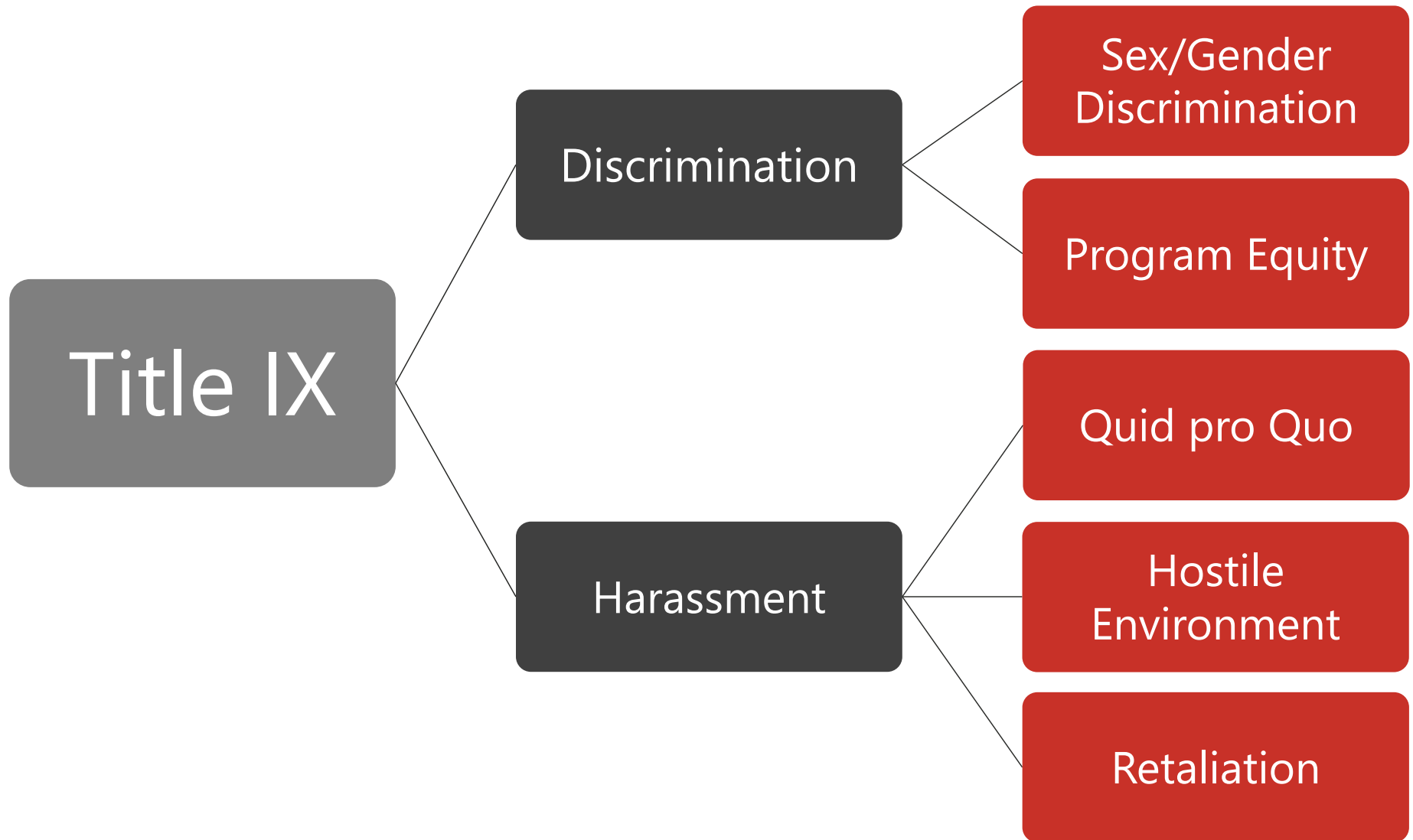




TITLE IX COMPLIANCE AND ATHLETICS

- Overview and History of Title IX and Athletics
- Accommodation of Interests and Abilities
 - The Three-Part Test
 - Levels of Competition
- Accommodation of Interests and Abilities
- Athletic Financial Assistance
- Other Athletic Benefits and Opportunities
- Red Flags
- Sexual Harassment, Sexual Violence and Intimate Partner Violence in Sports
- Inter- and Intra-squad Dating





