



To: Department of Education's Office for Civil Rights, National and Regional Offices
From: *Champion Women* and Nancy Hogshead, J.D.
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The OCR Should Enforce Equal Athletic Recruiting Budgets in Collegiate Athletics

In response to *Champion Women's* 101 complaints of sex discrimination in college and university athletics departments,¹ and parroting the 1979 Policy Interpretation² of Title IX of the Education Amendments of 1972, 20 USC § 1681 and athletics, regional OCR offices have asked us:

- 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; and**
- 3. Whether the differences in benefits, opportunities, and treatment afforded prospective student-athletes of each sex have a disproportionately limiting effect on the recruitment of students of either sex.³**

¹ *Champion Women*, 101 Sex Discrimination in Athletics Complaints, 2023 and updated in 2024, available: <https://titleixschools.com/2023/09/12/all-ocr-complaints-a-z/>

² U.S. Department of Education, Office for Civil Rights, and "A Policy Interpretation: Title IX and Intercollegiate Athletics," 44 Fed. Reg. 71,413, 71,415 (1979) (Hereinafter, "Policy Interpretation")

³ Id.

Here, we argue that the OCR should analyze Recruiting Dollars as it does to Athletic Scholarship Dollars, by comparing men's and women's athletics recruiting programs on a proportional, dollar-for-dollar basis.

Recruiting dollar budgets should not be lumped in with the other “Benefits and Treatment” analysis determining sex discrimination in athletics; it should not be able to be off-set with – purely hypothetical – better treatment that exists elsewhere in athletic treatment and benefits.

First, “Recruiting” and “Scholarships” have been part of the OCR Regulations interpreting Title IX since 1975. These budget allocations are applied throughout the institution, not just to athletics.⁴ Moreover, these regulations require institutions that provide women with fewer athletic opportunities are obligated to pursue *additional recruiting efforts*.⁵ In other words, school should provide bigger recruiting budgets for women than for men, in order to rectify a school's historic sex discrimination.

According to the most recent EADA, school will need to provide women and their teams with \$251,946,578 additional recruiting dollars, in order to close the 214% gap, as compared with their male peers.⁶

⁴ 34 CFR §106.41(10), Athletics, and §106.23, 1975, <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html#S41> **Recruitment.** (a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §106.3(a), and may choose to undertake such efforts as affirmative action pursuant to §106.3(b).

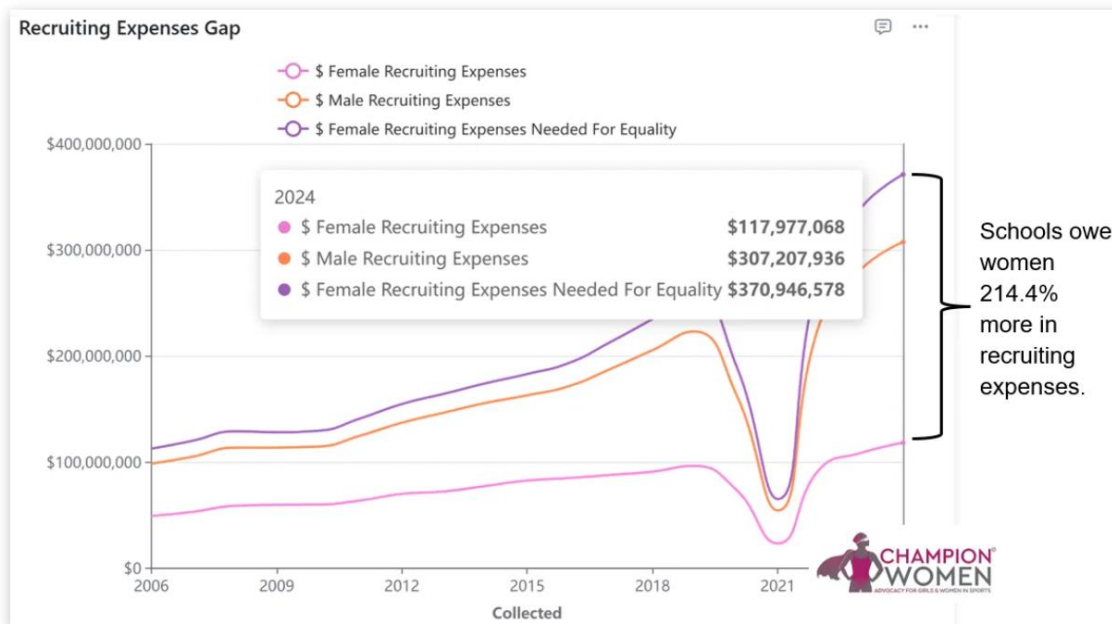
§106.53 **Recruitment.** (a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

⁵ Id., 34 CFR §106.23, 1975, <https://www.law.cornell.edu/cfr/text/34/106.23> **Recruitment.** (a) A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §106.3(a),

⁶ See *Champion Women's* graphs with data from 20 years of EADA reports, demonstrating the gaps and missing educational opportunities and funds here: <https://www.championwomen.org/2024-equity-in-athletics-graphs>

All Schools Recruiting Expense Gap



The bracket to the right of the graph demonstrates that All Schools needs to increase the number of female participants by 214.4%.

