



## The Forgotten Title IX

By Phil Catanzano | Senior Counsel

If someone asked about the impact of Title IX of the Education Amendments of 1972 on higher education institutions only seven years ago, the conversation would likely have moved quickly to a conversation about the impact the federal law has had on gender equity in intercollegiate athletics. Following the U.S. Department of Education's April 4, 2011 Dear Colleague Letter regarding sexual violence on campus, the conversation has changed dramatically. Reference to Title IX is now met in most higher education circles by conversations about sexual misconduct on campus, due process concerns for the parties involved, and debates over whether the U.S. Department of Education's Office for Civil Rights (OCR) has over-reached or underperformed.

Regardless of how the dialogue has changed, Title IX remains a thorny issue for athletic departments, and it is an issue that few institutions handle as well as they could. I have seen this first hand: I spent almost a decade as one of a handful of attorneys investigating Title IX athletics cases for the OCR, the primary federal agency enforcing Title IX in the athletics context. This unique vantage point of implementing Title IX on a very practical level led me to a few conclusions about Title IX in intercollegiate athletics and the increasing challenges faced by athletic programs and athletic directors, as well as some suggestions for athletic programs.

First, the challenges:

- **Title IX cases are complicated.** The goal of Title IX is straightforward enough: to ensure equity for men and women competing in intercollegiate athletics. However, athletic program reviews – whether done by the government or internally by an institution – are nuanced and highly technical, depending on extreme levels of detail across many different sports. A decision about one component of an athletic program, for example, even if well intentioned, can cause a domino effect that can lead the institution to fall out of compliance with several other components in the athletic program. If that were not enough, these cases involve math! Calculating participation disparities and athletic financial assistance ratios, itemizing current and projected budgets, and comparing expenses across sports as divergent as football, water polo, and equestrian – all of it is par for the course on a typical athletics case. But to someone unfamiliar with the intricacies of both Title IX and the way that athletic departments *actually* work in practice, all of this can be overwhelming.

There will be critics who contend that the federal government has over-complicated this area, much like it has with the tax code; while other critics will contend that Title IX ignores the reality of modern college sports. Both of these arguments have validity, but, much like the tax code, the reality is that there are two discussions institutions can and should have about Title IX: (1) theoretically, should it be reformed and how, and (2) how do we comply with the current law. This essay does not address reform, but focuses instead on the current law and its impact on institutions today.

- **Athletic departments are overburdened by various rules and laws.** Title IX is just one part of a large, complicated puzzle that is collegiate athletics. Despite the best efforts of many athletic departments, few have a handle on all of the areas of regulatory compliance to which they are subject. The Title IX implementing regulations, alone, detail thirteen areas that OCR focuses on when reviewing intercollegiate athletic programs, and that does not even include important issues like accommodating athletes with disabilities and the ranging problems that can be caused by booster clubs or other outside donors. OCR staff have extensive internal guidelines they use when



investigating institutions in a traditional Title IX review, and federal courts have conducted painstaking analyses of these same components in the context of civil litigation that can drag on for years. See, e.g., *Biediger v. Quinnipiac Univ.*, 691 F.3d 1085 (2d Cir. 2012). With all of that, Title IX is just one among many concerns for which athletic departments must be accountable.

Aside from Title IX, the Office of Post-Secondary Education Office within the Department of Education requires annual reporting via the Equity in Athletics Data Analysis (EADA). Leagues and conferences have complicated rules and often demand that annual requirements be met regarding scheduling, gate revenues, and other issues (and some institutions compete in several different leagues or conferences with different rules for different sports).

Finally, institutions must abide by NCAA rules and its complicated reporting structure (including a financial disclosure similar to but more extensive than the EADA), which can include a complex sanctioning system for athletic programs and individual athletes. Moreover, the NCAA has in the past changed the rules of the game – most recently in its cost of attendance changes for certain schools – and many times the changes raise potential Title IX concerns with which the schools, and not the NCAA, will ultimately have to contend.

This last category, the NCAA requirements, often take precedence in athletic departments because they can most publicly tarnish an otherwise well run athletic program and the institution. But, as any institution that has had to contend with an OCR compliance review, or take part in litigation with a student-athlete or coach, or had to reconfigure their athletic facilities to comply with a conference requirement will attest, each of these are huge areas of risk for institutions that are also trying to field competitive teams and provide a great experience for their students and fans.

