

To: Ted Gumbart, Commissioner, ASUN Conference  
From: Nancy Hogshead-Makar, CEO, Champion Women  
Amy Poyer, Senior Staff Attorney, California Women's Law Center  
Date: June 26, 2020  
Re: Legal Memo, Title IX Athletic Department Compliance

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On June 23, 2020, Title IX celebrated its 48th anniversary. While collegiate sports participation opportunities are rare and rationed, serving just 3% of the student body nationally, these opportunities provide considerable life-long benefits for participants in educational attainment, employment, and health.

Yet despite the strong statute, interpreting regulations, and case law, women lag behind men by all measurable criteria, including opportunities to play, scholarship dollars, and treatment, and those gaps are growing at an unrestrained clip. In athletic scholarship dollars alone, women lose almost \$1 billion dollars annually, solely because they are women. And as this memo establishes, the metrics for women athletes are getting worse, not better.

In the past, sport leaders have put the burden for change on their students, 18–22-year-old women, to bring lawsuits in order to enforce Title IX; to get their schools to add more sports and treat them with the same dignity afforded men. The dramatic discrepancies between men's and women's sports programming cannot be resolved through federal courts. Indeed, it is unfair to expect these young women to shoulder the responsibility to remedy the systemic, intentional sex discrimination that fundamentally characterizes intercollegiate athletics.

This legal memo, and our supporting documents and data from the Equity in Athletics Disclosure Act (EADA), are part of *Champion Women* and the *California Women's Law Center's* efforts to remedy sex discrimination in athletic departments.

### **1. Equal Opportunity to Participate: Equal Quantitative Educational Opportunities**

Title IX follows intuition on fairness and equality, a concept well-cemented for children early on. Title IX athletics compliance involves two parts: *quantitative* components and *qualitative* components. First, the law requires that schools provide women and girls with equal opportunities to participate, meaning schools must provide women with a team and equal scholarship dollars. The law also requires those participation opportunities be as educationally beneficial as those provided to men. This means female athletes and teams must receive equal treatment as compared with the male athletes and teams.<sup>1</sup>

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<sup>1</sup> 34 C.F.R. § 106, available at: <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html> - S41. The “laundry list” was further clarified in 1979; See Title IX Policy Interpretation: Intercollegiate Athletics (December 11, 1979), available at: <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

In 1979, the Department of Education announced a Policy Interpretation that created three independent ways for schools to demonstrate that students of both genders have equal opportunities to participate in sports. These are summarized below:

- **Under Prong 1**, a school can show that the percentage of total athletes at the school who are female is the same as the percentage of total students enrolled at the school who are female (the proportionality test), OR;
- **Under Prong 2**, the school can show it has a history and a continuing practice of expanding opportunities for female students, OR;
- **Under Prong 3**, the school can show it is fully and effectively meeting its female students' interests and abilities to participate in sports.<sup>2</sup>

The easiest standard for demonstrating equal participation opportunities is via Prong 1, but if a school cannot meet Prong 1 and is able to show compliance with Prong 2 or 3, it will be found to be providing equal athletic participation. This three-part test has been in effect for more than four decades. It has been heavily litigated in courts, and has been upheld by every one of the eight federal appeals courts that has considered it.<sup>3</sup>

We have looked at the past 16 years of data from the EADA for the schools in your athletic conference.<sup>4</sup> We have painstakingly deducted male practice players from the total women listed in the EADA count. Unless there is some information that is not represented in the EADA report, it appears that every school except Florida Gulf Coast University, Kennesaw State University, New Jersey Institute of Technology, and the University of North Florida is discriminating against its female students in its athletic offerings.

Importantly however, *Champion Women* and the *California Women's Law Center* have not looked "behind the EADA numbers" to account for actual rosters as listed on school websites, meaning the gaps in participation numbers are likely even larger than reported in the table below. Notably, Katie Thomas wrote a series of articles in the *New York Times* in 2011 on collegiate compliance with Title IX and found, "many [NCAA Division I institutions] are padding

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<sup>2</sup> A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413 (1979), available at: <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>. For ease of reading, I have substituted "female athletes" instead of the verbiage in the regulations that refers to protecting the "underrepresented gender." While a few women's colleges apply the test to men, the overwhelming majority of schools apply the test to women, as it does in all ASUN Conference schools.

<sup>3</sup> See Chalenor v. University of North Dakota, No. 00-3379ND (8th Cir. May 30, 2002); Pederson v. Louisiana State University, 213 F.3d 858, 879 (5th Cir. 2000); Neal v. Board of Trustees of The California State Universities, 198 F.3d 763, 770 (9th Cir. 1999); Horner v. Kentucky High School Athletic Association, 43 F.3d 265, 274-75 (6th Cir. 1994); Kelley v. Board of Trustees, University of Illinois, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); Cohen v. Brown University, 991 F. 2d 888 (1st Cir. 1993) (Cohen I), and 101 F.3d 155, 170 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997) (this case was before the First Circuit twice, first on Brown University's appeal of a preliminary injunction granted by the district court (Cohen I), and the second time after a trial on the merits (Cohen II)); Roberts v. Colorado State Board of Agriculture, 998 F.2d 824, 828 (10th Cir. 1993), cert. denied, 510 U.S. 1004 (1993); Williams v. School District of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993).