“TOO STRONG FOR A WOMAN”



The Genesis for Title IX

- Bernice Sandler story
- Title IX is patterned after Title VI of the Civil Rights Act of 1964, the portion of the landmark law that prohibits discrimination on the basis of race, color, and national origin in federally funded programs.
- President Lyndon Johnson – Executive Order 11246 – to include “sex” as a criterion for “minority group”.
- Bunny Sandler was the first person to realize that Executive Order 11246 (and Title VI) could be used to help open doors of colleges and universities to women.

HISTORY OF TITLE IX & ATHLETICS



- Athletics is not mentioned in the 1972 Title IX statute
- Proposed regulations (1974) did and created a fire-storm
- Regulations passed in 1975 and athletics was given three years to comply
- Dec. 11, 1979, HEW issued the “intercollegiate Athletics Policy Interpretation”
 - Contained the ‘Three-Part Test’ to determine Title IX compliance with student interests and abilities
- 1984: Grove City College v. Bell – Exempted most athletic programs from Title IX

HISTORY OF TITLE IX & ATHLETICS



- 1988: Civil Rights Restoration Act restored Title IX's application to athletics.
- 1990s: OCR studied the efficacy of the Three-Prong Test and institutions' compliance with it.
- 1996: Issued "Clarification on Intercollegiate Athletics Policy Guidance: The Three-Part Test."
- 2003: OCR again examined the Three-Part Test and restated that it remained unchanged.
- 2005: "Additional Clarification" from OCR that weakened 3-part test.
- 2010: OCR rescinded 2005 guidance.

