

Title IX & Collegiate Athletics: Enforcement and Litigation Risks

Phil Catanzano, Holland & Knight LLP

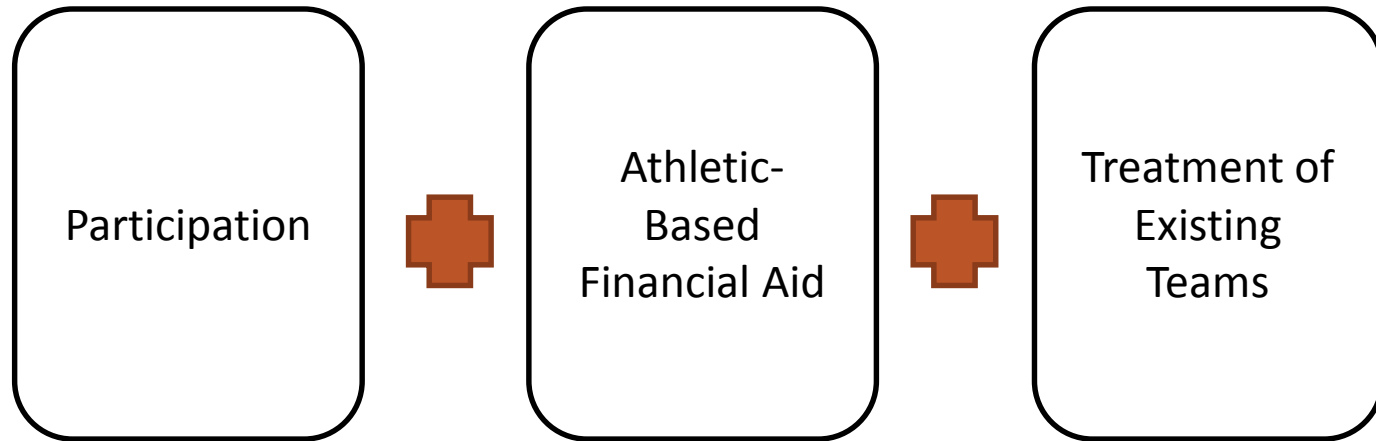
Janet Judge, Holland & Knight LLP

Agenda

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

Title IX Athletic Gender Equity

Independent compliance in each of the following three areas:



Title IX Participation Equity

Compliance with any one of the following three 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

Athletic Participation

Which participation opportunities count for Title IX purposes?

- Intercollegiate varsity athletes;
- Listed on the eligibility or squad lists maintained for each sport
- Receiving institutionally-sponsored support; e.g., coaching, equip.
- Participating in organized practice sessions and team activities
- On the team as of date of first competition, plus those added after the first date and during the competitive season, and maybe not those who leave shortly after the first date – it's complicated.

What about multi-sport athletes, male practice players?

- Multisport athletes are counted by team for participation equity purposes and one time only for financial aid (scholarship) equity purposes, e.g., a cross country, indoor track and outdoor track athlete would count 3 times for participation and one time for financial aid analysis.
- Male Practice Players on women's teams do not count as participants for Title IX purposes. But see, EADA reporting.

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.”
- Consider average squad size of sports currently offered for the underrepresented sex

Effective (and defensible) roster management

- Real Opportunities
- Caps versus Floors
- Coach Buy In and Adequate Support

Prong 2: Program Expansion

Can you demonstrate that your school has a:

history



current practice

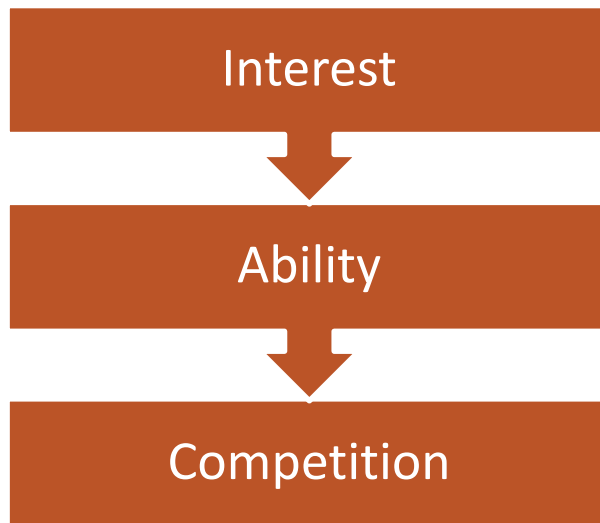
**of expanding athletic programs
for the underrepresented sex
which is responsive to their interests and abilities?**

