




HUSCH BLACKWELL

Title IX Compliance for Athletic Programs

December 6, 2022

1



Housekeeping

- **Recording is not permitted**
- Change Zoom name to match registration
- Please list your institution with your name
- Raise hand or use chat function to ask questions
- Anticipated lunch break from 12-1 p.m.
- Other breaks—take individually as needed

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

2



Agenda –

Module 1: Title IX, Gender Equity, & Athletics – The Big Picture

Module 2: Breaking down Equitable Participation

Module 3: Equitable Financial Support

Module 4: Equitable Treatment – The Laundry List

Module 5: Sexual Harassment and Athletics – Title IX

Module 6: Preparing for a Compliance Audit – Best Practices

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

3

Group Scenario



Breakout Groups

- 4 Scenarios discussed in Breakout Groups
- First group – time to introduce yourselves and select a spokesperson; this will be your group for today's training
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Add your institution to your displayed name

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

4

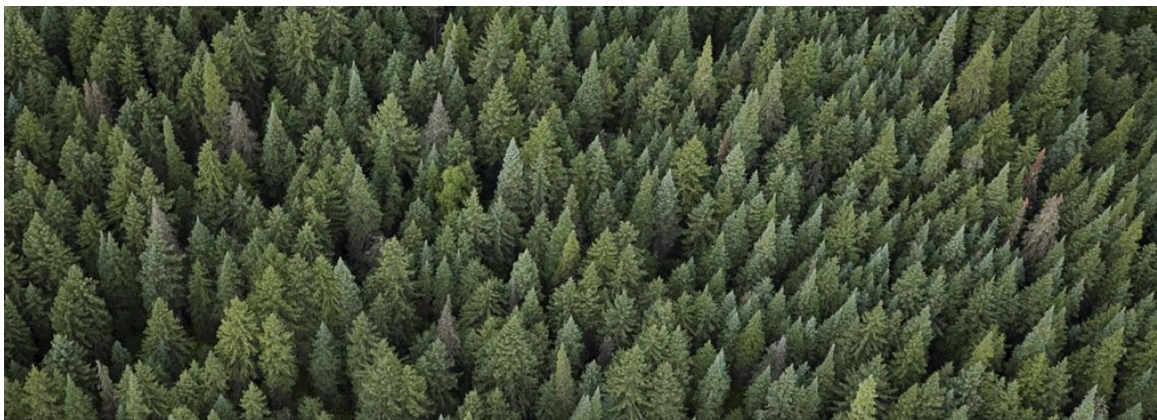
A word on terminology . . .

Vocabulary concerning gender identity and sexual orientation continues to evolve. There is no universal agreement on the meaning of all terms or the best terms to use to refer to certain concepts. We strive to utilize language and examples that are respectful and appropriate. But we welcome your feedback on how we can improve. Please be patient with your colleagues today and assume their good faith even if they use language or terms that you would not.

HUSCHBLACKWELL

© 2022 Husch Blackwell LLP

5



Module 1: Title IX, Gender Equity, & Athletics

The Big Picture

HUSCHBLACKWELL

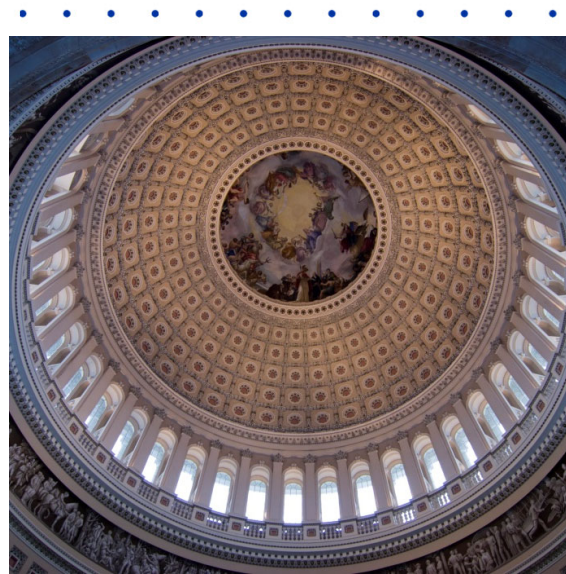
6

H-B

Title IX Key Language

“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

34 C.F.R. § 106.31



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

7

H-B

Title IX's Impact

- Prohibits discrimination in educational programs or activities on the basis of “sex”
- Applies to all institutions that receive Federal Student Aid funds
- Applies to all of an institution's programs and activities
- Imposes affirmative obligation to:
 - Prevent sex discrimination through education
 - Investigate claims of sex discrimination
 - Eliminate discrimination, prevent its recurrence, and address its effects

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

8

Title IX & Gender Equity in Athletics

“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”

34 C.F.R. § 106.41



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

9

Title IX & Athletics Scholarships

“To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex.”

34 C.F.R. § 106.37(c)

.....



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

10

H-B

Results of Title IX

- Both males and females continue to set participation records
- Today 44% of all NCAA student athletes are women (218,122)
- In 1972 less than 30,000



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

11

H-B

Participation Breakdown

- Division I—47% female
53% male
 - Spending is 2:1 in favor of male student athletes
- Division II—57.7% female
42.3% male
- Division III—58% female
42% male



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

12

Enforcement: Office of Civil Rights

- Department of Education's Office for Civil Rights ("OCR") investigates complaints of Title IX noncompliance made against educational institutions
- Recent increases in OCR complaints that mention athletics means there will likely be increased enforcement efforts from the Department

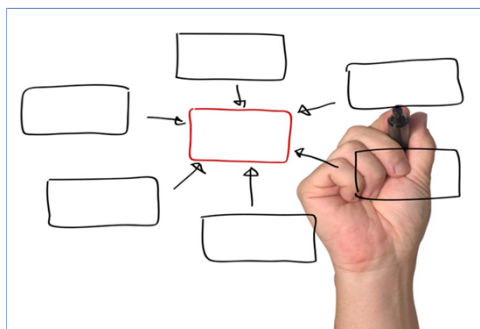


HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

13

Three Part Test of Compliance



- Equitable Participation
 - Three prongs
- Equitable Financial Support
- Equitable Treatment
 - "Laundry List"

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

14



What is a sport?

- OCR does not define a sport
 - However, the following factors are considered:
 - Whether the operating budget, support services, and coaching staff are administered by the athletics department in a manner consistent with varsity sports;
 - Whether the participants in the activity are eligible to receive athletic scholarships and athletic awards if available to athletes in varsity sports and whether athletes are recruited in the manner consistent with varsity sports.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

15



Team Preparation and Competition

- Whether practice opportunities are available in the manner consistent with other varsity sports
- Whether regular season competitive opportunities differ qualitatively from the established varsity sports; whether the team competes against intercollegiate varsity opponents in a manner consistent with varsity sports
- Whether pre-season or post-season exists
- Whether the primary purpose of the activity is to provide athletic competition at the intercollegiate varsity level

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

16

Example



Cheerleading

- Long argued it should be considered a sport
- OCR does not consider it a sport
- NCAA does not recognize as a sport
- NAIA does recognize as a sport

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

17

What does OCR mean when making an “overall determination of compliance?”

- OCR considers:
 - Effective accommodation of interest and abilities in conjunction with equivalence in availability
 - Quantity and kinds of athletic benefits and opportunities provided to males and females
 - Equal athletic opportunities
 - Always on a case-by-case basis

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

18

Why Compliance Matters

- Consequences of noncompliance include:
 - A complaint being filed with the OCR
 - Findings of noncompliance likely to result in ongoing oversight from ED
 - A lawsuit being filed against the institution
 - Monetary damages can be awarded in Title IX cases



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

19



Module 2: Breaking Down Equitable Participation

HUSCH BLACKWELL

20



Three Prongs of Equitable Participation

Compliance with Equitable Participation requirement is achieved by meeting any one of the following:

- Showing that the participation opportunities for male and female students are “substantially proportionate” to their respective full-time undergraduate enrollments; or
- Showing that the institution has a “history and continuing practice of program expansion” for the underrepresented gender; or
- Showing that the institution is “fully and effectively” accommodating the interests and abilities of the underrepresented gender.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

21



Prong 1: Substantial Proportionality



- Compares enrollment numbers for total full-time, undergraduate enrollees with the number of participants in intercollegiate athletics

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

22

Do we count online and non-traditional learners as undergraduates?



