



**THE DRAKE GROUP**

Advancing Positive Legislative  
Change In College Athletics



## **POSITION STATEMENT**

### **Title IX Athletics: Solving the Problem of Lack of Enforcement by the Department of Education Office for Civil Rights<sup>1</sup>**

#### **Background**

Federal Title IX athletics regulations requiring equitable athletics participation, financial aid, treatment and benefits became effective in July 1975. Almost 50 years later, over 2,000 institutions of higher education and 11,400 high schools sponsored intercollegiate and interscholastic athletic programs, respectively. Based on the most recently available data, in school year 2021-22, an estimated 92.7 percent of college programs were not in compliance with Title IX's standard for demonstrating equality in sports opportunities and were shortchanging female athletes \$1.1 billion per year in athletics scholarships.<sup>2</sup> At the high school level where only participation data is available, 65 percent of schools did not meet the Title IX participation standard, shortchanging girls 540,000 opportunities.<sup>3</sup> No national collegiate governance organization or athletic conference or high school athletic association requires Title IX compliance as a condition of membership or as a condition of access to post-season championship play. High schools and colleges are looking the other way, hoping the Department of Education Office for Civil Rights (DOE-OCR) will not notice.

Charged with enforcement of Title IX, DOE-OCR has never found one school in violation of Title IX. Why? DOE-OCR performs few random assessments and does not focus its efforts on readily available data that clearly depicts which schools are out of compliance. Rather, OCR depends on the paucity of female athletes brave enough to challenge their schools by filing formal OCR complaints. Whether responding to complaints or doing a random assessment, OCR never finds a school "out of compliance with Title IX." Instead, it uses a "sleight of hand," entering into "voluntary resolutions," a mechanism OCR created that enables an institution to avoid any

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<sup>1</sup> Preferred citation: Lopiano, Donna., Zimbalist, Andrew., Sommer, Julie, and Hughes, David C. (2024) The Drake Group Position Statement: Title IX Athletics: Solving the Problem of Lack of Enforcement by the Department of Education Office for Civil Rights. (August, 2024). Retrieve at: <http://thedrakegroup.org/>

<sup>2</sup> Champion Women. (2023) Based on data from 2021-22 Department of Education [Equity in Athletics Disclosure Act database](#). The Title IX participation standard requires a school to show that the percentage of total athletes at the school is the same as the percentage of total students enrolled at the school with limited exceptions. The scholarship equity standard is scholarship dollars proportional to participation opportunities with one percent variance permitted. Retrieve from: <https://titleixschools.com/2023/07/17/gender-gap/>

<sup>3</sup> Ibid. Based on data from the 2021-22 [Department of Education National Center for Educational Statistics](#). Retrieve from: <https://titleixschools.com/2023/06/06/check-your-high-school/>

penalty for a Title IX violation if it signs an agreement to remedy its violation in the future. Thus, there is no incentive for any institution to comply with the law if it knows it can discriminate on the basis of sex until caught by OCR and only then must the school comply without any penalty imposed. Thus, for almost 50 years OCR has operated a system that effectively eliminates any significant institutional risk for violating Title IX. The problem is compounded by the difficulties in utilizing the courts to seek compliance with Title IX. Very few athletes have the financial resources and bravery to stand up to powerful coaches and their educational institutions in order to turn to the courts for relief. Plus, the problem is further complicated because students who sue generally do not seek damages (financial penalties) for their academic institution's failure to comply with the law due to a lack of precedent, but instead seek injunctive relief that the school comply with Title IX in the future. The injunctive relief may not even timely benefit the students who bring the case. And, schools sued, other than fearing advise publicity, suffer few negative consequences. Schools mostly do not even have to pay for their own legal expenses or, if they lose, the legal expenses of the plaintiffs, because they have insurance that covers most of such liability.

