

Title IX Coordinator Training Online Course

Class Six: Athletics Equity and Applying the August 2020 Regulations

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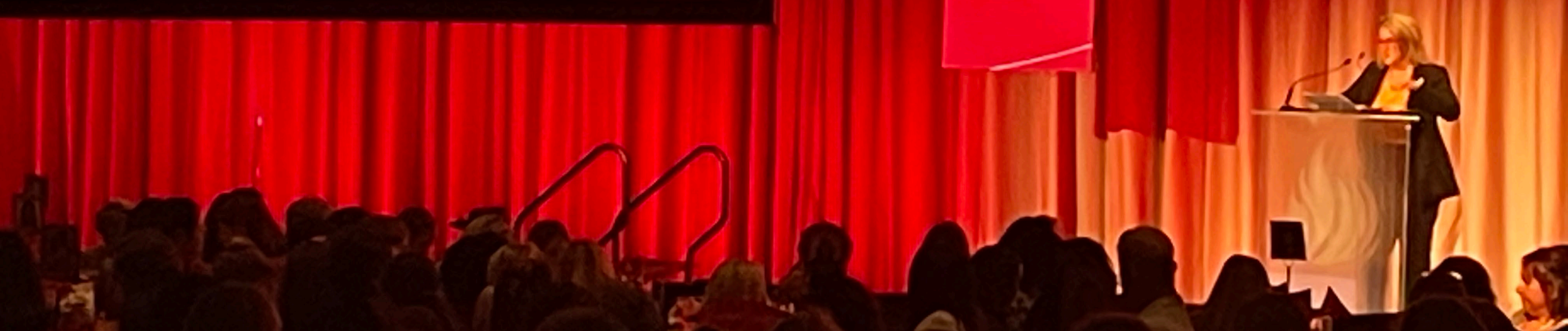
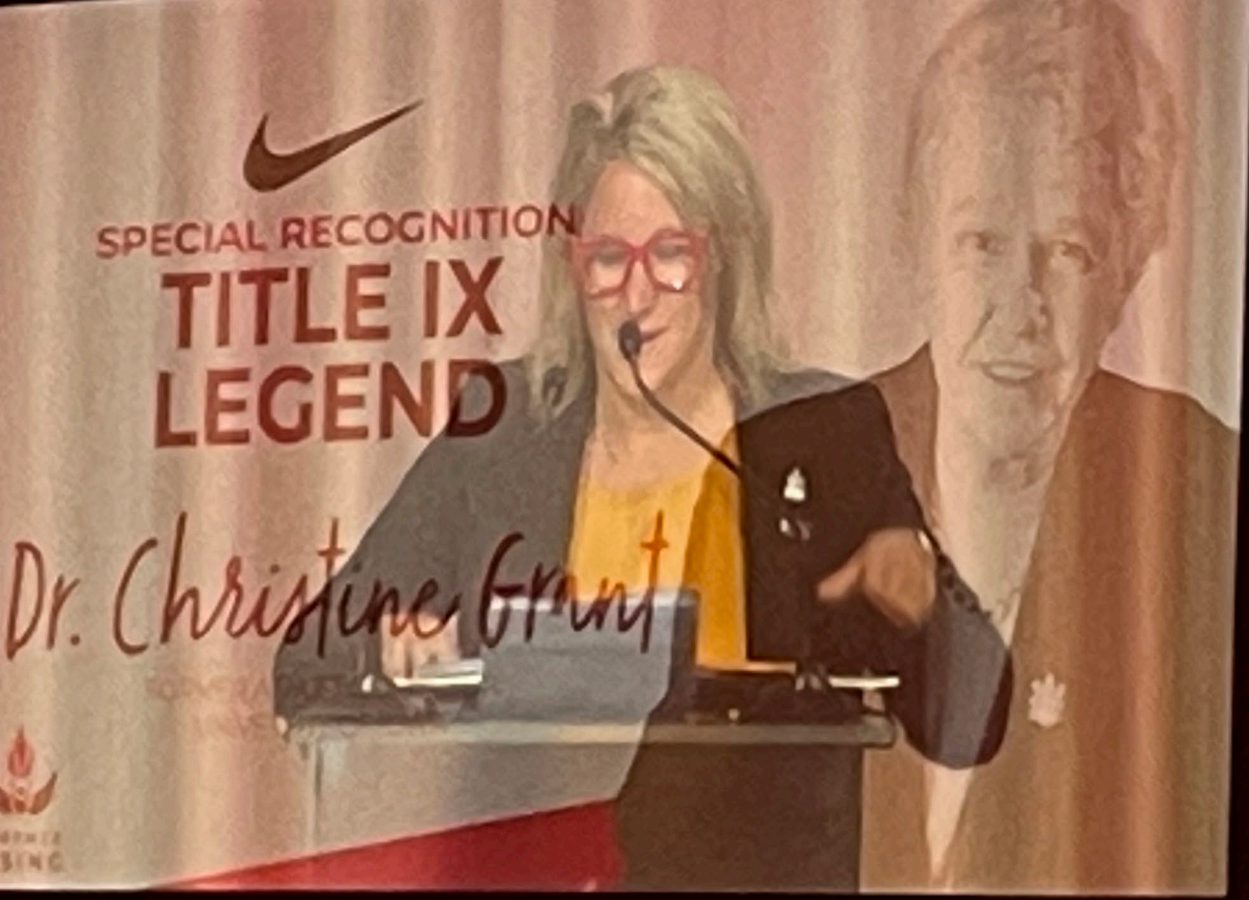
December 13, 2022

PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

Class Overview

- Athletic Equity
- Pay Equity
- The Regs
- Trans Athletes
- NCAA Board of Governor's Policy on Campus Sexual Violence





Role of the NCAA:

- Support the membership as established by the [NCAA Constitution](#)
- [Four membership DEI committees](#)
 - Committee to Promote Cultural Diversity and Equity
 - Committee on Women's Athletics
 - Gender Equity Task Force
 - Minority Opportunities and Interests Committee
- [NCAA Inclusion Statement](#)
 - "The NCAA will provide or enable programming and education . . ."
 - [Annual Inclusion Forum](#): April 21-23, in-person, in Indianapolis
- DEI Reviews

Overarching Principles:

Intercollegiate athletics programs should utilize their platform to serve as leaders on campus through engagement in and collaboration on efforts to support campus-wide sexual and interpersonal violence prevention initiatives.

This includes involving student-athletes in prevention efforts in meaningful ways across the campus, including encouraging use of leadership roles on campus to support such efforts.



The Updated Elements of the NCAA's Sexual Violence Policy and Attestation

In addition to the training requirements discussed in the last class, the NCAA requires school to attest to the following annually:

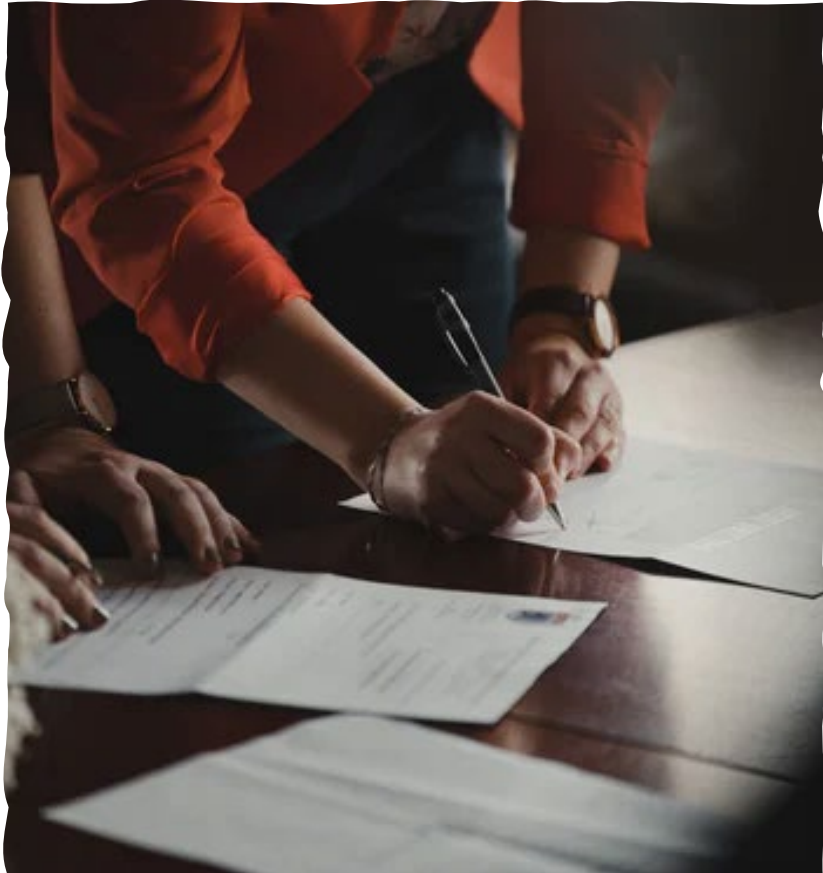
4. All incoming, continuing and transfer student-athletes have completed an annual disclosure related to their conduct that resulted in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.** Transfer student-athletes also must disclose whether a Title IX proceeding was incomplete at the time of transfer. Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.
5. Institutions have taken reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence.** In a manner consistent with federal and state law, all NCAA member institutions must share relevant discipline information and incomplete Title IX proceedings as a result of transfer with other member institutions when a student-athlete attempts to enroll in a new college or university.
6. An institution choosing to recruit an incoming student-athlete or accept a transfer student-athlete must have a written procedure that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the student left the institution with an incomplete Title IX proceeding, was disciplined through a Title IX proceeding or has a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to have it written and to gather information consistent with that procedure could result in penalties.

[Note: Item Nos. 4 to 6 above require attestation beginning with the 2022-2023 academic year attestation.]

NCAA Policy: Add'l Considerations

