



TITLE IX:

PART 1: ATHLETIC EQUITY

Agenda:

- ▶ Very Brief History
- ▶ Sources of Law/Guidance
- ▶ Title IX Athletic Equity
- ▶ What is a Title IX Sport?
- ▶ Participation
- ▶ Financial Aid
- ▶ Treatment
- ▶ Retaliation

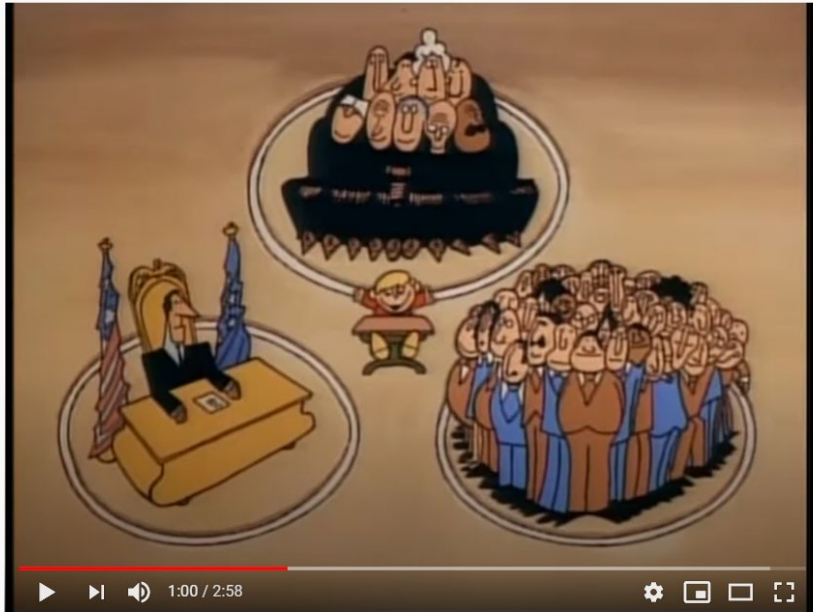


**Title IX
thru the**



DECADES

Sources of Law and Separation of Powers:



Schoolhouse Rock:

<https://www.youtube.com/watch?v=tEPd98CbbMk>

- Constitution
- **Federal Statutes**
- Federal Regulations
- Case Law
- Administrative Guidance
- Administrative Rulings
- Same for State
- Title IX is a Federal Law that applies to NCAA members if they accept federal funding.
- Title IX is enforced by Courts and/or the Executive Branch (OCR/DOJ).
- The NCAA does not enforce Title IX.

pandemics

Activities Counted For Purposes of Title IX:

Whether the activity is structured and administered in a manner consistent with established intercollegiate or interscholastic varsity sports in the institution's athletics program on a case-by-case basis. A review may consider the following, among other factors:

PROGRAM STRUCTURE AND ADMINISTRATION —

Is the program provided a budget, support services, access to coaching, equitable eligibility to athletics scholarships and awards, and are the student-athletes recruited in a manner consistent with established varsity sports?

TEAM PREPARATION AND COMPETITION —

Does the team practice and compete in a manner consistent with established varsity sport programs? Included in this review, among other factors, are the following considerations:

- Are there standardized rules of play and competition criteria for the sport?
- Are the support services provided based on the competitive needs of the program?
- Is post-season play determined by regular season performance?
- Is team selection based on athletics ability?

See, e.g., Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance (OCR 2008),

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html> .

Athletic Equity Compliance:



Participation



Financial Aid



Treatment





PARTICIPATION:

Athletic Participant

OCR defines a Title IX Participant as one:

1. who is 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
2. who is participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
3. who is listed on the eligibility or squad lists maintained for each sport; or
4. who, because of injury, cannot meet 1, 2, or 3 above but continues to receive financial aid on the basis of athletic ability.

Per guidance, “OCR considers a sport’s season to commence on the date of a team’s first intercollegiate competitive event and to conclude on the date of the team’s final intercollegiate competitive event.”

See, e.g., Dear Colleague Letter, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEP’T OF EDUC. (Jan. 16, 1996)) available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

What about . . .

EADA v. NCAA v. Title IX?

Student-athletes Added/Dropped after the First Date?

Transfer Student-Athletes?