Yes, count all full-time undergraduate students regardless of when or if they come to campus or are eligible to compete in athletics



Part-time undergraduates are not included.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

23

H-B

Example:

		Total	Male	Female	
2020-2021	Intercollegiate athletic participants	731	348 47.6%	383 52.3%	Disparity between Enrollment Numbers and Athletic Opportunities for Females in 2020-2021: 3%
	Enrollment of full-time undergraduate students	11,465	5,123 44.68%	6,342 55.3%	
2021-2022	Intercollegiate athletic participants	728	356 48.9%	372 51.1%	Disparity between Enrollment Numbers and Athletic Opportunities for Females in 2021-2022: 5.8%
	Enrollment of full-time undergraduate students	11,306	4,872 43.1%	6,434 56.9%	

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

24



Prong 1 (cont.)—OCR's definition

Athletic Opportunities are:

“substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team...”

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

25



When is a sport's season?

- OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event
- The season ends on the date of the final intercollegiate competitive event
- Athletes listed on the team's squad or eligibility list and are on the team as of the date of the first competitive event are counted as participants

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

26

H-B

Who counts as an athletic participant?

OCR has stated:

- An athlete who receives institutional support normally offered to student athletes
- An athlete who participates in organized practices and team meetings
- An athlete who is listed on the team's squad or eligibility list for each sport
- An athlete who is injured but continues to receive financial aid based on athletic ability

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

27

H-B

Examples of participants



Athletes who did not receive scholarships (walk-ons)



Athletes who compete on sponsor by the institution even though they are required to raise some or all of its operating funds



Athletes who practice but do not compete

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

28

Prong 1 (cont.)—Case law

Miami University Wrestling Club v. Miami University 302 F.3d 608 (6th Cir. 2002)

- The institution was successful in its attempt to achieve substantial proportionality when it brought the number of female athletes within two percentage points of male athletes

Biediger v. Quinnipiac University 691 F.3d 85 (2nd Cir. 2012)

- The court noted that a disparity of 3.62% was “a borderline case of disproportionate athletic opportunities” and not in compliance with the substantial proportionality test

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

29

Example

A male student athlete runs cross country, indoor track, and outdoor track. Under OCR’s definition, each time a student participates is counted. Thus, this student athlete would be counted three times.



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

30



NCAA Rules on Participation

- Squad Lists may include:
 - Walk on student athletes who tried out and quit or got cut after the first date of competition
 - Male practice players on women's teams
 - Red-shirt student athletes who may or may not practice but do not compete
 - Mid-year transfers
 - Student athletes who have exhausted eligibility but still receive financial aid

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

31



Best Practices on Substantial Proportionality

- Count all full-time undergraduates
- Maintain accurate roster/squad lists (create procedures for creation and maintenance of the lists)
- Document rationale for inclusion of participants on the list
- Counts must always reflect actual participation opportunities

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

32



Prong 2: History & Continuing Practice of Program Expansion

OCR will review:

- The entire history of the athletic programs
- Focus on participation opportunities
- Looks for demonstrative evidence of expanding opportunities in response to interests and abilities
- No fixed intervals of time
- No fixed number of sports

Key= program expansion responsive to the interests and abilities



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

33



What does “history” mean?

- OCR will consider the following factors:
 - An institution’s record of adding intercollegiate teams or upgrading sports teams to intercollegiate status
 - An institution’s record of increasing the number of participants in intercollegiate athletics who are members of the underrepresented sex
 - An institution’s affirmative response to the requests by students of other addition or elevation of sports

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

34



What does continuing practice of program expansion mean?

OCR's definition:

- An institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of a sports (including the elevation of club or intramural teams) and effective communication of the policy to students
- An institution's current implementation of a plan or program expansion that is responsible for developing interest and abilities

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

35



What are some factors OCR would consider to show compliance?

- Monitoring the developing interest of abilities
- Conducting periodic nondiscriminatory assessments
- Responding to assessments to show the institution is meeting the interests and abilities of the underrepresented population
- Taking timely action

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

36

What should be in our files?

Documentation is key:

- A detailed timeline of events of the addition or elimination of intercollegiate athletic teams
- Institution's policy on adding new teams
- Policy or procedure regarding participation on existing teams
- Gender Equity Plan



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

37

Policy Considerations

Adding or Eliminating a sport

- Use a multi-disciplinary team approach
- Identify factors and methodology for analysis
- Clearly outline the decision-making process and ownership for the decision

Squad/Roster Management

- Identify the role of the coach and role of the administration
- Set forth the process for all teams to follow
- Create standardized expectations

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

38



What is OCR's position on elimination of teams?

“[N]othing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and the elimination of teams is a disfavored practice. Because the elimination of teams diminishes the opportunities for students who are interested in participating in athletics instead of enhancing opportunities from discrimination, it is contrary to the spirit of Title IX...”

Dear Colleague Letter from the Assistant Secretary of Education, Office for Civil Rights, dated July 11, 2003, entitled “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.”

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

39



Elimination of Teams

Evaluation Criteria include:

- Circumstances surrounding the action
- Determining if cuts increase the proportional participation opportunities for the underrepresented sex
- Elimination does not equal non-compliance if the institution can show a continuing practice of program expansion

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

40



Elimination – Case Law Examples

- *Kelley v. Board of Trustees of the University of Illinois*, 35 F.3d 265 (7th Cir. 1994)
 - The court held the University was within its rights to eliminate men's programs as they were still the overrepresented sex after the program elimination
- *Miami University Wrestling Club v. Miami University*, 302 F.3d 608 (6th Cir. 2002)
 - Holding Title IX does not bestow rights on the over-represented gender. The program eliminations were implemented to bring the University in compliance, and therefore were permissible

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

41



Roster Management

- *Neal v. Board of Trustees of California State Universities*, 198 F.3d 763 (9th Cir. 1999)
 - The court held Title IX permits the University to decrease athletic opportunities for the over-represented sex in order to bring the University into compliance and the plain meaning of Title IX does not prohibit remedial actions
- *Biediger v. Quinnipiac University*, 691 F.3d 85 (2nd Cir. 2012)
 - The court held Title IX permits the University to set roster caps for the overrepresented. The elimination of programs for the underrepresented means an institution cannot meeting prong 2 or 3

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

42

H-B

Is there a specific time period an institution must meet to show history?

- No
- The institution must document its efforts to increase the underrepresented opportunities
- Time between increased athletic opportunities is not the focus
- Focus in on assessment of interest and creation of a history
- Isolated gains with no plan or rationale will not meet this prong

.....



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

43

H-B

Example



College University Timeline of events:

- 1975—CU establishes 6 teams for women
- 1985—CU added another female team at the request of students and coaches
- 1990—CU upgraded a club team to varsity team based on student requests and survey data
- 2000—CU adds 2 additional women's teams without request from students
- 2012—CU cuts one women's team but adds two others
- 2020—CU adopts a plan to add an additional 4 teams in the next 5 years based on feedback from students and coaches

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

44



What are the factors for compliance with Prong 2?

- Is there a documented history of adding athletic opportunities for the underrepresented sex?
- Are the opportunities being added based on the interests and abilities of the underrepresented sex?
- What is the increase in percentage of women participating in athletic opportunities at CU?