I. **The History of Title IX and Congress' Passage of the Javits Amendment in 1974 Suggest that Recruiting and Athletic Scholarships Should Both Be Calculated Separately to Determine Sex Discrimination.**

In 1974, just two years after Congress passed Title IX, Congress passed the Javits Amendment to Title IX, allowing educational institutions to spend differing amounts of money for male and female sports “considering the nature of particular sports.”⁷ The Javits Amendment prohibited a blanket dollar-for-dollar comparison between men’s and women’s teams, even though such an analysis would be much easier for all concerned.

The Javits Amendment allows schools and the OCR to consider that a football uniform costs more than a basketball uniform, a baseball field costs more than a sand volleyball court, etc., even though all these athletes may be getting an equal educational opportunity. The Javits Amendment to Title IX reflected this cost-reality and enabled athletic departments and coaches to

⁷ In 1974, Congress enacted the Javits Amendment, which read: “The [Department of Health, Education, and Welfare (HEW)] Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports. Education Amendments of 1974 section 844; *see also* S. Rep. No. 93-1026 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 4206, 4271. (Emphasis added)

spend more or less on athletes, as justified by the sport. Those cost differences could not create a presumption of sex discrimination, but it could indicate sex discrimination unless “the overall effects of any differences [between men’s and women’s sports] is negligible.” For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for athletes. Such differences are justifiable to the extent that they do not reduce overall equality of opportunity and treatment.

A. Athletic Scholarship Allocation and Athletic Recruiting Are Similar in Legislative History and Need, and Should Both Fall Outside the Javitz Amendment.

Not all athletics expenses are directly related to the cost of specific sports; thus, not all expenses fall under the Javits Amendment. One such example is Athletic Scholarships. The OCR’s regulations interpreting Title IX support similar interpretations. Consider the methodology used to assess equity specific to athletics scholarships as initially outlined in the regulation at §106.37:

§ 106.37 Financial assistance.

(c) Athletic scholarships.

(1) 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.

(2) 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 to the extent consistent with this paragraph and § 106.41.

These dictates are then continued with the 1979 Title IX Athletics Policy Interpretation:⁸

Athletic Financial Assistance: (Scholarships)

1. The Policy - The Department 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. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

a. At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men's and

⁸ *Policy Interpretation*, supra footnote 2.

women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

- b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require spreading scholarships over as much as a full generation [four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

2. Application of the Policy

- a. This section does not require a proportionate 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.
- b. 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. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

Athletic scholarship variance from absolute proportionality is permitted up to one percent; the above non-discriminatory reasons for disparities may be considered.⁹ As such, scholarship dollars are awarded to athletes, and their expenditures do not vary for reasons of sex.

Recruiting should be considered another example. Both recruiting (§106.23) and scholarships (§106.37) appear outside the athletics benefits section (§106.41). While coaches choose different recruiting methods and recruit an athlete for different reasons, all recruiting

⁹ “For example, according to OCR’s guidance, if men account for 60 percent of a college’s athletes, then men should receive approximately 60 percent of the college’s total annual athletic scholarship budget. A college may explain disparities in scholarship amounts for men and women based on legitimate, nondiscriminatory factors, such as differences between in-state and out-of-state tuition at public colleges. However, as noted in its guidance, OCR would consider an unexplained disparity of more than one percent a possible Title IX violation. Therefore, based on the example above, if men account for 60 percent of a college’s athletes, then OCR would expect that the men’s athletic scholarship budget would be within 59 to 61 percent of the college’s total annual athletic scholarship budget absent legitimate, nondiscriminatory reasons for any larger disparities.” Report to Congressional Requesters: College Athletics, Education Should Improve Its Title IX Enforcement Efforts, United States Government Accountability Office, page 6. (April 2024)

See also, *College Athletics: Education Should Improve Its Title IX Enforcement Efforts*, General Accounting Office, available at: <https://www.gao.gov/assets/870/868649.pdf>.

See also, Letter from Dr. Mary Frances O’Shea, National Coordinator for Title IX Athletics, Office for Civil Rights, Department of Education, to Nancy S. Footer, General Counsel, *Bowling Green State Univ.* (July 23, 1998), available at: <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

requires dollars. These expenses include a coach's travel to observe prospects, a prospective athlete's travel on to campus, entertainment for a prospects' on-campus visits, etc. (See our more detailed cost discussion below.)

These travel costs vary by the location of the athlete being recruited; men's and women's coaches should not be geographically constrained to different geographic areas. As such, it is almost impossible to begin a fair assessment of recruiting allocation without starting with an assumption that equal resources should be provided on an all-men compared to all-women basis.

Recruiting expenses, like Athletic Scholarship Expenses, not vary by sex or "by the nature of the sport" and are thus unlike all other elements of the laundry list in (§106.41). Athletic scholarships and athletic recruiting budgets are, therefore, dollar allocations to support coaches' common recruiting activities performed by coaches and their staff.

The 1975 Regulations support such a separate analysis for Athletics Recruiting.

34 CFR § 106.23 Recruitment:

*(a) **Nondiscriminatory recruitment.** A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 106.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 106.3(b).*

*(b) **Recruitment at certain institutions.** A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.*

This same methodology employed for athletic scholarships should be applied to recruiting athletic students. Schools should enjoy a presumption of equity in recruiting expenditures when aggregated by sex, when the resulting allocation is plus or minus one percent of the total expenses, as it appears in the school's EADA report.¹⁰ Equity would be determined by assessing whether the male/female distribution is proportional to male/female athletic participation with a one percent variance. This analysis makes common sense, especially when females are underrepresented in athletic opportunities.