- Athletics department will cooperate with college or university investigations into reports and matters related to sexual and interpersonal violence involving student-athletes and athletics department staff in a manner compliant with institutional policies for all students.
- Schools that do not submit the required attestations will be prohibited from hosting any NCAA championship competitions for the next applicable academic year.
- International member schools and schools that do not receive federal funding, or are otherwise exempt from Title IX, must submit an annual attestation from the President, AD and Title IX coordinator or institutional staff member with comparable responsibilities.
- Covered Conduct:
 - Discipline through a Title IX proceeding or a criminal conviction, regardless of the degree, and whether the result of a plea or court determination, of either of the following:
 - Interpersonal Violence is defined to include violence that is predominantly caused due to the relationship between the victim and the perpetrator, including dating and domestic violence.
 - Sexual Violence is defined to include both forcible and non forcible sex offenses, ranging from sexual battery to rape.
 - Other Acts of Violence is defined to include murder, manslaughter, aggravated assault or any assault that employs the use of a deadly weapon or causes serious bodily injury.

Attestation: Prez, AD, TIX



- Requires annual attestations signed by the Director of Athletics, Title IX Coordinator, and President (CEO).
- BOG revisions to the Policy expanded its reach and attestation content, effective Fall 2023.
- Policy and FAQ are on the NCAA Website.
- How are schools approaching this?
 - Discussions with Title IX, General Counsel, and others on campus.
 - Explore compliance position.
 - Check state law.
 - Consider intersection with the 2020 Regs around Permissive Dismissals and Confidentiality.
 - What about the NPRM?

The tools you need for Equity in Athletics analysis

Get Data for One School

Search for a school to view general information and EADA statistical data for the most recent year.

Compare Data for Multiple Schools

Select up to four schools to see a side-by-side comparison of data for the most recent year.

Download Custom Data

Select the EADA statistical data you are interested in for one or more years and download data for a customized group of schools.

Generate Trend Data

Select a subject area and a question that you are interested in, and then see the answer for a selected year, build a table, and see a graph that shows the trend over time. You can customize your results by various institutional characteristics such as athletic sanctioning body, public or private, and state.

Download Data

Download the complete data file for all institutions from a single data collection. Files will include all data submitted by all institutions in the selected survey year.