- **Athletic issues do not exist in a vacuum.** While all of this would be challenging enough if athletic departments were run like professional sports teams and were entities unto themselves, that is simply not the reality in the modern university. Institutions, particularly non-Division I institutions, commonly use their intercollegiate athletic programs to boost enrollment. Financial aid awards at these non-Division I institutions are often a complicated amalgam of academic awards and athletic financial assistance (AFA). While AFA is tracked under Title IX to ensure men and women receive substantially proportionate amounts, there are a range of awards (e.g., pure academic awards or work study) that are not always part of their Title IX analysis. Coaches aiming to recruit athletes often do not focus on which pool the aid is coming from, much less on the gender of the student receiving it and how that fits into the larger athletic program. Too frequently, those hard questions are only asked *after* the government is reviewing the institution's program, which is too late.
- **Regulatory burdens are the same but budgets and staffing are not.** Division I athletic budgets have earned their reputation as being complicated, and recent NCAA changes (and litigation) promise to further complicate athletic budgets and projected budgets for years to come. However, at least Division I schools typically have resources to assign people to some of these areas of regulatory compliance. The majority of colleges and universities compete at the Division II or III level, and their athletic department budgets can be just as complicated, but they often lack the support enjoyed by some Division I schools. While their athletic department budgets and resources often pale in comparison to the Division I schools, they are still held to most of the same legal and regulatory requirements.



**What can institutions and athletic directors do?** Here are three initial steps to take to ameliorate some of these challenges:

- 1. Understand your institution's compliance challenges, i.e., remove the silos.** The biggest problem I saw during my tenure at OCR is that many institutions and athletic departments did not completely understand the requirements that they had to follow and, because of that lack of understanding, they could not effectively confront their compliance risks. This is where some nuance is necessary: it is not a lack of institutional knowledge that limits the athletic program. Rather, it is the silo-style organization that many athletic departments operate under that segregates knowledge and the responsibilities within institutions. Often there are compliance officers who understand their reporting requirements for the Department of Education or the NCAA. Perhaps an associate athletic director went to a Title IX training five years ago or had a class in college so he or she understands the rough requirements of the law surrounding gender equity or disability. Perhaps there is a coach who understands the concerns of the student-athletes on his or her team. Unless the institution make it a priority, unfortunately there is usually no one who is looking across all of these issues on a programmatic level. If this programmatic view is not apparent at the athletic department level, the associated risks are most likely unclear at the general counsel or administrative level, as well.
- 2. Organize your analysis to address your various compliance requirements.** Once institutions start asking the hard questions around compliance, then they start to get concerned. While at OCR, athletic directors commonly asked me how they could stay on top of all of this information when legal compliance is, at most, only 10% of the job they are trying to accomplish. The answer is simple to give but challenging to accomplish: athletic departments need to organize the way that they collect and analyze information around the areas in which they must maintain legal compliance. Talk to your staff who are compiling your EADA and NCAA reports and ask them to present to you on the gender differences in your programs. Ask your facility managers to give you an overview of the quality of different facilities that are used by men and women. During end of season interviews with coaches and athletes, don't just ask the standard questions about the past season and the goals for the upcoming season, but also ask about any other problems bubbling up that could impact the institution's broader compliance. All of these steps, along with others, can provide the athletic department with a much-needed bill of health that can help it, and the institution, gauge whether there are potential problems on the horizon.
- 3. Seek out the tools and training that you need to understand the requirements and risks faced by your institution.** As mentioned above, the biggest risk athletic programs run is in their lack of understanding of how the various rules and regulations and compliance standards apply. This has always seemed odd to me. Athletic departments are, by and large, made up of people who understand the rules of their leagues or sports down to the tiniest detail. This is what allows them to excel in their sports and as a larger institution. An athletic director would not accept from a coach the excuse that "we lost because I did not understand the rules." Coaches would *never* accept that excuse from their athletes, either. Yet athletic departments operate for years without understanding the rules of the legal "game" in which they are playing. The cost of this lack of understanding, unfortunately, is not just a tally in the loss column. Instead, when compliance concerns are uncovered, these athletic departments must pay this cost in time, resources, and negative publicity associated with litigation or formal program reviews.



## **A BRIGHTER FUTURE**

I have spent most of the last decade helping institutions understand their obligations, either through the lens of Title IX, or more recently through advice regarding what is required by the government, the NCAA, and individual leagues or conference. These are often difficult conversations, but they are important ones. If an athletic department can at least take the steps mentioned above, it will be far ahead of many of the institutions with whom it competes.

Institutions that have contended with litigation filed by athletes or coaches, or had to respond to negative publicity around an athletic department's decision to cut a team, or who have had to withstand an arduous OCR investigation followed by the implementation of a resolution agreement that wrested budgetary spending decisions away from an athletic department for several years, or even who have had to rethink their data collection systems in light of various reporting requirements can tell you that these "forgotten" requirements for an athletics program can get expensive for an institution quickly. With a fair bit of due diligence, however, institutions and their athletic departments can cut off a good portion of this risk and, in the process, provide a better environment for their community.

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### **About the Author**

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