OCR has never been held accountable for its enforcement failures until Congress asked the United States Government Accountability Office (GAO) in 2022 for such an audit. We review the results of that assessment — "[College Athletics: Education Should Improve Its Title IX Enforcement Efforts](#)" — released in April of 2024. We have asked a panel of Title IX experts, to make additional recommendations that might improve Title IX enforcement.

## **House Members Requesting Oversight**

The Drake Group applauds this long overdue examination of OCR's lack of enforcement and commends the U.S. House of Representatives who made the audit request: The Honorable Robert C. "Bobby" Scott, Ranking Member of the Committee on Education and the Workforce and The Honorable Suzanne Bonamici, Ranking Member of that committee's Subcommittee on Early Childhood, Elementary, and Secondary Education. The [GAO](#) is known as "the Congressional watchdog" and "investigatory arm" of Congress. Its function is to support Congress by providing independent, fact-based, non-partisan audit, evaluative, and investigative services.

## **Overview of GAO Findings**

The GAO audit covered 14 years of OCR Title IX enforcement activity (from school years 2008-2009 to 2021-22) related to college athletics programs only. With regard to estimating how many institutions were not in compliance with Title IX, the GAO examined the two most significant indicators which were most easily obtainable: numbers of participation opportunities offered to male and female athletes and total scholarship dollars provided to males and female

athletes in the aggregate.<sup>4</sup> The remainder of the GAO report examined OCR’s enforcement practices and institutions actually investigated.

With regard to participation and scholarships, the findings were disheartening. Schools overwhelmingly ignore their Title IX obligations.

1. Participation opportunities. Title IX requires comparing the number of female and male participants rather than comparing the number of sports offered to males and females. Male/female participation in athletics must be proportional to male/female full-time undergraduate enrollment.<sup>5</sup> Significantly, in 2021-22, the GAO found only 1 of 2008 schools met the proportionality standard. These 2007 institutions are out of compliance with the Title IX participation standard unless they can meet either of two exceptions. The first exception, termed the “Prong Two” participation standard, requires showing a history and continuing practice of athletic participation increases for the underrepresented sex from the 1975 issuance of the Title IX athletics regulations<sup>6</sup> to the present, never cutting or capping the participation of the underrepresented sex during that 49-year period, annually monitoring the participation of the underrepresented sex in high school and open non-school sports not sponsored by the institution, and adding new teams as such interest and ability are identified.<sup>7</sup> Few institutions can utilize this exception, because they have had 49 years to achieve proportionality — sufficient time to add sports and expand opportunities for the underrepresented sex. Further, GAO found that 50 percent of all schools not meeting the proportionality standard have not added a sport for the underrepresented sex in the last ten years and 17 percent of colleges had eliminated a sport for females which made them ineligible to use this exception (at p. 14), apt factual evidence that many schools are simply ignoring their proportional participation obligation.

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<sup>4</sup> Title IX requires that schools provide equitable participation opportunities and equitable scholarship dollars, and equal treatment and benefits to demonstrate that it is equally meeting the sport interests of each sex (identical sports are not required). Schools must also provide equal opportunities at the same levels of competition. Deficiencies in either participation or scholarship assistance are sufficient for a finding of non-compliance.

