

Legal Issues in

COLLEGIATE ATHLETICS

A Report of Court Decisions, Legislation and Regulations Affecting Collegiate Athletics

Clearing Up Misperceptions

Title IX's Application to Full Cost of Attendance Scholarships

By Daniel A. Cohen, Esq.

Division I universities can now provide additional scholarship aid to student-athletes up to their full cost of attendance under new legislation passed at the NCAA Convention in January. Universities have been struggling to determine how to allocate that additional athletic aid.

There is a common belief that universities may violate Title IX if they limit full-cost-of-attendance scholarships to the revenue-generating sports (i.e., football and basketball), but that vague proposition will not apply to many Division I universities.

FULL-COST-OF-ATTENDANCE LEGISLATION

Pursuant to Proposal 2014-13, which was adopted in January, Division I members can begin including additional amounts in their athletic scholarships, up to the full cost of attending their schools, in 2015-2016. The legislation simply changed the definition of a "Full Grant-in-Aid" scholarship to incorporate "other expenses related to attendance at the institution up to the cost of attendance."

Significantly, and contrary to many commentators' statements, the NCAA

membership did not vote to provide separate cost-of-attendance "stipends" to student-athletes. That is a meaningful distinction under Title IX.

TITLE IX'S ATHLETIC SCHOLARSHIP PROVISIONS

Title IX's scholarship provisions require universities to "provide reasonable opportunities for [athletic scholarships or grants in aid] 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)(1).

"The Department [of Education] will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results. ...

"This section does not require a pro-

portionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates." Policy Clarification, 44 Fed. Reg. 71413 (December 11, 1979).

Courts have reiterated that Title IX does not require individual scholarships of equal value. In *Beasley v. Alabama State University*, plaintiff Audra Beasley argued that she and a class of similarly-situated female athletes at ASU were injured because ASU failed to furnish scholarships and intercollegiate opportunities in proportion to those provided to male athletes. See 966 F. Supp. 1117, 1120 (M.D. Ala. 1997). Citing to the Policy Interpretation, the court stated: "What matters is simply whether the total amounts of scholarship aid made available to men and women are substantially proportionate to their participation rates. The actual number or dollar value of individual scholarships made available to men and women is not directly compared." *Id.* at 1122; reiterated at 3 F. Supp. 2d 1325, 1334 (M.D. Ala. 1998) (internal punctuation and citation omitted).

In discussing Beasley's standing to bring her claims, the court further stated that "Title IX directly affords Beasley no individual right to a scholarship, so her standing to assert a claim must hinge on [an] overall disproportionate provision of [athletic scholarship] funds to athletes of each gender." *Id.* at 1126.

In enforcing Title IX's "substantially proportionate" requirement, the federal Office for Civil Rights requires universi-

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ties' scholarship allocations for men's and women's teams to be within 1% of their relative participation ratios. See OCR's July 23, 1998 letter to Bowling Green State University (the "Bowling Green Letter"). The Bowling Green Letter specifies: "if men are 60% of the athletes, OCR would expect that the men's athletic scholarship budget would be within 59%-61% of the total budget for athletic scholarships for all athletes, after accounting for legitimate nondiscriminatory reasons for any larger disparity."

CURRENT TITLE IX COMPLIANCE TRENDS

Title IX has been used for decades to increase female students' athletic opportunities and funding. Nonetheless, 43 years after Title IX was passed, women remain underrepresented in athletics throughout the NCAA.

As the pendulum has swung, however, women have become the proportionately-overfunded gender, in terms of scholarship funding, at most NCAA schools.

For the 2013-2014 school year, 64.2% of NCAA schools overfunded female student-athletes' athletic scholarships by more than 1%, according to their own self-reported Equity In Athletics Disclosure Act ("EADA") data. In the aggregate across all NCAA schools that provide athletic scholarships, female student-athletes received only 42.9% of the athletic

opportunities, but they received 46.2% of all athletics aid, for an overall scholarship disparity of 3.3% in their favor.

While women's overall participation rate is disappointing and suggests many schools do not comply with the first prong of Title IX's Three-Prong Test for equitable participation opportunities, the scholarship compliance data suggests widespread violations against male student-athletes under Title IX's scholarship provisions.

Several recent OCR enforcement actions, including those against LSU and Butler, have reinforced that, while schools cannot discriminate against female student-athletes by failing to provide adequate participation opportunities, they simultaneously cannot discriminate against male student-athletes by failing to provide "substantially proportionate" athletic scholarship funding. Arguments by advocacy groups like Champion Women that women's scholarships are underfunded by eye-popping amounts are just plain wrong on the law.

IMPLEMENTATION OF FULL-COST-OF-ATTENDANCE SCHOLARSHIPS

Colleges that currently overfund women's athletic scholarships in the aggregate could improve their legal compliance by increasing scholarship aid to male student-athletes. Accordingly, providing full-cost-of-attendance scholarships to only male student-athletes in revenue-generating sports may actually help bring them into compliance with Title IX.

While this should not be employed as a myopic legal compliance strategy, it may present a financial option for some schools that previously seemed unavailable: given finite budgetary resources and a perceived need to compete in the revenue sports, many universities have the legal option of devoting limited full-cost-of-attendance resources to only those sports.

Of course, universities should strive to provide full-cost-of-attendance scholarships to as many student-athletes as possi-

ble — and should strive to simultaneously increase female athletic opportunities to improve compliance with that aspect of Title IX.

When a school finds those goals impeded by financial obstacles, it should analyze its individual facts in light of Title IX's legal requirements. Schools may find they have more flexibility under Title IX to strategically implement full-cost-of-attendance scholarships than advocacy groups (and the media) lead the public to believe.

Those groups often mislabel full-cost-of-attendance as a "stipend" — an extra monetary benefit beyond the full grant-in-aid. The Policy Interpretation would exclude true stipend payments from the aggregated scholarship analysis discussed above and instead require a stand-alone comparison of stipend payments: "When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes."

But that was not the formulation adopted by the NCAA membership, which simply and expressly changed the definition of a "Full Grant-in-Aid" scholarship to incorporate additional costs of attendance.

CONCLUSION

Under Title IX, universities have made great strides in providing opportunities for female student-athletes, and that work is not done.

But in the area of scholarship compliance, men are often the underfunded gender. For those universities, proper and strategic implementation of full-cost-of-attendance scholarships, including potentially providing more of them to male student-athletes in revenue-generating sports, could actually improve their compliance with Title IX. ■

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