<sup>4</sup> *Equity in Athletics Disclosure Act* reports, available at: <https://ope.ed.gov/athletics/#/>. (Each year, colleges and universities provide the Department of Education with data from their athletic department regarding numbers of participation opportunities provided to the students, scholarships, staffing, and revenues and expenses, that are broken down by the men's and women's teams. The Athletic Director of the institution must sign off on the numbers submitted.)

women’s teams rosters with underqualified, even unwitting, athletes.”<sup>5</sup> Courts, too, have found schools are undercounting their male athletes and over-counting their female athletes, in a fraudulent attempt to make their participation gap look smaller.<sup>6</sup> We have not compared the numbers as reported by ASUN Conference member institutions with their online rosters, but typically those errors would make a school further out of compliance with Prong 1, rather than the other way around.

ASUN Conference Institution Name	Overall Title IX Grade	Needed Additional Scholarship Dollars for Women	Grade - Equitable Scholarships	Needed Additional Sports Opportunities for Women (based on duplicated count)	Needed Additional Sports Opportunities for Women (based on unduplicated count)	Grade - Equitable Participation	Needed Additional Recruiting Dollars for Women	Grade - Equitable Benefits	Student-athletes as percent of total student body (based on unduplicated count)
Florida Gulf Coast University	Fail	\$ -	Pass	0	0	Pass	\$ 42,632	Fail	2.4%
Jacksonville University	Fail	\$ -	Pass	135	159	Fail	\$ 158,920	Fail	21.2%
Kennesaw State University	Fail	\$ 436,888	Fail	8	35	Pass	\$ 128,713	Fail	1.6%
Liberty University	Fail	\$ 3,628,274	Fail	87	85	Fail	\$ 814,972	Fail	2.0%
Lipscomb University	Fail	\$ 515,737	Fail	121	83	Fail	\$ 62,454	Fail	9.6%
New Jersey Institute of Technology	Pass	\$ -	Pass	0	0	Pass	\$ -	Pass	5.0%
Stetson University	Fail	\$ -	Pass	112	119	Fail	\$ 170,418	Fail	14.0%
University of North Alabama	Fail	\$ 2,135,569	Fail	161	171	Fail	\$ 156,862	Fail	5.9%
University of North Florida	Fail	\$ -	Pass	0	0	Pass	\$ 7,612	Fail	2.7%
<b>Total</b>		<b>\$ 6,716,468</b>		<b>624</b>	<b>652</b>		<b>\$ 1,542,583</b>		<b>Average: 3.5%</b>

**a. Analysis of Prong 1**

As the table above demonstrates, only Florida Gulf Coast University, Kennesaw State University, New Jersey Institute of Technology, and the University of North Florida can comply with Prong 1, meaning that both male and female students have an equal opportunity, numerically speaking, to participate. While case law explicitly does not allow gaps of 25 or more athletes,<sup>7</sup> the standard is equality, and the gap should be smaller than the size of a new women’s team that is not currently offered. As should be clear from the 2018-2019 NCAA Division I average squad sizes shown in the table below, there are quite a number of sports that schools in the ASUN Conference could add to increase opportunities for their female students.<sup>8</sup>

Sport	2018-2019 NCAA Division I Average Squad Size
Archery	N/A
Badminton	N/A
Team Handball	N/A
Wrestling	N/A
Rifle	7.5
Triathlon	7.8

<sup>5</sup> Thomas, Katie, *College Teams, Relying on Deception, Undermine Gender Equity*, NY Times, April 26, 2011, available at: <https://www.nytimes.com/2011/04/26/sports/26titleix.html>. (The NCAA, NAIA, NJCAA, NCCAA, CCCAA and USCAA failed to respond with any collective action to remedy this blatant sex discrimination.)

<sup>6</sup> *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 95 (2d Cir. 2012).

<sup>7</sup> *Biediger v. Quinnipiac Univ.*, 928 F. Supp. 2d 414, 467 (D. Conn. 2013)

<sup>8</sup> NCAA Sports Sponsorship and Participation Rates Report, 1981-82 – 2018-19, available at: [https://ncaaorg.s3.amazonaws.com/research/sportpart/2018-19RES\\_SportsSponsorshipParticipationRatesReport.pdf](https://ncaaorg.s3.amazonaws.com/research/sportpart/2018-19RES_SportsSponsorshipParticipationRatesReport.pdf)

Golf	8.2
Tennis	9.1
Bowling	9.6
Skiing	12.8
Squash	13.3
Basketball	14.4
Volleyball	16.6
Fencing	16.8
Cross Country	17.2
Sand Volleyball	17.6
Gymnastics	18.3
Synchronized Swimming	19.5
Water Polo	21.6
Softball	21.7
Field Hockey	23.0
Ice Hockey	24.6
Soccer	28.4
Swimming/Diving	29.6
Lacrosse	31.6
Rugby	32.1
Equestrian	35.3
Track, Outdoor	39.7
Track, Indoor	40.0
Rowing	62.8

As stated in the summary letter, in order to provide women with the same opportunities to participate in sports, other ASUN Conference schools must add 624 female athletes in the duplicated count, or 652 in the unduplicated count.<sup>9</sup>

These eye-popping numbers are simply not acceptable, nearly 50 years after the passage of Title IX. We urge you to use your leadership position to remedy these gaps with great haste.

**b. Analysis of Prong 2**

No ASUN Conference school can comply with Prong 2, which requires a showing of a “history *and continuing* practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex.”<sup>10</sup> We have looked at each school’s historical data over the past 16 years as reported on the EADA website, and no school can show it has consistently grown its programming for female athletes without an interceding contraction

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<sup>9</sup> Some athletes compete in more than one sport, so one student’s participation is counted two or three times. If every student competed during all three seasons, schools would show a participation rate of 300%. This puts ASUN Conference average participation rates of just 3.5% into comparison; for most schools it is smaller than 3.5-out-of-every-100 students.