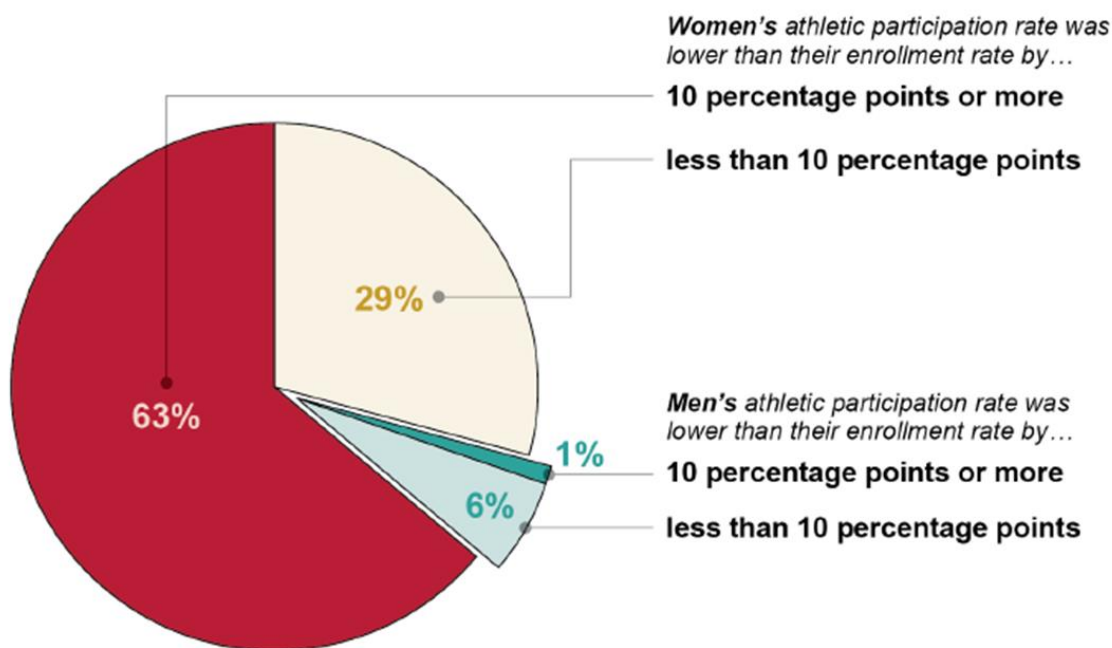
<sup>5</sup> This is commonly referred to as the Prong One proportionality standard or the “safe harbor” participation standard. There is no fixed percentage or number of participants that constitutes an allowable variance from exact proportionality. The allowable variance is the size of a team (number of participants) that could be added for the underrepresented sex without flipping underrepresentation to the opposite sex. If a school does not meet this “Prong One” standard, it may choose to meet one of the two exceptions to the proportionality standard, as explained herein.

<sup>6</sup> Title IX was adopted by Congress in 1972, but the regulations interpreting its application to athletics program were not issued until July 1975 and schools were given one year to come into compliance.

<sup>7</sup> The justification for the Prong Two exception was recognition that at the beginning (1975) of Title IX’s equal opportunity mandate, it would take a number of years to assess the interests and abilities of the underrepresented sex for the purpose of adding teams. Thus, this is a proactive standard that requires schools not meeting Prong One, to carefully and regularly monitor female sports development and interest, and to be responsive to requests to add female teams.

The second exception, the Prong Three standard, permits institutions to demonstrate that its athletics program has fully met the interests and abilities of the underrepresented sex without achieving proportionality — that there are no additional sports with sufficient competition available within the institution’s normal competitive region that could be added for the underrepresented sex.<sup>8</sup> Again, few if any schools can use this standard. See GAO report Figure 4 (at p. 12) below depicting the huge participation gaps that exist at over 90 percent of all colleges and universities.