PART 1: ATHLETIC EQUITY: EADA v Title IX

Athletic Equity Compliance: Three Separate and Independent Areas of Compliance



Participation



Financial Aid



Treatment



Equitable Participation: The Three Part Test



Substantial
Proportionality



History and Ongoing
Practice of Expansion



Full Accommodation
of Interest and Ability



Prong 1.

Male and female intercollegiate participation is provided in numbers substantially proportionate to their respective full-time undergraduate enrollment, or

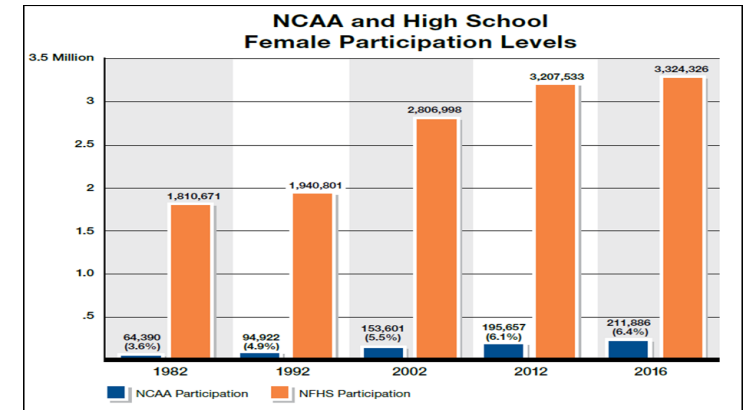
Prong 2.

The institution has a history and continuing practice of program expansion responsive to the developing interests and abilities of the members of the underrepresented gender, or

Prong 3.

The interests and abilities of the members of the underrepresented gender are fully and effectively accommodated by the present program.

Sport Cuts that Involve the Underrepresented Sex: Typically Require Prong 1 Compliance Post Program Elimination



ENFORCEMENT —

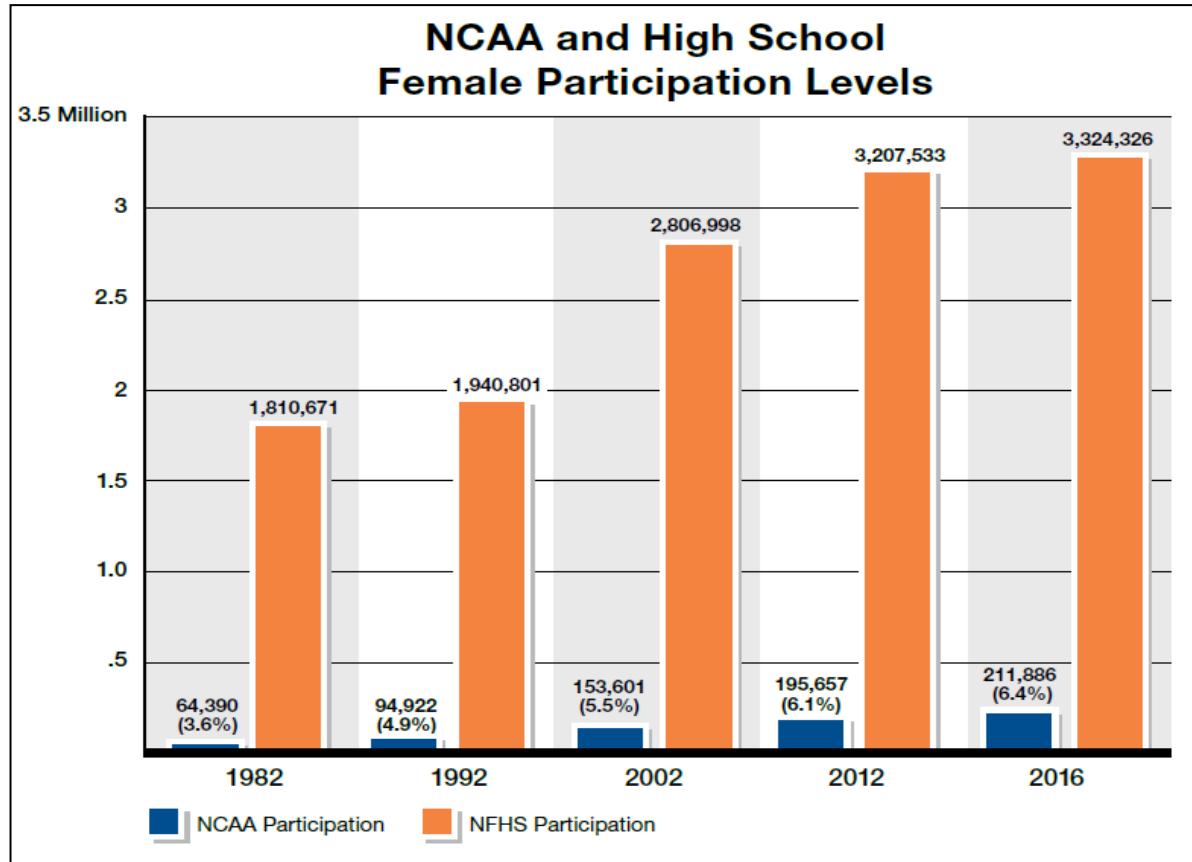
OCR: Investigation. Letter of Findings. 302 Resolution Agreement. Referral to DOJ.