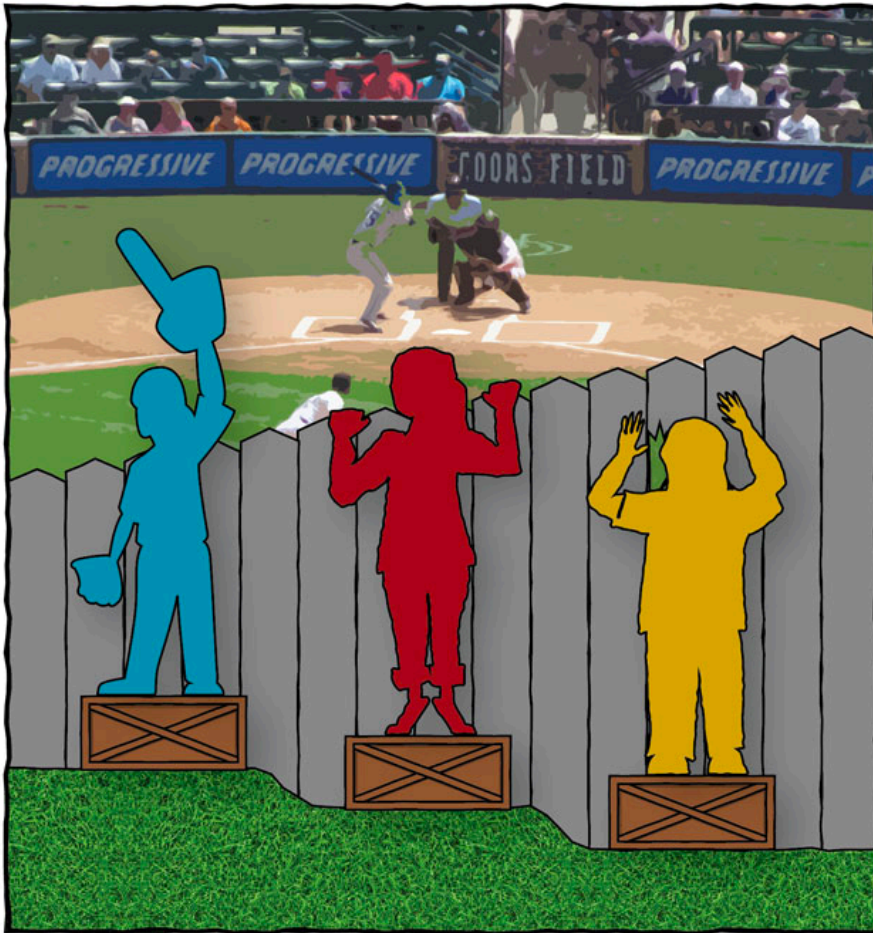
DEAR COLLEAGUE LETTERS



- Sept. 17, 2008 Criteria for a Sport
- April 4, 2011* Sexual Violence
- Jan. 25, 2013 Disabled Student-Athletes
- April 24, 2013 Retaliation
- June 23, 2013 Pregnant and Parenting Students
- Oct. 1, 2014* OCR Enforcement
- April 24, 2015 Title IX Coordinators
- May 12, 2016* Transgender Students
- June 15, 2016 Career & Technical Education
- Feb. 22, 2017 - Transgender Students (withdraws guidance of the 5-1-16 DCL)
- Sept. 22, 2017 Rescind DCL on Sexual Violence April 4, 2011 and
Q&A on Title IX Sexual Violence April 29, 2014
- *currently rescinded

- Applies to:
 - Interscholastic athletics
 - Intramurals
 - Club teams
- However, 3-part test and the 13 program components are typically not as problematic for Intramurals and clubs because those programs are self-initiated and benefits provided by the institution are far fewer.

EQUITY DEFINED



EQUALITY



EQUITY

- Title IX DOES require an institution to:
 - Provide equal **opportunities** for female and male students to become intercollegiate athletes.
 - Analyzed by means of a three-part test (“Prongs”)
 - Provide equitable treatment of **participants** in the overall girls’ program as compared to the overall boys’ program.
 - Analyzed according to thirteen (13) different program components. (The “Laundry List”)

Source: Valerie McMurtrie Bonnette (2004), Title IX and Intercollegiate Athletics, p.7.

TITLE IX & ATHLETICS



- Title IX DOES NOT require an District/School to:
 - Provide the same funding to the overall girls' and boys' programs
 - Provide the same funding to girls' and boys' teams on the same sport
 - Provide specific benefits to teams
 - Offer the same number of teams for girls and boys
 - Offer the same sports for girls and boys
 - Provide the same benefits to girls' and boys' teams in the same sport
 - Compete at a specific level

Source: Valerie McMurtrie Bonnette (2004), Title IX and Intercollegiate Athletics, p.7.

OVERSIGHT OF ATHLETICS GENDER EQUITY



- Title IX compliance requirements:
 - Effective accommodation of interests and abilities
 - Financial assistance proportionality (not applicable to interscholastic)
 - Treatment of student-athletes
- Compliance may be delegated but at most K-12 schools this will be the responsibility of the school or district ADs.
- The oversight of compliance remains the responsibility of the Title IX coordinator.

THE THREE-PART TEST: ACCOMMODATION OF INTERESTS AND ABILITIES

1. Proportionality
2. Program Expansion
3. Full Accommodation

OVERSIGHT OF ATHLETICS

GENDER EQUITY: THREE-PART TEST (1979)

Effective accommodation of interests and abilities (this is an "or" test, not an "and" test):

- **Prong 1:** Opportunities for males and females substantially proportionate to their respective enrollments; OR
- **Prong 2:** Where one sex has been underrepresented, a history and continuing practice of program expansion responsive to the developing interests and abilities of that sex; OR
- **Prong 3:** Where one sex is underrepresented and cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program

COUNTING PARTICIPANTS



- For purposes of Title IX compliance, a “participant” is defined as those athletes who:
 - Regularly receive institutionally-sponsored support normally provided to athletes, and/or
 - Regularly participate in organized practices or team meetings and activities during the season, and/or
 - Are listed on the eligibility or squad list or
 - Are injured, but continue to receive financial aid or other support on the basis of athletic ability