"Revenue-producing" sports are not permitted to spend more to recruit men in these sports. The legislative history of Title IX and the regulations interpreting the statute preclude different treatment of male and female athletes based on their participation in "revenue-producing" sports.¹¹ An important note: the NCAA and schools have thwarted

¹⁰ U.S. Department of Education, Equity in Athletics Data Analysis, "The Tools You Need for Equity in Athletics Analysis," available at: <https://ope.ed.gov/athletics/?#/>

¹¹ Kaplan Hecker & Fink LLP, NCAA External Gender Equity Review, Media & Sponsorship Addendum Analysis Developed by: Desser Sports Media, Inc., www.desser.tv, August 2, 2021, available at:

women's sports' revenue-producing capabilities:

“...the NCAA has never put the Other Championships package up for competitive bid – either as a collection of properties or broken out individually (e.g., the WBBC bid individually), the NCAA has foregone the single most crucial negotiating tactic in assuring it is receiving fair market value for its media property.

- By selling all of the NCAA official marketing partnerships together with the MBBC rights to CBS/Turner, the NCAA created a set of incentives where the vast preponderance of income flows from NCAA Corporate Champions and Corporate Partners exclusively focused on the MBBC. For the 2020-2021 academic year, barely one-tenth of one percent of the NCAA official sponsorship revenue was earmarked to support an NCAA Championship other than the MBBC.

-- The NCAA has succeeded in generating huge revenues from sponsorships for the MBBC, but the design has left the remaining Other Championships without due support, undermining the veracity of assertions that particular Championships “lose money.”¹²

Thus, any reasoning that relies on “recruiting is more competitive in revenue-producing sports” is wrong and should not be acceptable.

If females are underrepresented, as all 101 complaints filed by *Champion Women* are, meaning that the institution fails to meet any of the three Prongs for meeting the athletic participation requirement, and does not have a valid, non-discriminatory justification for providing women with fewer recruiting dollars, the OCR should determine recruiting equity by determining whether recruiting males or females is plus or minus one percent of the total expenses, as it appears in the school's EADA report. Institutions should have no excuse for spending less than expenditures for men, given that schools that discriminate against women in participation opportunities are obligated to recruit more women.¹³ Therefore, additional spending on female recruiting is justified based on the need to remedy long-standing participation discrimination.

The following additional information is provided to further justify aggregating recruiting expenses by sex, and to educate investigators who are faced those three questions.

“...where an institution recruits potential student-athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit

<https://kaplanhecker.app.box.com/s/qz5v7y58srqssky3t0n36osdo3gwzdbt>

¹² Id., page 9.

¹³ 34 CFR §106.23, 1975, <https://www.law.cornell.edu/cfr/text/34/106.23>

Recruitment. (a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §106.3(a), and may choose to undertake such efforts as affirmative action pursuant to §106.3(b).

potential student-athletes.”¹⁴

Recruitment of Student Athletes. The athletic recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes. Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.¹⁵ (emphasis added)

II. Unequal Recruiting Expenditures Make Equal Recruiting Impossible.

- A. Nationally, girls’ and women’s demand for collegiate sports is enormous. Hundreds of thousands of interested and able female athletes will not have an opportunity to compete in higher education.
- B. Just 6.5% of girls competing in the high school sports arena are given an opportunity to play collegiate sports¹⁶ – a percentage that is far lower when additional AAU teams, club teams, travel teams, and Olympic and Paralympic sports are included in the pool of recruitable athletes.
- C. Yet still, the opportunity to compete in NCAA Division I programs is very small; about 2% of high school athletes.
- D. According to the latest EADA reports in 2023 – 2024, schools need to increase recruiting dollars for women *an average* of 214.4% to equal the amount schools spend

¹⁴ U.S. Department of Education, Office for Civil Rights, and “A Policy Interpretation: Title IX and Intercollegiate Athletics,” 44 Fed. Reg. 71,413, 71,415 (1979). See also, “Title IX and Athletic Opportunities in Colleges and Universities, A Resource for Students, Coaches, Athletic Directors, and School Communities,” February 2023, available at: <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf>, Pages 5 and 6: Recruitment.

- Are coaches and other personnel given substantially equal opportunities to recruit women and men for athletic teams? (For example, the amount of time coaches have to recruit, a similar and appropriate geographic range for recruiting)
- Is recruitment for men and women athletes funded in a way that is equally adequate to meet the needs of each men’s and women’s athletic program? (For example, funds for outreach, brochures, visiting campuses)
- Do the differences in benefits, opportunities, and treatment afforded to women or men who are prospective athletes have a disproportionately limiting effect upon the recruitment of students based on sex?”

¹⁵ A Policy Interpretation, Supra Note 2.

¹⁶ NCAA: Estimated Probability of Competing in College Athletics, last updated April 1, 2024. See <https://www.ncaa.org/sports/2015/3/2/estimated-probability-of-competing-in-college-athletics.aspx> This resource actually underestimates the number of female athletes that colleges are competing to attract; these are just high school athletes, and do not include the club-sport, the AAU, Little League, the Olympic Movement athletes. In addition, colleges and universities sponsor sports teams that do not have strong high school participation. “Data for several sports (e.g., rowing, skiing, gymnastics) is not shown due to the low number of high school programs in those sports relative to non-scholastic pre-college participation opportunities.”

recruiting men.¹⁷

It would be obvious to those who have worked in sports over their lifetimes that a lack of recruiting funds for women and women's teams, as compared with men and their teams, is sex discrimination. Women's sports programs need to recruit similarly to the men's programs, women athletes and their families need women to be recruited, and unequal recruiting budgets and resources impact women's sports programs and women athletes profoundly.

