

**Title IX Coordinator
Training Online Course**

**Class Six: Athletics
Equity and Applying the
New Regulations**

Amy C. Foerster
Attorney and Higher Education Professional

Melinda Grier
Melinda Grier Consulting & Novus Law Firm, Inc.

Janet P. Judge
Partner, Holland & Knight LLP

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



1

Class Overview



- Athletic Equity
- Pay Equity
- Practical Effects of the New Regulations
- Training/Related NCAA Requirements


NACUA
National Association of College and University Attorneys



2




3



Sources of Law, Title IX Enforcement, and the impact of Pandemics (NCAA does NOT enforce Title IX)

Schoolhouse Rock:
<https://www.youtube.com/watch?v=tEPd98CbbMk>

The bottom of the slide features the NACUA logo and the text 'National Association of College and University Attorneys' in a white, sans-serif font, set against a red and black geometric background.

4

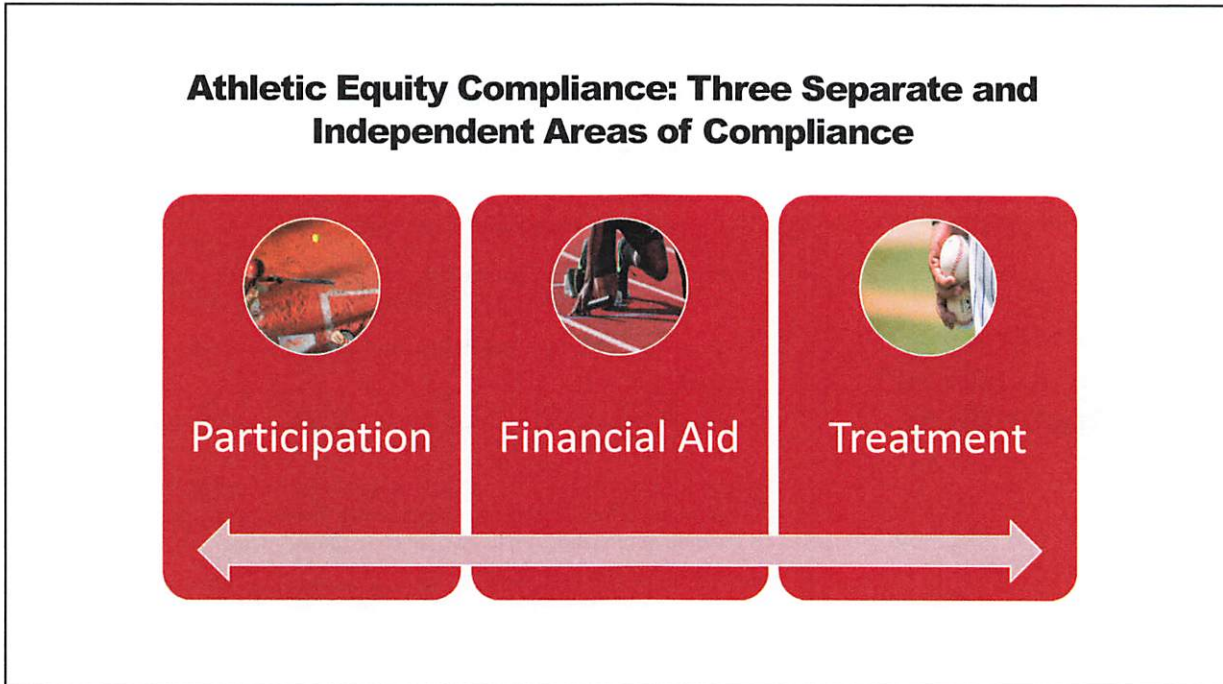
U.S. DEPARTMENT OF EDUCATION
EADA Equity in Athletics
Data Analysis

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

5



6

Activities counted as Sports for purposes of Title IX

- NCAA Championship sports are presumed to be countable.
- For non-NCAA sports, a review may consider the following, among other factors:

PROGRAM STRUCTURE AND ADMINISTRATION —

Is the program provided a budget, support services, access to coaching, equitable eligibility for athletics scholarships and awards, and are the student-athletes recruited in a manner consistent with established varsity sports?

TEAM PREPARATION AND COMPETITION —

Does the team practice and compete in a manner consistent with established varsity sport programs? Included in this review, among other factors, are the following considerations:

- Are there standardized rules of play and competition criteria for the sport?
- Are the support services provided based on the competitive needs of the program?
- Is post-season play determined by regular season performance?
- Is team selection based on athletics ability?

Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance (OCR 2008), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>.

7

Title IX Countable Participation Opportunity

OCR defines a Title IX Participant as one:

1. who is receiving the institutionally sponsored support normally provided to athletes competing at the institution involved (e.g., coaching, equipment, medical and training room services) on a regular basis during a sport's season; and
2. who is participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
3. who is listed on the eligibility or squad lists maintained for each sport; or
4. who, because of injury, cannot meet 1, 2, or 3 above but continues to receive financial aid on the basis of athletic ability.

Per guidance, "OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event."

Dear Colleague Letter, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC. (Jan. 16, 1996) available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

8

What about . . .



9

Equitable Participation: The Three Part Test



Prong 1.
Male and female intercollegiate participation is provided in numbers substantially proportionate to their respective full-time undergraduate enrollment, or

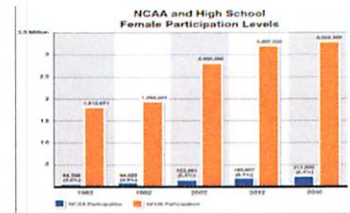
Prong 2.
The institution has a history and continuing practice of program expansion responsive to the developing interests and abilities of the members of the underrepresented gender, or

Prong 3.
The interests and abilities of the members of the underrepresented gender are fully and effectively accommodated by the present program.

Dear Colleague Letter, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, OFFICE FOR CIV. RIGHTS, U.S. DEPT. OF EDUC. (Jan. 16, 1996)) available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

10

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



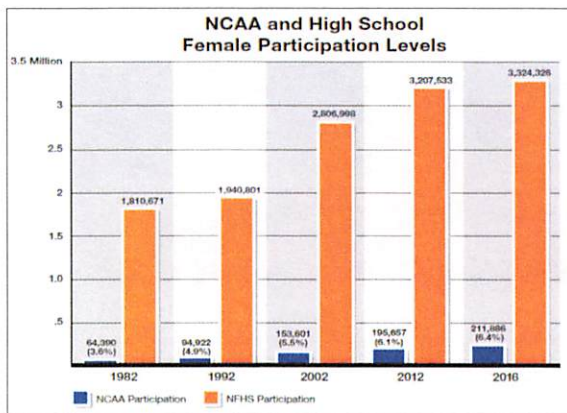
ENFORCEMENT —

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

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

11

Prong 3: Accommodating Interest & Abilities



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

What is the underrepresented sex?

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?

12

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.

13

Athletics-Based Financial Aid/Scholarship Equity



"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.

We would like to clarify that use of statistical tests is not appropriate in these circumstances."

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

14



15

Non-Exhaustive Areas of Review	Men's Program Overall	>/</=	Women's Program Overall
Equipment and Supplies (Apparel and Equipment)			
Scheduling (Practice, Competition)			
Travel (Mode, Housing, Food)			
Tutors/Academic Services (Personnel, Services)			
Coaches (Quantity, Quality, Compensation*)			
Facilities/Spaces (Practice, Competition, Locker Room)			
Medical (Personnel, Experience, Availability)			
Housing & Dining (Home)			
Publicity/Communications (Sports Information & Marketing)			
Support Services (Administrative, Office, Support)			
Recruiting (Financial & Other Support)			


16


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)




NACUA
 National Association of College and University Attorneys

17

Are the Disparities Significant? OCR v Judicial Review



Difference, on the Basis of Sex

- in benefits or services that has a . . .
- negative impact on athletes of one sex . . .
- when compared with benefits or services available to athletes of the other sex.


Disparity:

- So Substantial as to Deny Equal Opportunity to Athletes of One Sex.

Disparities that are not Substantial. . .

- Evidence to be Evaluated on a case by case basis.

See, e.g., Policy Interpretation, 44 Fed. Reg at 71,417 (1979).


NACUA
 National Association of College and University Attorneys

18

Retaliation Prohibited

Retaliation is intentional discrimination on the basis of sex.