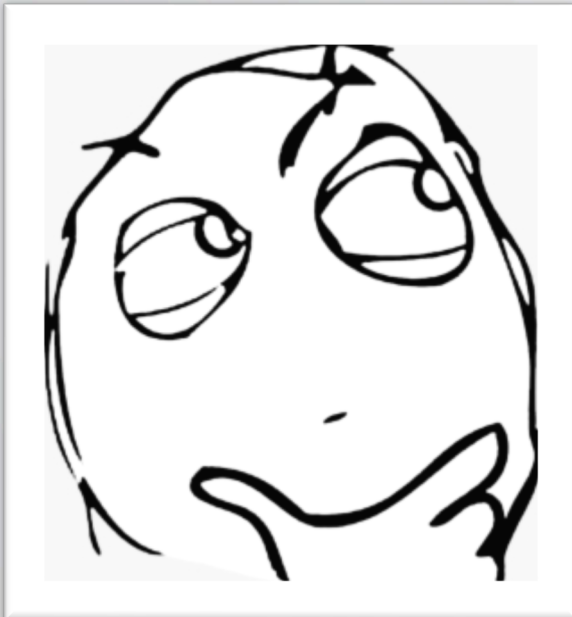
Multisport Student-Athletes?

Male Practice Players?

Injured Athletes?

Exhausted Eligibility?

Pandemics?



The Three Part Test



Prong 1.

Intercollegiate-level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective full-time undergraduate enrollment, or

Prong 2.

The institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of the underrepresented gender, or

Prong 3.

It can be demonstrated that the interests and abilities of the members of the underrepresented gender have been fully and effectively accommodated by the present program.

See, e.g., Dear Colleague Letter, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC. (Jan. 16, 1996)) available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