<sup>10</sup> *Mansourian v. Bd. Of Regents of Univ. of Cal.*, 594 F. 3d 1095, 1108. (9<sup>th</sup> Cir. Cal. 2010) (emphasis added; schools must have both a history *and* continuing practice of expanding opportunities for women for Prong 2 compliance.)

or growth-stoppage of at least five years. Merely adding one sport within the last five years is insufficient. By our evaluation, all ASUN Conference schools have lost the ability to utilize this Prong forever.

### **c. Analysis of Prong 3**

No ASUN Conference school can show compliance with Prong 3, which requires a showing that women have no current unmet demand for additional sports opportunities such that their interests and abilities are accommodated by the current program. To measure compliance with Prong 3, the OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).<sup>11</sup>

Since all ASUN Conference member schools recruit nationally, the interest for sports is evaluated on the same national basis.

Based on EADA data, ASUN Conference schools are only offering a small fraction of their students a sports experience. In 2017-2018, America had 16,756,000 high school students,<sup>12</sup> and 7,937,491 participated in school-sponsored sports,<sup>13</sup> for a high school sports participation rate of 47.37%. But even 47% understates the high school sports participation rate and the demand for sports. It does not include athletes on club teams, travel teams, and Olympic sports that can be, but frequently are not, high-school-sponsored sports, like ice hockey, rowing, wrestling, fencing, beach volleyball, skiing, rifle, rugby, triathlon, archery, equestrian, sailing, and gymnastics.<sup>14</sup>

### **i. Schools and Conferences Create Demand for New Women's Sports**

Overall interest is so great that ASUN Conference members are able to create their own demand for a particular sport they choose to add. As an example, women's rowing was added to NCAA rosters before the sport had added significant numbers of high school teams. In other words, the demand for new women's sports is so intense that NCAA members can choose almost any sport to offer and have women ready-and-willing to fill those sport opportunities.<sup>15</sup>

We have not seen the results of any surveys that ASUN Conference members may have completed as part of their Title IX compliance to determine interest and ability in new sports, but

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<sup>11</sup> A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. At 71413 (1979), available at: <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>. Other factors courts and the OCR will use to evaluate compliance with Prong 3, available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

<sup>12</sup> Duffin, Erin, *High school enrollment in public and private institutions in the U.S.* Statista, April 23, 2020. available at: <https://www.statista.com/statistics/183996/us-high-school-enrollment-in-public-and-private-institutions/>.

<sup>13</sup>National Federation of State High School Associations, *Participation in High School Sports Registers First Decline in 30 Years*, Sept. 5, 2019, available at: <https://www.nfhs.org/articles/participation-in-high-school-sports-registers-first-decline-in-30-years/>.

<sup>14</sup>National Federation of State High School Associations, *High School Sports Participation Increases for 29th Consecutive Year*, Sept. 11, 2018, available at: <https://www.nfhs.org/articles/high-school-sports-participation-increases-for-29th-consecutive-year/>.

<sup>15</sup> “Additionally, because OCR recognizes that students may have a broad range of athletic experiences and abilities, OCR also examines other indications of ability such as: ...participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered;” Letter from Russlyn Ali, United State Department of Education, Office of Civil Rights, to Colleague (April 20, 2010) available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

based on our experience, these surveys will only help schools determine *which* sports to add, not *whether* to add women's sports.

Given the ASUN Conference institutions' national recruiting pool, combined with the small number of sports opportunities offered, the ASUN Conference will have a large percentage of students (both male and female) who would compete on a new team if offered. Therefore, ASUN Conference institutions cannot rely on Prong 3 for Title IX compliance.

### **ii. Equal Recruiting Dollars for Men's and Women's Sports Teams**

Schools must provide this type of benefit equally in its overall athletic offerings, meaning that if the ASUN Conference institutions provided men and women with equal scholarship dollars, women's athletic programs would receive an additional \$1,542,583 in recruiting dollars in 2018-2019.<sup>16</sup>

Recruiting spending naturally intersects with Prong 3, the interests and abilities of the students. As the court noted in *Cohen v. Brown University* 24 years ago, "[i]nterest and ability rarely develop in a vacuum; they evolve as a function of opportunity..."<sup>17</sup> Schools have competitive athletes at their schools because they aggressively pursue these students and bring them to their institution. In the highly improbable scenario that ASUN Conference schools do not have students who show interest in playing the new sports offered, money comparable to sums spent on men's recruiting, combined with athletic scholarships, can and will bring these women athletes to the institution.

## **2. Numerous Resources Are Available to Help the ASUN Conference Add Women's Sports**

*Champion Women* and the *California Women's Law Center* stand ready to make introductions to non-profits and sport governing bodies that have invested significant resources and expertise towards helping schools like your members start new sports. Some sports even offer financial assistance.<sup>18</sup> In addition, the NCAA offers guidance for starting new sports in its "Emerging Sports Program."<sup>19</sup> Their "NCAA Women's Sports Inventory, a guide to the NCAA's Championship and Emerging Sport for Women" offers information on sports, costs and facilities needs, average squad size, diversity of athletes and coaches, and more, to facilitate adding sports.<sup>20</sup>

The TIDES has been chronicling sex and racial discrimination in collegiate and professional sport for over 15 years.<sup>21</sup> Numerous other superior resources from distinguished scholars and

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<sup>16</sup> Where an institution recruits potential student athletes for its men's teams, it must ensure that its women's teams are provided with substantially equal opportunities to recruit potential student athletes. See 44 Fed. Reg. at 71417, 1979.