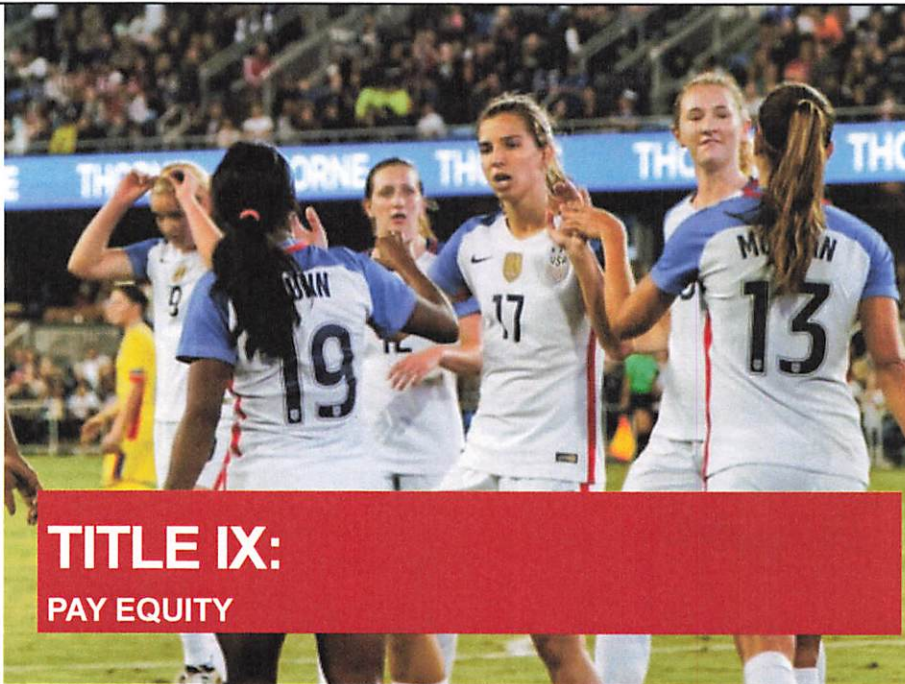
One who witnesses and complains about discrimination is protected from adverse action they encounter because of the complaints.

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)



NACUA
National Association of College and University Attorneys

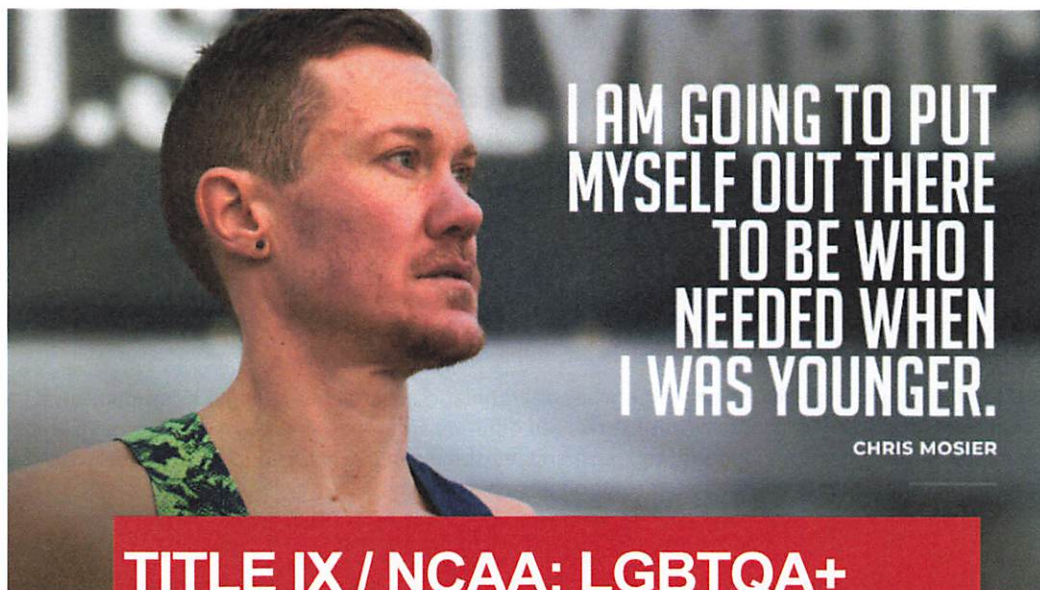


**TITLE IX:
PAY EQUITY**

Compensation and 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**

21



22



23

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>

24

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.