Court: Injunctive Relief. Class Actions. Attorneys Fees, No Administrative Exhaustion. No Cap on Damages.

OCR Substantial Proportionality

- Amicus Brief (United States) in the Michigan State University (MSU) Case:
 - OCR “has not specified a magic number at which substantial proportionality is achieved.” *Equity In Athletics, Inc. v. Department of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011), cert. denied 565 U.S. 1111 (2012); see also *Biediger*, 691 F.3d at 106 (explaining that the Second Circuit did not “understand the 1996 Clarification to create a statistical safe harbor at [2%] or any other percentage”).
 - What matters *** is whether the participation gap is large enough to sustain a *viable* team. As the 1996 Clarification explains, where “it is likely that a viable sport could be added,” an institution will not satisfy the first prong. (1996 Clarification).
 - Here, the district court failed to conduct the necessary fact-intensive inquiry to determine whether a participation gap of at least 15 athletes (if not more) could sustain a *viable* women’s team.
 - **If [the school] can field a viable team of eight female tennis players, for example, it will not have satisfied [the substantial proportionality standard].**

Prong 3: Accommodating Interest & Abilities



Does the current line up of sports effectively accommodate the athletic interests and abilities of the underrepresented sex?

How is underrepresented sex determined?

Is there:

- unmet interest in a particular sport;
- sufficient ability to sustain a team in the sport; and
- a reasonable expectation of competition in the normal competitive area?

How much interest/ability/competition is enough?

What is the relevant pool to be assessed?

Final Participation Question: Are there Equitable Levels of Competition?

The competitive schedules for men's and women's teams, on a program-wide basis, afford proportionately similar numbers of male and female athletes equivalently advanced competitive opportunities;

OR

There exists a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.



**I AM GOING TO PUT
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CHRIS MOSIER

TITLE IX / [TRANSATHLETE.COM](https://transathlete.com) / NCAA

NCAA Transgender Student-Athlete Participation

- NCAA Summit on Gender Identity and Student-Athlete Participation (Oct. 2020)
- NCAA Policy Updated and Approved by Board of Governors in January 2022