<sup>17</sup> *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), at 178-179.

<sup>18</sup> See e.g., USA Triathlon has \$3.5 million in grants for NCAA schools to add women's triathlon, details available at: <https://www.teamusa.org/USA-Triathlon/About/Multisport/NCAA-Triathlon/Grant-Details>.

<sup>19</sup> NCAA Emerging Sports for Women Process Guide, available at: <http://www.ncaa.org/about/resources/inclusion/ncaa-emerging-sports-women-process-guide>.

<sup>20</sup> NCAA Women's Sports Inventory, *A Guide to the NCAA's Championship and Emerging Sports for Women*, PDF File, available at: <https://www.ncaa.org/sites/default/files/NCAA-WSI.pdf>.

<sup>21</sup> The Institute for Diversity and Ethics in Sports, "TIDES", See, e.g., NCAA College Sport Association Racial and Gender Report Card, See historical data, available at: <https://www.tidesport.org/college>. (TIDES provides resources related to gender and race in amateur, collegiate and professional sports. The Institute researches and publishes a



from the NCAA itself are freely available to help schools comply with Title IX.<sup>22</sup> There is simply no reason for universities and their athletic departments not to know about the race and sex discrimination, or how to comply with Title IX.

Sports need competitors. The ASUN Conference, as a group of schools, is best poised to add women's sports collectively. Conference members have worked together to add women's sports both in the distant past, and recently in 2012, the SEC recognized Equestrian as a championship sport.<sup>23</sup> It is time to repeat that type of leadership and add more sports and resources for women's sports as a conference.

### **3. Equal Scholarship Opportunities**

If the ASUN Conference complied with Title IX participation opportunities and provided women with additional athletic opportunities, women would be entitled to an additional \$6,716,468 in scholarships per year. These are important sources of funding for educational attainment that women are being denied because of their gender.

In 1998, the OCR clarified that “[i]f 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 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.”<sup>24</sup>

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variety of studies, including annual studies of student-athlete graduation rates and racial attitudes in sports, as well as the internationally recognized Racial and Gender Report Card, an assessment of hiring practices in coaching and sport management in professional and college sport.)

<sup>22</sup> National Women's Law Center, *Breaking Down Barriers: A Legal Guide to Title IX and Athletic Opportunities*, (2007) PDF File, available at: [https://www.nwlc.org/wp-content/uploads/2015/08/BDB07\\_Front-Ch1.pdf](https://www.nwlc.org/wp-content/uploads/2015/08/BDB07_Front-Ch1.pdf); NCAA, Title IX, FAQ, available at: <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions>; Women's Law Project, *A Guide to Gender Equity in Athletics in Pennsylvania Schools*, (March 2009; updated April 2016) PDF File, available at: [http://www.womenslawproject.org/wp-content/uploads/2016/04/Title-IX-Guide\\_Rev\\_April2016.pdf](http://www.womenslawproject.org/wp-content/uploads/2016/04/Title-IX-Guide_Rev_April2016.pdf); Lichman, Brenda, *Playing Fair: What School Leaders Need to Know about Title IX and Gender Discrimination in Athletic Programs*, (1997); *American School Board Journal*, 184:27–30, available at: <https://education.stateuniversity.com/pages/2511/Title-IX.html>; Minnesota State High School League, *A Guide to Compliance: Providing Equal Athletic Opportunities*, (July 2012), PDF File, available at: [https://legacy.mshsl.org/mshsl/titleix/Compliance\\_Guide.pdf](https://legacy.mshsl.org/mshsl/titleix/Compliance_Guide.pdf); National Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education*, (2017) at p. 37, PDF File, available at: <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>...the list of easily digestible materials for schools could continue in this memo, but the point has already been made; ignorance of the law is no excuse.

<sup>23</sup> See e.g., SEC Staff, *History of Women's Athletics in the SEC.*, Southeastern Conference, April 11, 2020, available at: <https://www.secsports.com/article/29021252/history-women-athletics-sec>.

<sup>24</sup> Letter from Dr. Mary Frances O'Shea, 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>.

See also, Bonnette, Valerie M; Daniel & Lamar. *Title IX Athletics Investigator's Manual*, (1990) at 20, available at: [http://eric.ed.gov/ERICDocs/data/ericdocs2/content\\_storage\\_01/0000000b/80/23/24/ef.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/23/24/ef.pdf); Policy Interpretation, 44 Fed. Reg. 71413, 71415 (1979).

#### **4. Equal Treatment: Measuring Men’s and Women’s Qualitative Educational Experience**

The EADA does not provide information on the many of the metrics required for Title IX compliance, but providing educational experiences that are qualitatively equal is also important. These include equality in:

- (1) Provision and maintenance of equipment and supplies;
- (2) Scheduling of games and practice times;<sup>25</sup>
- (3) Travel and per diem expenses;
- (4) Opportunity to receive tutoring and assignment and compensation of tutors;
- (5) Opportunity to receive coaching, and assignment and compensation of coaches;
- (6) Provision of locker rooms, practice and competitive facilities;
- (7) Provision of medical and training services and facilities;
- (8) Provision of housing and dining services and facilities;
- (9) Publicity;
- (10) Support services; and
- (11) Recruiting.<sup>26</sup>

The ASUN Conference and its member schools should provide public disclosures about equitable treatment in all these areas as well.