According to the OCR's *Policy Interpretation*:

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 with this section, **but 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.**¹⁸ (emphasis added.)

As such, schools' failure to provide women and their teams with proportional recruiting budgets and funds to recruit, create brochures and videos, to travel, and to bring in potential athletes for paid recruiting visits should be considered in determining sex discrimination in athletics.

III. A Lack of Recruiting Equity Discriminates Against High School Female Athletes From Lower Resourced Backgrounds.

Unlike most public high schools, most athletes attend their college or university because of the school's recruiting efforts. It is not a fluke that men over 6'9" just happen to be walking around campus with stellar basketball programs. In other words, when a school needs to attract athletes to its campus, the school hires a coach and staff and empowers them to go out and get these elite athletes. Recruiting has been a proven strategy for athletic success for over a century.

Sadly, most girls and women who are not recruited, who do not have equal opportunities in sports, or to earn an athletic scholarship, are led to believe that the reason is because they are not as deserving as their male peers. Instead, these women have been the aim of intentional sex discrimination.

IV. Sex Discrimination in Athletics Recruiting Impacts Women's Athletics Overall

A lack of recruiting budgets exacerbates other types of sex discrimination and harms women's sports.¹⁹ Here are some of the ways in a non-exhaustive list:

¹⁷ See *Champion Women's* data analysis in their spreadsheet, available here: <https://docs.google.com/spreadsheets/d/1zBMM5rfx7rN5--eeKPw9rVPMnb5rqKf7keBAzIN9AeM/edit?gid=197008020#gid=197008020>

¹⁸ 34 C.F.R. § 106.41(c)(2) (2024).

¹⁹ "In addition, when an "overall determination of compliance" is made by OCR, 44 *Fed. Reg.* 71417, 71418, the OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to

1. A lack of Recruiting budgets harms employees that service women athletes. Coaches and other women's team personnel do not have substantially equal opportunities to recruit women for their athletic teams.²⁰
2. Women's staff have fewer funds to create brochures, videos, and other materials, either promoting their program or targeted towards an individual recruit.
3. Women's team coaches must spend time away from the current team, impacting current female athletes' access to coaching, thereby denying these women equal coaching.²¹
4. Potential female athletes cannot receive the same recruiting services from colleges and universities. As a result, athletes cannot evaluate the program with accurate data about their prospective team and future expectations.
5. Recruiting is necessarily individualized. Some sports provide coaches with objective measurements, like swimming, triathlon, and track. In these sports, the coach will still need to know about the athlete; the level of training an athlete has received in high school

determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

²⁰ Women's teams already have larger coach-to-athlete ratios, easily calculated by the EADA and the college or university's athletics website.

²¹ *Policy Interpretation*, supra, note 2.

d. *Opportunity to Receive Coaching and Academic Tutoring* (§ 86.41(c)(5)).

(1) Coaching—Compliance will be assessed by examining, among other factors:

- (a) Relative availability of full-time coaches;
- (b) Relative availability of part-time and assistant coaches; and
- (c) Relative availability of graduate assistants.

e. *Assignment and Compensation of Coaches and Tutors* (§ 86.41(c)(6)) In general, a violation of Section 86.41(c)(6) will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.

Nondiscriminatory factors can affect the compensation of coaches. In determining whether differences are caused by permissible factors, the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition will be considered.

(1) Assignment of Coaches—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

- (a) Training, experience, and other professional qualifications;
- (b) Professional standing.

(3) Compensation of Coaches—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

- (a) Rate of compensation (per sport, per season);
- (b) Duration of contracts;
- (c) Conditions relating to contract renewal;
- (d) Experience;
- (e) Nature of coaching duties performed;
- (f) Working conditions; and
- (g) Other terms and conditions of employment.

to determine their potential improvement trajectory, but generally, a coach can objectively assess the athlete's competitive results.²²

But many other sports rely on non-objective measurements, such as soccer, basketball, softball, tennis, rugby, gymnastics, field hockey, lacrosse, and wrestling... sports that are evaluated by the strength of the competition in the athlete's geographic area, or by the unique interaction between the other players in team sports. Only recruiting can equip the coach with the ability to determine whether the athlete is a good fit for the school and the current team.

V. Lower Recruiting Budgets for Women Shift the Cost of Recruiting to the Athlete and Their Families.

With a lower recruiting budget, female athletes often receive fewer opportunities for paid visits to come to the campus. Many female athletes and their families do not have the economic resources to "sell" their skills to a coach or team. Without family or school resources, prospective students may be unable to afford to visit the school and the team independently.

Moreover, these female athletes may be unable to create recruiting materials for the coach to enable personnel to evaluate the athlete's abilities, such as videos, training regimens, photos, program history, and detailed statistics.

A. Schools Regularly Host "Identification Camps" That Cost More for Women Than Men.

Colleges often host "Identification Camps" or "ID Camps" at their college or university, allowing the college coach and staff to evaluate players. Female athletes must pay for their travel and the participation fee to be seen and evaluated by the college coach, often exceeding \$200 per ID Camp, for just one school.