- Key questions:
 - Have any programs been eliminated or suspended?
 - When you added teams for the underrepresented sex, did you also add teams on the other side of the aisle?



Prong 3: Accommodating Interest & Abilities

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



If there is interest and ability in a sport for which there is a reasonable expectation of competition, a school may not rely on Prong 3 to comply with this aspect of Title IX.

Accommodating Interest and Abilities, cont.

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 the athletic interests and abilities of its students
 - ✓ Are there multiple indicators of interest?
 - ✓ What is the frequency of assessments?
 - ✓ Has the school determined if there is a reasonable expectation of competition?
- Whether 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.

It's Not Just the 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 (e.g., admitted students);
 - ✓ Participation rates in regional feeder high schools, amateur athletic associations, and community sports leagues; and
 - ✓ Participation in intercollegiate sports in normal competitive regions/leagues, e.g., are you the one institution that does not compete in X sport?
- “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, (Jan.16, 1996))

Questions & Answers



Scholarships & Substantial Proportionality

- » Bowling Green = the 1% standard
 - OCR's approach?
 - The courts?
- » Duplicated v. unduplicated counting
- » NCAA scholarship caps are hugely important in reaching compliance, but not justification for noncompliance
- » Efforts to reach compliance on participation opportunities can be complicated by efforts to reach compliance on scholarships (while also staying within NCAA rules)
- » Often an important factor if an institution determines it will start a new team for the underrepresented gender:
 - Where is the interest and ability?
 - How many scholarships are allowed for that sport?

Additional Considerations:

- » The use of the term “budget” is misleading. In practice, dollars must be awarded to count.
- » Cost of Attendance Guidance
- » In-State vs. Out-of-State Tuition Differentials
- » Exhausted Eligibility Awards
- » Summer School Dollars
- » SAF Funds

The “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
- Pre-season and post-season competition



Travel & Per Diem

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

The “Laundry List,” Cont.

Coaching (and Tutors)

- Full-time v. part-time
- Number of coaches, roles
- Training/experience
- Duration of contracts
- Conditions of contract renewal
- Nature of coaching duties
- Working conditions
- Fringe benefits (camps, etc.)

Equipment & Supplies

- Quality, maintenance, suitability
- Amount and availability



Support Services

- Administrative assistance
- Secretarial and clerical assistance

The “Laundry List,” Cont.

Medical & Training Facilities

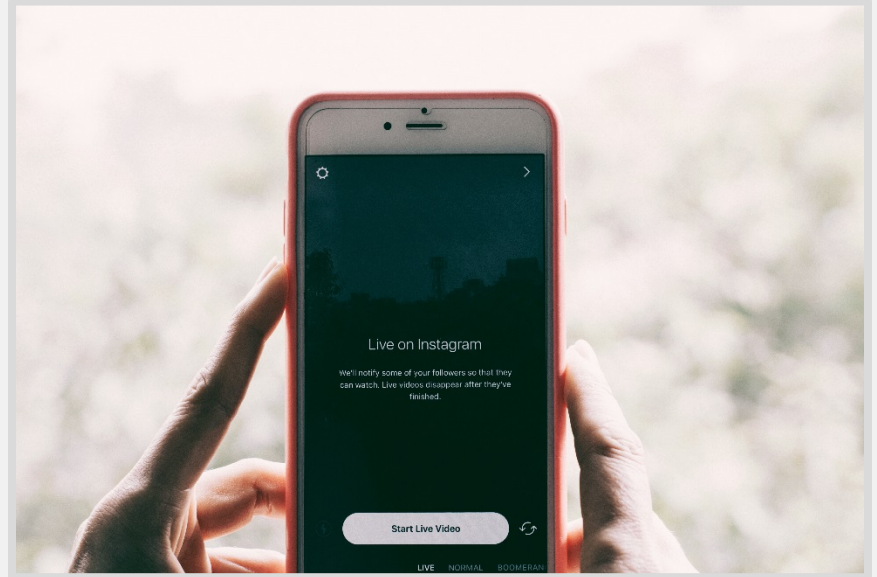
- Medical personnel and assistance
- Weight and training facilities
- Conditioning facilities
- Certified athletic trainers
- Insurance Coverage