#### **5. Nationally, the Raw Gap and the True Discrimination Gap Between Men’s and Women’s Sports Participation is Enormous and Has Been Growing Steadily for Thirty Years**

Contrary to the perception by some that Title IX has achieved its goals of equality in collegiate sports, women lag behind men by every measurable criterion, and dramatically so. The Raw Gap in the 2018-2018 academic year between men’s and women’s sports opportunities was a staggering 63,149 women. This means that last year alone, NCAA schools provided women with 63,149 fewer sports opportunities than these schools provided men.

But that raw number, calculated by subtracting women’s opportunities from men’s, does not reflect the true measure of sex discrimination in athletic departments. Women are 56.5% of the student-body.<sup>27</sup> If universities offered women the same sports opportunities they provide men, these schools would be offering an additional 148,030 opportunities for women to play each year.

Currently, schools are providing almost four men with an opportunity to play sports for every 100 male students on campus, or 3.93 men. In other words, NCAA schools provide men with a 3.93% participation rate. If NCAA schools provided women with a 3.93% sports participation rate, that equal to men’s, those NCAA schools would need to provide women with 148,030 *additional* sports opportunities. In the graph below, this is the space that represents the True Discrimination Gap.

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<sup>25</sup> *Parker v. Franklin County Community School Corp.*, 667 F.3d 910 (7<sup>th</sup> Cir. 2012).

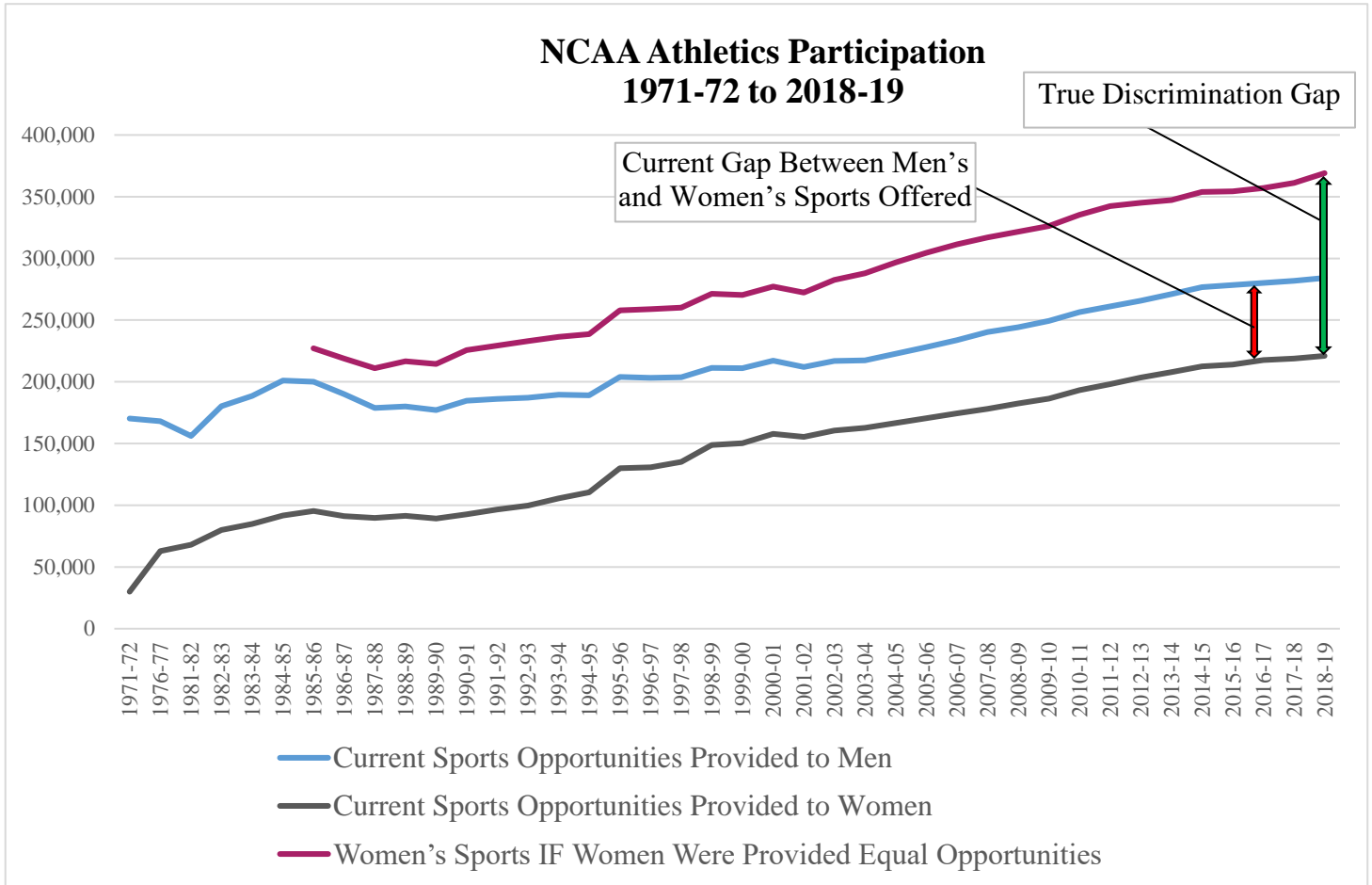
<sup>26</sup> 34 C.F.R. § 106, *available at*: <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html> - S41.