- For example, at the University of North Carolina at Chapel Hill, the women's volleyball ID camp costs \$415 (2-days): <https://www.tarheelvolleyball.com>
- Meanwhile, male football players pay just \$50 <https://www.mackbrownfootballcamps.com/>

These travel costs and entry fees are multiplied for the high school athlete and their families as they vie for one of the few educational opportunities to be on the women's team.

These ID Camps are often run to provide revenue to the school from *potential* athletes and their families.²³ Schools and their coaches will often permit athletes to pay and attend who are not competitive or do not have a realistic prospect of being a member of this college team to make money for the school. The young female athletes and their families do not know whether they have a realistic possibility of making the team or not.

²² The coach may need to know the level of training an athlete has had in high school in order to determine their improvement trajectory.

²³ See, e.g., the University of North Carolina's website for women's volleyball ID camp, where female athletes pay \$415 (2 days): <https://www.tarheelvolleyball.com/>. Meanwhile, the men's football players pay just \$50 for their ID camp: <https://www.mackbrownfootballcamps.com/>. These ID camps are sometimes billed as being separate from the school, but obviously, they are part of the school's educational offerings. Of course, third parties cannot create sex discrimination.

In addition to ID Camps, prospective college players often must attend a “Showcase” for coaches to evaluate them. Again, prospective athletes must pay an entry fee and pay for their travel. Showcases are often run for five days, from Wednesday to Sunday. Women’s team coaches and staff with lower budgets can attend fewer of these Showcase events.

Attending Showcases removes the coach from their current athletes. Moreover,

Additionally, high school athletes' academics suffer when Showcases and ID Camps take them away from their high school academics. Remember, these ID Camps and Showcases are in addition to an athlete’s normal competitive schedule.

Lower recruiting budgets may also mean college coaches must rely on their network of club coaches for recommendations and assessments. This practice disadvantages athletes from lower-resourced programs who cannot afford a private coach or to be on a travel team or whose high school coach may have other duties such as teaching classes. Families that cannot afford an expensive visit to a college cannot pay to travel and attend ID camps or Showcase camps.

Lower recruiting budgets thereby cheat deserving women of collegiate athletics, including accompanying financial aid for higher education.

VI. A School’s Recruiting Increases Women’s “Interests and Abilities” in Sports, Intersecting with Prong Three.

Athletic departments and their teams have athletic recruiting budgets to accomplish the task of attracting the best athletes and students to attend their school. Schools and their athletic departments use recruiting to determine the interests of men and women off campus²⁴ when they choose their sports offerings and decide the sums spent on recruiting. (As stated above, exceptional athletes do not just “happen” to attend schools with stellar programs.) Recruiting, therefore, provides increased numbers of female students with an interest and ability assessment regarding participation in college-level sports.

In high schools, coaches are typically prohibited from recruiting students from outside their respective institutions. They recruit existing students during lunch at the cafeteria or by an invitation to tryouts.

Contrasted with college recruiting, it is the college program coming to high schools to meet and observe high school athletes that provides the high school athlete with validation of their ability to play in college, which drives interest in playing in college.

With such small percentages of high school athletes having the opportunity to compete in college sports, many unobserved competent athletes with the interest and ability to compete at the college level may not apply to schools that offer the sports they play. It should not be acceptable for a school to claim Prong Three participation compliance based on any claim that it does not have competitive athletes in a specific sport at the school who are “interested and able to compete” when the school does not recruit athletes in those sports they could but do not sponsor.

Courts have recognized that demand for sports at a particular college is due in part to the sports that the school provides women and a school's efforts to attract these athletes to the

²⁴ On campus interest surveys, along with observation of club, intramural, and recreational sports and tryouts may provide sufficient information.

campus. Twenty-five years ago, the court in *Neal v. Bd of Trs. Of Cal. State University*,²⁵ held, “[T]he creation of additional athletic spots for women would prompt universities to recruit more female athletes, in the long run shifting women's demand curve for sports participation. As more women participated, social norms discouraging women's participation in sports presumably would be further eroded, prompting additional increases in women's participation levels”); See also, *Cohen v. Brown University*, (“[B]ecause recruitment of interested athletes is at the discretion of the institution, there is a risk that the institution will recruit only enough women to fill positions in a program that already under-represents women, and that the smaller size of the women's program will have the negative effect of discouraging women's participation.”²⁶

Prong 3 envisions that girls’ demand, their “interests and abilities” for a sport will drive the decisions to add that new sport. But that is not often the case. For example, when NCAA schools started adding the sport of rowing, only a few private high schools in the northeast offered rowing at the high school level. Thus, a school creates athletic opportunities and then recruits athletes to fill the teams. Title IX simply requires that schools allocate these school-created slots in a nondiscriminatory manner, an impossible feat with females receiving 277% fewer recruiting dollars. Courts have recognized that “Crew or rowing is an example of a sport in which interest commonly develops only after matriculation at college.”²⁷ Indeed, before high schools adopted rowing slightly,²⁸ a school’s rowing recruiting efforts included scholarships, open tryouts, coaches walking through campus searching for tall, broad-shouldered women, former swimmers, or other unaccommodated athletes, and advertisements in school newspapers. (Male rowers were traditionally recruited on college campuses using precisely these techniques.)