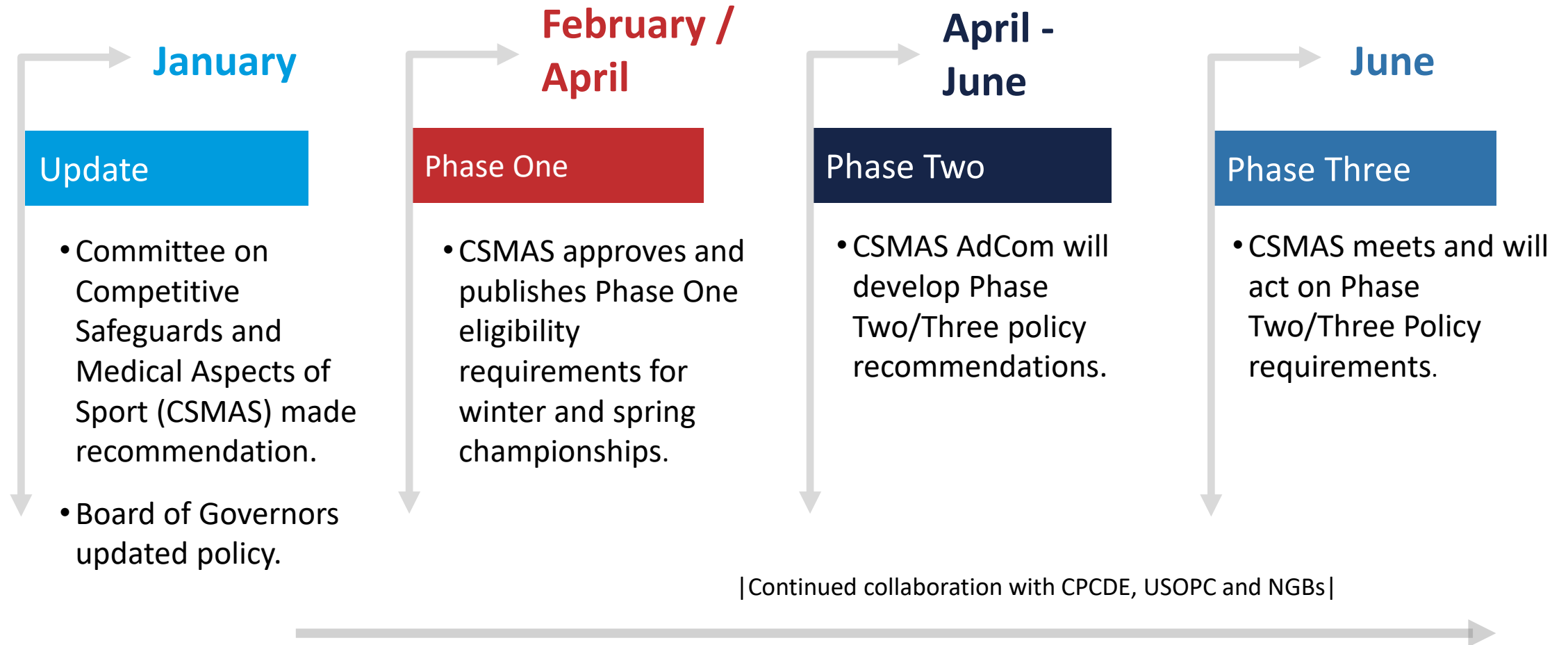
2022 Update to NCAA Policy

Alignment with Olympic Movement to balance fairness, inclusion and safety.

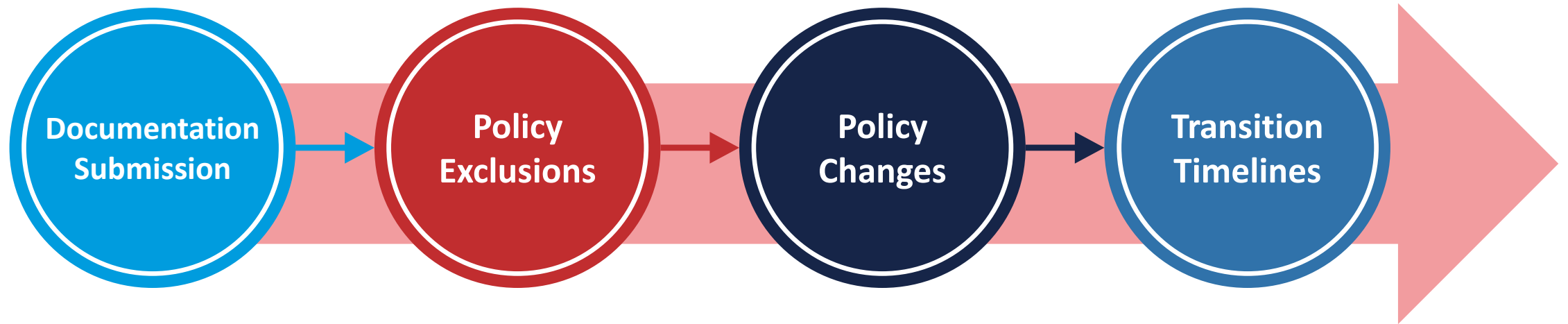
January 2022: Board of Governors (BOG) adopts policy as recommended by the Committee on Competitive Safeguards and Medical Aspects of Sport (CSMAS).

