



Title IX and Collegiate Athletics Under the Biden Administration

Speakers: Phil Catanzano, Holland & Knight LLP; Janet Judge, Holland & Knight LLP

Moderator: Alyssa Keehan, J.D., CPCU, ARM, Director of Risk Management Research & Consulting

Today's Speakers



Phil Catanzano

(617) 305-2126

phil.catanzano@hklaw.com

2022 Education Lawyer
of the Year (Boston)



Janet Judge

(617) 573-5866

Janet.Judge@hklaw.com

2022 Sports Lawyer
of the Year (Boston)

Disclaimer

- This presentation is provided for education purposes only and isn't intended to provide legal advice or create an attorney-client relationship.
- Title IX athletic equity and sexual misconduct prevention compliance is complicated. Attendees should consult with their legal counsel to evaluate Title IX compliance questions.

Agenda

Gender Equity in Athletics, Private Litigation, OCR Reviews

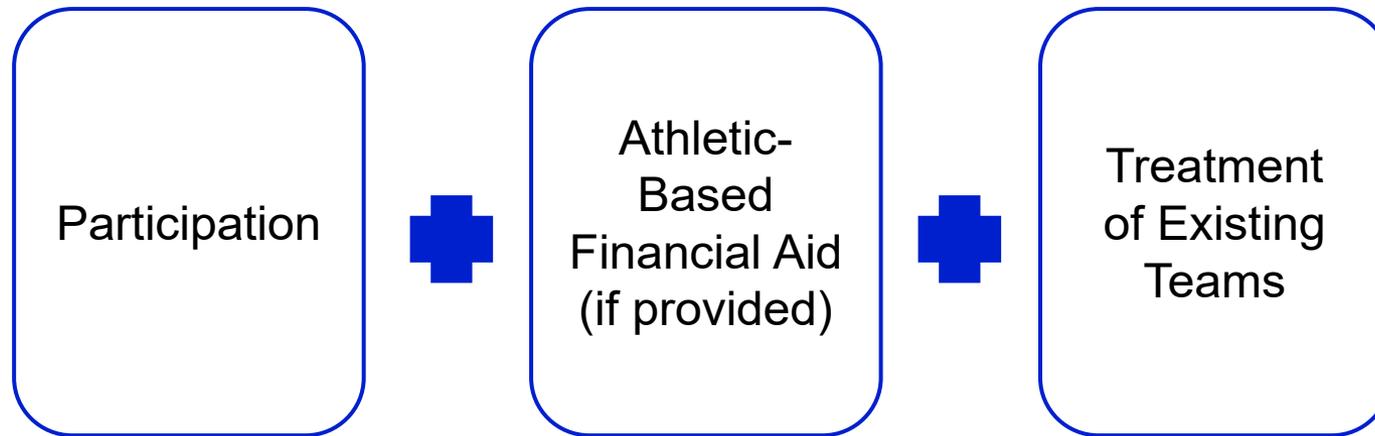
- How does the gender equity analysis work under Title IX?
- What is most likely to trigger a federal investigation or private litigation?
- How does the federal government conduct its reviews, and why does this matter for private complaints?
- Are courts analyzing complaints in the same manner as the government?
- Proactive steps to consider for your athletic program

Additional Challenges in the Athletic Program

- Confronting misconduct in the athletic program (sexual misconduct, hazing)
- Confronting misconduct by coaches (bullying, retaliation, etc.) and responding to complaints by coaches (different treatment)
- Considerations unique to athletics, such as NCAA involvement, league/conference rules, coaching contracts, corporate partnerships, and issues surrounding name-image-likeness (NIL)
- Accommodating student-athletes (disability, transgender athletes)

Title IX Athletic Gender Equity

Independent compliance in each of these three areas:



Title IX Participation Equity

Compliance with any of the following participation tests:

Prong 1:
Substantial
Proportionality

OR

Prong 2:
History and
Practice of
Program
Expansion

OR

Prong 3:
Full and
Effective
Accommodation
of Interest and
Ability

Prong 1: Substantial Proportionality

Are the male/female intercollegiate athlete participation percentages substantially proportional to the full-time male/female undergraduate enrollment percentages?

