing skills.[15]

2. **Equal Effort**

In determining whether the comparator and a plaintiff share "equal efforts" in their jobs, the actual requirements of the jobs that are compared.[16] This is analysis does not preclude coaches of different sports from being considered as comparators because coaches often share similar efforts. Typical job "efforts" to compare for collegiate coaches include "1) teaching/training; 2) counseling/advising of student-athletes; 3) general program management; 4) budget management; 5) fundraising; 6) public relations; and 7). . . recruiting."[17]

3. **Equal Responsibility**

"Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation."[18] Relevant factors to compare include the size of the team, the number of assistant coaches supervised by the coach, and the "media management" duties of the coach.[19]

4. **Similar Working Conditions**

The EEOC recognizes that most coaches work under similar working conditions for EPA purposes.[20]

B. **Affirmative Defenses to EPA and Title VII Claims**

Once the plaintiff has proven a prima facie case of pay discrimination, the burden shifts to the defendant to assert an affirmative defense.[21] Having an employment pay scale that is based on a seniority system, a merit-based system, or a system that measures the quantity or quality of output are all affirmative defenses to a prima facie case of pay discrimination.[22] These defenses speak for themselves and are relatively easy to prove if they exist.

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[14] 29 C.F.R. § 1620.15(a).

[15] *See* EEOC Guidance.

[16] 29 C.F.R. § 1620.16(a).

[17] EEOC Guidance.

[18] 29 C.F.R. § 1620.17(a).

[19] EEOC Guidance.

[20] *Id.*

[21] EEOC Guidance.

[22] 29 U.S.C. § 206(d)(1).

An employer may also assert as an affirmative defense that the difference in pay is based on a "factor other than sex."[23] Factors other than sex that have been found to be viable affirmative defenses are described in the subsections below.

1. **Revenue**

The fact that one coach brings in more revenue to the institution than another coach may be sufficient to defeat an EPA claim.[24] However, the institution must have provided equal revenue-raising resources to male and female coaches to qualify for this defense.[25] For example, if a male coach is provided with marketing staff and a high advertising budget while a female coach is not (or is provided with significantly less), this factor likely will not act as an affirmative defense for the institution.[26]

2. **Marketplace**

If the institution can show that a certain coach was the best person for the job given his or her expertise, skill, and experience, then a difference in pay may be justified.[27] Paying a competitive rate to hire someone is alright, but paying someone the "marketplace rate" based solely on what other coaches are paid and without regard to the individual's skills or marketability is likely not justifiable and may discriminatorily perpetuate pay gaps.[28]

3. **Prior Salary**

If an employer shows (1) that it consulted with the employee's prior employer to determine their prior salary, (2) that it determined that the prior salary was accurate given the employee's education, experience, and skills, and (3) that it did not rely solely on the prior salary in setting the current salary, then the employer may be justified in paying the different wage.[29] If an employer bargained with employees of one gender with respect to salary, the employer must also show that it bargained with employees of the other gender.[30]

4. **Sex of Student-Athletes**

The sex of the student-athletes coached by the employee may be an adequate justification for a pay discrepancy, the rationale being that the gender of the student-

[23] EEOC Guidance.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

athlete is not related to the gender of the coach in question.[31] That said, this will not be a defense to a pay discrepancy if female coaches are limited to coaching female students at the institution because then it would be a factor tied to gender.[32]

5. **Experience, Education, and Abilities**

As long as they are not gender-based, "superior experience, education, and ability may justify pay disparities."[33] The experience in question must be related to the job.[34] Decisions based on this factor, like all of the above factors, are case and fact specific.

6. **More Duties**

If the higher pay is related to other duties that a coach is required to complete, then the wage discrepancy might be justified.[35] However, the institution must ensure that duties are not offered to employees in a discriminatory way.[36]

C. **A Distinct Facet of Title VII**

In addition to the pay equity analyses described above, Title VII might allow for an employee to succeed on a claim for wage discrimination under the EPA even if they do not satisfy the "equal work" requirement.[37] The EEOC gives the example of male coaches of male teams receiving bonuses for winning seasons and female coaches of female teams not receiving bonuses for winning seasons as an instance of discriminatory pay unless the employer can show an affirmative defense.[38]

D. **Title IX**

Title IX can also be used to bring a pay discrimination claim. Title IX prohibits discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance."[39] This includes athletic programs. The problem arises for plaintiffs, however, in the interpretation that Title IX will only be violated if the coach's salary effectively denies the athletes "coaching of equivalent quality, nature, or availability" due to their gender.[40] This means that a plaintiff coach would have to allege

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[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *See County of Washington v. Gunther*, 452 U.S. 161 (1981) (holding that the EPA's affirmative defenses still apply to Title VII wage discrimination claims but that employees who show that they are "discriminatorily underpaid" may still get relief even without a showing of equal work).

[38] EEOC Guidance.

[39] *See* NACUANOTES Vol. 18, No. 3, pp. 542-550.

[40] *Deli v. University of Minnesota*, 863 F.Supp. 958, 962–63 (D. Minn. 1994); EEOC Guidance.

that their lower salary caused their student athletes to receive coaching that was "inferior in 'quality, nature or availability" to those student athletes of a different gender.[41]

III. Practical Suggestions

Attached is a tool, *Pay Equity Evaluation*, that might be useful to analyze coaches' salaries. The chart is intended for use by legal counsel to apply the factors discussed above. The chart will provide a broad-brush overview to help flag pay inequities, so there can be a deeper analysis to determine whether such inequities are potentially discriminatory. The chart uses the base salary as the point of comparison. Of course, merit pay, bonuses, and other additions to base salary must be paid without regard to a coach's gender. The "quantifying factors" and the "target levels" should be tied to performance evaluations or other objective means of comparing coaches. All factors will likely not apply to all coaches, and that is fine. What is important is to determine who might serve as comparators, and if there are differences in pay amongst comparators, whether those differences are defensible.

IV. Conclusion

There have not been significant changes in how pay equity claims in athletics are analyzed in the past decade. The EEOC guidance from 1997 and the Ninth Circuit Court of Appeals decision in *Stanley* (1999), continue to provide the legal framework for analysis. However, as litigants and legislation continue to make progress on reducing the real problems of pay inequity in the workforce, it is a good idea to periodically assess pay practices in collegiate athletic departments.

[41] *See Id.*

LEVELING THE TITLE IX ATHLETICS PLAYING FIELD: SEX, RACE, LBTQA+ AND PAY EQUITY

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Lucy T. France
University of Montana
Missoula, Montana

I. Pay Equity Evaluation

This spread sheet takes the factors used in the EEOC guidance and those considered by courts in analyzing equal pay claims by intercollegiate athletic coaches. It is intended to be used as a tool for compiling information about factors that go into calculating coaches' salaries. It is intended to help identify coaches that might be used as comparators and to flag potential pay inequities.

Download the spread sheet by clicking here.

Pay Equity Evaluation

Factors	**Coach**	**Coach**	**Coach**
Base Salary			
Quantifying Factors (%time; # assistants; # players)			
Teaching/Training			
Counseling/Advising			
Program Management			
Fundraising			
Public Relations			
Recruiting			
Scheduling			
Supervising			
Target Levels Revenue Spectators Wins Media Events			
Other (e.g., staff or event management)			
Individual Factors Experience Marketplace value Training Education Ability			