1. Trans student-athletes must continue to meet 2010 NCAA policy; and
2. Meet sport-specific policies that are reviewed and approved by CSMAS, in each case to be informed by national governing body policy (or international federation policy or 2015 IOC policy).
3. Implemented over three phases.


Timeline of TSAP Policy Work



Areas of TSAP Policy Work



Athletics-Based Financial Aid/Scholarship Equity



1%

“If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the “substantially proportionate” requirement.

Dear Colleague Letter – [Bowling Green](#) (July 23, 1998)

NON-EXHAUSTIVE AREAS OF REVIEW	MEN	>/</=	WOMEN
Equipment and Supplies: Apparel and Sports-Specific Equipment			
Scheduling and Access to Facilities: Practice, Competition			
Travel: Mode, Housing, Food			
Academics: Athletics-Specific: Personnel, Services, Compensation			
Coaches: Quantity, Quality, Compensation*			
Facilities/Spaces: Practice, Competition, Locker Room, Meeting Spaces			
Medical, Strength & Conditioning: Staff, Experience, Availability, Facilities			
Housing & Dining: Athletics-Specific On-Campus Support			
Publicity/Communications: Sports Information & Marketing			
Support Services: Administrative, Sport-Specific Staff, Office Space			
Recruiting: Financial & Other Support			



Sources of Funding

It's not a dollar-to-dollar analysis. Focus on goods and services. Where differences exist, OCR may focus on funding.

Private donations are institutional dollars and goods and services provided through private funding still count. In other words, those goods and services are included in the equity analysis.

See, e.g., Chalenor v. Univ. of North Dakota, 142 F. Supp. 2d 1154 (D.N.D. 2000)



How Does School Financial Support Factor In?

- Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance.
- The Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

34 CFR 106.41(c)



Are the Disparities Significant?

- Sex based differences in benefits or services that have a **negative impact** on athletes of one sex when compared with benefits or services available to athletes of the other sex.
- Significant Disparity must be **so substantial** as to deny equal opportunity to athletes of one sex.
- Disparities that are not significant are evaluated case-by-case.
- What are the non-discriminatory justifications?

An athletic program is gender equitable when the men's sports program would be *pleased to accept for its own* the overall participation, opportunities and resources currently allocated to the women's program and vice versa.

Retaliation Prohibited

Retaliation is intentional discrimination on the basis of sex.

Those who witness and raise concerns about discrimination are protected from adverse action they encounter because of the complaints.

Recognition that coaches, teachers, administrators and students are in the best position to witness and alert schools

See, e.g., Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005)





Compensation & Pay Equity

- **Title IX Program Review:**
Coaches of women's sports as compared to coaches of men's sports, and usually only when coaching inequities are otherwise identified.
- **Title IX Employment/EPA:**
Female coaches' salaries compared to male coaches' salaries.
 - Equal Pay for Equal Work
 - Non-Discriminatory Justifications
- **OFCCP Audits/Title VII/State Law**
- **Documenting & Auditing Compensation Systems/Approaches**

The 2020 Title IX Regulations

Application (per the preamble):

- “[T]he Department declines to address other topics . . . such as pregnancy, parenting, or athletics under Title IX, coverage of Title IX to fraternities and sororities, whether speech codes discriminate based on sex, funding intended to protect women or young adults on campus, funding cuts to girls’ programs by recipients, or forms of harassment other than sexual harassment.”
- These complaints “may be referred” to the recipient’s Title IX Coordinator to review under the grievance procedures required by these Regulations.
- “[T]he handling of non-sexual harassment sex discrimination complaints brought by students and employees (for instance, complaints of sex-based different treatment in athletics . . .) remains the same as under current regulations (*i.e.*, recipients must have in place grievance procedures providing for prompt and equitable resolution of such complaints).”