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

45



Example



College University Timeline of events:

1993—CU establishes women's sports—6 teams

2013—CU added 1 team by elevating a club sport at the request of student and coaches and expanded the size of the original 6 teams

2015—CU created a surveyed incoming underrepresented students and based on the results planned to add 3 additional teams

2017—CU adds 1 team identified by the survey

2018—CU adds 1 women's team

2021—CU adds the last of the 3 teams it promised to add

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

46

Prong 3: Full & Effective Accommodation of the Interests & Abilities



Requires a showing that the University is “fully and effectively” accommodating the interests and abilities of the underrepresented gender

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

47

Showing Full & Effective Accommodation

3 questions to answer:

- Are there females who are interested in competing in a particular sport?
- Is there sufficient ability among them to sustain a team in that sport?
- Is there a reasonable expectation of competition for that team?

Be proactive in seeking answers.



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

48



What if the institution eliminates a team, can you still meet prong 3?

- If the institution recently eliminates an underrepresented viable team, it **will not** be considered to have met prong 3
- Viable team—interest and ability
- Only caveat—if competition for the team no longer exists



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

49



How will OCR determine if there is sufficient unmet interest?

OCR will assess:

- Requests by students and admitted students that a particular sport be added
- Request that an existing club sport be elevated to intercollegiate status
- Participation in club or intramural sports
- Interviews with students, admitted students, coaches, administrators regarding interest
- Results of questionnaires of students and admitted students regarding interest
- Participation in particular interscholastic sports by admitted students

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

50



What are some additional ways to assess interest in a sport?

- Participation rates in high school sports
- Amateur athletic associations
- Community sports leagues
- Any other sports operated in the areas the where the institution draws students



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

51



What about surveys?

- History—
 - 2005 OCR allowed institutions to demonstrate compliance relying on surveys of the student body—sample survey
 - 2005-2010—OCR received criticism about methodology and response rates
 - 2010 Guidance was withdrawn—the inquiry is much broader

HUSCH BLACKWELL

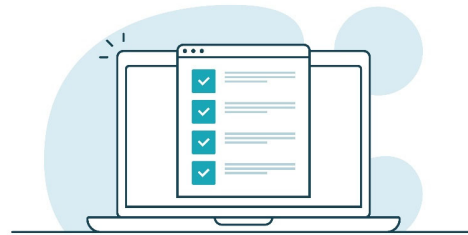
© 2022 Husch Blackwell LLP

52

H-B

Are institutions required to administer a survey to comply with prong 3?

- No
- A survey is only one indicator that **may** be used as part of the overall assessment
- Response rates are evaluated on a case-by-case basis
 - 38% too low
 - 70% may be acceptable



HUSCH BLACKWELL

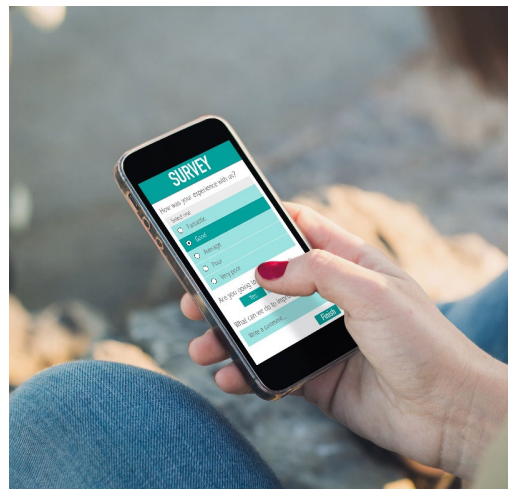
© 2022 Husch Blackwell LLP

53

H-B

Survey Design

- OCR will look at the following factors:
 - Content of the survey
 - Target population surveyed
 - Response rates and treatment of nonresponses
 - Confidentiality protections
 - Frequency of conducting the survey

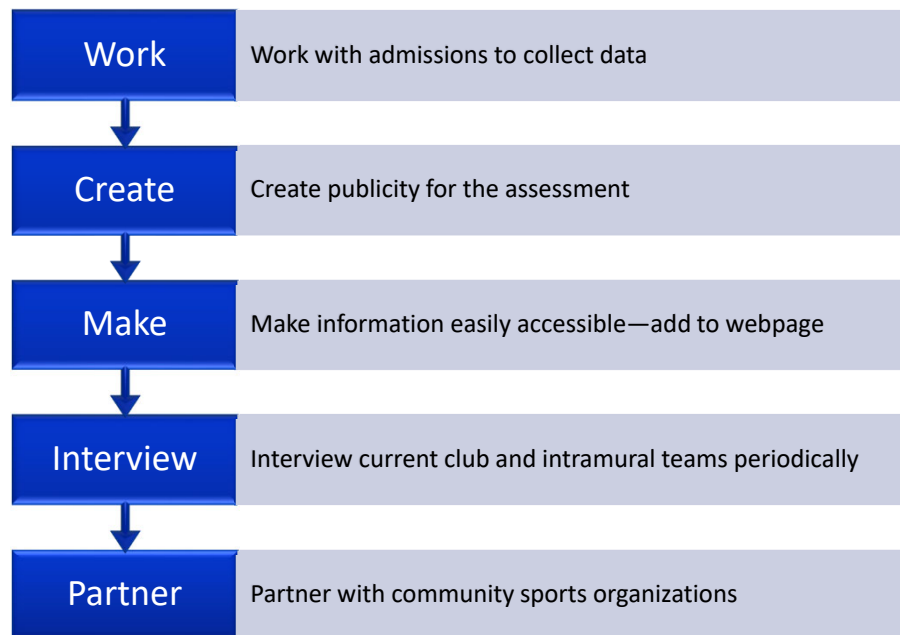


HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

54

Tips of ways to evaluate unmet interest



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

55



Is there sufficient ability to sustain an intercollegiate team?

OCR will examine:

- The athletic experience, interest and accomplishments—club, intramural, interscholastic
- Opinions of coaches, administrators, and athletes at the institution regarding the potential to sustain a team
- If the team has previously competed at the club or intramural level, whether the competition experience indicates the potential to sustain a team

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

56



Other factors to consider

- Do you have enough interest to sustain a team?
- Do interested participants have the athletic ability that could translate and sustain the team in the sport?
- WARNING:
 - A poor competition record; or
 - The inability of students to play at the same level of competition engaged by the institution's other athletes

Does not=conclusive evidence of lack of ability

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

57

Is there a reasonable expectation of competition for the team?



Competitive opportunities in geographic area in which the athletes are primarily competing



Competitive opportunities offered by other schools against which the institution competes



Competitive opportunities offered by other schools in the geographic area, including schools against which the institution does not currently compete.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

58

Intramural & Club Sports

Note: Club sports are student-initiated, so best practice would be to have a gender-neutral policy for approval and recognition of clubs

Title IX requires equitable participation opportunities in club and intramural athletics, but guidance is not clear about what is actually expected

Focus on equal access and equal opportunity in funding and facilities

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

59

Group Scenario



College University has an undergraduate enrollment of: 2021-2022 55% women—45% men, 2020-2021, 53% women—47% men, 2019-2020 51% women—49% men. Athletic participation rates were 2022- 52% women—48% men, 2021- 50% women—50% men, and 49% women—51% men. In the last seven years, College University has added 3 women's sports teams: lacrosse, sand volleyball, and cross country. The last new sports team added was in 2019. CU has not eliminated any men's or women's sports teams in the last 15 years.

However, CU has a policy regarding roster management which states, "Rosters for teams of the overrepresented sex may only maintain a maximum of the permissible number of athletes permitted to travel to championship competition by the NCAA or conference, whichever is greater, unless an exception is granted by the director of athletics. Rosters for teams of the underrepresented sex shall maintain a minimum of two times the number of athletes who can participate in a varsity game/match on the team unless an exception is granted by the director of athletics."

CU surveyed its underrepresented student population in 2021 and had a 44% response rate. The survey revealed interest in adding field hockey as a varsity sport. CU currently offers intramural field hockey but has struggled to fill the teams.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

60

Questions



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

61

H-B



Module 3: Equitable Financial Support

HUSCH BLACKWELL

62



Equitable Financial Support

Title IX regulations state: “To the extent that [an institution] awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.”

