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NACUA Online Course
Title IX Coordinator Training

Module 10: Athletics

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Submodule 1

What is the requirement for equity in athletics, and how does the Department of Education determine if an institution is compliant?

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34 CFR 106.41

- This is the primary regulation that governs equity in athletics
- The U.S. Department of Education has issued guidance and many resolution agreements that help understand how they enforce this regulation

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34 CFR 106.41(a)

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any **interscholastic, intercollegiate, club or intramural** athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

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34 CFR 106.41(b)

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

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34 CFR 106.41(c)

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

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34 CFR 106.41(c) Factors (1 of 2)

- **(1)** Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- **(2)** The provision of equipment and supplies;
- **(3)** Scheduling of games and practice time;
- **(4)** Travel and per diem allowance;
- **(5)** Opportunity to receive coaching and academic tutoring;

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34 CFR 106.41(c) Factors (2 of 2)

- **(6)** Assignment and compensation of coaches and tutors;
- **(7)** Provision of locker rooms, practice and competitive facilities;
- **(8)** Provision of medical and training facilities and services;
- **(9)** Provision of housing and dining facilities and services;
- **(10)** Publicity.

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34 CFR 106.41(c) Expenditures

Unequal **aggregate** expenditures for members of each sex or unequal expenditures for **male and female teams** if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the **failure to provide necessary funds** for teams for one sex in assessing equality of opportunity for members of each sex.

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How does OCR enforce equitable opportunities?

- Three areas evaluated for compliance per 1979 policy interpretation:
  - Participation opportunities (three-part test)
  - Athletic scholarships
  - Benefit and treatment areas
- We will talk about each in the coming slides

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Note about Boosters

- OCR will consider anything that a booster does to be an action of the institution itself for purposes of equity
- This requires your athletic staff to ensure all gifts are "over the table" for purposes of ensuring equity
- This requires your athletic and advancement staff to be prepared to explain Title IX requirements

- If the donor will not provide an equitable gift, can your institution make up the difference to maintain compliance?

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Participation Opportunities – Key Guidance

- December 1979 Policy Interpretation "Three-Part Test"
- 1996 Clarification of Three-Part Test
- 2008 Guidance on Athletic Activities Counted
- 2010 Guidance on Part Three

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Three-Part Test

- Know your numbers
- Know your history
- Know your students' interests

You only need to pass one part to be in compliance.

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Three-Part Test: Part One

The number of male and female athletes is substantially proportionate to their respective enrollments.

"Know your numbers":

- How many students are enrolled?
- How many students are athletes?

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Part One: Examples from OCR (1 of 2)

This Year (compliant):

	Men	**Women**
Enrolled	52%	48%
Athletes	52%	48%

Next Year (compliant):

	Men	**Women**
Enrolled	51%	49%
Athletes	52%	48%

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Part One: Examples from OCR (2 of 2)

Big School (non-compliant):

	Men	Women
Enrolled	48%	52%
Athletes	53%	47%

Little School (compliant):

	Men	Women
Enrolled	51%	49%
Athletes	52%	48%

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Three-Part Test: Part Two

Is there a history and continuing practice of program expansion for the underrepresented sex?

"Know your history"!

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Part Two – Keep Your Chronology

- When did you add each team?
- When did you elevate each team?
- What did your numbers look like over the years?
- How have you responded when new teams were requested?
- Do you have a plan in place to monitor interest and expand opportunities?

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Three-Part Test: Part Three

Is your institution fully and effectively accommodating the interests and abilities of the underrepresented sex?

"Know your student interest":

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

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Athletic Scholarships

Key resource: July 23, 1998 Dear Colleague Letter: Bowling Green State University

- "Title IX requires that such scholarships be made available to the separate men's and women's athletic programs in a manner which is 'substantially proportionate' to the participation rates of male and female athletes"
- Example: If 60% of athletes are men, the expectation is that 60% of the annual scholarship funding will be awarded to men (within 1% in either direction).
- They will consider legitimate nondiscriminatory reasons for a larger disparity.

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Benefits and Treatment Areas

This focuses on the "laundry list" in 106.41.

December 1979 Policy Interpretation contains information on each of these key factors when comparing men to women.