See Title IX Regulations, 85 FR 30026 at <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

Notice:

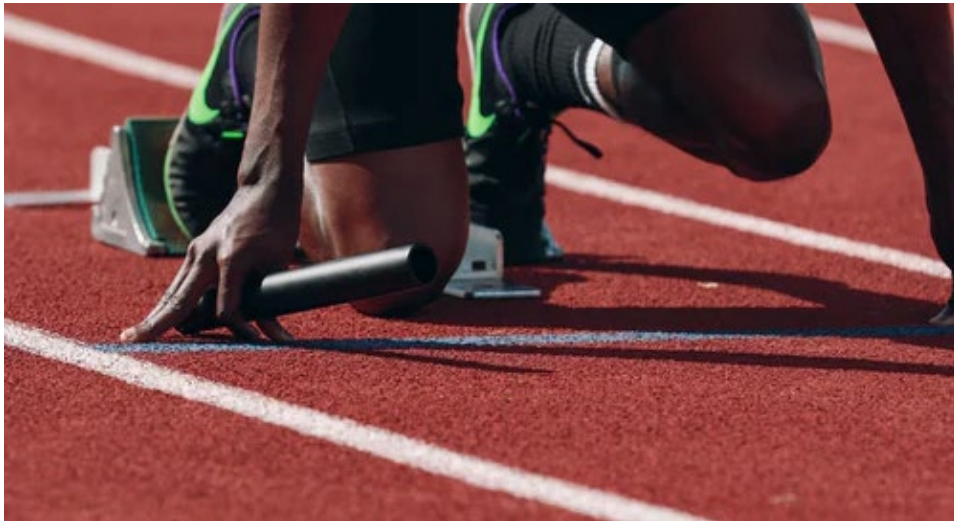
- Reporting in Athletics
 - Title IX Coordinator in Athletics?
 - Officials with Authority to address Sexual Harassment?
 - Who else is required to report?
 - Confidential? By licensure?
 - Limited confidentiality? Why?



Athletics:

Supportive Measures

- Can not punish, discipline, or unreasonably burden the respondent.
- Denials must be documented.



Emergency Removals

- A school may remove an individual from one or more education programs or activities in situations where the person poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations concludes (or where no grievance process is pending).
 - The school makes an individualized assessment that “an imminent threat to the physical health or safety of any person, *arising from* sexual harassment allegations, justifies removal,” **and**
 - The school provides an opportunity to challenge its determination.
- An emergency removal cannot be imposed simply *because* an individual has been accused of sexual harassment.
- The Regulations do not prohibit a school from addressing violations of a school’s code of conduct, policies, or laws, **provided the conduct does not constitute Title IX sexual harassment or is not “arising from” Title IX misconduct allegations.**

Findings, Sanctions, & Appeals

What are the Potential Roles of the Title IX Office Around Athletics?



- Oversight for Title IX
- Oversight for NCAA Policy
- Policy Oversight, Training, and Attestation
- Outside Title IX Speaker Review and Approval
- Evaluation of Equity and Sexual Misconduct Complaints
- Support and Emergency Removals
- EADA Report Review
- Equity Committee Membership

Infusing Equity: Consider a Supplemental Policy

Sample Language:

This policy supplements the overall school policy prohibiting sexual harassment, [provide link] which also applies to all members of the athletics department, both staff and student-athletes.

School U. values the educational aspect of athletics and as such offers opportunities to compete in a [NAIA/NCAA] Division [I, II or III] varsity athletics program and is a member of the [name] conference[s], club level and intramural programs. School U. believes that its student-athletes should be provided gender equitable participation opportunities, receive gender equitable athletic scholarships, and be afforded gender equitable treatment overall.

To report an athletics gender equity concern or to a request for varsity status for an athletic team not currently offered at the varsity level, please contact School U's Title IX Coordinator, titleix@schoolu.edu, Office 405, University Hall, 8-4490.

No Retaliation Policy:

Employees and/or students who ask questions, seek advice or report a suspected violation of this policy are protected by School U's no retaliation policy. Retaliation will not be tolerated. If you suspect that you or another employee may be the victim of retaliation, you should contact TIX immediately. Those who violate the No Retaliation policy are subject to discipline.

IMPORTANT: Consider how complaints would be managed and findings would be implemented.

Questions?



Note

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