Prong 3 requires that the school demonstrate it is “meeting the interests and abilities of the members of that sex” and that females “have been fully and effectively accommodated by the present program,” as required by Prong 3.²⁹ To the degree that a women’s program cannot reach out as effectively as the men’s program and thus cannot recruit the best athletes possible, the school cannot comply with Prong 3. Schools should engage in “actively encourage[ing] the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.”³⁰

²⁵ *Neal v. Bd of Trs. Of Cal. State Univs.*, 198 F.3d 763, at 769 (9th Cir. 1999).

²⁶ *Cohen v. Brown Univ.*, 101 F.3d 155, 177 (1st Cir., 1996), cert. denied, 520 U.S. 1186 (1997).

²⁷ *Cohen v. Brown University*. 879 F.Supp., 185 at 207, (D.R.I., 1999), (usually referred to as “*Cohen III*”).

²⁸ According to the National Federation of State High School Associations, only 89 High Schools offer high school girls’ rowing, serving just 2,102 athletes in 2021. Given that 3,241,472 girls play high school sports, rowing represents just .00065% of all high school female athletes. See https://www.nfhs.org/media/5989280/2021-22_participation_survey.pdf

²⁹ See U.S. Department of Education, Office for Civil Rights, “A Policy Interpretation: Title IX and Intercollegiate Athletics,” 44 Fed. Reg. 71,413, 71,415 (1979). *Champion Women’s Sex Discrimination Complaints* demonstrate that the 101 schools cannot meet Prong 3.

³⁰ *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, January 16, 1996, available at: <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>

VII. Unequal Recruiting Budgets and Recruiting Opportunities for Women Inevitably Lead to Less Merit-Based Athletic Educational Opportunities, Missing Exceptional and Worthy Athletes.

Unequal recruiting budgets mean that women athletes are often unaware of the potential opportunities available, particularly at lesser-known schools. Potential athletes may not consider a school unless they are recruited. Practically, a match between institutional and athlete interest is required—the school is interested in the athlete, and the athlete is interested in the school. This cannot happen without recruiting budgets.³¹

VIII. Lower Recruiting Budgets Lower the Overall Performance of the Team.

A women’s program without resources to recruit cannot evaluate and assess potential athletes. If a coach only has enough recruiting funds to recruit one or two players, this impacts all the women on the team; it results in poor competition for team members during practice, and competition. Thereby, the women have a lessor athletic experience than that afforded to their male peers.

IX. Lack of Recruiting Resources Directly Hurts Women’s Employment in Collegiate Athletics.

Unequal recruiting budgets directly hurt a woman’s coaching employment.³² A coach’s professional career is directly tied to win/loss records, and much of winning is the direct result of a coach’s ability to recruit athletes to compete on their team. As we say in sport, “The tail of the bell-shaped curve for athletic performance is long,” meaning that the differences within and between athletic performance standard deviations are *enormous*, even in this hyper-elite cadre of top 6% of potential high school students. Winning in college-level sport is often a direct result of a coach’s ability to recruit.

Because women have been functionally locked out of coaching collegiate men,³³ women coaches bear the professional burden when a school discriminates against their teams in recruiting. In *Roberts v. Colorado State University*, the court held that “insofar as recruiting is

³¹ One of *Champion Women’s* current Research Assistants was her high school’s valedictorian and on the school’s six-time state championship team. Before being actively recruited, she was unaware of the school she currently attends. There, she is an NCAA Division I scholarship athlete.

³² “Title IX and Athletic Opportunities in Colleges and Universities, A Resource for Students, Coaches, Athletic Directors, and School Communities” February 2023, available at: <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf>

“Do coaches of men’s and women’s teams receive equivalent compensation? — If not, can differences in pay be justified by factors that could be nondiscriminatory? (For example, experience, number of athletes, extra responsibility to supervise other coaches, outstanding record of achievement, nondiscriminatory factors related to the context of recruiting and hiring coaches for specific sports).” Of note, coaching men or women are not inherently different jobs. page 6.

³³ Equal Employment Opportunity Commission, “Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions” 1997, available at: <http://www.eeoc.gov/press/10-31-97.html>

integral to team development, it is a core coaching function. Under the Title IX regulations, defendant would not be permitted to hobble a coach's efforts to improve his or her team."³⁴

Some coaches excel in specific athletic skill development, while others are more skilled at enhancing overall fitness or fostering team play. With lower recruiting budgets, women's team coaches have a lesser ability to evaluate the training program where the prospective athlete has been developed, looking for metrics such as key athletic skills, overall conditioning, social skills, and the ability to perform under pressure. Each of these metrics separately indicates a high school athlete's ability to improve in higher ed and contribute meaningfully to their women's college program.

Additionally, these coaches have a lesser ability to evaluate the potential athlete's interests and talents in the school's academic programs and offerings. With low recruitment budgets, women's coaches do not have the resources to vet the recruits in the same way as the men's coaches can to ensure a proper fit. Their lower budget means that women's coaches are hampered by a smaller geographic range from which to recruit. If the women's coaches cannot travel to see athletes compete, meet their families, and the athletes' coaches, they cannot equally evaluate the program's "fit" for the athletes.

X. Lack of Recruiting Budgets Exacerbates the Plight of Women Coaches, Who Unlawfully Pressured to Carry Inflated Squad Sizes.