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

COUNTING PARTICIPANTS



- “Participants” also include those who:
 - Are listed on a team's squad or eligibility list AND are on the team *as of the team's first competitive event*
 - Join the team during the season*
 - Are a walk-on
 - Are a member of the JV, freshman, “B” team, etc.
 - Quit or were cut after the first competitive event
 - Are a Redshirt athlete
 - Are a mid-year transfer eligible to participate in the spring

**Season begins on the date of a team's first intercollegiate competitive event and concludes on the date of the final intercollegiate competitive event.*

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation; OCR (1996). Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test; Bonnette, pp. 91-92.

COUNTING PARTICIPATION OPPORTUNITIES



- The following are not participants (*Even if on scholarship)
 - Unfilled team slots or positions
 - e.g., 30 SB slots, only 25 players does not equal 30 participants
 - Club, intramural and recreation program participants
 - Cheerleaders*
 - Athletes who quit or are cut BEFORE first competitive event of the season
 - Sport participants out of season (e.g.: spring football)
 - Scrimmage or practice squads
 - Student managers*, student coaches*, student trainers*
 - Students who are academically ineligible*
 - Mid-year transfers if no spring season*

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation. OCR (1996). Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test; Bonnette, pp. 91-92.

PRONG/PART 1: PROPORTIONALITY

OPPORTUNITIES FOR MALES AND FEMALES SUBSTANTIALLY PROPORTIONATE
TO THEIR RESPECTIVE ENROLLMENTS



- Substantially proportionate accounts for natural fluctuations in enrollment and participation rates, but schools must adjust if shifted enrollment or participation shifts persist.
- OCR uses a case-by-case analysis, rather than a rigid statistical requirement (e.g.: within 1% of student body).
- OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team.

Source: OCR (1996). Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.

PRONG/PART 2: PROGRAM EXPANSION

HISTORY AND CONTINUING PRACTICE OF PROGRAM EXPANSION RESPONSIVE TO THE DEVELOPING INTERESTS AND ABILITIES OF THE UNDERREPRESENTED SEX



- In analyzing a history of program expansion, OCR considers:
 - A school/district's record of adding teams, or upgrading team's status, for the underrepresented sex;
 - A school/district's record of increasing the numbers of participants in athletics who are members of the underrepresented sex; and
 - A school/district's affirmative responses to requests by students or others for addition or elevation of sports.

Source: OCR (1996). Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.

PART/PRONG 2: PROGRAM EXPANSION

HISTORY AND CONTINUING PRACTICE OF PROGRAM EXPANSION RESPONSIVE TO THE DEVELOPING INTERESTS AND ABILITIES OF THE UNDERREPRESENTED SEX



- In analyzing a continuing practice of program expansion, OCR considers:
 - A school/district's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students/parents; and
 - A school/district's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

Source: OCR (1996). Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.

PART 3: FULL ACCOMMODATION (UNMET INTEREST)

WHETHER IT CAN BE DEMONSTRATED THAT THE INTERESTS AND ABILITIES OF THAT SEX HAVE BEEN FULLY AND EFFECTIVELY ACCOMMODATED BY THE PRESENT PROGRAM



- OCR will consider whether:
 - There is sufficient unmet interest to support a varsity or JV team
 - There is sufficient ability to sustain an varsity or JV team
 - There is a reasonable expectation of competition for the varsity or JV team

Source: OCR (1996). Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.

PART 3: FULL ACCOMMODATION (UNMET INTEREST)

WHETHER IT CAN BE DEMONSTRATED THAT THE INTERESTS AND ABILITIES OF THAT SEX HAVE BEEN FULLY AND EFFECTIVELY ACCOMMODATED BY THE PRESENT PROGRAM



- Determining unmet interest
 - Requests from Athletes, Students, Coaches and other constituents
 - Vibrant Club team – why not elevated to varsity
 - Surveys (annual)
 - What is offered in your conference, region, feeder schools?

Source: OCR (1996). Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.