Housing & Dining

- Provided?
- Training Table? Nutrition?

Travel & Per Diem

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Publicity

- Sports information personnel
- Publicity resources
- Publications and other promotional devices

Questions & Answers



A Potential Landmine: Private Dollars

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

- » **Booster Clubs?**
- » **Team Fundraising?**
- » **Private Donations (alumni, fans, etc.)?**
- » **Guarantees**
- » **In Kind Donations**



Are there hidden costs to accepting a donation?

Common Triggers...

Common Triggers of a Compliance Review

- While there are exceptions, the typical formula is as follows:
High profile program + “worst” numbers (in an OCR region) + room for program growth = unwanted federal attention
- High profile changes, *e.g.*, firing a popular coach, cutting a women’s team, improvements to a men’s team/program

Common Triggers for an Individual Complaint

- Obvious Noncompliance
- Disgruntled player or parent, *e.g.*, not receiving playing time, not receiving AFA to their liking, etc.
- Disgruntled coach, *e.g.*, subpar budgets, comparatively bad offices, salary disputes, etc.
- Negative local media attention, *e.g.*, a campus newspaper describing the plight of a women’s team or a specific athlete
- Outside observers with or without standing.

Sample Report Card

Component	Men	</>/=	Women
Participation			
Scholarships			
Equipment			
Scheduling			
Per Diem & Travel			
Academic Services			
Coaching			
Facilities			
Medical & Training			
Housing & Dining			
Publicity			
Support Services			
Recruiting			

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?
 - Who are sport supervisors, development, communications staff, SWA?
- What are the priorities of the athletic department?
 - Does the athletic department have a gender equity plan in place?
 - Planned growth on any teams? Planned shrinking or cutting teams? Impact on overall compliance?
 - What is 5-year plan for facility improvements? Equipment? Recruiting?

Make Sure Resources are Available and Understood All Around

- Is there a contact in the general counsel's office for legal questions?
- What are your EADA numbers? Do they include satellite campuses? Online enrollees?
- How does the Athletic Department work with students with disabilities? Transgender students?
- Understand how policies impact athletic department and how athletic policies impact the rest of the institution.

Final Tips: Incorporate Components in Exit Interviews

Exit Interviews of Coaches and Athletes

- Go beyond merely “goals for the following season.”
- Incorporate “Laundry List” 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?

If Concerns are Found During Exit Interviews, Act

- If a female team is routinely denied a \$2,000 recruiting trip while the analog male team commonly takes a \$25,000 trip, that should be examined.
- If coaches/athletes/parents are threatening to file a complaint, listen!
- While an institution may not satisfy everyone, encourage the sharing of this information with the right people, *e.g.*, the general counsel or other appropriate institution official.

Final Tips: Proactive v. Reactive Response

- Assess and make changes on your own terms to maintain control of your athletic program. Understand the challenges inherent in your program, e.g., unfortunate selection of sports from a participation/scholarship equity perspective, locker room challenges, inaccessible stadiums, etc.
- Consider developing a gender equity plan going forward.
- 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 are not subject to administrative exhaustion requirement or caps on damages.

Questions/Contact



Janet Judge

617.573.5866

Janet.Judge@hklaw.com



Phil Catanzano

617.305.2126

phil.catanzano@hklaw.com