**Figure 4: Differences between Athletic Participation and Enrollment Rates, Academic Year 2021–2022**



Source: GAO analysis of Equity in Athletics Disclosure Act data. | GAO-24-105994

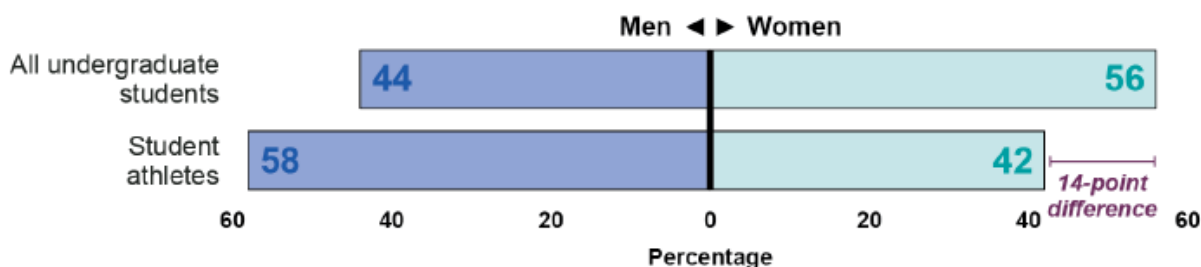
The data by institution, by conference, and by national governance organization, are readily available to anyone in the [DOE-OCR Equity in Athletics Disclosure Act \(EADA Database\)](#). However, as discussed below, OCR very rarely uses this resource, available online since 2003, to identify those institutions that should be annually notified that they are risk for being investigated by DOE-OCR.

2. Scholarships. The EADA database provides definitive data on scholarship assistance to males and females by institution. Title IX requires that scholarship dollars be distributed according to

<sup>8</sup> The justification for the Prong Three exception was the 1975 recognition that there were some schools that sponsored 30 or more sports for males and females, so there might not be a sport that could be added for which competition was available. There was also doubt at the time whether females were interested enough in sports participation to try out for teams even if they were offered.

athletics participation rates with an allowable one percent disparity. However, examining scholarship amounts without questioning whether athletic participation percentages meet the undergraduate proportionality standard is a major assessment flaw. The GAO found that only 1 of 2008 institutions met the proportional to undergraduate enrollment standard in 2021-22 (at p. 12). When athletics participation percentages are adjusted to match the undergraduate enrollment percentage, Champion Women found that female college athletes were shortchanged by over \$1.1 billion per year in scholarship assistance in 2021-22. The need to make such an adjustment is further supported by the GAO finding: “Overall, the athletic participation rate for females was 14 percentage points lower than their enrollment rate.” (at p. 10) See GAO Figure 3 below (at p. 11).

**Figure 3: Women Participated in Varsity College Athletics at a Lower Rate Compared to Their Enrollment Rate, Academic Year 2021–2022**



Source: GAO analysis of Equity in Athletics Disclosure Act data. | GAO-24-105994

Further, at 58 percent of colleges the female athletics participation rate was 10 to 30 percentage points lower than their enrollment rate (at p. 11) and at schools awarding percentages of financial aid that exceeded their athletic participation rate, 71 percent of these colleges had undergraduate enrollment percentages that were higher than athletics participation rates by 10 percentage points or more (at p. 19).

3. OCR Case Management. The GAO reviewed documentation of schools that had been reviewed by OCR. Regarding the management of these cases, the GAO found:

- While OCR uses the EADA database to help select colleges for reviews, the number of such reviews is miniscule. Of 443 cases opened during the 14-year period examined, only 4 percent or 19 were reviews initiated by OCR. The most recent initiated review was in 2016-17 and four of the 12 OCR regional offices never initiated a review during this period. Otherwise, OCR does not systemically use EADA data to inform its oversight efforts.
- The remaining 96 percent (424 or 443) of cases opened were in response to Title IX complaints. Of these 424 complaints, 258 complaints were not investigated and dismissed for lack of factual detail or other reasons.
- Of the 185 cases investigated by OCR (at p. 21):

- OCR did not take action to terminate any college’s federal funding or refer the case to the Justice department;
- 121 “resolution agreements” were negotiated with no finding of non-compliance;
- 33 were closed based on insufficient evidence or a resolution was mediated without a formal resolution agreement; and
- 31 remain under investigation.
- OCR does provide technical assistance upon request, issues policy guidance educational materials such as its February 2023 publication *Title IX and Athletic Opportunities in Colleges and Universities: A Resource for Students, Coaches, Athletic Directors, and School Communities*, and over the 14-year period, made 20 educational presentations to colleges and stakeholder groups.
- The GAO found the following delays in OCR communications with colleges:
  - Six months average response time following submission of athletics monitoring reports;
  - In 44 of 332 reports, OCR did not respond for a year or more;
  - In five cases OCR did not respond for 5 or more years;
  - OCR does not have timeliness goals; and
  - 50 percent of the time OCR staff failed to use data field designed for recording due dates.