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Equipment and Services

- The quality of equipment and supplies
- The amount of equipment and supplies
- The suitability of equipment and supplies
- The maintenance and replacement of the equipment and supplies
- The availability of equipment and supplies

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Scheduling of Games and Practice Times

- The number of competitive events per sport
- The number and length of practice opportunities
- The time of day competitive events are scheduled
- The time of day practice opportunities are scheduled
- The opportunities to engage in available pre-season and post-season competition

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Travel and Per Diem Allowances

- Modes of transportation
- Housing furnished during travel
- Length of stay before and after competitive events
- Per diem allowances
- Dining arrangements

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Opportunity to Receive Coaching and Academic Tutoring

- Coaching:
  - Relative availability of full-time coaches
  - Relative ability of part-time and assistant coaches
  - Relative availability of graduate assistants
- Academic tutoring:
  - The availability of tutoring
  - Procedures and criteria for obtaining tutorial assistance

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Assignment and Compensation of Coaches and Tutors (1 of 2)

- Does the institution's compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability?
- Factors to consider: range and nature of duties, experience of individual coaches, number of participants for particular sports, number of assistant coaches supervised, and level of compensation
- "There may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary"

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Assignment and Compensation of Coaches

- Assignment of coaches – Training, experience, professional qualifications, and professional standing
- Compensation of coaches – Rate of compensation (per sport/season), duration of contracts, conditions relating to contract renewal, experience, nature of coaching duties performed, working conditions, other terms and conditions of employment

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Assignment and Compensation of Tutors

- Assignment of tutors – Tutor qualifications, training, experience, and "other qualifications"
- Compensation of tutors: Hourly rate of payment by nature subjects tutored, pupil loads per tutoring season, tutor qualifications, experience, other terms and conditions of employment

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Provision of Locker Rooms, Practice and Competitive Facilities

- Quality and availability of the facilities provided for practice and competitive events
- Exclusivity of use of facilities provided for practice and competitive events
- Availability of locker rooms
- Quality of locker rooms
- Maintenance of practice and competitive facilities
- Preparation of facilities for practice and competitive events

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Provision of Medical and Training Facilities and Services

- Availability of medical personnel and assistance
- Health, accident and injury insurance coverage
- Availability and quality of weight and training facilities
- Availability and quality of conditioning facilities
- Availability and qualifications of athletic trainers

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Provision of Housing and Dining Facilities

- Housing provided
- Special services as part of housing arrangements (e.g. laundry facilities, parking space, maid service)

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Publicity

- Availability and quality of sports information personnel
- Access to other publicity resources for men's and women's programs
- Quantity and quality of publications and other promotional devices featuring men's and women's programs

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Name, Image, and Likeness?

- There is considerable discussion about NIL agreements and how they may be analyzed through a Title IX equity lens
- Case law is developing as we speak!

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Digging Into the Details

- Review the 1979 Policy Interpretation and other guidance to help dig into the details of each area
- Search for recent OCR resolution letters that demonstrate how they are currently enforcing complaints in these areas:
    - https://ocrcas.ed.gov/ocr-search

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Starting the Conversation

- Ask your athletic director if you can check in about Title IX compliance to get a general sense of what has been done and what needs to be done
    - Have there been past OCR complaints? Are there any currently?
    - Has a gender equity study ever been performed? If so, can you have a copy of the latest one?
    - Which part of the three-part test does your institution rely on for compliance?
    - How can I help ensure that we are meeting the requirements?

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Submodule 2

What considerations should be taken into account when adding or discontinuing athletic teams?

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General Considerations

- How will the elimination of the team affect your compliance with each part of the three-part test?
    - Does it affect your numbers?
        - Even eliminating both a men's and women's team could put you out of compliance.
    - Does it affect your history by moving away from compliance, instead of towards it?
    - Does it affect your students' interests by removing a sport where there is still significant interest?
- What impact does this have on the equity of scholarships and benefits?

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Recent Litigation

- *Balow v. Michigan State University*, 620 F. Supp. 3d (W.D. Mich. Aug. 8, 2022)
  - University eliminated men's and women's swimming/diving programs; women's team members challenged under Title IX
  - Court applied three-part test
  - Eliminating the programs contributed to an imbalance in athletic participation opportunities that already existed
  - Court found an average participation gap of 31 opportunities for women over 8 years – larger than the smallest Big Ten women's swimming/diving team
  - University required to create Title IX compliance plan

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Takeaways

- Before making decisions to eliminate teams for men or women or both, run your numbers
  - Are you compliant now?
  - Would you be compliant if you eliminate the team(s)?
  - Are you making a noncompliance issue worse?
- If you are challenged, you're going to have to create a compliance plan.
  - You should already be moving in this direction!