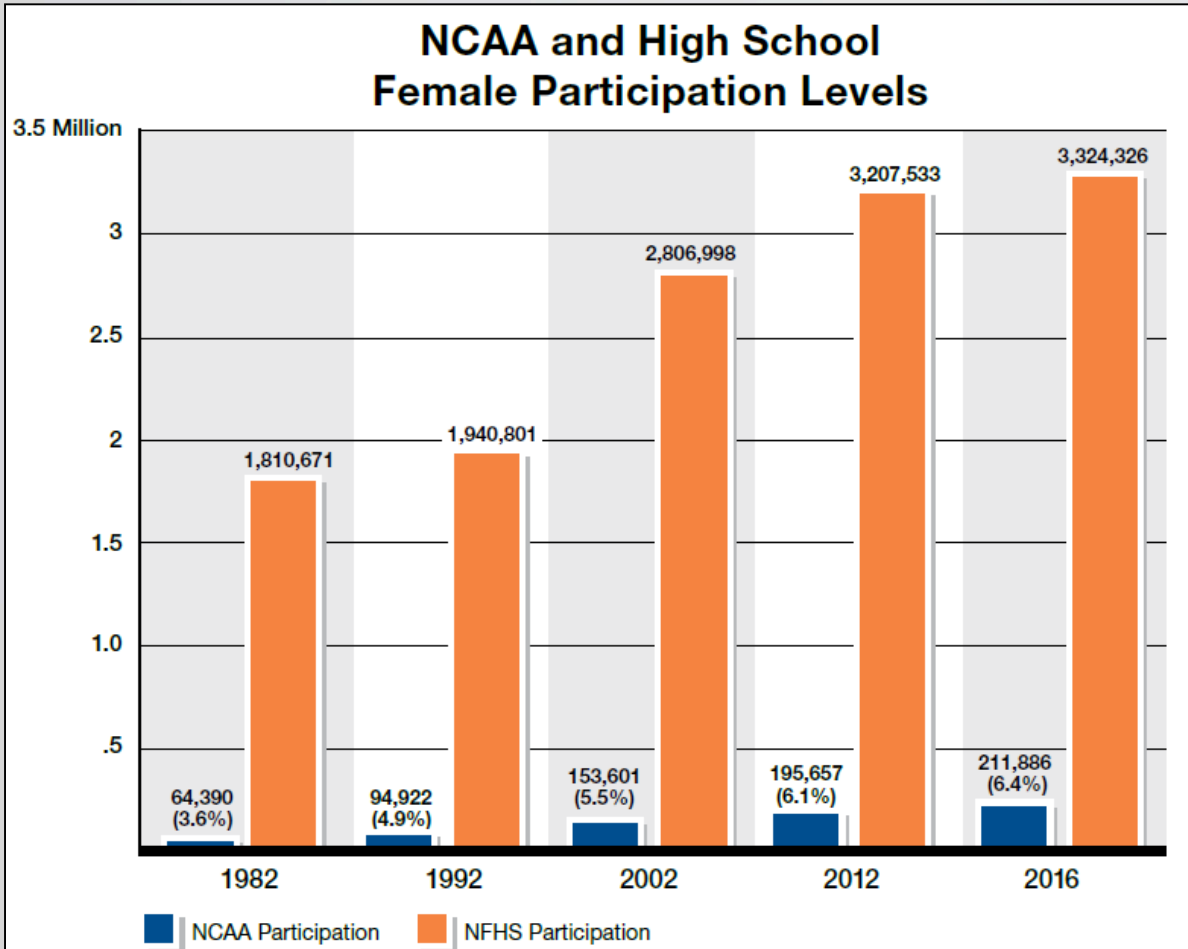
Prong 1: Substantial Proportionality



Prong 2: History and Current Program of Expansion



Prong 3: Accommodating Interest & Abilities



Does the Current Program Effectively Accommodate the Athletic Interests and Ability of the Underrepresented Sex?

What is the Underrepresented Sex?

Is there:

- Unmet interest in a particular sport;
- Sufficient ability to sustain a team in the sport; and
- A reasonable expectation of competition in the normal competitive area?

How much is enough?

What is the relevant pool?

Prong 3: Assessing Interest & Abilities

Some Important Factors, among others:

- Does the institution use nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students
 - ✓ 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?
- Were any viable teams for the underrepresented sex eliminated?
- Are there are effective procedures for evaluating requests to add teams and assess participation?
- Have there been requests?
- Have the students been surveyed to assess interests and abilities?
- Does club sport participation by members of the underrepresented sex exist in a sport or sports not currently offered at the varsity level?
- High School and other feeder program participation?

For a full discussion, please visit: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf> .

“While these indications of interest may be helpful to 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, (OCR 1996). See also, e.g., *Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three (Dear Colleague Letter)(OCR 2010)* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html> .

Levels of Competition:

The competitive schedules for men's and women's teams, on a program-wide basis, afford proportionately similar numbers of male and female athletes equivalently advanced competitive opportunities;

OR

There exists 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.

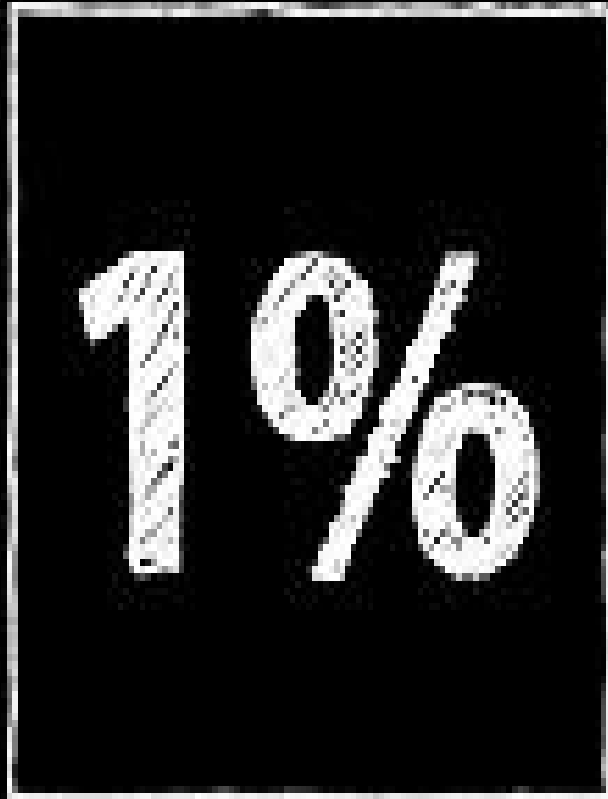
NCAA®



FINANCIAL AID:

Tied to Athletics Ability

Financial Aid Equity: What About . . .



“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.

We would like to clarify that use of statistical tests is not appropriate in these circumstances.”