Key GAO recommendations:

- OCR should use EADA data to improve enforcement reach without initiating expensive and time intensive investigations by:
  - sending informational letters to colleges with large female/male differences to remind them of their obligations under Title IX and encourage them to work with their legal counsel and athletics department to ensure compliance with Title IX athletics requirements — a proverbial warning shot over the bow to let institutions know they are on OCR’s radar;
  - offering to deliver an educational program on Title IX athletics requirements and guidance to athletics associations or divisions with colleges that show large differences in participation; and
  - publishing information about its analyses on its blog or website to bring attention to data that could indicate Title IX issues.
- OCR should establish timeliness goals for reviewing and responding to monitoring reports.
- OCR should consistently record due dates in its case management system and use such data to evaluate response times against established timeliness goals.

## **Support for OCR Recommendations and Additional Recommendations Suggested by The Drake Group**

The Drake Group supports all of the GAO recommendations listed above and makes the following additional recommendations.

### **RECOMMENDATION #1**

#### **Title IX Compliance as a Condition of Athletic Association Membership**

Realizing the promise of Title IX cannot rest solely with the courts or government agencies. College presidents and high school principals or school district superintendents must play leadership roles. The rules of national collegiate athletic associations and state high school athletic associations are promulgated by their member institutions. These institutional leaders should propose and adopt rules mandating Title IX compliance as a condition of association membership. Each member institution should be required to conduct an athletic conference or other third-party Title IX program assessment once every three years, submitting a gender equity status report to demonstrate compliance. If inequities are identified, institutions should be required to remedy these within one year, or, in the case of facility projects, indicate a time certain for such projects. Status reports should be updated as remedies have been completed. The purpose of such a program should be to fix rather than punish. Accordingly, association enforcement should follow a commitment to gradually escalating penalties such as (a) offer of technical assistance, (b) warning, (c) suspension of school athletic team eligibility for post-season championship play, (d) suspension of membership, and (e) revocation of membership.

### **RECOMMENDATION #2**

#### **Need to Correct Instructions for Completing Equity in Athletics Disclosure Act Annual Reports**

The Department of Education should specify in its EADA data submission instructions that transgender women or male practice players participating in female sports not be counted as female participants for Title IX compliance and not be included in the female category in the EADA data. Title IX permits separate sex sport competition based on immutable physiological and physical differences between male and female bodies<sup>9</sup> because sports competition is a

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<sup>9</sup> Congress recognized that at the biological level, when it comes to strength, speed, power and all the physical aspects that matter in competitive sport, female bodies are generally smaller, not capable of achieving the muscle mass of male bodies, have smaller lungs and hearts and have less testosterone and hemoglobin. Thus, Title IX gave females their own separate category limited to sport competition. If the category were not created as an exception to anti-discrimination law, females would virtually never make competitive teams if they were open to both males and females. And, in contact sports (basketball, ice hockey, wrestling) or sports involving propelling a ball through space (softball, volleyball), there are significant safety concerns.

measure of physiological and physical performance. Eligibility rules for a category must be based on an objectively determined measure for all participants. Gender identity is self-identified and fluid — transgender, non-binary, gender fluid — and not the proper exception variable for different treatment. Title IX mandates that biological females receive the same participation opportunities, scholarship support, and equitable treatment and benefits as male participants based on their physical and physiological performance advantages. Counting male bodies as female bodies in females' sports defeats this purpose. Transgender women should be allowed to play or practice in the female sports space with accommodations that ensure safe and fair competition and do not diminish participation opportunities, scholarship support, and equitable treatment and benefits for biological females.