Abuse of "Roster management" is the practice of schools artificially under-sizing or limiting men's teams to the average team size of the teams they compete against, while requiring coaches of women's teams to illegally oversize or inflate their team rosters.³⁵ In other words, women's coaches are required to create a mandatory floor for team size that is higher than the normal team size.³⁶ Such practices are used to make a school appear to be closer to Prong 1, Proportionality.

³⁴ *Roberts v. Colorado State Univ.*, 998 F.2d 824, 828 (10th Cir. 1993).

³⁵ See e.g., Katie Thomas, "College Teams, Relying on Deception, Undermine Gender Equality," THE NEW YORK TIMES, August 25, 2011, available at: <https://www.nytimes.com/2011/04/26/sports/26titleix.html?auth=login-google1tap&login=google1tap> ("a federal judge ruled that Quinnipiac University in Connecticut had violated Title IX by engaging in several questionable practices, including requiring that women cross-country runners join the indoor and outdoor track teams so they could be counted three times. The judge found... that Quinnipiac had been padding women's rosters by counting players, then cutting them a few weeks later."
"...instead of pouring money into new women's teams or trimming the rosters of prized football teams, many colleges are turning to a sleight of hand known as roster management. According to a review of public records from more than 20 colleges and universities by The New York Times, and an analysis of federal participation statistics from all 345 institutions in N.C.A.A. Division I — the highest level of college sports — many are padding women's team rosters with underqualified, even unwitting, athletes. They are counting male practice players as women. And they are trimming the rosters of men's teams."

"At the University of South Florida, more than half of the 71 women on the cross-country roster failed to run a race in 2009. Asked about it, a few laughed and said they did not know they were on the team.")

As an aside, seven runners constitute a team, and only the top five place finishers count in scoring.

³⁶ Michael L. Kasavana, Michigan State University, NCAA News, *Roster management not end to equitable means*, Aug 28, 2000, available at: <https://ncaanewsarchive.s3.amazonaws.com/2000/editorial/roster-management-not-end-to-equitable-means---8-28-00.html> ("The fact is that roster management, even when it works, benefits neither gender. ...The recipe for roster management doesn't include competitive success, participant satisfaction, diversity or any other student-athlete welfare ingredients. Simply stated, roster management is quantitatively driven and inherently flawed. It enjoys unwarranted confidence in its ability to solve the gender-balancing puzzle.")

Such intentionally discriminatory strategies of not using the same team-size standard, such as average team size for both men's and women's teams, are not accompanied by allocating higher recruiting budgets for inflated roster women's teams.

As noted above, women already have larger coach-to-athlete ratios than their male peers, and roster management exacerbates that disparity between coach and athlete.

School-imposed roster management often requires women's coaches and teams to carry more athletes than optimal or necessary. This practice often creates difficulties in managing the team and leads to disgruntled athletes who do not have the same shot at playing time as their male peers. Disgruntled athletes can create a host of problems for women coaches.³⁷ For example, when women's teams have larger-than-necessary roster sizes, potential student-athletes recognize lineup congestion and that they will have less opportunity to develop and get proper athletic performance support and instruction. Therefore, women's teams and their coaches are harmed.

XI. Other Types of Sex Discrimination in 1975 Title IX “Laundry List” Interact with Recruiting, and Cannot Be Disaggregated.

The OCR's resource documents ask:

“Do the differences in benefits, opportunities, and treatment afforded to women or men who are prospective athletes have a disproportionately limiting effect upon the recruitment of students based on sex?”³⁸

In other words, if women have obviously unequal facilities and equipment, a less qualified coach, and are given far less publicity by the school, as compared to their male peers, do those types of “Laundry List” differences make it harder for the coach to recruit athletes?

As we will demonstrate, the answer must be in the affirmative.

Earlier we demonstrated the intersection of unequal participation opportunities and athletic scholarships. A lesser recruiting budget is also a type of sex discrimination that impacts other items on the “Laundry List. For example, see *Champion Women's* graphs on OCR complaint forms for individual schools, starting about page 37, showing the impact of failing to consider athletic *opportunities* when also evaluating athletic *scholarships* and *recruiting*. When a school provides women with far fewer opportunities, it lowers the athletic financial aid that would be due to women. The three metrics are examples of types of sex discrimination in athletics that cannot be disaggregated.

Unequal treatment, as measured by Title IX (facilities, equipment, locker rooms, travel, publicity, etc.), impacts how recruits view the school's overall program and the educational

³⁷ Becky Carlson, an NCAA Champion Division 1 Rugby Coach, has written on this phenomenon repetitively. See, e.g., Carlson, “The 5-Step Process to Firing Your Female Coach,” 2024, available at: <https://www.linkedin.com/pulse/5-step-formula-firing-your-female-coach-coach-carlson-2ia2e/?trackingId=p2Cz7uthTRynD%2BsfXlaNWg%3D%3D>, Carlson, “Female Coaches: Here is How Schools are Getting Rid of Us,” available at: <https://www.linkedin.com/pulse/female-coaches-here-how-schools-getting-rid-us-becky-carlson/?trackingId=qw8asGpmRYy024QMm1ufSw%3D%3D>; and Carlson, “How Schools Are Getting Athlete Abuse Wrong” 2019, available at: <https://www.linkedin.com/pulse/how-schools-getting-wrong-athlete-abuse-becky-carlson/?trackingId=qw8asGpmRYy024QMm1ufSw%3D%3D>;

³⁸ “Title IX and Athletic Opportunities in Colleges and Universities, A Resource for Students, Coaches, Athletic Directors, and School Communities,” February 2023, available at: <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf>

opportunity the school and the women's coach can offer. In other words, differences in *all the other* athletic benefits and treatment afforded to female prospective athletes, compared to their male peers, disproportionately limit women's athletic recruitment and overall athletic experience. Together, any one specific type of sex discrimination is impossible to disaggregate from the sex discrimination women in athletics experience overall.