- Ultimate standard is whether the disparity equates to enough athletes that could create a “viable team”
- Office for Civil Rights (OCR) *may* consider average squad size of sports currently offered for the underrepresented sex
- DOJ amicus brief in the Michigan State litigation

Effective (and appropriate/defensible) Roster Management

- Real opportunities
- Caps vs. floors
- NCAA national averages
- Coach preference
- Adequate support

Athletic Participation

OCR's 1979 Policy Interpretation defines participants as those athletes:

- Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
 - Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
 - Who are listed on the eligibility or squad lists maintained for each sport, or
 - Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.
- 44 *Fed. Reg.* at 71415.

Prong 2: Program Expansion

Does your school have a (1) history and (2) current practice of expanding athletic programs for underrepresented sex that is responsive to their interests and abilities?

- The federal government has historically preferred (but hasn't required) adding teams and adding participants rather than eliminating opportunities.
- It's challenging for schools to satisfy the Prong 2 elements as we approach the 50th Anniversary of Title IX and when examining the full history of the school's athletics program.
- Key question: Has there been a steady growth of participation opportunities (actual and percentage based) for the underrepresented sex?

Prong 3: Accommodating Interest & Abilities

Does the current program effectively accommodate the athletic interests and ability of the underrepresented sex?

- Is there unmet interest in a particular sport?
- Is there sufficient ability to sustain a team in the sport?
- Is there a reasonable expectation of competition for the team?

If the answer is “no” to any of the questions above and the institution has taken appropriate steps to evaluate each of the questions consistent with OCR guidance and court opinions, an institution may be able to show that it is fully and effectively accommodating the underrepresented sex’s interests and abilities.

Accommodating Interest and Abilities (Cont'd)

In determining whether an institution has unmet interest and ability to support a team, these factors become important:

- Whether the institution uses nondiscriminatory methods of assessment when determining its students' athletic interests and abilities:
 - Are there multiple indicators of interest? Ability?
 - What is the frequency of assessments?
 - Has the school determined if there is a reasonable expectation of competition?
- Whether any viable teams for the underrepresented sex were recently eliminated
- Whether there are effective procedures for evaluating requests to add teams and assess participation
- Whether a survey may assist in capturing information on students' interests and abilities
- Whether there exists vibrant club sport participation by members of the underrepresented sex in a sport not currently offered at the varsity level

Prior administrations have changed their interpretation of this participation test. What will the Biden administration do?

It's Not Just a Survey. . .

- Additional Factors to Consider:
 - Requests by students to add a sport
 - Participation rates in club or intramural sports and requests to elevate the sports to intercollegiate participation (and whether that is feasible)
 - Interviews with students, coaches, administrators, and others (such as admitted students)
 - Participation rates in regional feeder high schools, amateur athletic associations, and community sports leagues
 - Participation in intercollegiate sports in normal competitive regions/leagues; for example, are you the one institution that doesn't compete in X sport?
- “While these indications of interest may be helpful to the OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.” Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, (Jan.16, 1996) (emphasis supplied).

Athletics-Based Financial Aid: Scholarships

“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.”

Dear Colleague Letter – Bowling Green (July 23, 1998)

Calculation is based on number of men and women playing sports – “singly counted.” See, for example, *Portz v. St. Cloud* (D.C. Minn. 2018) (the plain text of 34 C.F.R. § 106.37(c)(1) requires the Court to calculate the athletic-based financial-aid disparity based on the “number of students of each sex participating in interscholastic or intercollegiate athletics.” The regulation is clear that the Court calculates the disparity using the number of student-athletes actually participating in intercollegiate athletics.

Additional Considerations

- The use of the term “Budget” is misleading
- Phase in with new programs
- In-state vs. out-of-state tuition differentials
- Cost of attendance and summer school
- Other examples of athletics-based financial aid

“Laundry List” Subjective Analysis

Locker Rooms, Practice & Competitive Facilities:

- Quality and availability of facilities
- Exclusivity of use of facilities
- Availability of locker rooms
- Quality of locker rooms
- Maintenance of facilities
- Preparation of facilities

Scheduling of Games & Practices:

- Number of competitive events
- Number and length of practices
- Time of day for competition and practices
- Preseason and postseason competition

Coaching:

- Assignment
- Availability
- Compensation*

Academic Services:

- Assignment
- Availability
- Compensation of tutors

Equipment & Supplies:

- Quality, maintenance, suitability
- Amount and availability
- Personnel and storage

“Laundry List” Subjective Analysis (Cont’d)

Medical & Training Facilities:

- Medical personnel and assistance
- Sports docs, mental health support
- Certified athletic trainers
- Weight and training personnel
- Conditioning facilities
- Insurance coverage

Publicity:

- Sports information personnel
- Publicity resources
- Publications and other promotional devices, including social media
- Marketing

Housing & Dining:

- Housing provided at any time
- Athletics-based food and services (meals, snacks, fueling stations, education, meal planning, personnel)

Travel & Per Diem:

- Modes
- Travel housing
- Length of stay
- Per diem
- Dining

Recruitment:

- Opportunities to recruit
- Resources made available
- Limiting effect on recruitment

Support Services:

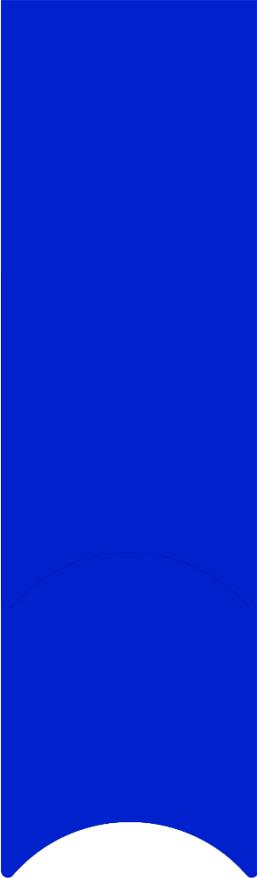
- Administrative assistance
- Secretarial and clerical assistance
- Directors of operations, video, etc.

Caution: Goods and Services Purchased with Donations/Outside Dollars

Private donations injected into an athletic program become institutional dollars no different than if the institution directed the spending itself. See, for example, *Chalenor v. Univ. of North Dakota*. For example, if a booster contributes funds to purchase jackets for the men's hockey team, that benefit (the jackets) "counts" for Title IX purposes.

- Private Financial Donations (alumni, fans, etc.)
- Donations of Goods and Services
- Booster Funding
- Team Fundraising
- Game Guarantees

Are there hidden costs to accepting a donation?

A vertical blue bar on the left side of the slide, with a white curved cutout at the bottom.

Audience Q&A

Alston, NIL, and Other Developments

- The U.S. Supreme Court recently held in favor of student-athlete plaintiffs re: NCAA limits on student-athlete education-related compensation. Specifically, the Court affirmed that NCAA limits on education-related benefits are unreasonable restraints of trade in violation of antitrust protections, and, therefore, are enjoined.
- NCAA, conferences, and institutions can't consult or agree to limit education-related benefits. HOWEVER: Member schools and/or individual conferences may limit education-related benefits, including academic or graduation awards or incentives.
- In addition, the NCAA has issued an interim NIL policy allowing student-athletes to pursue certain NIL opportunities consistent with state law and school policy.

Triggering a Federal Audit

Common Triggers of a Compliance Review:

- Eyes on the Compliance Manual
- The prior administration didn't conduct many, if any, compliance reviews in athletics. The current administration may return to compliance reviews with a focus could be on programs with the worst participation numbers for the region.
- High-profile changes occur, such as firing a popular coach, cutting a team, high profile improvements to a team/program of the overrepresented sex.
- 50th Anniversary of Title IX?

Common Triggers for an Individual Complaint:

- Obvious noncompliance occurs, such that a student-athlete (or parent) or coach would be on clear notice.
- Different treatment exists for coaches in treatment areas; for example, subpar budgets, comparatively bad offices, salary disputes, etc.
- Negative local media attention exists. For example, a campus newspaper describes the plight of a women's team or a specific athlete.
- Cutting teams, limiting resources, or otherwise scaling back a program.

Investigative Challenges in Athletics

General Misconduct, Academic Integrity, Hazing, and Title IX Sexual Misconduct:

- What is the NCAA's role?
- Who conducts investigations?
- Investigative strategies must adapt to unique aspects of athletic departments:
 - Title IX emergency removals
 - Navigating close-knit groups with often sensitive allegations; for example, sexual misconduct that may have been observed or facilitated by other team members
 - Navigating coaches and their desire to be involved/apprised during an investigation
 - Navigating conflicting interests (game scheduling, travel, scholarships), etc.
- What are the appropriate/applicable standards?
- Investigations often incorporate school and student-athlete codes of conduct, as well as other policies and team rules.
- Violations of school policy often can impact league/conference matters. For example, they may lead to canceling a season, making a team ineligible for the playoffs. They may “punish” student-athletes who weren't involved in the misconduct.
- Publicity, social media, and potential NIL challenges:
 - Can impact corporate sponsorships in instances of high-level misconduct, such as endorsement agreements with apparel companies, etc.