<sup>27</sup> National Center for Education Statistics, *Digest of Education Statistics*, Table 303.70: Total undergraduate fall enrollment in degree-granting postsecondary institutions, by attendance status, sex of student, and control and level of institution: Selected years, 1970 through 2029, *available at*: [https://nces.ed.gov/programs/digest/d19/tables/dt19\\_303.70.asp](https://nces.ed.gov/programs/digest/d19/tables/dt19_303.70.asp).



It is misleading to look at the upward trending line for both men’s and women’s sports participation opportunities, and claim victory for women and Title IX. Both the Raw Gap and the True Discrimination Gap have been growing since 1989, over 30 years. Although the True Discrimination Gap is more accurate, both the Raw Discrimination Gap and the True Discrimination Gap document immense intentional discrimination in intercollegiate sports.

To achieve equality for women in intercollegiate athletics, leaders must take into account that they have allowed schools to grow their men’s sports programming at a faster rate than they have been adding for women. At the same time, intercollegiate leaders must reckon with their failure to account for women’s faster rate of growth for attending higher education than men.



Year	Sports Opportunities Provided to Men by Year	Sports Opportunities Provided to Women by Year	Women’s Sports IF Schools Provided Equal Opportunities	NCAA Sports Opportunities Schools Deny Women
1971-72	170,384	29,977		
1976-77	168,136	62,886		
1981-82	156,131	68,062		
1982-83	180,235	80,040		
1983-84	188,594	84,813		
1984-85	201,063	91,679		

1985-86	200,031	95,351	227,141	131,790
1986-87	190,017	91,101	218,911	127,810
1987-88	178,941	89,825	211,044	121,219
1988-89	180,145	91,409	216,655	125,246
1989-90	177,166	89,212	214,546	125,334
1990-91	184,595	92,778	225,756	132,978
1991-92	186,047	96,469	229,370	132,901
1992-93	187,038	99,859	232,997	133,138
1993-94	189,642	105,532	236,557	131,025
1994-95	189,084	110,524	238,547	128,023
1995-96	203,974	130,080	257,958	127,878
1996-97	203,208	130,695	258,900	128,205
1997-98	203,686	135,180	260,060	124,880
1998-99	211,366	148,844	271,315	122,471
1999-00	210,989	150,185	270,345	120,160
2000-01	217,114	157,916	277,190	119,274
2001-02	212,140	155,513	272,440	116,927
2002-03	216,991	160,650	282,599	121,949
2003-04	217,309	162,752	287,995	125,243
2004-05	222,838	166,728	296,667	129,939
2005-06	228,100	170,526	304,487	133,961
2006-07	233,830	174,534	311,299	136,765
2007-08	240,261	178,084	317,013	138,929
2008-09	244,267	182,503	321,584	139,081
2009-10	249,307	186,460	326,369	139,909
2010-11	256,344	193,232	335,177	141,945
2011-12	261,150	198,103	342,313	144,210
2012-13	265,645	203,565	345,038	141,473
2013-14	271,055	207,814	347,346	139,532
2014-15	276,599	212,474	353,951	141,477
2015-16	278,445	214,086	354,240	140,154
2016-17	280,016	217,584	357,069	139,485
2017-18	281,928	218,805	361,181	142,376
2018-19	284,191	221,042	369,072	148,030

**6. The NCAA’s Prior Efforts, including Certification, the Institutional Performance Program, and its Emerging Sport Program, Have Proven to be Ineffective at Slowing the Growth of the Gender-Gap in Intercollegiate Sport**

In 1993, the NCAA convened the first Gender Equality Taskforce. Members included experts like Charlotte West, Judy Sweet, Chris Voelz, Christine Grant, and Donna Lopiano, who successfully included gender equity into the NCAA’s Certification process. They had recently completed an in-depth NCAA Gender Equity Study, that showed that 20 years after passage of

Title IX, only modest progress toward equity had been made.<sup>28</sup> The idea behind Certification was that schools would need to add women's sports in order to continue in good standing with the NCAA.

In 2010, Mark Emmert replaced Myles Brand as President of the NCAA. One of Emmert's first actions as the leader of a 400,000+ athlete organization was to eliminate Certification and institute its Institutional Performance Program.<sup>29</sup> As the name suggests, the IPP does not require members to meet gender equality standards in order to retain membership; it is merely a reporting process for schools to share data with each other. Looking at the numbers of opportunities for women and men and the trends for both, there is no evidence that the NCAA's IPP is effective at remedying the intentional sex discrimination. Since the IPP was instituted in 2014, women have lost out on a total of 711,523 sports participation opportunities, an average of 142,305 per year. The NCAA has known these trends and appalling numbers, and has not publicized the numbers, the gaps, or called on their members to end their intentional sex discrimination in sport.

Similarly, the NCAA adopted the Emerging Sport Program in 1994.<sup>30</sup> Because sports teams need competitors, the idea was to identify sports for schools to adopt simultaneously and help newer sports achieve NCAA championship status.<sup>31</sup> But it too has failed to rectify or slow down the growing gap in sports opportunities for women. Instead, since 1994, women have lost out on a total of 3,332,277 sports participation opportunities, or an average of 133,291 per year.

The NCAA has tried the "carrot" approach, and the numbers show it is not working. There is little evidence these reports, incentives, or promotions have reversed the trend or the intentional sex discrimination or even effectively slowed it down. Despite these noble efforts by well-meaning people, women's college sports equity continues to move backwards as compared with their brothers. New requirements, accountability, transparency, and resolve are necessary.