Below are just a few:

1. Athletic Scholarships and Recruiting.

- Women's teams provided with lower athletic scholarship budgets than their proportional participation do not have the same compensation assets as men's teams to attract equal numbers of high-ability athletes.

2. Unequal Facilities and Recruiting.

- It is not difficult for recruits of *all sports* to see glaring differences between women's softball and men's baseball facilities. This is another example of recruiting dollars for campus visits being less effective by other sex discrimination in laundry list deficiencies.
- The photos in *Champion Women's* OCR sex discrimination complaints display the disparities between the stadiums, locker rooms, weight training facilities, recreation rooms, medical treatment center, and team rooms. The OCR will be able to find other photos.
- Photos of men's locker rooms and team-hosting areas are typically available online for potential male recruits. The facilities themselves are used as a recruiting tool.
- *Champion Women* found it far more difficult to find photos of women's softball facilities and locker rooms, as compared with men's baseball. The quality and number of pictures of men's facilities are clearly apparent. The lack of school promotion of women's facilities compared to men's has to be intentional, as the women's accommodations are not the same caliber as the men's stadiums and facilities, thus receiving less attention.
- Thereby, women's coaches cannot use their facilities to recruit female athletes as the men's teams clearly can and do.

3. A Lack of Publicity and Promotion and Recruiting.³⁹

- Publicity, social media presence, and team/athlete exposure are essential elements of recruiting. Men's teams – with their larger recruiting budgets - can afford to hire recruiting coordinators or sports information staff members assigned to only their men's team for the express purpose of designing recruiting materials, creating video and social media promotions specifically aimed at recruits (such as avatars of the prospect in the school's uniform) or sample branding campaigns that will affect the athlete's perception that he will earn more NIL money because the institution will invest in creating his brand.

³⁹ 34 CFR 106.41(10), 1975, Publicity, See also i. "*Publicity (§ 86.41(c)(10))*". Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Availability and quality of sports information personnel;
(2) Access to other publicity resources for men's and women's programs; and
(3) Quantity and quality of publications and other promotional devices featuring men's and women's programs." Office of Civil Rights, "A Policy Interpretation: Title IX and Intercollegiate Athletics," Federal Register, Vol. 44, No. 239, 1979, available at: <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>

Often, these men's staff members are budgeted to travel to all contests for content and photography, with real-time updates online, etc.

- Women's staff have fewer resources to produce social media and are less likely to receive the services of a videographer and/or photographers and graphic designers, allowing for specific, more attractive content creation and frequent posts customized for individual prospective athletes. That lesser visibility for the team means fewer touchpoints for prospective families and athletes to learn about the school and evaluate the athletic educational opportunity.
- Female recruits will experience less professionalism, such as targeted communications and responding to recruits' inquiries.
- If women's contests are videotaped or live-streamed, inexperienced color broadcasters or staff with a lower sport-specific-IQ, fewer cameras, and lower videocast quality, means women coaches cannot recruit as effectively.
- When on campus for official or unofficial visits, Female recruits attending contests may experience substandard game sound monitoring, roster announcements, and name pronunciation.
- Unequal publicity leads to less potential revenue for women athletes and a potential economic loss in "Name Image and Likeness" (NIL) opportunities, thereby impacting women athletes' financial potential and recruiting. Without equal publicity and recruiting budgets, women's teams cannot provide the same recognition to their women athletes.
- Without the ability of sports information staff to compile statistics efficiently, women athletes cannot be recognized for individual achievements, have milestones celebrated, cannot be validated with record-breaking performances, or realize equal media interest.
- Without equal publicity and recruiting budgets, women's teams have a harder time growing their programs' fan base. These publicity and treatment gaps also impact women's teams' ability to fundraise, which is often a part of a coach's job responsibility, a factor in their annual evaluation, and an important consideration in salary determination.

Conclusion:

Deficient recruiting budgets impact the overall success and morale of women's coaches, female students, faculty, alumni, donors, professors, and beyond. In combination, when schools provide women with sex-based unequal abilities to recruit in violation of Title IX, they send a loud signal that women's sports are second-class; they are less valuable to the institution.

To address these disparities, *Champion Women* requests that the Office for Civil Rights ("OCR") investigate schools to determine whether these schools discriminate against women in their athletic departments and to use a dollar recruiting standard akin to the athletic scholarship standard for a presumption of equity.

With an OCR investigation, additional Title IX violations are expected to be found, including equipment and supplies; game and practice times; travel and per diem allowances; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, practice and competitive facilities; medical and training facilities and services; housing and dining facilities and services; and publicity. 34 C.F.R. §106.41(a), *1979 Policy Interpretation*. When

violations are inevitably found, *Champion Women* is requesting that the OCR secure assurances from institutions of compliance with Title IX that include full remedies.