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



Treatment

A/K/A The Laundry List

The Laundry List of Treatment Areas:

- Regs and Policy Interpretation

- Equipment
- Scheduling
- Travel/Per Diem
- Coaching
- Academic Services
- Facilities
- Medical & Training Facilities
- Housing/Dining
- Publicity
- Recruitment
- Support Services

“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 [....]

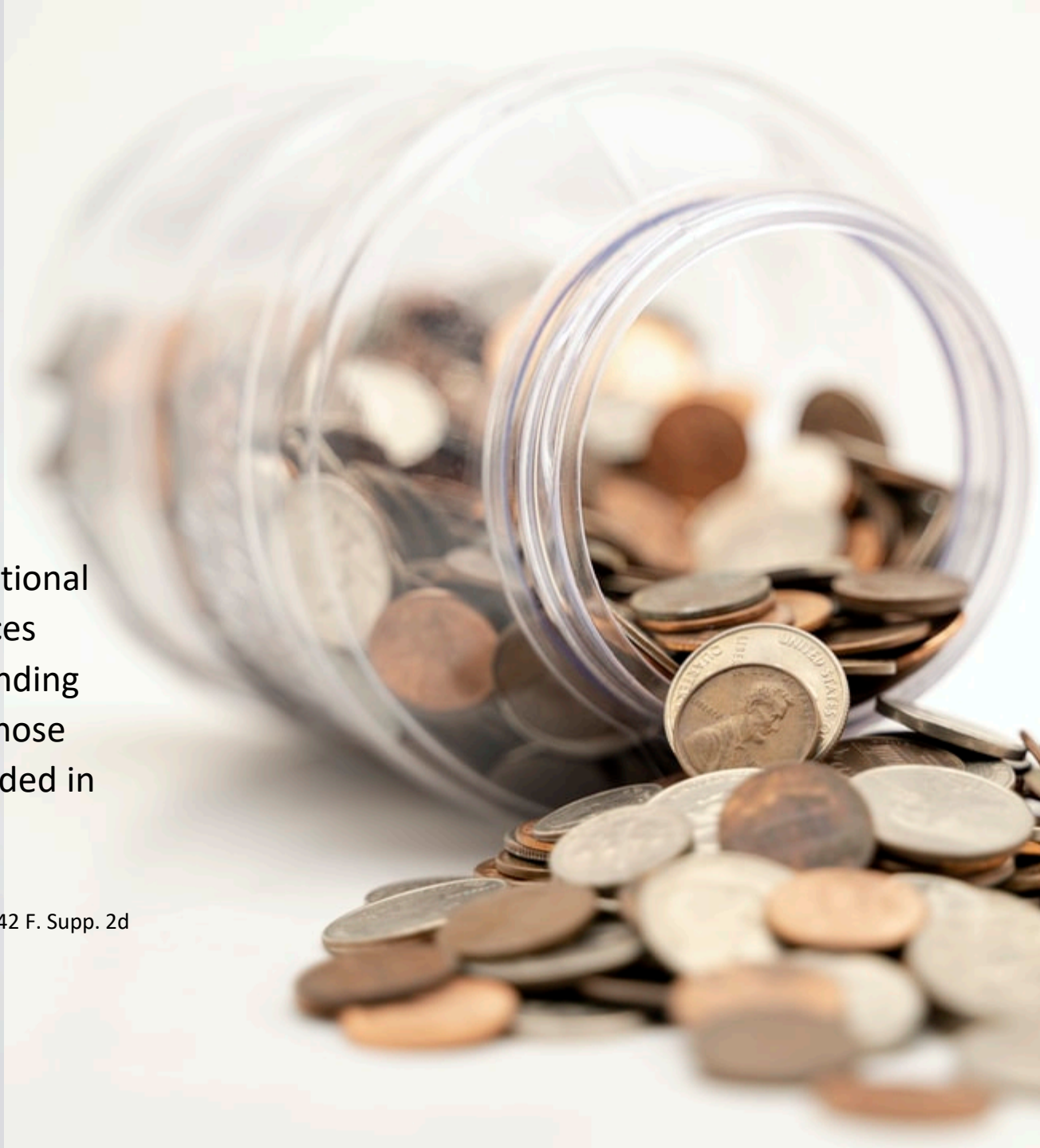
[OCR] may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.”
34 C.F.R. Section 106.41(c)



Sources of Funding:

Private donations are institutional dollars and goods and services provided through private funding still count. In other words, those goods and services are included in the equity analysis.