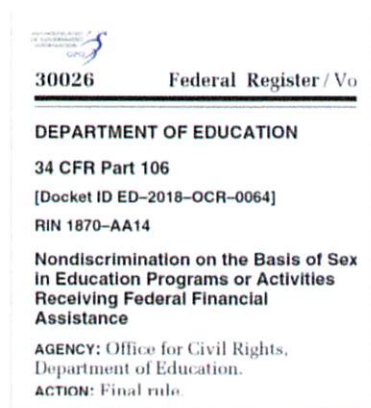
To report an athletics gender equity concern or to a request for varsity status for an athletic team not currently offered at the varsity level, please contact School U's Title IX Coordinator, titleix@schoolu.edu, Office 405, University Hall, 8-4490.

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.

Discussion



- Title IX Coordinator and Deputies
- Actual Knowledge/Reporting Responsibilities*
- Definitions of Prohibited Conduct
- Supportive Measures*
- Formal Complaints/Notice/Investigation
- Confidentiality
- Advisors
- Jurisdiction/Mandatory v. Permissive Dismissals
- Emergency Removals*
- Informal Resolution
- Findings/Sanctions/Appeals*

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?





NACUA
National Association of College and University Attorneys

27

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



NACUA
National Association of College and University Attorneys

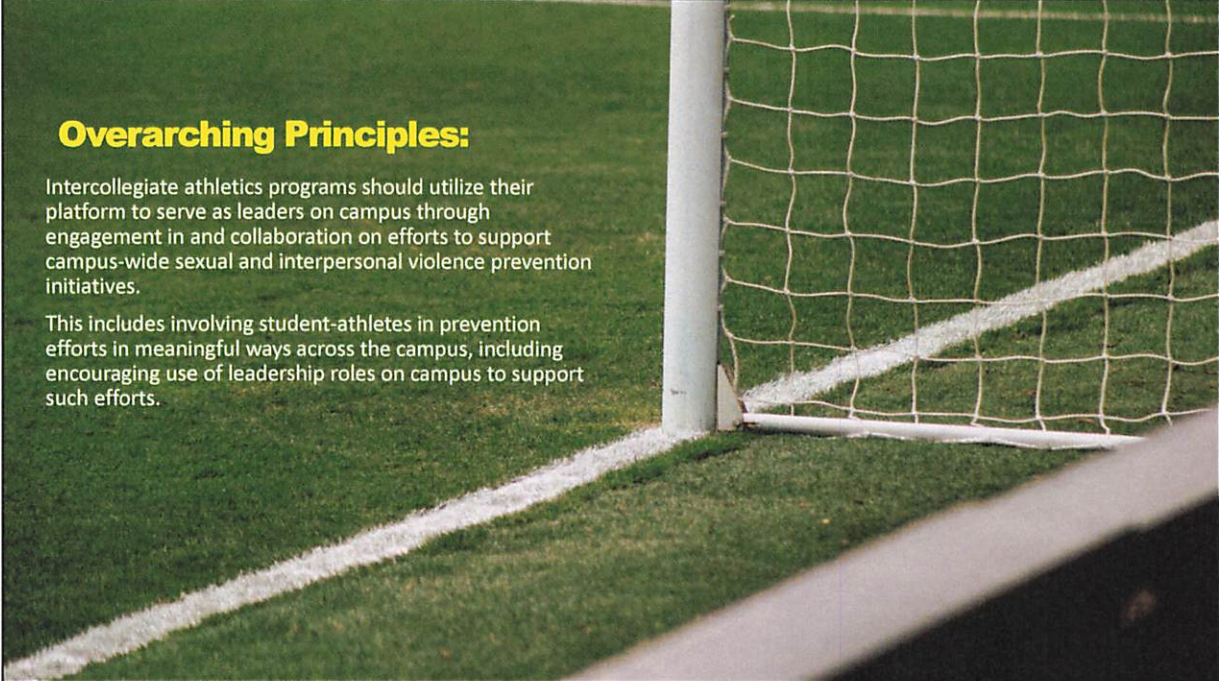
28

Training:

- Annual Per NCAA Requirements
- All Staff
 - Administration
 - Team Doctors/ATC
 - Support Staff
 - Coaches
 - GAs and Paid Student Workers
- Student-Athletes
- Cross Campus Engagement
- Reporting Protocols
- Complaint Avenues
- In Person and Safe
- Protocols for Outside Speakers
- Importance of Face Time
- Retention/Time of Day/Time of Year
- Sport Examples
 - Consider Student Involvement/Investment
- Culture of Sport/Supervisor
- Confidential Resources
- Support for Complainants and Respondents
- Spotlight/Speed/Updates/Engagement
- Head Coach Culture of Compliance