34 C.F.R. § 106.37(c)

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

63

What does this mean?

OCR has said that universities are not required to provide the same number of scholarships for men and women or scholarships of equal value

Instead, a university's Title IX compliance hinges on the “substantially proportionate” test

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

64

H-B

Substantially Proportionate Funding

- The total amount of assistance awarded to men and women must be “substantially proportionate” to the University’s participation rates in athletic programs
- Defined as:
 - Financial assistance awards to male and female athletes must be within 1% of participation percentage

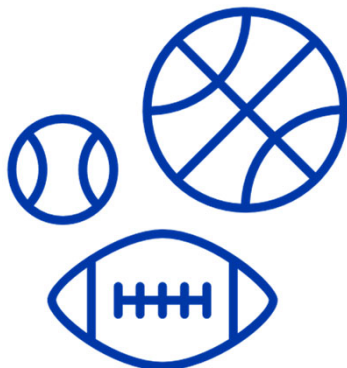
**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

65

H-B

Example



If female athletes make up 46% of an institution’s athletic participants, then OCR expects that the female athletic scholarship budget would be within 45%-47% of the total budget for athletic scholarships for all athletes

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

66

An Example

Athletics Participation

Varsity Teams	Number of participants as of the day of the first scheduled contest	
	Men's Teams	Women's Teams
Baseball	37	
Basketball	18	27
All Track Combined	158	155
Equestrian		55
Football	119	
Golf	14	10
Soccer		32
Softball		25
Swimming and Diving	34	42
Tennis	12	10
Volleyball		19
Total Participants Men's and Women's Teams	392	375
Unduplicated Count of Participants (Number of individuals who participated on at least one varsity team.)	310	267
CAVEAT		

- 310 Men, 267 Women, 577 total student-athletes
 - Men 53.7%
 - Women 46.3%
- 53% funding for Men's teams, 47% funding for Women's
- Compare: Are the percentages within +/- 1%?

Athletically Related Student Aid

	Men's Teams	Women's Teams	Total
Total	\$4,235,175	\$3,773,757	\$8,008,932
Ratio (percent)	53	47	100%

Information obtained from the Equity In Athletics Data Analysis Cutting Tool, 2014-2015

67

H-B

OCR Guidance

- OCR has stated that when a disparity in athletic financial aid is 1% or less, there is a strong presumption that the disparity is reasonable and is based on legitimate and nondiscriminatory factors
- But, if the disparity is more than 1%, there is a strong presumption that this is in violation of the substantially proportionate requirement

See Dear Colleague Letter from the Assistant Secretary of Education, Office for Civil Rights, dated July 23, 1998, entitled "Dear Colleague Letter: Bowling Green State University."



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

68

H-B

Difficulties with the 1% standard

- The 1% or less standard may be difficult for an institution to achieve because it looks at dollars **spent** and not dollars **awarded**
- There are also scholarship limits imposed by conferences, but schools might not be able to give athletes the full allotment of scholarships allowed and still comply with the law

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

69

H-B

Additional Considerations



- OCR judges programs on a case-by-case basis, taking into account the facts of an institution's athletics program
- If an institution can articulate **legitimate, nondiscriminatory reasons** for disparity in aid, OCR may find that a program is in compliance with this prong

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

70

H-B

Examples of Legitimate Reasons

- Actions taken to promote athletic program development;
- Differences between in-state and out-of-state tuition at public colleges;
- Legitimate efforts to comply with Title IX requirements such as participation requirements;
- Unexpected fluctuations in the participation rates of male and females, such as if an athlete accepted an athletic scholarship but last minute decided to enroll at another school.

Note: an institution must **demonstrate** that its asserted rationale is reasonable and does not reflect underlying discrimination. It is not enough to simply state a nondiscriminatory reason.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

71

H-B

Case Law Examples

O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015)

- NCAA Division I football and men's basketball players challenged the NCAA's use of the name, image and likeness of its former student-athletes for commercial purposes.
- Litigated 2009-2015.
- Result – Trial court found rules limiting student-athlete compensation violated anti-trust law. Athletes entitled to receive scholarships up to full cost of attendance + \$5,000. Supreme Court denied cert.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

72



NCAA v. Alston, 141 S. Ct. 2141 (2021)

- Same trial court as O'Bannon, but this time the restrictions related to education-related compensation were challenged.
- Court held that the restrictions related to "non-cash education-related benefits" violated antitrust law.
 - NCAA may limit cash or cash equivalent awards for academic purposes, but the limit may not be less than what the NCAA permits student-athletes to receive for athletics performance (\$5,980 per year).
- Judge Kavanaugh's concurring opinion suggests all NCAA compensation rules (e.g., scholarship limits) "raise serious questions under antitrust laws"

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

73



How are Alston Awards evaluated?

- Academic awards that can be provided to DI student athletes up to \$5,980 annually
- Allowed after the Supreme Court decision
- Awards are subject to evaluation under Title IX
- Most institutions are attempting to balance awards between men and women

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

74



How do we treat summer or mid-term aid?

- Recent changes to NCAA rules on engagement summer participation for men's and women's basketball and football
- Additional coaching and aid may be received if enrolled
- No challenge or determination from OCR
- Institutions believe OCR will evaluate these awards separately from aid during the academic year.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

75

Questions



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

76



Module 4: Equitable Treatment

The Laundry List

HUSCH BLACKWELL

77

Equitable Treatment/Equitable Benefits: the "Laundry List"

- Title IX requires an institution to provide equitable treatment
- This encompasses an Equitable Benefits "laundry list" of items that are subject to review and audit by OCR
- The laundry list includes a deep dive into the athletic department's operations to determine if there is disparity and why



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

78

H-B

Laundry List (cont.)



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

79

H-B

Equitable Treatment

- Compliance is determined by an evaluation of the entire athletics program as a whole
- Look at:
 - Availability
 - Quality
 - Kinds of benefits
 - Opportunities
 - Treatment



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

80



Questions to be asked of each component

1. Are the benefits provided to students equally available?
2. Is a benefit being provided to one sex, but not the other?
3. Is the underrepresented sex denied or limited any benefit provided to the other sex?

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

81



Compliance with Equitable Treatment

- No requirement for spending equivalence
- Equal allocation of funds is not enough
- No requirement that men's and women's teams of the same sport to be treated equally
- Differences are not "disparities" if they are the result of nondiscriminatory factors



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

82



OCR's Athletics Investigations Manual

3 step methodology to assess compliance:

1. Obtain and analyze information under each factor to determine for each factor whether men's or women's programs are favored, the same, or have a negative effect on one sex
2. After step 1 is completed, the investigator will make an overall determination for that one program factor
3. Then OCR will consider "the number of significance of the disparities in the program components in which nonequivalence was found and compare discrepancies..."

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

83



1. Equipment and Supplies

Uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices and conditioning and weight training equipment

OCR considers:

- Quality
- Amount
- Sustainability
- Maintenance and replacement
- Availability of equipment and supplies



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

84



Common Issues with Assessing Equipment and Supplies

- The number of game uniforms provided to each respective team and the amount and different types of clothing and footwear provided to the respective teams
- Maintenance and replacement schedules for equipment and uniforms
- Differences between practice equipment
- Differences in weight room equipment

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

85



Example (non-compliance)

The men's soccer team is provided a weight room specifically for the team. No other teams are allowed to use it. The women's soccer team shares the weight room with volleyball, softball, and tennis.



