

# BOND

## HIGHER EDUCATION INFORMATION MEMO

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## OCR Issues New Guidance on the Application of Title IX in Higher Education Athletics

### Introduction

In February 2023, the U.S. Department of Education's Office for Civil Rights (OCR) issued a [resource](#) to the higher education community reiterating some of the core concepts it uses to evaluate whether institutions are providing equal athletic opportunities consistent with Title IX. For colleges and universities, this new resource should serve as a not-so-subtle prompt to review their programs for compliance with applicable standards.

The 15-page resource document outlines the contours of institutional compliance in the context of the three primary areas OCR typically examines during Title IX athletic equity investigations. Here, OCR encourages community members to recognize and call out any areas of concern that they may observe within an institution's program. Specifically, the document invites students, parents and guardians, employees or others in the community who believe their institution may be providing unequal athletic opportunities based on sex to file a complaint through their institution's grievance procedures. We recommend that institutions read this invitation as an assumption that complaints will be filed and prepare now by auditing their policies, procedures and practices to identify and correct areas of concern.

### Evaluating Your Institution's Athletic Program

Although OCR evaluates each complaint on a case-by-case basis, the new document offers insight into the focus of its Title IX investigations. Specifically, OCR detailed three areas where institutional compliance will face scrutiny: (i) benefits, opportunities, and treatment for men's and women's teams; (ii) athletic scholarships and financial assistance; and (iii) meeting students' athletic interests and abilities.

#### Benefits, Opportunities and Treatment of Men's and Women's Teams

In determining whether a school has offered equivalent benefits, opportunities and treatment to its men's and women's teams OCR sets forth eleven areas of emphasis:

- *Equipment and Supplies* – Institution should provide gear of equivalent quality, quantity, suitability, condition and availability for athletes on men's and women's teams.
- *Scheduling Games and Practice Time* – Institutions should ensure reasonable opportunity for men's and women's teams to compete in an adequate number of regular season competitions and allow for similar attendance by spectators. Similarly, your institution must ensure that scheduled practice times are equally convenient for both men's and women's teams and that the number and length of practice sessions are equivalent for the same or similar sports.
- *Travel and Daily Allowance* – Institutions should provide equivalent modes of transportation, travel accommodations (i.e., hotels) and meals including meal allowances for athletes on men's and women's teams.

- *Coaching* – Institutions should ensure that men’s and women’s teams have coaches with equivalent qualifications and have equal access to time with coaches. Additionally, your institution should ensure that coaches of men’s and women’s teams set compensation based on equivalent factors and assign equivalent “other duties.”
- *Academic Tutors* – Your institution should provide equivalent access to qualified tutors and these qualified tutors should be compensated equally.
- *Locker Rooms and Fields, Courts or Other Facilities for Practice and Competition* – Institutions should ensure that athletes on men’s and women’s teams have access to locker rooms of equivalent quality and size. Similarly, institutions should ensure that the playing conditions of practice and game facilities for men’s and women’s teams are equivalent.
- *Medical and Training Facilities and Services* – Athletes on men’s and women’s teams should have equivalent access to training facilities of equivalent quality and condition, including access to equivalent medical and training personnel.
- *Housing and Dining Services* – Institutions should offer equivalent access to special housing, special housing services and special dining services for athletes on men’s and women’s teams.
- *Publicity* – Institutions should provide opportunities for equivalent coverage of men’s and women’s teams and athletes on its website, social media accounts and other forms of publicity. Similarly, men’s and women’s teams should receive equivalent support from cheerleaders, pep bands and drill teams.
- *Recruitment* – Institutions should ensure that recruitment resources are allocated in a way that is equivalently adequate to meet the needs of each men’s and women’s athletic program.

Although the list above should not be viewed as exhaustive, it offers a great starting point for institutions that seek to review their compliance with Title IX regulations. Additionally, there are a few areas that tend to trigger the most complaint activity. Institutions should be ready to explain the competitive market that drives men’s and women’s head coaching salaries, and the qualifications and experience of certain coaches that may account for salary differences. Similarly, institutions should also be prepared to provide a rationale for the total number of assistant coaches allotted per men’s and women’s teams. Issues pertaining to the equivalence of locker rooms, fields and practice space tend to be a focus of attention in the age of social media. The scheduling of games and practice times are publicly posted and therefore subject to easy scrutiny. For instance, men’s basketball games played in the main gym on weekends and women’s games played during the week can be a cause for concern and provide low-hanging fruit for a potential complainant.

#### Athletic Scholarship and Financial Assistance

The new resource reminds institutions that compliance with scholarship and financial aid assistance equity requires that the total amount of athletic scholarship aid is proportionate to participation rates. For example, the OCR notes that an institution whose athletic program consists of 45% of women should distribute 45% of the athletic financial assistance available to women to comply with Title IX.

### *Meeting Students' Athletic Interest and Abilities*

OCR also urges institutions to ensure that the athletic interests and abilities of both men and women within its student body are met. To this end, institutions can ensure compliance by choosing one of the following options based on the best fit for its community:

- *Substantial Proportionality* – An institution complies with this prong when the percentage of women and men participants on athletic teams is “substantially proportionate” to the percentage of women and men enrolled as full-time undergraduates.
- *History and Continuing Practice* – An institution complies with this prong if it can demonstrate a history and continuing practice of expanding its athletic program in response to the interests and abilities of members of the underrepresented sex.
- *Interests and Abilities of Students* – An institution complies with this prong by demonstrating, despite any disproportionality, that it otherwise meets the interests and abilities of the underrepresented sex.

Overall, the best way to prepare for potential OCR actions and mitigate associated risks is to conduct an equity audit of your athletic programs.

For more information or questions about the information provided above or Bond’s Title IX Equity Audit services, please contact [Kristen Thorsness](#), or the following other members of Bond’s Title IX Equity Audit Team: [Monica Barrett](#), [Katherine Hajjar](#) and [Seth Gilbertson](#).

*\*Special thanks to Bond Law Clerk Connor Johnson for assisting with researching and drafting this memo.*