Complying with NCAA Requirements: Policy and Attestation

- NCAA Board of Governors adopted a Policy on Campus Sexual Violence on Aug. 8, 2017.
- Requires annual attestations signed by the Director of Athletics, Title IX, and President (CEO).
- April 30, 2020 BOG revisions to the Policy expanded its reach and attestation content, effective Spring 2023.
- Policy and FAQ are on the NCAA Website
- Task Force
- In the meantime:
 - Consider Discussions with Title IX, General Counsel, and others on campus.
 - Explore Compliance Position.
 - Consider Intersection with the new Regulations around Permissive Dismissals and Confidentiality.
 - Forward Comments to Regional Conference or NCAA Office.




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.

31

Attestation:



1. The athletics department is informed on, integrated in, and compliant with institutional policies and processes regarding sexual violence prevention and proper adjudication and resolution of acts of sexual and interpersonal violence.
2. The institutional policies and processes regarding sexual violence prevention and adjudication, and the name and contact information for the campus Title IX coordinator, are readily available within the department of athletics, and are provided to student-athletes.
3. All student-athletes, coaches and staff have been educated each year on sexual violence prevention, intervention and response, to the extent allowable by state law and collective bargaining agreements.

NACUA
National Association of College and University Attorneys

32

Attestation, cont'd:

Nos. 4-6 require attestation beginning with the 2022-2023 academic year attestation:

4. All prospective, continuing and transfer student-athletes have completed a disclosure form annually related to their conduct that resulted in an investigation, discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to accurately and fully disclose investigatory activity, a disciplinary action or criminal conviction 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 prospective, continuing and transfer student-athletes have been under investigation, subject to discipline 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 information related to these matters with other member institutions when a student-athlete attempts to enroll in a new college or university.
6. An institution choosing to recruit a prospective student-athlete or accept a transfer student-athlete must have a written policy 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 prospect has been under investigation, disciplined through a Title IX proceeding or a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to have a written policy and to gather information consistent with that policy could result in penalties.

Further, the 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.

FAQs:

- **When did the policy begin?** August 2017. The most recent amendments are effective in the 2022-23 academic year. The annual attestation period runs from March 1 – May 15 each year.
- **What is the deadline for completing the annual education for coaches, student-athletes and athletics staff?** For the 2020-21 academic year, education should be completed prior to the May 15, 2021 deadline so that presidents or chancellors, athletics directors and campus Title IX coordinators can attest to their compliance by the May 15 deadline. The attestation form will be available electronically in the NCAA Learning Portal and on [ncaa.org/csvpolicy](https://www.ncaa.org/csvpolicy) beginning March 1, 2021 and must be completed by May 15, 2021. This is a firm deadline.
- **How do I upload my completed form?** Each school's director of athletics must upload the final form in the NCAA Learning portal.
- **What type of education meets the expectations of the policy?** The policy allows member schools to determine the types and manner of education provided. The [NCAA Sexual Violence Prevention Tool Kit](#) can assist member schools in this effort. The tool kit provides checklists for campus collaboration and educational resources created specifically for student-athletes. Those resources include the online curriculum myPlaybook, which includes a course on sexual violence prevention.
- **What happens after the deadline?** A list of schools that have and have not attested to the requirements of the policy will be presented in a report to the Board of Governors at their August meeting each year. Once approved, the lists will be published on [ncaa.org](https://www.ncaa.org).
- **Which athletics staff members are expected to complete the education requirement?** While the policy does not provide a specific definition of staff for purposes of the educational prong and provides institutions the discretion to determine how far to extend their educational efforts (e.g. whether to include temporary workers, consultants or contractors), there is an expectation that all education will meet the requirements of local, state and federal law. All coaches including part-time, volunteer and assistant coaches, as well as athletics administrators full-time and temporary, and participating student-athletes are expected to complete the education.
- **If I have additional questions about the policy where should I go?** Questions may be sent to questions@ncaa.org. This inbox will only answer questions related to the policy and attestation process.



35

Note

The content of this presentation is to provide news and information on legal issues and all content is provided for informational purposes only and should not be considered legal advice.

The transmission of information in this presentation does not establish an attorney-client relationship with the recipient. The recipient should not act on the information contained in this presentation without first consulting retained legal counsel.

If you desire legal advice for a particular situation, you should consult an attorney.

36