LEVELS OF COMPETITION

1. Equivalently Advanced Competitive Opportunities
2. Upgrades of Competitive Opportunities

LEVELS OF COMPETITION



OCR assesses compliance by examining:

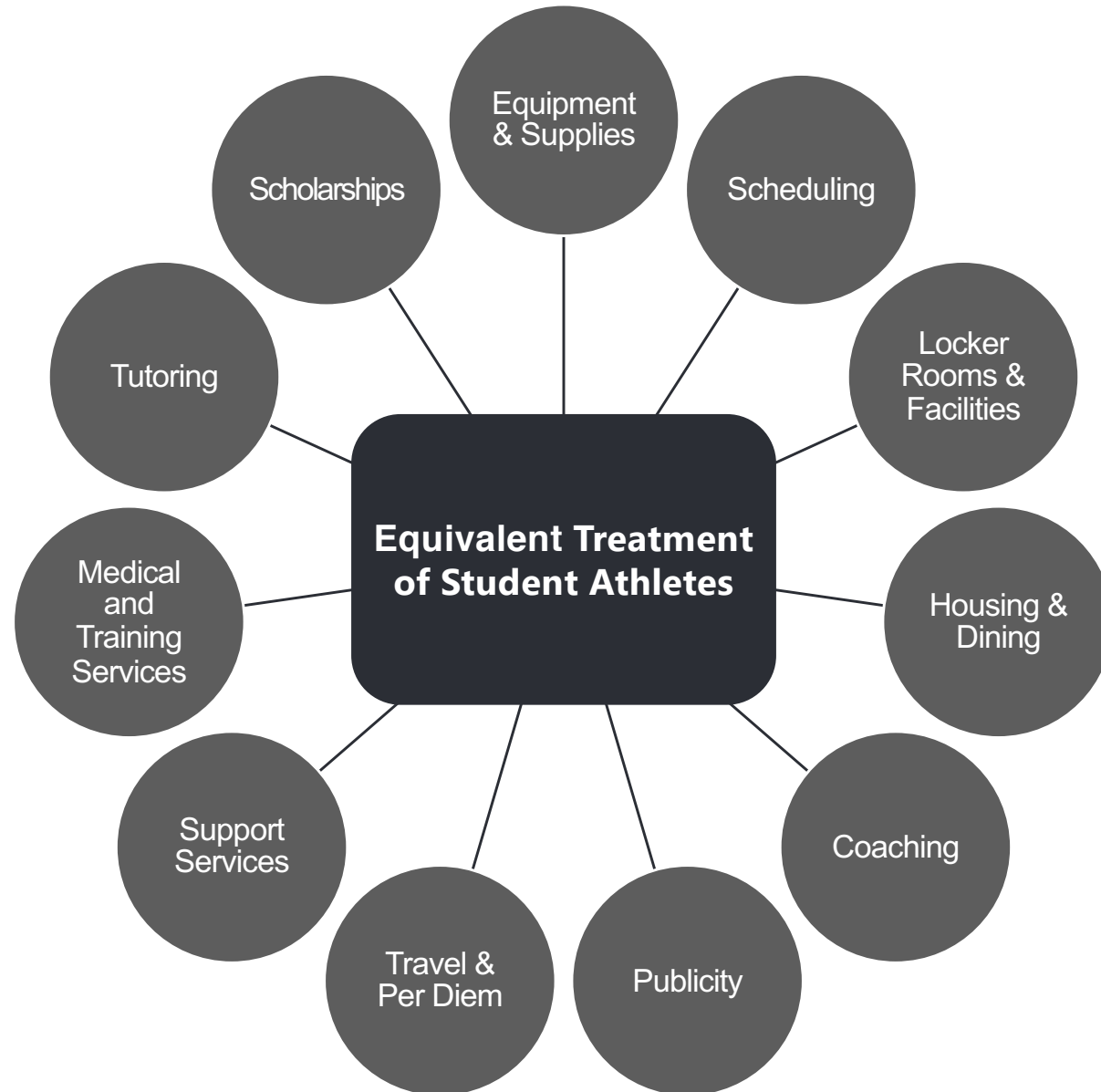
1. Whether the competitive schedules for boys' and girls' teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; OR
2. Whether the School/District can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

