Leveling the Title IX Athletics Playing Field: Sex, Race, LGBTQ+, and Pay Equity

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Agenda:

• Introductions
• Title IX
• Transgender Athletes
• Pay Equity
• Question and Answer
Athletics Program Restructuring & Recent Title IX Litigation

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Overview

• Title IX & Sports: Prong One Refresher
• Litigation in Connection with Recent Athletics Program Restructuring
• The Biden Administration Weighs In
Title IX & Sports: Prong One Refresher

Prong One: 1996 Policy Clarification

- OCR evaluates Prong One on “a case-by-case basis,” not “through use of a statistical test”
- If a “participation gap” < size of a viable team → substantial proportionality
- Calculating the gap according to OCR:
  - Undergraduate enrollment: 52% women; 48% men
  - Athletic Participation: 47% women; 53% men
  - Total Athletes: 600 athletes
  - Formula: (number of male athletes (600 x 0.53) / percentage of males in student body (.48)) - total number of athletes (600) = 62 additional women-athletes
**Prong One: Case Law**

**Evaluating the gap based on:**
- Eliminated team size
- School’s maximum roster size
  - *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 107-08 (2d Cir. 2012).
- School’s average roster size
- Average size of teams in NCAA division
- Percentage size of the disparity
- Absolute number of student-athletes
  - *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 857 (9th Cir. 2014).

**Athletics Program Restructuring: Recent Litigation**
2020-21 Litigation Uptick

- Cohen v. Brown Univ., 92 Civ. 197 (D.R.I.) (motion to enforce consent decree filed June 2020; settlement on appeal)
- Ohlensehlen v. Univ. of Iowa, No. 20 Civ. 80, 2021 WL 1257554 (S.D. Iowa Feb. 23, 2021) (PI granted; MTD denied)
- Keesing v. Bd. of Tr. of Stanford Univ., No. 21 Civ. 3555 (N.D. Cal.) (filed May 12, 2021; pending)
- Guden v. Bd. of Tr. of Stanford Univ., No. 21 Civ. 3559 (N.D. Cal. May 20, 2021) (voluntarily dismissed)
- Lazor v. Univ. of Conn., No. 21 Civ. 583, 2021 WL 2138832 (D. Conn. May 26, 2021) (TRO granted)
2020-21 Litigation Uptick: Title IX Claims

The recent cases include the “triumvirate” of Title IX claims:

- **Effective Accommodation (i.e., Participation) Claims**

- **Unequal Treatment/Benefits Claims**

- **Unequal Financial Aid Claims**

2020-21 Litigation Uptick: State Law Claims

- **Breach of Contract**
  - Claim that eliminating a team violated “[the school’s] obligation to provide [plaintiffs] with . . . promised varsity [sports] opportunities.”

- **Fraud/Misrepresentation**
  - Claim that a school misrepresented or concealed that it planned to cut a team when recruiting students.

- **Promissory Estoppel**
  - Claim that students “reasonably relied on [a school’s] promise of varsity [sports] opportunities to their detriment, by matriculating [there] and forgoing opportunities at other universities.”

- **Breach of Fiduciary Duty**
  - Claim that student-athletes are in a “fiduciary relationship” with a school, “based on the trust and reliance they placed in [a school] representative” during the recruitment process.

Key to Success = Robust Data: 
Cohen v. Brown University

Takeaways

• Restructuring athletics programs can invite litigation

• Restructuring athletics programs can also create unexpected alliances

• Institutions will need to rely on Prong One in such litigation

• Robust data maintenance is essential
Title IX & Sports: The Biden Administration Weighs In

Title IX Enforcement in the News


**Balow v. Michigan State University, No. 21-2283 (6th Cir.)**

May 26, 2021:

DOJ Civil Rights and DOE file an amicus brief

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**Balow v. MSU: PI Denied**

The District Court addressed **Prong One only**:

- Rejected the plaintiffs’ expert’s allegations of “roster inflation”

- Calculated a “participation gap”

  - Participation gap = (number of male athletes / percentage of males in student body) - total number of athletes
**Balow v. MSU: PI Denied**

The District Court concluded:

- There was a “participation gap”:
  - 2018-19: 27
  - 2019-20: 12

  *MSU estimated the gap would increase from 12 to 15 after cutting men’s and women’s swimming & diving.*

- “MSU’s participation gap appears to be lower than 2%.”

- The estimated gap was “less than the average size of a women’s team at MSU.”

- The gap was not large enough to preclude substantial proportionality.

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**Balow v. MSU: DOJ/DOE Amicus Brief**

The Biden Administration has taken the position that *the Balow* Court misapplied Prong One in three ways:

1. Courts should look at the absolute number of the participation gap, **not the percentage** of the size of the athletic program.

2. A gap of £2% is not necessarily substantially proportionate.

3. Courts should assess whether the gap could support a viable team, **not the school’s average-size women’s team**.
Takeaways

The Biden Administration is:

- Paying attention to and engaging with Title IX compliance in intercollegiate athletics;
- Taking a muscular view of Prong One compliance.