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

86



2. Scheduling of Games and Practice Times

Factors to be considered:

- Number of competitive events offered per sport
- Practice opportunities equivalent to number and duration for each sex
- There are competitive events scheduled at a comparable time and the men were given “prime time” slots
- Would members of the opposite sex be satisfied with the practice schedule if the schedules were reverse
- Teams given equitable practice time
- Programs have similar opportunities to engage in pre and post season competition

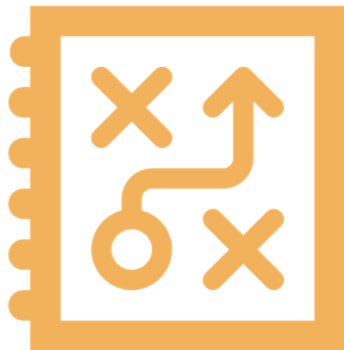
HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

87



Example



College University allows the football team to return to campus earlier in August than all other teams. The University justifies its decision by stating there is no other comparable program.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

88

3. Travel and Per Diem

Factors to determine compliance:

1. Modes of transportation
2. Housing furnished during travel
3. Length of stay before and after competitive events
4. Per diem allowances
5. Dining arrangements

OCR considers overall travel budget for men's and women's collegiate athletics



HUSCHBLACKWELL

© 2022 Husch Blackwell LLP

89

Travel and Per Diem (cont.)

- The NCAA states Division I spends two times as much on men's travel versus women's
- Document reasons for discrepancies
- Length of stays has=equity
- Amount and types of food
- Number of student athletes per room
- Size of travel party (i.e., admin and medical)

HUSCHBLACKWELL

© 2022 Husch Blackwell LLP

90

H-B

Is the institution out of compliance if it provides charter flights for some teams and not for others?

- Not necessarily
- OCR looks at the overall spending between men's and women's teams
- However, charter flights purchased by or donated to the institution will still be considered as part of the overall spend

**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

91

H-B

4. Opportunity to Receive Academic Tutoring and Assignment of Compensation for Tutors

Compliance is determined by the following factors:

1. Tutor availability including procedures and criteria for obtaining tutorial assistance
2. Tutor qualifications and experience, including training
3. Rates of pay and employment conditions for tutors

**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

92

Example

College University provides all student athletes equal access to tutors. The tutors receive the same rate of pay. No team has special access to additional services.

**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

93

5. Opportunity to Receive Coaching, Assignment and Compensation of Coaches

- Factors in determining coaching:
 1. Relative availability of full-time coaches
 2. Relative availability of part-time or assistance coaches
 3. Relative availability of graduate assistances

**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

94

Opportunity to Receive Coaching, Assignment and Compensation of Coaches (cont.)



Assessment factors regarding coaching:

1. Training, experience and other professional qualifications of the coach
2. Professional standing of coaches

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

95

Compensation of Coaches – Factors



Rate of compensation (per sport, per season)



Duration of contracts



Conditions related to contract renewal



Experience



Nature of coaching duties performed



Working conditions



Terms and conditions of employment

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

96



6. Provision of Locker Rooms, Practice and Competitive Facilities

OCR assesses 6 factors:

1. Quality and availability of facilities provided for practice in competitive intercollegiate events
2. Exclusivity of use of facilities provided for practice and competitive events
3. Availability of locker rooms
4. Quality of locker rooms
5. Maintenance and practice of competitive facilities
6. Preparation of facilities for practice and competitive events

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

97



Locker Rooms, Practice and Competitive Facilities (cont.)



Key questions in the analysis

1. Are locker rooms and team rooms comparable for both sexes?
2. Do facilities have limitations on their use?
3. Are spectator seating, scoreboards, concessions and restrooms provided equally for male and female teams?
4. Are the conditions of the fields, courts, or pools equal for each team?

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

98



7. Provision of Medical and Training Facilities and Services

- OCR compliance considerations:
 1. Availability of medical personnel and assistance
 2. Health, accident, and injury insurance coverage
 3. Availability of quality training facilities
 4. Availability and quality of weight and conditioning facilities
 5. Availability and qualifications of athletic trainers

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

99



8. Provision of Housing and Dining Facilities and Services

OCR assessment factors include:

1. Equivalence of housing facilities and services provided
2. Equivalence of the dining facilities and service provided
3. Equivalence of any other special services provided in these areas

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

100



9. Support Services

- OCR's guidance states "[t]he administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions."

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

101



Support Services Factors

1. The amount of administrative assistance provided to men's and women's programs
2. The amount of secretarial and clerical assistance provided to men's and women's programs
3. Other amenities, i.e., office space, equipment provided to administrative support services

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

102

10. Publicity

OCR considers the following factors:

1. Availability and quality of sports information personnel
2. Access to other publicity resources for men and women's programming
3. Quality and quantity of publications and other promotional devices featuring men's and women's programs

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

103

Media Coverage

- What if outside media (locally and/or nationally) has chosen not to publicize and/or promote women's sports to the same degree as men's sports?
- This does not absolve institutions from providing equivalent publicity for teams



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

104



11. Recruitment of Student-Athletes

- OCR considers the following factors:
 1. Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit
 2. Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program
 3. Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

105



Name, Image, and Likeness & Title IX

- Athlete-facilitated agreements do not trigger Title IX concerns
- Institution-facilitated or coordinated agreements directly affiliated with the institution likely warrant additional analysis
- Commentators have speculated third-party compensation like booster club funds are subject to the same analysis
- Any direct assistance provided by the institution as it pertains to NIL must be equal between men and women

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

106



Will equitable budgeting alone satisfy compliance?

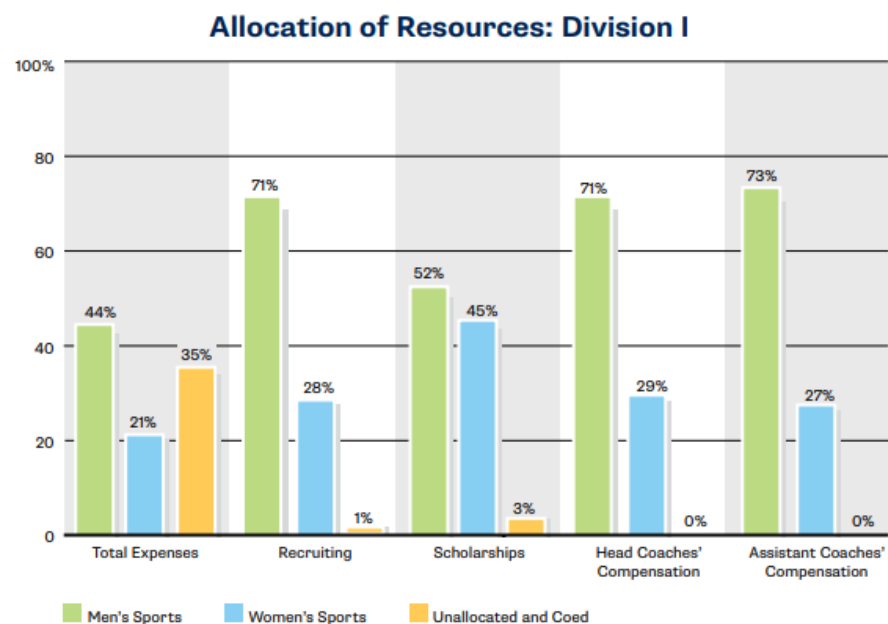
- No
- No requirement for per capita expenditures
- Budgeting is one component
- Empowering coaches to spend their budgets could lead to issues if not monitored
- The administration must have some controls over coaches to ensure spending