## **7. Hiring and Equal Compensation for Coaches of Women's Teams**

### **a. Market Rates**

The EADA reports also on ASUN Conference schools' exceedingly large discrepancies in coaching compensation. Women employees continue to experience sex discrimination, and are often professionally punished for bringing light to the discrimination they face.<sup>32</sup> As the front

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<sup>28</sup> See NCAA Gender Equity Task Force's ongoing efforts *available at*: <http://www.ncaa.org/governance/committees/gender-equity-task-force>.

<sup>29</sup> See Institutional Performance Program, *available at*: <http://www.ncaa.org/governance/division-i-institutional-performance-program>.

<sup>30</sup> See NCAA's Information about its Emerging Sport for Women, *available at*: <http://www.ncaa.org/about/resources/inclusion/emerging-sports-women>.

<sup>31</sup> Women's Wrestling and Acrobatics and Tumbling were two recent additions to the NCAA emerging sport list, *available at*: <http://www.ncaa.org/about/resources/media-center/news/acrobatics-and-tumbling-women-s-wrestling-added-ncaa-emerging-sports-women-program>.

<sup>32</sup> Three cases illustrate the bind of successful, powerful women coaches. In *Burns v. San Diego State University*, in *Griesbaum and Meyer v. the University of Iowa*, and in *Miller v. the University of Minnesota at Duluth*, all plaintiffs' intentional sex discrimination claims were validated by a jury of their peers. And the men committing the unlawful, sexist acts are not professionally punished, certainly not by the NCAA or their Conferences.

See, e.g. Christensen, Joe, *Women in coaching continue to win in court- and then lose careers*, (May 17, 2018) *available at*: <https://www.startribune.com/women-in-coaching-continue-to-win-in-court-and-then-lose->

line in women's sports, coaches are expected to advocate for equal treatment and resources for the athletes they coach. Yet when they do, they risk losing their job for engaging in this protected activity.<sup>33</sup>

To be clear, employer-schools cannot pay a coach less because the *coach is a woman* or because the employee *coaches women athletes*. The “market rate” defense does not allow schools to split the market into two with one market for men's coaches and another for coaches of women's teams. Schools can justify unequal pay if the male coach brings in more money, but only if the school provides the women's coaches with the same marketing, publicity resources, and staffing to bring in that revenue. Moreover, schools cannot discriminate in the provision of these resources – marketing, publicity resources, and staffing – to the women's teams. Similarly, if coaches are evaluated on their team's success, schools must provide women with the same resources to achieve that success, including recruiting resources and program presentation.<sup>34</sup>

The substantial pay inequities between male and female coaches in the ASUN Conference also raise equal treatment concerns under Title IX. If schools attempt to justify their large pay discrepancies by arguing the women's coach is less competent, has less education, or has less experience; it would indicate that women athletes are not receiving the same quality coaching the ASUN Conference schools provide to its male athletes. Coaches are not fungible, and they directly contribute to the educational experience their athletes receive. Women athletes have the right to the same educational opportunity, which includes receiving coaches of equal quality and competence. To remedy the pay and treatment discrepancies, please refer to “*Creating Gender Neutral Coaches' Employment and Compensation Systems; a resource manual*.”<sup>35</sup>

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[careers/482942381/](https://www.sandiegouniontribune.com/sports/aztecs/sd-sp-burnsverdict-20160928-story.htm). (“In all three cases, a female coach had her career derailed, with no real prospects for another top job. Meanwhile, the athletic directors who ousted them — all men — have flourished.”)

Zeigler, Mark, *Beth Burns wins wrongful termination lawsuit vs. SDSU*, (Sep. 28, 2016) available at: <https://www.sandiegouniontribune.com/sports/aztecs/sd-sp-burnsverdict-20160928-story.htm>; (Beth Burns fired for “being a complainer” but a jury determined she was fired for advocating on behalf of her student-athletes for Title IX compliance.)

Emmert, Mark, *Iowa settles Athletic Discrimination cases for \$6.5 million*, (May, 19, 2017), available at: <https://www.hawkcentral.com/story/sports/college/iowa/2017/05/19/tracey-griesbaum-iowa-hawkeye-gary-barta-settlement/333218001/>.

<sup>33</sup> In *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), the United States Supreme Court held that retaliation against a person who complains about sex discrimination is itself a form of discrimination “on the basis of sex” forbidden by Title IX. That is small comfort to successful coaches who lose their professional lives for speaking out in support of their athletes. *Supra*, FN 33. Compare the NCAA's hands-off approach to white men who are found in a court of law to have intentionally discriminated against men with the heavy-handed sanctions imposed on athletes, *Infra*, FN 39.

<sup>34</sup> Equal Employment Opportunity Commission, *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions*, Oct. 29, 1997, available at: <https://www.eeoc.gov/laws/guidance/enforcement-guidance-sex-discrimination-compensation-sports-coaches-educational>.

<sup>35</sup> Lopiano, Donna, *Creating gender neutral coaches' employment and compensation systems: A resource manual*, September 1995, (Updated June 2016). Women's Sports Foundation, Eisenhower Park, East Meadow, NY 11554, available at: <https://www.womenssportsfoundation.org/wp-content/uploads/2016/09/gender-neutral-compensation-guide-final-53016.pdf>.

## **b. Hiring Women**

We also encourage you to examine hiring practices of women coaches. While women have flocked to sports as teams are created, the percentage of female coaches has declined. Women are almost entirely locked out of employment opportunities to coach men. *The Tucker Center for Girls and Women in Sports* track women's coaching data.<sup>36</sup> They conclude:

It is simply not possible that as each new generation of females becomes increasingly involved in and shaped by their sport experience, they simultaneously become less interested, less passionate, and less qualified to enter the coaching profession. We can do better.<sup>37</sup>

We can.