Transgender Athletes: Basic Concepts & Terminology

- Gender identity refers to a person's internal, psychological identification as male or female.
- A transgender girl or a transgender woman is a person who was identified as male at birth, but who has a female gender identity.
- A transgender boy or a transgender man is a person who was identified as female at birth, but who has a male gender identity.

Note: Some people do not identify as either male or female. Such a person may identify as nonbinary.
Problems with the Term “Biological Sex”

• There is no medically or legally agreed-upon definition of the term.
• Those who use the term often do so in order to negate transgender identity—for example, by referring to a transgender woman as “biologically male.”
• Statements such as these—seeking to pit biology against transgender identity—are inaccurate for multiple reasons, including: (1) gender identity has a biological basis; (2) many transgender people undergo medical treatments that alter their biological makeup; (3) many cisgender people have atypical biological traits; and (4) there is no agreed-upon medical or legal definition of “biological sex.”

Karnoski v. Trump, 2018 WL 1784464 (W.D. Wash April 13, 2018)

“The Court notes that the Implementation Plan uses the term ‘biological sex,’ apparently to refer to the sex one is assigned at birth. This is somewhat misleading, as the record indicates that gender identity—“a person’s internalized, inherent sense of who they are as a particular gender (i.e., male or female)”—is also widely understood to have a “biological component.”
NCAA Policy on Transgender Athletes
(adopted 2011)

1. A transgender man (i.e., a person assigned female at birth but whose gender identity is male) who is taking testosterone as a treatment for gender dysphoria may compete on a men’s team but may not compete on a women’s team without changing that team status to a mixed team.

2. A transgender woman (i.e., a person assigned male at birth but whose gender identity is female) who has completed one calendar year of testosterone suppression medication for the treatment of gender dysphoria may compete on a women’s team. Prior to the completion of one year of testosterone suppression treatment, she may compete on a men’s team but may not compete on a women’s team without changing it to a mixed team status.

"The NCAA Board of Governors firmly and unequivocally supports the opportunity for transgender student-athletes to compete in college sports. This commitment is grounded in our values of inclusion and fair competition."
States that currently Ban Transgender Girls from School Sports

- Alabama
- Arkansas
- Florida
- Idaho (enjoined)
- Mississippi
- Montana
- Tennessee
- North Dakota
- South Dakota
- West Virginia

Relevant Federal Laws

- Equal Protection Clause
- Title IX
**Bostock v. Clayton County, Ga.**

“When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.”

Bostock v. Clayton County, Ga., 140 S. Ct. 1731 (2020)

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**Challenges to Transgender-Inclusive Athletic Policies**

**Soule v. Conn. Ass’n of Sch.**, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021) (dismissed as moot)
Challenges to State Laws Banning Transgender Girls from School Sports


Pay Equity for Collegiate Coaches

- 1979: 37% wage disparity overall per U.S. Bureau of Labor Statistics (U.S. BLS)
- 2018: 19% wage disparity overall per U.S. BLS
- 2004-2010 Div. I head coaching salaries for men have increased $314,100 compared with female head coaches at $197,800. (58.6% compared to 41.4% at the median). *NCAA Gender-Equity Report 2004-2010* ([https://www.ncaapublications.com/productdownloads/GEQS10.pdf](https://www.ncaapublications.com/productdownloads/GEQS10.pdf)).
Applicable Laws

• Equal Pay Act of 1963
  • 29 U.S.C. § 206(d) (part of Fair Labor Standards Act)
• Title VII of the Civil Rights Act of 1964
  • 42 U.S.C. § 2000e-2
• Title IX of the Education Amendments of 1972
  • 20 U.S.C. §§ 1681-1688
• State Law
  • *E.g. Massachusetts Equal Pay Act (2018)*

EEOC Guidance

  • Acknowledges problems with pay disparities (“overall pattern of employment of coaches by educational institutions is not gender-neutral”)
  • Describes the EPA and Title VII burden shifting analyses
Prima Facie Case

Appropriate Comparator who is not the same sex and who receives a higher salary.

Comparator Factors

• Equal:
  • Skills
    • Experience, training, education, ability
  • Effort
    • Teaching/training, counseling/advising, program management, budget management, fundraising, public relations, recruiting
  • Responsibilities
    • # of players, # of assistant coaches, media management
  • Working Conditions
Affirmative Defenses to EPA and Title VII Claims

Factor Other than Sex

- Revenue
- Marketplace
- Prior Salary
- Sex of Student Athletes
- Experience, Education, Abilities
- More Duties

What is on the Horizon?

- David Leonhardt, “Massages vs. doubleheaders” New York Times, June 4, 2021 (opining that revenue differences do not explain disparities in treatment of Women’s College World Series versus male baseball)
- OFCCP agreement with UConn to pay $249,539 to female coaches and athletic staff after finding of underpayment compared with men in similar positions. Associated Press, Oct. 20, 2020
- State Laws, e.g., Massachusetts
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