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

107

Allocation of Resources: Division I



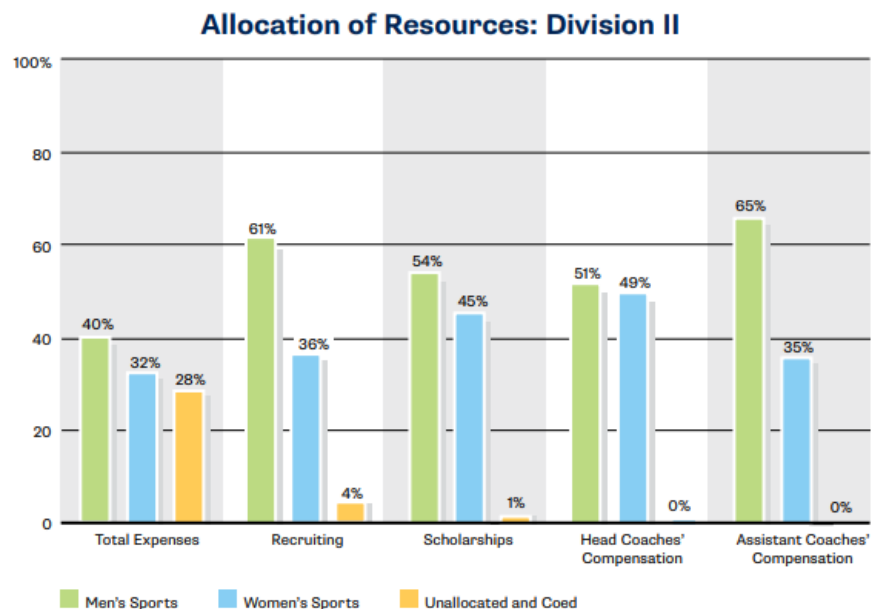
Source: NCAA, *The State of Women in College Sports* (2022), https://s3.amazonaws.com/ncaaorg/inclusion/tit/leix/2022_State_of_Women_in_College_Sports_Report.pdf.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

108

Allocation of Resources: Division II



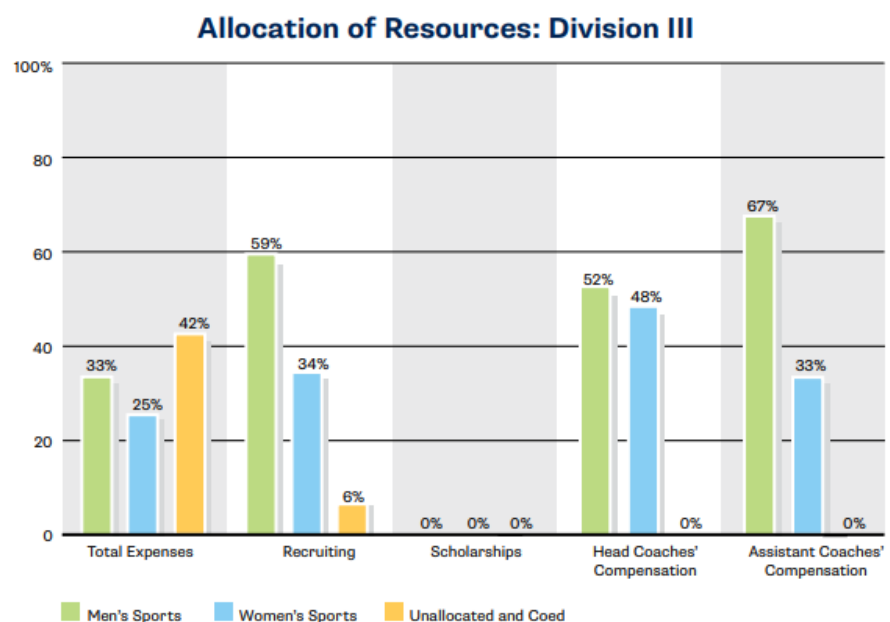
Source: NCAA, *The State of Women in College Sports* (2022), https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

109

Allocation of Resources: Division 3



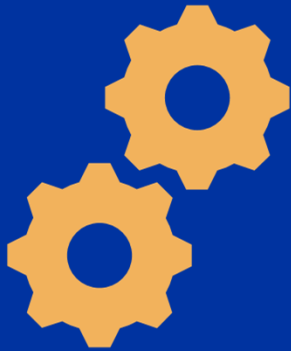
Source: NCAA, *The State of Women in College Sports* (2022), https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

110

Group Scenario



College University's athletic budget in 2021-2022 was allocated 34% men, 32% women, 34% unallocated coed. Senior swimmer, Sarah Gilbert, has made a complaint to the Title IX office of unequitable treatment between the men's and women's programs and tier 1 versus tier 2 programs. Specifically, Sarah has complained women's teams do not receive the same amount of extra equipment (shoes, sweatshirts, pants, etc.) as the men's, and women's teams are required to fundraise up to 20% of their budget. Men's teams are supported by the boosters and do not have to fundraise. Men's teams have 9 assistant coaches while women's teams only have 3. Women's teams are required to stay 2 per room while traveling and take buses to games. Men's tier 1 teams have their own rooms and twice as much allocated for food than women. CU has a gender equity plan and the plan only focuses meeting substantial proportionality, not the laundry list.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

111

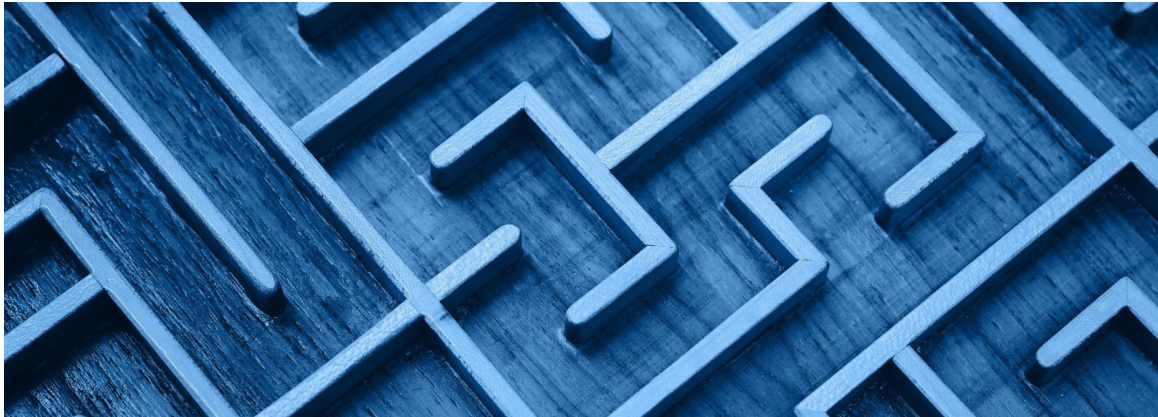
Questions



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

112



Module 5: Sexual Harassment & Athletics

Title IX

HUSCH BLACKWELL

113

What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro
quo
harass-
ment

Hostile
environment
harassment

Sexual
assault

Dating
violence

Domestic
violence

Stalking

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

114

What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the “education program or activity” of a federal funding recipient
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

115

What are examples of education programs and activities?

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on campus

Sports teams

Work-study

Games, concerts, and speeches on-campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

116

H-B

.....

Example (included in EP&A)

Student is sexually assaulted in a residence hall on-campus. The sexual assault occurs on a Saturday evening. The alleged perpetrator is a member of the lacrosse team.

HUSCH BLACKWELL

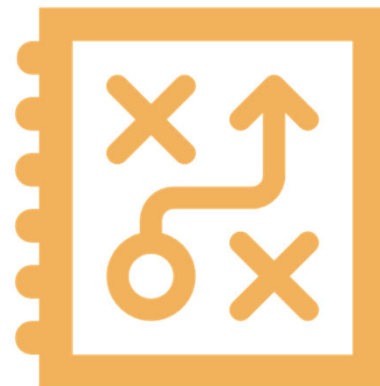
© 2022 Husch Blackwell LLP

117

H-B**Example (included in EP&A)**

.....

The tennis team travels to a different school for a tournament and stays overnight at a hotel. At the hotel where the team is staying, the coach sexually harasses the team's manager.

**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

118

H-B

Example (excluded from EP&A)

During spring break, two student athletes travel to another state and stay at an all-inclusive resort owned by a prominent hotel chain. The students booked the trip on their own for leisure purposes. While staying at the resort, one student sexually assaults the other student.



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

119

H-B

Does Title IX also prohibit retaliation?