"OTHER ATHLETIC BENEFITS AND OPPORTUNITIES"

- Equipment and supplies
- Scheduling (games and practice times)
- Travel and per diem allowance
- Coaches
- Tutors
- Locker rooms and other facilities
- Medical and training services
- Housing and dining services
- Publicity
- Recruitment of student athletes
- Provision of support services

13 FACTORS TO CONSIDER FOR EQUITY AKA “THE LAUNDRY LIST”



Key factors in examining the equivalence for boys and girls (Good-Better-Best analysis) :

- The quality of equipment and supplies
- The amount of equipment and supplies
- The suitability of equipment and supplies
- The maintenance and replacement of the equipment and supplies
- The availability of equipment and supplies

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

SCHEDULING OF GAMES AND PRACTICE TIMES



Key factors in examining the equivalence for men and women:

- The number of competitive events per sport
- The number and length of practice opportunities
- The time of day competitive events are scheduled
- The time of day practice opportunities are scheduled
- The opportunities to engage in available pre-season and post-season competition

K-12 athletics: the number of times students compete is a major benefit.

Key factors in examining the equivalence for boys and girls:

- Modes of transportation
- Housing furnished during travel
- Length of stay before and after competitive events
- Per diem allowances
- Dining arrangements

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

Key factors in examining coaching:

- Opportunity to receive coaching
 - Relative availability of full-time coaches
 - Relative availability of part-time and assistant coaches
 - Relative availability of graduate assistants
 - Volunteers
- Assignment of coaches
 - Training, experience, and other professional qualifications
 - Professional standing

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

Key factors in examining coaching:

- Compensation of coaches
 - Rate of compensation (per sport, per season)
 - Duration of contracts
 - Conditions relating to contract renewal
 - Experience
 - Nature of coaching duties performed
 - Working conditions
 - Other terms and conditions of employment

In the K-12 world, OCR considers Coaching a big deal.

Key factors in examining the equivalence for boys and girls:

- Academic Tutoring
 - The availability of tutoring
 - Procedures and criteria for obtaining tutorial assistance
- Assignment of Tutors
 - Tutor qualifications
 - Training, experience, and other qualifications
- Compensation of Tutors
 - Hourly rate of payment by nature subjects tutored
 - Pupil loads per tutoring season
 - Tutor qualifications
 - Experience
 - Other terms and conditions of employment

LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES



Key factors in examining the equivalence for boys and girls:

- Quality and availability of the facilities provided for practice and competitive events;
- Exclusivity of use of facilities provided for practice and competitive events;
- Availability of locker rooms;
- Quality of locker rooms;
- Maintenance of practice and competitive facilities; and
- Preparation of facilities for practice and competitive events.

Source: HEW (1979) Intercollegiate Athletics Policy Interpretation.

Key factors in examining the equivalence for men and women:

- Availability of medical personnel and assistance.
 - Health, accident and injury insurance coverage.
 - Availability and quality of weight and training facilities.
 - Availability and quality of conditioning facilities.
- Source: H.M.V. (1979). Intercollegiate Athletics Policy Interpretation.

HOUSING AND DINING FACILITIES AND SERVICES



Key factors in examining the equivalence for boys and girls:

- Housing provided
- Special services as part of housing arrangements (e.g., laundry facilities, parking space, maid service)
- Generally not an issue at K-12

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

Key factors in examining the equivalence for boys and girls:

- Availability and quality of sports information personnel;
- Access to other publicity resources for boys' and girls' programs; and
- Quantity and quality of publications and other promotional devices featuring boys' and girls' programs.

RECRUITMENT OF STUDENT ATHLETES



Key factors:

- Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;
- 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; and
- 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.
- Interscholastic/K12 issues: coaches having access to students to recruit to their team. Teacher-coaches vs. non-teacher coaches.

Source: HEW (1979). Intercollegiate Athletics Policy Interpretation.