On the Radar

When the Challenges Involve the Coach:

- Title IX related challenges, such as different contractual perks and terms (*feds generally haven't focused on salary for various reasons), different financial resources (such as recruiting budgets, operating budgets), different locker rooms, etc.
- State "Equal Pay" statutes
- Different standards in responsibility, discipline

Transgender and Transitioning Athletes:

- NCAA guidance re: transgender students:
 - "NCAA Inclusion of Transgender Student Athletes," August 2011
 - 2016 DCL pulled back and OCR took several cases, but Biden Administration pulled transgender student-athletes back in
 - State law legislation
 - Courts cases are ongoing in various states (often creating restrictions pre-college)

Accommodating Athletes with Disabilities:

- 2013 Dear Colleague Letter: while the "illustrative examples offered in this guidance are focused on the ... secondary school context ... students with disabilities at the postsecondary level must also be provided an equal opportunity to participate in athletics, including intercollegiate, club, and intramural athletics." (Emphasis added.)

Final Tips: Connect Your Silos

Understand the Key Positions in Athletics and their Roles

- Everyone should know the Athletic Director, but what about:
 - Who completes your EADA submission?
 - Who is charged with ordering equipment? Scheduling/maintaining facilities?
 - What about sport supervisors, development, communications staff, SWA?
- What are the Athletic Department's priorities?
 - Does the department have a gender equity plan in place?
 - Is there planned growth on any teams? Do they plan on shrinking any teams or cutting teams? How do these changes impact overall compliance?
 - What is five-year plan for facility improvements? Equipment? Recruiting?

Ensure Resources Are Available and Understood All Around

- Is there a contact in the general counsel's office for legal questions?
- What are your EADA enrollment numbers? Does they include satellite campuses? Online enrollees?
- How does the Athletic Department work with students with disabilities?

Final Tips: Exit Interviews

End of Season Surveys and Exit Interviews of Coaches and Athletes:

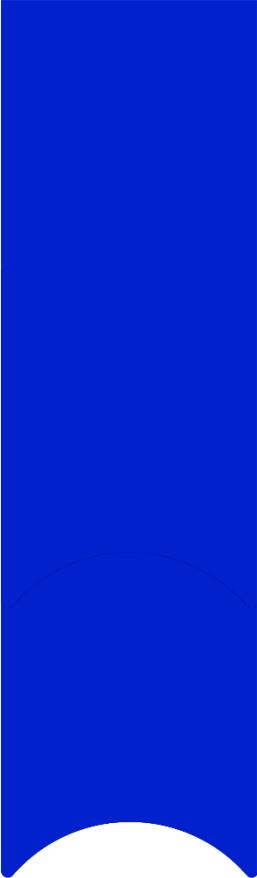
- Go beyond merely “goals for the following season.”
- Incorporate “Laundry List” and other components to provide program barometer:
 - Are there individual concerns with facilities or equipment, for example?
 - Is recruiting spending sufficient, travel budgets, training opportunities?
- If an athletic director finds concerns during exit interviews, what do they do with that information? How is it elevated or shared outside of athletics?
- Be transparent about your questions.

If concerns are raised, ACT:

- If a women’s team is routinely denied an out-of-region competitive opportunity while men’s teams routinely travel out-of-region to compete, investigate.
- If coaches/athletes/parents raise treatment concerns, listen.
- While an institution may not satisfy everyone, encourage the sharing of this information with the right people, such as the general counsel or other appropriate institution official.

Final Tips: Proactive vs. Reactive Response

- Assess and make changes on the school's own terms to maintain control of its athletic program.
- Understand the challenges inherent in the school's athletics program, such as unfortunate history of selection of sports from a participation/scholarship equity perspective, ongoing locker room challenges, inaccessible stadiums, etc.
- Remember, an individual doesn't need to have "standing" in order to file an OCR athletic equity complaint.
- Litigation (or threat of litigation) has become a more effective and timely means of controlling or influencing athletic programs, both by insiders and outsiders.
- Title IX athletic equity cases aren't subject to an administrative exhaustion requirement or caps on damages.



Audience Q&A

Questions/Contact



Phil Catanzano

(617) 305-2126

phil.catanzano@hklaw.com

2022 Education Lawyer
of the Year (Boston)



Janet Judge

(617) 573-5866

Janet.Judge@hklaw.com

2022 Sports Lawyer
of the Year (Boston)