Yes – Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated in or refused to participate in any manner in an investigation, proceeding, or hearing under the institution's policy.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

120

H-B

What training must we provide?

- Federal Clery Act requires primary prevention and awareness training for all incoming students and new employees
- Clery Act requires ongoing prevention and awareness campaigns for the institutional community

**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

121

H-B

Is there additional training for student athletes and coaches?

- NCAA and some other associations and conferences require annual student athlete/coach training that exceeds baseline requirement for all students
- NCAA Policy To Combat Sexual Violence

**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

122

.....

NCAA Requirement



“All student-athletes, coaches and staff [must] have been educated each year on sexual violence prevention, intervention, and response, to the extent allowable by state law and collective bargaining agreements.”

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

123

Must an institution investigate sexual harassment?

- Every institution must have a policy
 - prohibiting sexual harassment
 - providing mechanisms for reporting and complaints
 - providing a fair and equitable process to investigate and resolve complaints of sexual harassment and impose discipline and remedial measures where appropriate

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

124



How does an institution “learn” about sexual harassment?

- Institutional official with authority to take corrective action is notified
- Institutional officials include Title IX Coordinators, certain administrators, and may include coaches



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

125



Are all employees required to report sexual harassment?

- All institutions adopt some form of mandatory reporting, with the scope varying by institution
- Most institutions make athletics administrators, staff, and coaches, mandatory reporters



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

126

H-B

What about medical staff?

- Institutions typically designate doctors, psychologists, and counselors as “confidential” resources
- Some institutions designate trainers as “confidential” resources

**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

127

What are the institution's duties once it learns of sexual harassment?

Engage with the alleged victim and offer supportive measures and information about options

If a formal complaint is filed, conduct an investigation to gather evidence

If misconduct occurred, impose discipline and remedial measures, as appropriate

Conduct a live hearing with testimony and cross examination to determine whether the misconduct occurred

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

128

Who administers the Title IX process?

Title IX Coordinator oversees the entire process

Title IX Coordinator appoints investigators and hearing officers/panel consistent with policy

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

129



What role do athletic administrators and coaches play?

- Cooperate with Title IX Coordinator
- Implement supportive measures
- Make players and staff available, as needed



HUSCH BLACKWELL

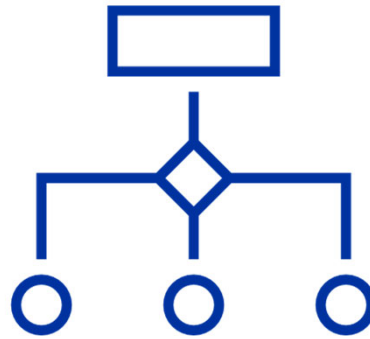
© 2022 Husch Blackwell LLP

130

H-B

Is the Title IX process exclusive?

- Title IX process is the exclusive means of adjudicating sexual harassment as defined by Title IX
- Institutes are free to use other policies and processes to address other forms of misconduct



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

131

H-B

Example

Basketball player is accused of sexually assaulting another student at a late-night party, where drugs and alcohol were present the night before a game. Team rules impose a 10:00 pm curfew the night before games. Team rules prohibit drugs and prohibit alcohol during the season.



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

132



Can there be “special” rules for student athletes?

- No
- Title IX regulations require fair and equitable treatment of all students
- Title IX prohibits special rules that would work more favorably to student athletes than other students



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

133



Can schools suspend athletes from competition pending investigation?

- Title IX regulations adopt a presumption of innocence unless and until a finding is made after a hearing
- “Supportive measures” imposed pending an investigation must be “non-disciplinary”
- Substantiated concern of threat to safety can justify suspension of any student



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

134



Are sexual harassment cases confidential?

- Sexual harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Records containing identifying information on students are subject to FERPA analysis
- The Title IX regulation contains an express preemption, permitting FERPA-protected material to be used only as required by Title IX itself



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

135



Can we vet prospective student athletes?

- Yes
- Title IX permits schools to inquire whether prospects have been adjudicated responsible for sexual harassment at another institution or convicted of a sex crime



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

136



NCAA Requirements

Institutions must:

- Require incoming and transfer students to disclose conduct that resulted in Title IX discipline or a crime of violence conviction
- Take reasonable steps to confirm whether incoming, current, and transfer students have been disciplined under Title IX or convicted of a crime of violence
- Share relevant disciplinary information and Title IX outcomes with other NCAA schools where a student seeks to transfer or enroll
- Have a procedure for gathering information on completed and pending Title IX proceedings and criminal convictions as part of the recruiting process

HUSCH BLACKWELL

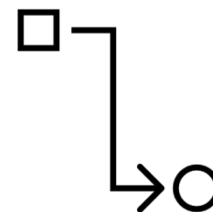
© 2022 Husch Blackwell LLP

137



How do we implement NCAA requirements?

- Develop an overall policy/process
- Develop student self-questionnaire/verification
- Develop release of information form for previous institution
- Develop annual attestation form
- Develop infrastructure and rules to review positive cases

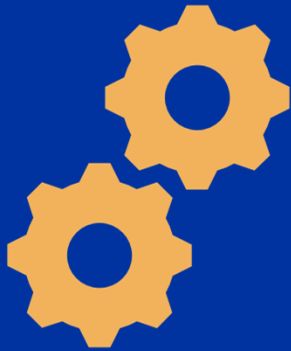


HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

138

Group Scenario



The day before the baseball team is set to begin a series with its arch-rival, a female lacrosse player tells the sports psychologist that the baseball team's star catcher sexually assaulted her at an off-campus party the night prior. The lacrosse player requests that the psychologist relay the allegations to the athletic director but keep her name and team anonymous. Upon learning the matter, the athletic director immediately notifies the head coach who, in turn, summons the star catcher to his office. The star catcher confesses to having a sexual encounter with the lacrosse player (giving her name) but denies that it was non-consensual. The head coach then holds a team meeting and notifies the team that the star catcher will not play in the series because he "failed to respect a woman" and "embarrassed this team." The head coach then calls the head coach of the lacrosse team to apologize for the catcher's actions and to tell her he will implement rigorous sexual assault training for his team. Later that night, the catcher confronts the lacrosse player outside the training center, calls her a vulgar term, and threatens to sue.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

139

Questions



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

140

Page 10

HUSCH BLACKWELL

141

-

142



Phase 1 Document Request

General Information

- Self-assessment
- Areas for improvement
- Copies of equity studies
- Policies
- Institutional reports or action plans

Participation

- EADA submission vs. institution's data on enrollment
- Lists of athletic teams, conference affiliations, NCAA or NAIA divisions—number of participation and sex on each team
- Eligibility/squad list
- Changes to the programs over the last 3 years
- History and ongoing practice evidence
- Requests to expand programs
- Surveys and assessments
- Research results
- List of club and intramural—with history

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

143



Document Request (cont.)

Scholarship

- Copies of policies, procedures and criteria for awarding aid
- Summary of all assistance or grants-in-aid
- All expenses covered by awards of aid
- Amounts budgeted for aid for each team/each year
- Anticipated aid expenditure for next year

Treatment

- Policies relevant to each areas
- List of all equipment and supplies
- Lists of practice schedules
- Lists of methods of transportation for each team
- Documentation on Tutoring
- Qualifications of all coaches
- Lists of locker rooms and facilities
- Any and all information regarding the 11 laundry list components

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

144

H-B

Phase 2—On-site review

- Typically list 3-5 days
- Review of all facilities and all equipment
- Interviews with administrators, coaches, staff, and student athletes



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

145

H-B

Phase 3—Report/Remediation

- It could take months or years to receive the draft
- Institution will be able to respond but typically moves quickly into remediation
- Institution may be asked to enter into a voluntary resolution agreement and remediation plan
- OCR will maintain jurisdiction and monitoring will be ongoing until compliance is reached

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

146



Towson University - Gender Equity Complaint (January 2022)

- OCR investigated a complaint that the University discriminated on the basis of sex and engaged in retaliation against the complainant (a female coach).
- Alleged failure to provide equal opportunities to female athletes in its intercollegiate athletics program in the following areas:
 - a) Assignment and Compensation of Coaches;
 - b) Provision of Locker Rooms, Practice and Competitive Facilities;
 - c) Provision of Medical and Training Facilities and Services;
 - d) Publicity;
 - e) Provision of Support Services; and,
 - f) Athletic Financial Assistance.
- Alleged different treatment of the complainant compared to a similarly situated male coach and alleged retaliation (i.e., suspension of employment and non-renewal of contract after a discrimination complaint was filed against her).