The 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.

Key factors:

- The amount of administrative assistance provided to men's boys' and girls' programs;
- The amount of secretarial and clerical assistance provided to boys' and girls' programs.

OTHER CONSIDERATIONS



- Transgender athletes
 - Title IX and Equal Protection Clause
 - Current state of federal regulations
 - Withdrawal of Obama-era protections
 - State laws
 - Current litigation in Idaho and Connecticut
- Consider:
 - Sex-segregated sports teams
 - Locker rooms/bathroom
 - Institution-wide policies

RED FLAGS TO LOOK FOR AND ASK ABOUT

- Proportionality
- Program Expansion
- No Unmet Interest
- Retaliation
- Equal Pay
- Hostile Environment

"Our proportionality is within 5 percentage points - close enough!"

"We will reach proportionality through roster management!"

"We just added a girl's team so we definitely are in compliance

"It's OK, we are cutting a boy's and a girl's team!"

"But no one has complained about our lack of girl's sports!"

"We absolutely have enough money to add a new boy's team!"

Gender imbalance on the coaching staff.

Closed hiring.

Salaries not benchmarked.

Booster clubs and donations for single sports

Complaints about hostile environment

Coaches raising money for just their teams

SEXUAL HARASSMENT, SEXUAL VIOLENCE AND INTIMATE PARTNER VIOLENCE AND SPORT

- Recent Examples
- Instructive Cases
- Prevalence
- NCAA Position
- Definitions
- Obligations
- Challenges

COLLEGIATE ATHLETICS AND SEXUAL VIOLENCE: SOME EXAMPLES



- Florida State University
- University of Montana
- University of Georgia
- University of Colorado
- Vanderbilt University
- Oregon State University
- Xavier University
- University of Missouri
- University of Notre Dame
- Steubenville HS, Ohio
- Damascus HS, Md. (Hazing)



UNDERSTANDING THE THREE FORMS OF SEXUAL HARASSMENT



Sexual Harassment is

Unwelcome conduct of a sexual nature or that is sex or gender-based

Based on power differentials
(**quid pro quo**),

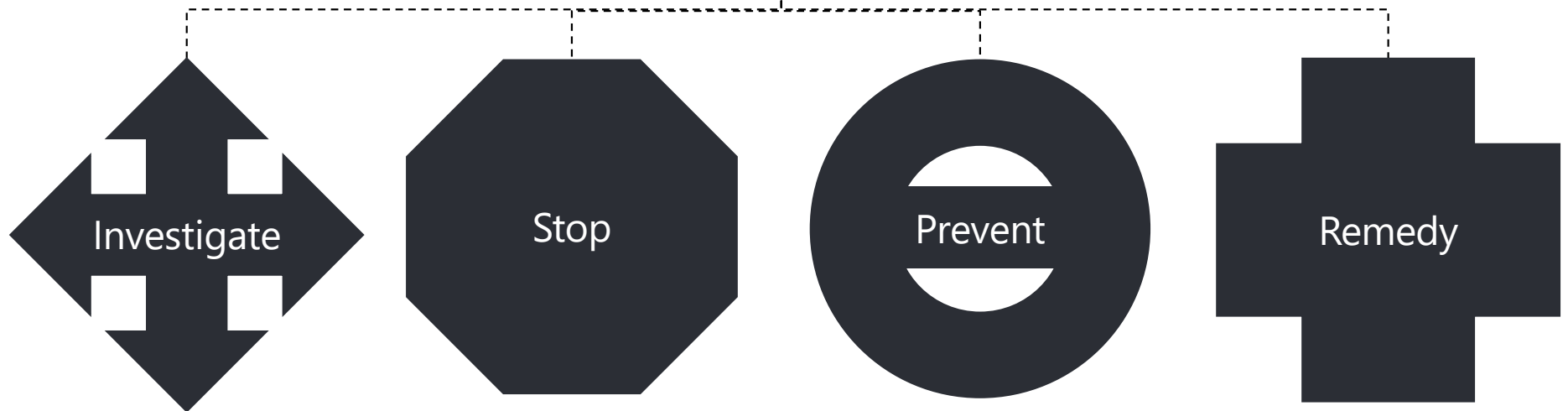
The creation of a
hostile environment,
or

