

To: Craig Thompson, Commissioner, Mountain West Conference  
From: Nancy Hogshead-Makar, CEO, Champion Women  
Amy Poyer, Senior Staff Attorney, California Women's Law Center  
Date: June 5, 2020  
Re: Legal Memo, Title IX Athletic Department Compliance

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On June 23, 2020, Title IX will celebrate its 48th anniversary. The law continues to open up sports opportunities for millions of girls and women. While collegiate sports participation opportunities are rare and rationed, serving less than 2% of the student body nationally, these opportunities provide 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.

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.

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>

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

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;

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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>

- **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 Boise State University, San Diego State University, University of Nevada Reno, and University of Wyoming 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 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 MW 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.

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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 MW 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.

<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>

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

Mountain West Conference Institution Name	Needed Additional Sports Opportunities for Women (based on duplicated count)	Needed Additional Sports Opportunities for Women (based on unduplicated count)	Needed Additional Scholarship Dollars for Women	Needed Additional Recruiting Dollars for Women	Student- athletes as percent of total student body (based on unduplicated numbers)
Boise State University	2	21	\$1,597,952	\$504,821	3.1%
California State University-Fresno	56	98	\$1,457,431	\$395,861	2.6%
Colorado State University-Fort Collins	68	46	\$1,440,892	\$605,615	1.7%
San Diego State University	0	0	\$1,059,069	\$310,633	2.0%
San Jose State University	36	48	\$753,793	\$176,670	2.0%
University of Nevada-Las Vegas	49	121	\$3,279,727	\$724,801	2.1%
University of Nevada-Reno	0	19	\$1,175,345	\$435,895	2.6%
University of New Mexico-Main Campus	112	149	\$3,420,705	\$413,426	3.3%
University of Wyoming	4	56	\$1,619,494	\$533,376	4.8%
Utah State University	38	45	\$1,162,222	\$204,985	3.1%
<b>Totals:</b>	<b>365</b>	<b>603</b>	<b>\$16,966,630</b>	<b>\$4,306,083</b>	<b>Average: 2.5%</b>

**a. Analysis of Prong 1**

As the table above demonstrates, only Boise State University, San Diego State University, University of Nevada Reno, and University of Wyoming 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 MW could add to increase opportunities for their female students.<sup>8</sup>

<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)

<b>Sport</b>	<b>2018-2019 NCAA Division I Average Squad Size</b>
Archery	N/A
Badminton	N/A
Team Handball	N/A
Wrestling	N/A
Rifle	7.5
Triathlon	7.8
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 MW schools must add 365 female athletes in the duplicated count, or 603 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 hope you will use your leadership to remedy these gaps with great haste.

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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 MW average participation rates of just 2.5% into comparison; for most schools it is smaller than 2.5-out-of-every-100 students.

### **b. Analysis of Prong 2**

No MW 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 or growth-stoppage of at least five years. Merely adding one sport within the last five years is insufficient. By our evaluation, all MW schools have lost the ability to utilize this Prong forever.

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

No MW 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 MW member schools recruit nationally, the interest for sports is evaluated on the same national basis.

Based on EADA data, MW 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 school-sponsored sports, like ice hockey, rowing, 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**

Demand is so great that MW 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

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<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.)

<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/>

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 MW members may have completed as part of their Title IX compliance to determine interest and ability in new sports, but based on our experience, these surveys will only help schools determine *which* sports to add, not *whether* to add women's sports.

Given the MW institutions' national recruiting pool, combined with the small number of sports opportunities offered, the MW will have a large percentage of students (both male and female) who would compete on a new team if offered. Therefore, MW 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 MW institutions provided men and women with equal scholarship dollars, women's athletic programs would receive an additional \$4,306,083 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, "Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity..."<sup>17</sup> In the highly improbable scenario that MW 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 MW 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

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<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>

<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>

needs, average squad size, diversity of athletes and coaches, and more, to facilitate adding sports.<sup>20</sup>

Sports need competitors. The MW, as a collection of schools, is best poised to add women's sports collectively. Conference members have worked collectively to add women's sports both in the distant past, and recently in 2012, the SEC recognized Equestrian as a championship sport.<sup>21</sup> It is time to repeat that leadership and add more sports and resources for women's sports as a conference.

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

If the MW complied with Title IX participation opportunities and provided women with additional athletic opportunities, women would be entitled to an additional \$16,966,630 in scholarships per year. These are important sources of funding for educational attainment that women are being denied because of their gender.

### **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>22</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>23</sup>

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

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

#### **a. Market Rates**

In addition, the EADA reports on MW schools' exceedingly large discrepancies in coaching compensation. 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

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<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> 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>22</sup> *Parker v. Franklin County Community School Corp.*, 667 F.3d 910 (7<sup>th</sup> Cir. 2012).

<sup>23</sup> 34 C.F.R. § 106, available at: <https://www.2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html> - S41.



money, but only if the school provides the women's coaches with the same marketing, resources, and staffing to bring in that revenue. Moreover, schools cannot discriminate in the provision of these resources to the women's teams. Similarly, if coaches are evaluated on their team's success, schools must provide the same resources to achieve that success, including recruiting resources and program presentation.<sup>24</sup>

The substantial pay inequities in the MW also raise equal treatment concerns under Title IX. Coaches are not fungible, and they directly contribute to the educational experience that athletes receive. Women athletes have the right to the same educational opportunity, which includes receiving coaches of equal quality and competence. If the large pay discrepancies are defended on a market rate for that particular coach because 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 MW is providing to the male athletes. To remedy the pay and treatment discrepancies, please refer to "*Creating Gender Neutral Coaches' Employment and Compensation Systems; a resource manual.*"<sup>25</sup>

#### **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 number and percentage of women in coaching has declined. Women are almost entirely locked out of the employment opportunities to coach men. *The Tucker Center for Girls and Women in Sports* have tracked the data for women in coaching.<sup>26</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>27</sup>

### **Conclusion**

Title IX and its interpreting regulations and case law have been uncommonly consistent: schools are expected to provide their male and female students with equal athletic opportunities, treatment, and scholarships. After almost 48 years, it is time for the MW and its member

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<sup>24</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>25</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>

<sup>26</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>27</sup> Id.



institutions to fully comply with Title IX. The goal of gender equity in athletics cannot be relegated to the athletics department or legal counsel's office. We sincerely hope that MW schools will lead in this area, in service to the larger goals of higher education in the conference and in America.

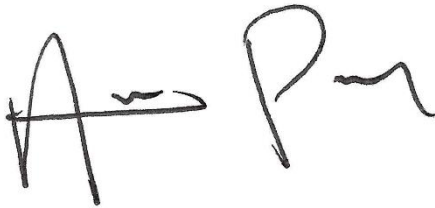
Please let us know if we can provide further guidance. I look forward to hearing your plans to rectify the current inequalities before June 23, 2020, the 48th anniversary of Title IX. Please respond to this correspondence by email.

Sincerely,

A handwritten signature in blue ink that reads "Nancy Hogshead-Makar". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Nancy Hogshead-Makar, J.D.

CEO, *Champion Women*

A handwritten signature in black ink that reads "Amy Poyer". The signature is stylized and cursive, with a horizontal line crossing through the middle of the letters.

Amy Poyer, J.D.

Senior Staff Attorney, *California Women's Law Center*