### RECOMMENDATION #3 Need for Congress Should Adopt the Fair Play for Women Act

Congress should adopt the Fair Play for Women Act ([S. 3762](#) and [H.R. 7269](#)). This legislation closes significant collegiate athletics EADA reporting loopholes, requires long overdue K-12 reporting (similar to EADA college athletics reporting database), and requires educational institutions to inform high school and college athletes of the institution's Title IX obligations. As important, the Act provides for a private right of action and civil penalties as well as clearly holding high school and college athletics governance associations accountable for discriminatory treatment. This is good, common sense gender equity legislation deserving of widespread non-partisan support.

### RECOMMENDATION #4 Need to Correct OCR Interpretation of Allowable Participation Variance from Proportionality

With regard to the allowable variance from participation proportionality, the GAO report noted:

*OCR officials said if they find a participation gap, they compare its size to the average team size of the underrepresented sex at the college. They said this comparison helps them determine whether athletic participation is substantially proportional to enrollment and whether it is likely that a sport could be added for the underrepresented sex. Some officials said they might have concerns about a college's ability to meet part one of the three-part test if the size of the gap is much larger than the average team size.*

-- p. 13



The proper determination of the allowable difference from exact proportionality is the average team size of the smallest team for the underrepresented sex<sup>10</sup> that is not currently sponsored by the institution that could be added without underrepresentation switching to the opposite sex. Average team size of existing sports for the underrepresented sex is irrelevant. The institution is obligated to add participation opportunities for the underrepresented sex when interest and ability are identified and competition is available within the institution’s normal competitive region. Common sense dictates that schools should be obligated to choose by adding any team or teams unless the size of the smallest team that could be added is so large that it flips underrepresentation to the opposite sex. We also note that use of average team size determined on the basis of existing female sports teams such as cross country, track, rowing, and swimming may reflect inflated participation because some institutions instruct coaches to carry larger than normal rosters so they do not have to add new sports for females.

#### RECOMMENDATION #5

##### Need to Correct OCR Instructions Regarding Use of Unduplicated Participation Counts in the Computation of Scholarship Entitlements

The GAO report noted that it followed OCR’s use and examination of only “unduplicated” participation counts with regard to scholarship entitlements:

*We used the EADA unduplicated count of participants when presenting data on the amount of reported athletic scholarship aid compared to reported participation rates. In assessing scholarship spending for men and women under Title IX, OCR counts students who participate on more than one team only once.*

– FN #26, p. 18

The use of “unduplicated” count is improper.<sup>11</sup> There is only one definition of participant that is used in the Title IX regulations, the 1979 policy interpretation, and the 1996 Clarification and that definition is for “duplicated” count (an athlete is counted as “1” in each sport in which they participate). No valid legal authority (statutes, regulations, case law, or OCR Dear Colleague Letters) supports the use of different definitions or different means of counting athletic participants or athletic participation or measuring equity in the allocation of aid or the provision of athletic benefits or treatment. The Title IX definition of “participant” appears in the Athletic Financial Assistance (VII.A) section of the Title IX Regulations (see Exhibit A). This definition specifies that counts are on the basis of “the eligibility or squad lists maintained for

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<sup>10</sup> The NCAA provides average team size reports on an annual basis. See [NCAA Sports Sponsorship and Participation Rates Report](#).

<sup>11</sup> The only reference to the use of “unduplicated count” appears in the 1990 Title IX Investigators’ Manual (“Manual”).<sup>11</sup> Even there it appears as an aside and not in the main section (on page 17). The Manual is an internal document. It is not official guidance. It is not binding legal authority. It is also wrong on this point.

each sport.” If an athlete participates in basketball and track, they count as two participants - one participant in basketball and one participant in track.