Retaliation

INSTITUTIONAL OBLIGATIONS UNDER TITLE IX



Sexual Harassment



THE IX COMMANDMENTS



Investigation	Process	Remedies
Thorough	Prompt	End the Discrimination
Reliable	Effective	Prevent its Recurrence
Impartial	Equitable	Remedy the effects upon the victim & community

INSTRUCTIVE CASES



- *Simpson v. Univ. of Colorado Boulder*. 500 F.3d 1170 (10th Cir. 2007).
 - Off-campus events.
 - Climate.
- *Williams v. Bd of Regents of Univ. of Georgia*. 477 F.3d 1282 (11th Cir. 2007).
 - Student histories and notice.
- *Jennings v. UNC Chapel Hill*. 482 F.3d 686 (4th Cir. 2007).
 - Climate in locker room.
 - Player evaluation meetings.
 - Power of a coach
- *Jackson v. Birmingham*, 544 U.S. 167 (2005).
 - Retaliation

MORE INSTRUCTIVE CASES



- *Ollier v. Sweetwater Union School District,*
- *T.S., et al. v. Red Bluff Joint Union High School District,*
- *Working, et al. v. Lake Oswego,*
- *Hamilton* (Hazing case – also criminal)
- (Sexual Harassment) Chicago Public Schools – loss of federal dollars

UNIQUE CHALLENGES: TITLE IX AND STUDENT ATHLETICS



- Athletic department hostile educational environment.
- Insularity of teams and the athletic department
- Protectionism of teams and athletic department
- Coach-Athlete dynamic
 - Power-based
 - Trust-based
 - Recruitment
 - Performance meetings
- Coach-coach dynamic



UNIQUE CHALLENGES: TITLE IX AND STUDENT ATHLETICS



- Male privilege
- Body Image and focus on the body (especially girls)
- Student-athlete on student-athlete violence.
- Power dynamics
- "Revenue" vs. non-revenue sports.
- Must-win mentality



UNIQUE CHALLENGES: TITLE IX AND STUDENT ATHLETICS



- Culture of violence and aggressive behavior in sports.
- Male bonding and group loyalty.
- Sexualization and subordination of girls in boys team sports.
- Approval of sexist language and attitudes.
- Perception of "groupie culture."
- Celebrity sense.
- Entitlement.

MANAGING DATING RELATIONSHIPS AMONG TEAMMATES



Frame intra-team dating as part of broader relationship management issues that can distract a team from their competitive goals, such as:

- Best friends on a team being cliquey or having a big falling out
- Two people on a team dating the same person on another team
- One teammate getting dumped by her boyfriend and then he starts dating one of her teammates
- Heterosexual dating on a mixed team
- Heterosexual dating on boys' and girls' teams that practice together and travel to competitions together
- Same-sex teammates dating on a boy's or on a girl's team
- Conflicts between teammates based on race
- Conflicts between teammates based on sexuality
- Conflicts between teammates based on religion

MANAGING DATING RELATIONSHIPS AMONG TEAMMATES



- Develop policy that applies to all relationship management issues rather than focusing on same-sex teammates dating
- Make policies about dating apply to all dating relationships not just same-sex relationships
- Range of possible policies on intra-team dating:
 - Prohibit intra-team dating (Not recommended)
 - Ignore intra-team dating (Not recommended)
 - Proactively set expectations for intra-team dating and other dating relationships and interpersonal conflict on the team (Recommended)

Source: Pat Griffin, UM-Amherst

QUESTIONS?



CASE STUDIES



- Counting athletes
- Macro counting \$\$ (in state v out of state)
- Tier 1 sport (M & W)
- Equipment plan (K12 and IHE)
- Scheduling problem (preseason IHE, SB v BB at k12)
- Travel (school bus v charter v drive yourself v air)
- Food buffets v per diem