See, e.g., Chalenor v. Univ. of North Dakota, 142 F. Supp. 2d 1154 (D.N.D. 2000)



Non-Exhaustive Areas of Review:	Men's Program Overall	< > =	Women's Program Overall
Equipment and Supplies (Apparel and Equipment)			
Scheduling (Practice, Competition)			
Travel (Mode, Housing, Food)			
Tutors/Academic Services (Personnel, Services)			
Coaches (Quantity, Quality, Compensation*)			
Facilities/Spaces (Practice, Competition, Locker Room)			
Medical (Personnel, Experience, Availability)			
Housing & Dining (Home)			
Publicity/Communications (Sports Information & Marketing)			
Support Services (Administrative, Office, Support)			
Recruiting (Financial & Other Support)			

Are the Disparities Significant?



Difference, on the Basis of Sex

- ▶ in benefits or services that has a . . .
- ▶ negative impact on athletes of one sex . . .
- ▶ when compared with benefits or services available to athletes of the other sex.

Disparity:

- ▶ So Substantial as to Deny Equal Opportunity to Athletes of One Sex.

Disparities that are not Substantial. . .

- ▶ Evidence to be Evaluated on a case by case basis.

Retaliation Prohibited:

Retaliation is intentional discrimination on the basis of sex.

One who witnesses and complains about discrimination is protected from adverse action they encounter because of the complaints.

Recognition that coaches, teachers, administrators and students are in the best position to witness and alert schools

See, e.g., Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005)







TITLE IX:

Part II Sexual Misconduct under the New Regulations

OCR States that the New Regulations are Effective August 14, 2020 forward:

**Title
IX**

As schools plan and prepare for implementation of the new Title IX Rule, which is effective on August 14, 2020, the Office for Civil Rights (OCR) has received a number of questions regarding whether the Title IX Rule applies retroactively. It does not. OCR will enforce the new Title IX Rule only when it becomes effective, and will enforce the new Rule prospectively

See, OCR Blog – 20200803 at <https://www2.ed.gov/about/offices/list/ocr/blog/20200805.html> .

Application per the Preamble:

- ▶ “[T]he Department declines to address other topics outside of the original scope, such as pregnancy, parenting, or athletics under Title IX, coverage of Title IX to fraternities and sororities, whether speech codes discriminate based on sex, funding intended to protect women or young adults on campus, funding cuts to girls’ programs by recipients, or forms of harassment other than sexual harassment.”
- ▶ Such complaints “may be referred” to the recipient’s Title IX Coordinator to review under the grievance procedures required by these Regulations.
- ▶ “[T]he handling of non-sexual harassment sex discrimination complaints brought by students and employees (for instance, complaints of sex-based different treatment in athletics, or with respect to enrollment in an academic course) remains the same as under current regulations (*i.e.*, recipients must have in place grievance procedures providing for prompt and equitable resolution of such complaints).”



The new Title IX regs do not alter existing regulations under civil rights laws: Title VI (discrimination on the basis of race, color, or national origin) or regulations under disability laws.

What about LGBTQ+?

Discussion



30026

Federal Register / Vo

DEPARTMENT OF EDUCATION

34 CFR Part 106

[Docket ID ED-2018-OCR-0064]

RIN 1870-AA14

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Office for Civil Rights,
Department of Education.

ACTION: Final rule.

- ▶ Title IX Coordinator and Deputies*
- ▶ Actual Knowledge:
Title IX & Officials with Authority*
- ▶ Definitions of Prohibited Conduct
- ▶ Supportive Measures*
- ▶ Formal Complaints
- ▶ Confidentiality
- ▶ Notice / Investigation
- ▶ Advisors
- ▶ Jurisdiction Issues
 - ▶ Mandatory Dismissal
 - ▶ Permissive Dismissals
- ▶ Emergency Removals*
- ▶ Informal Resolution
- ▶ Policies / Grievance Procedures
 - ▶ Evidence / Standard of Evidence
 - ▶ Live Cross Examination
 - ▶ Appeals

Who must report?

Title IX Coordinator(s) and Officials with Authority.

Otherwise: Campus by Campus Determination.