To determine male/female scholarship entitlements, the total scholarship dollars are aggregated for each sex and percentages computed for each sex. Male and female financial aid percentages must be within one percent of the percentage of male and female athletes based on the participant count — the “duplicated count.” If the percent of male and female athletics participants does not meet the proportion of males and females in the full-time undergraduate student body (Prong One proportionality) and the institution is not eligible for a Prong Two or Three exception, the scholarship entitlement percentages must match the proportion of males and females in the full-time undergraduate student body.

#### **RECOMMENDATION #6**

##### **Need for Congress to Appropriate Increased Funding to Support OCR Enforcement**

Given that the GAO report found that over 93 percent of 2,008 colleges and universities with athletics programs and 65 percent of 11,400 high school athletics programs are likely to be out of compliance with Title IX and OCR over the 14-year period of the GAO audit completed only 185 investigations, Congress should better resource DOE-OCR.

#### **RECOMMENDATION #7**

##### **OCR Must Determine Non-Compliance and Impose the Penalty for Non-Compliance as Directed by the Statute**

The GAO Report found that OCR has never used or started the proceedings required to use the specified penalty for Title IX non-compliance — the withdrawal of federal financial aid from the institution. Any institution that does not meet the timely deadlines of any Title IX voluntary resolution or monitoring agreement should be found in violation and notice of proceedings to withdraw federal financial aid from the institution should be generated.

#### **RECOMMENDATION #8**

##### **Need for OCR to Focus on Equitable Publicity and Promotion Obligations**

The advent of outside NIL employment opportunities for college athletes has underscored the issue that female sports have not been provided with the same publicity, promotion or television exposure as male athletes, which has adversely affected the female development of individual brands and economic opportunities for NIL employment. This Title IX publicity and promotions benefits and treatment obligation is seldom addressed in OCR campus Title IX assessments. OCR should pay particular attention to evaluating institutional practices in this area.

**Exhibit A**  
**Title IX Regulations Excerpt — Definition of Athletic “Participant”**

published a summary of historic patterns affecting the relative status of men's and women's athletic programs. The Department has modified that summary to reflect additional information obtained during the comment and consultation process. The summary is set forth at Appendix A to this document.

**VII. The Policy Interpretation**

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 86.37(c) and 86.41(c).

**A. Athletic Financial Assistance (Scholarships)**

**1. The Regulation**—Section 86.37(c) of the regulation provides:

[Institutions] must provide reasonable opportunities for such award [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in \* \* \* intercollegiate athletics.\*

**2. The Policy**—The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

a. At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men's and women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require

spreading scholarships over as much as a full generation (four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

**3. Application of the Policy**—a. This section 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.

b. When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

**4. Definition**—For purposes of examining compliance with this Section, the participants will be defined as those athletes:

a. 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

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport, or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

**B. Equivalence in Other Athletic Benefits and Opportunities**

**1. The Regulation**—The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club, or intramural athletics, "provide equal athletic opportunities for members of both sexes." In determining whether an institution is providing equal opportunity in intercollegiate athletics, the regulation requires the Department to consider, among others, the following factors:

- (1)\*
- (2) Provision and maintenance of equipment and supplies;

(3) Scheduling of games and practice times;

(4) Travel and per diem expenses;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training services and facilities;

(9) Provision of housing and dining services and facilities; and

(10) Publicity

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.\*

**2. The Policy**—The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation 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 equivalent, 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.

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. Some of the factors that may justify these differences are as follows:

a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits Amendment" to Title IX, which instructed HEW to make "reasonable (regulatory) provisions considering the nature of particular sports" in intercollegiate athletics.

Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation,



\* 86.41(c)(1) on the accommodation of student interests and abilities, is covered in detail in the following Section C of this policy interpretation.

\* See also § 86.41(a) and (b) of the regulation.  
 \* Section 844 of the Education Amendments of 1974, Pub. L. 93-380, Title VIII, (August 21, 1974) 88 Stat. 612.

\* See also § 86.37(a) of the regulation.