## **8. The NCAA and Member Conferences Like Yours Have the Power to Remove Schools That Intentionally Discriminate Against Women**

Conferences and the NCAA are private, voluntary organizations, and have full legal authority to enforce their own standards, irrespective of federal law.<sup>38</sup>

The NCAA adopted their own rule, separate from Title IX, in 1992:

An athletics program can be considered gender equitable when the participants in both the men's and the women's programs would accept as fair and equitable the overall program of the other gender. NCAA Operating Principle 3.1

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<sup>36</sup> LaVoi, N. M., Boucher, C., & Silbert, S. (2019, July). Head coaches of women's collegiate teams: A comprehensive report on NCAA Division-I institutions, 2018–19. Minneapolis, MN: The Tucker Center for Research on Girls & Women in Sport; available at: [https://www.cehd.umn.edu/tuckercenter/library/docs/research/WCCRC-Head-Coaches\\_All-NCAA-DI-Head-Coaches\\_2018-19.pdf](https://www.cehd.umn.edu/tuckercenter/library/docs/research/WCCRC-Head-Coaches_All-NCAA-DI-Head-Coaches_2018-19.pdf).

LaVoi, N. M., & Boucher, C. (2020, April), Head coaches of women's collegiate teams: A report on select NCAA Division-I institutions, 2019-20. Minneapolis, MN: The Tucker Center for Research on Girls & Women in Sport, available at: [https://www.cehd.umn.edu/tuckercenter/library/docs/research/WCCRC\\_2019-20\\_Head-Coaches\\_Select-7.pdf](https://www.cehd.umn.edu/tuckercenter/library/docs/research/WCCRC_2019-20_Head-Coaches_Select-7.pdf).

<sup>37</sup> Id.

<sup>38</sup> NCAA v. Tarkanian, 488 U.S. 179, 197 (1988). The NCAA frequently bans athletes under the flimsiest of transgression.

See, e.g., Viera, Mark & Thamel, Pete, *Baylor Star, a Top NBA Prospect is Suspended* (Mar. 9, 2011), available at: <https://www.nytimes.com/2011/03/10/sports/ncaabasketball/10hoops.html>. (The NCAA deemed Perry Jones ineligible to play basketball at Baylor when, during his high school career, his mother borrowed money from Jones' former AAU coach to avoid their family being homeless ... all without Perry Jones' knowledge, and even though the mother repaid the coach);

Rooney, Pat, Freshman Evan Battey ruled Academically Ineligible for Colorado Buffaloes (Oct. 26, 2017), available at: <https://www.denverpost.com/2017/10/26/evan-battey-academically-ineligible-colorado-buffaloes-basketball/>. (NCAA declared Evan Battey academically ineligible to participate on the basketball team after family and academic struggles required him to repeat 9th grade, taking him five years to graduate from high school, instead of four.);

Reagan, J.J, Virginia Tech Transfer Brock Hoffman Loses Bid for Immediate Eligibility despite Mother's Health Issues (Aug. 28, 2019), available at: <https://www.nbcsports.com/washington/ncaa/virginia-tech-transfer-brock-hoffman-loses-bid-immediate-eligibility-despite-mothers-health>. (NCAA declared Brock Hoffman ineligible after he transferred colleges to be closer to his mother, in order to help her recover from surgery to remove a brain tumor. In the appeal, the NCAA reasoned that Hoffman "did not transfer quickly enough after his mother's diagnosis.")

The NCAA frequently removes students, but not coaches or other employees, for violations of other NCAA rules it chooses to enforce, such as recruiting violations or accepting unauthorized benefits.

Without leadership, gender equity compliance is left to 18–22-year-old students to enforce Title IX via private lawsuits.

You are the adults in the room. Your 18–22-year-old students have already done the heavy lift of bringing dozens of cases, and they won those cases. The precedent they helped set is clear. The law is clear. Equality is required. Young women have sacrificed and done the grinding work to set clear, solid, predictable case law. Now it is your turn to live up to that law because it's the right thing to do for your current and future students.

### **Conclusion**

Title IX, its interpreting regulations, and case law are clear: schools are required to provide male and female students with equal athletic opportunities, treatment, and scholarships. Period. After almost 48 years, it is time for the ASUN Conference and its member institutions to fully comply with Title IX.

Past efforts to encourage schools to comply with Title IX have failed.

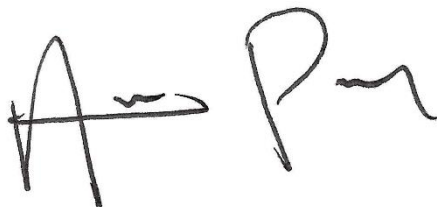
Achieving gender equity in intercollegiate sports will require collective action on the part of all your members, all your competitor Conferences' members, the NCAA, NAIA, NJCAA, NCCAA, CCCAA, and USCAA. We urge ASUN Conference schools to be leaders in service of the larger goals of intercollegiate sport and higher education in your conference and in our country.

Please let us know if we can provide further guidance. We look forward to hearing your plans to rectify the current inequalities before July 10, 2020, just weeks after the 48th anniversary of Title IX. Please respond to this correspondence by email.

Sincerely,



Nancy Hogshead-Makar, J.D.  
CEO, *Champion Women*



Amy Poyer, J.D.  
Senior Staff Attorney, *California Women's Law Center*