The Regulations leave it to schools to determine who are the Officials with Authority (i.e., those who have authority to institute corrective measures on behalf of the institution), to decide which employees are mandatory reporters (i.e., employees who must report sexual harassment to the Title IX Coordinator), which employees may listen to a student's or employee's disclosure of sexual harassment without being required to report it to the Title IX Coordinator, and/or which employees must report sexual harassment to the Title IX Coordinator but only with the complainant's consent.

- Official with Authority is a legal determination. It depends on the facts.
- Who else is required to report on your campus?
- Who is confidential? Who has limited confidentiality?
- The Regulations eliminate the prior “should have known” standard.
- When does a school have ACTUAL KNOWLEDGE?
- What must a school do when it has ACTUAL KNOWLEDGE?
- Notice/Investigation

See Title IX Regulations, 85 FR 30026 at <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

Supportive Measures:

- ▶ Supportive measures must be designed to restore or preserve equal access to education program or activity without unreasonably burdening the other party.
- ▶ Supportive measures may include steps designed to protect the safety of parties or the educational environment, or deter sexual harassment.
- ▶ The supportive measures cannot punish, discipline, or unreasonably burden the respondent.
- ▶ The Regulations require schools to offer supportive measures to every complainant whether or not a formal complaint is filed.
- ▶ If a school does not provide a complainant with supportive measures, then it must document why such a response was not clearly unreasonable in light of the known circumstances.
- ▶ What if the respondent and the complainant are in the same education program or activity?

Emergency Removals

Emergency Removals:

- ▶ The Regulations address whether a school may remove a person accused of Title IX sexual harassment from an education program or activity.
- ▶ A school may remove an individual from one or more education programs or activities in situations where the person poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations concludes (or where no grievance process is pending).
- ▶ A school must make an individualized assessment and provide an opportunity to challenge the school's determination that "an imminent threat to the physical health or safety of any person, *arising from* sexual harassment allegations, justifies removal."
- ▶ The opportunity to challenge does not have to be provided prior to removal. It may be provided after removal is implemented.
- ▶ An emergency removal cannot be imposed simply *because* the an individual has been accused of sexual harassment.
- ▶ Emergency removal may be implemented *in addition* to providing supportive measures.
- ▶ The emergency removal provision applies to students.

Emergency Removals:

- ▶ The threat justifying a removal could consist of facts and circumstances “arising from” the sexual harassment allegations.
 - ▶ “For example, if a respondent threatens physical violence against the complainant in response to the complainant’s allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant’s physical safety posed by the respondent may ‘arise from’ the sexual harassment allegations.”
 - ▶ “[I]f a respondent reacts to being accused of sexual harassment by threatening physical self harm, an immediate threat to the respondent’s physical safety may ‘arise from’ the allegations of sexual harassment and could justify an emergency removal.”
- ▶ The Regulations do not prohibit a school from addressing violations of a school’s code of conduct, policies, or laws, provided the a conduct does not constitute Title IX sexual harassment or is not “arising from” Title IX misconduct allegations.

Appeals:

Equitable, Grounds, Actions Pending.

See Title IX Regulations, 85 FR 30026 at <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>



TRAINING

Equitable, Transparent, Posting & Retention, NCAA Policy



NCAA POLICY

Following this presentation on October 15, 2020, the NCAA Board of Governors met on October 27, 2020, and approved the two action items on the next slide.

- ▶ 2022-23 is the new effective date for schools to confirm that they are following the expanded NCAA Board of Governors Policy on Campus Sexual Violence.
 - ▶ Policy in effect now: http://www.ncaa.org/sites/default/files/Aug2018SSI_UpdatedCampusSexualViolencePolicy_20180905.pdf
 - ▶ Policy in effect in 2022-23: <http://www.ncaa.org/sport-science-institute/topics/ncaa-board-governors-policy-campus-sexual-violence>
- ▶ A Task Force is being formed to create operational guidelines and documentation to facilitate members' enhancement of their own campus policies. Task force members will be appointed by the board chair and include university general counsel, campus Title IX coordinators, compliance administrators, conference administrators, senior woman administrators and student-athletes.
- ▶ Questions about the policy can be sent to questions@ncaa.org



ncaa.org |  twitter.com/ncaa |  facebook.com/ncaa1906 |  instagram.com/ncaa

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