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Submodule 3

What does the NCAA require in terms of handling sexual violence cases?

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NCAA – Policy on Campus Sexual Violence

This policy is regularly revised. The latest version is available at:

- https://www.ncaa.org/csvpolicy
- Member institutions must annually attest to their compliance with the NCAA.
  - Those that don't will be fined, and their names will be posted on the NCAA website.
- The policy requires the University Chancellor/President, the Director of Athletics, and the campus Title IX Coordinator to attest annually to certain statements.

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Attestations (1 of 6)

- The athletics department is informed on, integrated in, and compliant with institutional policies and processes regarding sexual violence prevention and proper adjudication and resolution of acts of sexual and interpersonal violence.

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Attestations (2 of 6)

- The institutional policies and processes regarding sexual violence prevention and adjudication, and the name and contact information for the campus Title IX coordinator, are readily available within the department of athletics, and are provided to student-athletes.

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Attestations (3 of 6)

- All student-athletes, coaches and staff have been educated each year on sexual violence prevention, intervention and response, to the extent allowable by state law and collective bargaining agreements.

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Attestations (4 of 6)

- All incoming, continuing and transfer student-athletes have completed an annual disclosure related to their conduct that resulted in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence. Transfer student-athletes also must disclose whether a Title IX proceeding was incomplete at the time of transfer. Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.

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Attestations (5 of 6)

- Institutions have taken reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence. In a manner consistent with federal and state law, all NCAA member institutions must share relevant discipline information and incomplete Title IX proceedings as a result of transfer with other member institutions when a student-athlete attempts to enroll in a new college or university.

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Attestations (6 of 6)

- An institution choosing to recruit an incoming student-athlete or accept a transfer student-athlete must have a written procedure that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the student left the institution with an incomplete Title IX proceeding, was disciplined through a Title IX proceeding or has a criminal conviction for sexual, interpersonal or other acts of violence. Failure to have it written and to gather information consistent with that procedure could result in penalties.

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Bonus requirement

- The athletics department will cooperate with college or university investigations into reports and matters related to sexual and interpersonal violence involving student-athletes and athletics department staff in a manner compliant with institutional policies for all students

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Applies to...

- A person who has been disciplined through a Title IX proceeding or criminally convicted, regardless of the degree, and whether the result of a plea or court determination, of either of the following:
    - **Interpersonal Violence:** Violence that is predominantly caused due to the relationship between the victim and the perpetrator, including dating and domestic violence

- **Sexual Violence:** A term used to include both forcible and nonforcible sex offenses, ranging from sexual battery to rape.
- **Other Acts of Violence:** Crimes including murder, manslaughter, aggravated assault or any assault that employs the use of a deadly weapon or causes serious bodily injury

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Takeaways

- Check the current policy language each August
- Create your plan to ensure you can sign the attestations
- Deadline: First Friday of November each year

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Submodule 4

What are some sticky issues relating to Title IX and athletics?

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Hazing

- Hazing may also constitute prohibited conduct under your Title IX policy
- Title IX is a federal statute, whereas hazing is typically covered by state law
- Work with legal counsel to ensure compliance

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Interim Suspensions

- Title IX does not permit disciplinary action to be taken against a respondent until the process has been completed
- Coaches may want to consider whether to suspend a player from the team due to Title IX charges – but is this disciplinary in nature?
- Consult with counsel to determine whether such a suspension may violate Title IX obligations

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Recruiting

- Does your institution have a process for determining whether to admit a student with a disciplinary record?
- Does your institution apply that process for students who have been found responsible for Title IX prohibited conduct?
- How does your institution evaluate risks to determine whether a student with a disciplinary record can safely join your campus community?
- Are coaches knowledgeable about that process when recruiting transfer students, and are they informing such students that the process will occur?

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Sex-Separated Teams

- It is currently disputed whether transgender women are permitted to participate on women's athletic teams, or whether this violates Title IX
- Check current guidance from the U.S. Department of Education, as well as case law in your jurisdiction

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