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

147



Towson University – Voluntary Resolution Agreement

- OCR and Towson entered agreement to resolve issues related to provision of financial aid and alleged inequity in the treatment areas.
- University required to assess its efforts in each of the areas.
 - If University determines that the provision of certain benefits is inequitable, it must devise a plan to ensure that female and male student-athletes are provided with equivalent benefits and services in the area.
 - If University determines that the provision of benefits is comparable, it must provide a report and supporting documentation.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

148



Western Illinois University - Gender Equity Complaint (February 2022)

- OCR investigated a complaint that the University discriminated against female students because it failed to offer equal athletic opportunities in its intercollegiate programs in the following areas:
 - 1) Effective accommodation of the interests and abilities of female students;
 - 2) Opportunity to receive coaching and assignment and compensation of coaches; and
 - 3) Recruitment of student athletes.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

149



Western Illinois University - Voluntary Resolution Agreement

The University agreed to the following:

- **Athletics interests and abilities:** Meet at least one prong of the Three-Prong Test by the 2024-25 academic year.
- **Opportunity to receive coaching and assignment and compensation of coaches:** University required to conduct assessment and devise plan to provide equal opportunities related to coaching and assignment and compensation of coaches by the 2023-24 academic year.
- **Recruitment of student-athletes:** University required to conduct an assessment, by team, of the recruiting benefits and opportunities provided and devise plan to provide equivalent treatment, benefits, and opportunities with respect to recruitment by the 2022-23 academic year.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

150



Anders v. California State Univ., Fresno (E.D. Cal. Aug. 16, 2022)

- Members of the women's lacrosse team at Fresno State University brought gender equity claims after the University discontinued its women's lacrosse, men's wrestling, and men's tennis teams.
- Court denied class certification and noted conflict between the interests of the named plaintiffs and the interests of other female students within the scope of the proposed class.
- Court found that the interest of the named plaintiffs focused exclusively on the restoration of the varsity women's lacrosse team.
 - Requiring this specific remedy would divert resources from and undermine the interests of other female students participating in other sports.

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

151



Where should we begin?

- Gather documentation
- Assess what has been done
- Create a buy-in from campus—not just Athletics
- Planning is key....

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

152

H-B

Gender Equity Institutional Plan

The NCAA Division I Committee on Athletics Certification developed guidance on Gender Issues Institutional Plan with the goal of helping NCAA member schools assess (also a roadmap for Division II):

- Where an institution is now
- Where the institution wants to be
- How the institution intends to move from one status to the other

**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

153

H-B

Gender Equity Institutional Plan



- Plans must:
 - Extend at least five years into the future
 - Be active at all times
 - Include a mechanism to ensure the plan is reviewed on an annual basis

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

154



Gender Equity Committee Responsibilities

- Analyze & Evaluate compliance
- Identify concerns and areas for improvement
- Formulate a responsive plan
- Establish reasonable timelines to achieve success
- Identify individuals to assist committee in accomplishing goals



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

155

Examples of Goals & Action Items

ACTION ITEMS				
2008-2013 Gender Equity Plan Montana State University Department of Athletics				
ISSUE	MEASUREABLE GOAL	STEPS TO ACHIEVE GOAL	RESPONSIBILITY OF	TIMETABLE
Participation Rates should be within 1% variance of the student body male: female ratio.	The proportion of athletic participation opportunities for men and women will be maintained to correspond to the proportionality limits for Title IX. The five year average variance of participation rates between athletics participation and the student body population is 73.	The goal has been achieved. It shall continue to be maintained.	Intercollegiate Athletics, Senior Women Administrator, Coaches, Affirmative Action Officer	Ongoing. Should be reviewed annually.
Summer School should be allocated in an equitable manner.	Ensure compliance with gender equity in the allocation of summer school. A written plan shall be created to ensure compliance. Summer School aid shall be allocated so that A) it is available to all student-athletes who wish to attend or B) it is allocated proportionately to FA participation.	Develop a written policy for summer school allocations and ensure policy is followed.	Senior Women's Administrator and Athletic Department Business Manager	Develop for summer 2009.

The Gender Equity Compliance Action Plan is intended to serve as a working document and will assist the University in its efforts to achieve compliance with the athletic provisions of the regulations implementing Title IX of the Education Amendments of 1972.

(Adopted September 18, 1983)
(Revised September 20, 1995)
(Revised September 1, 2002)
(Amended August 1, 2006)
(Amended August 1, 2012)

*Source: UNLV Policies and Procedures Manual: Department of Athletics Title IX- Gender Equity Action Plan

156

Strategic Planning

Goal Setting

- Short Term
 - Annual benchmarks
- Long Term
 - 5 Year and beyond
- One-time Goals
 - Smaller, concrete action goals
- Recurring, Continuous Goals

**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

157

Constant Reassessment

- **Evaluating**
 - Action Items
 - Overall Compliance
- **Updating the Plan**
 - Periodic
 - Regular
 - Documentation

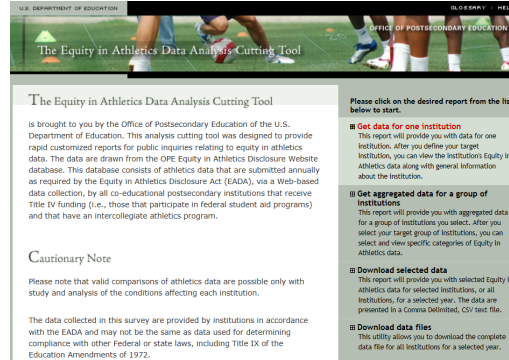
**HUSCH BLACKWELL**

© 2022 Husch Blackwell LLP

158

Equity in Athletics Data Cutting Tool

- <http://ope.ed.gov/athletics/>
- Department of Education database provides athletic data for institutions that receive Title IX funding and have an intercollegiate athletics program
- Allows users to search for a group of institutions (by state, region, conference, etc.)



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

159

NCAA Resources: Gender Equity & Title IX Important Facts

Links to NCAA Gender Equity Programs, Events, and News

- <https://www.ncaa.org/sports/2021/9/27/genderequityupdates.aspx>

An overview of relevant Title IX guidance since Title IX was enacted in 1972

- <http://www.ncaa.org/about/resources/inclusion/gender-equity/title-ix-important-facts>

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

160



NCAA Resources: Equity and Title IX in Intercollegiate Athletics



- Available for free download on NCAA Publications (<https://www.ncaapublications.com/>)
 - Gender Equity Online Manual
 - Equity & Title IX in Intercollegiate Athletics (2012)
 - The State of Women in College Sports (2022)
- Gives practical guidance to institutions that outlines:
 - Title IX Athletics Compliance
 - NCAA Issues
 - FAQs

HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

161



Steps for Gender Equity Compliance: Best Practices

- Understand Gender Equity
 - Title IX Requirements
 - NCAA Requirements
- Assess
- Develop a plan
- Measure, Monitor, Report on Progress
- Regularly re-assess



HUSCH BLACKWELL

© 2022 Husch Blackwell LLP

162

Questions



HUSCHBLACKWELL

© 2022 Husch Blackwell LLP

163

HUSCH
BLACKWELL

© 2022 Husch Blackwell LLP

164