

Western New England University

## Digital Commons @ Western New England University

---

Faculty Scholarship

School of Law Faculty Scholarship

---

2023

### Athletic Scholarships and Title IX: Compliance Trends and Context

Erin E. Buzuvis

*Western New England University School of Law*, ebuzuvis@law.wne.edu

Follow this and additional works at: <https://digitalcommons.law.wne.edu/facschol>



Part of the [Civil Rights and Discrimination Commons](#), [Education Law Commons](#), and the [Sexuality and the Law Commons](#)

This work is licensed under a [Creative Commons Attribution-Non-Commercial-No Derivatives 4.0 International License](#).

---

#### Recommended Citation

Erin Buzuvis, Athletic Scholarships and Title IX: Compliance Trends and Context, 16 J. INTERCOLLEGIATE SPORT 74 (2023).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons @ Western New England University. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Digital Commons @ Western New England University.

# Athletic Scholarships and Title IX: Compliance Trends and Context

Erin Buzuvis

Western New England University

This article evaluates enforcement practices and compliance trends related to Title IX's requirement for gender equity in the distribution of athletic financial aid. It confirms that universities in the most competitive athletic programs continue to underfund women's athletic scholarships relative to the proportionality standard required by law. It also confirms that the under-allocation of women's athletic opportunities at universities across divisions results in additional disparities in scholarship funding that is not captured by an analysis of compliance. This article concludes with suggestions that the government clarify its expectations and enforcement priorities. It further calls for regulators, scholars, and advocates to monitor disparities in athletic financial aid and to ensure that these existing disparities are not replicated as universities expand the scope of economic benefits that students receive because of their participation in college athletics.

*Keywords:* Title IX, scholarships, gender, commercialism

## Introduction

This article presents the current state of colleges and universities' compliance with Title IX's requirements for gender equity in the distribution of athletic financial aid, also known as athletic scholarships. When examined narrowly as a matter of compliance with the regulation governing athletic financial aid, scholarship allocation appears to favor female athletes except in the most competitive athletic programs. However, as other authors have also pointed out (Osborne, 2017; Yiamouyiannis & Hayes, 2015), such narrow focus obscures the degree to which women are short-changed in athletic scholarship dollars by college and universities constraining their athletic opportunities in the first place. This article provides updated analysis and figures about the degree to which that is so, as well as historic social and legal context. It also examines enforcement practices that affect compliance. Last, it offers suggestions for regulatory adjustment to add clarity to the concept of compliance in this regard.



## Background

Any analysis of gender equity in the distribution of athletic scholarships needs to acknowledge from the outset that college men's and women's athletic programs developed separately, with distinct objectives and values differently compatible with the notion of awarding financial aid on the basis of athletic talent. Early athletic programs provided opportunities for male students to engage in intercollegiate competition that was intended to raise the profile of the institution, and of higher education in general. (Sack & Staurowsky, 1998, pp. 19-20). To be effective marketing for the institution, athletic teams had to win. To that end, administrators invested in recruiting the most talented players incentivizing them to attend by subsidizing their education. As these athletes became distinct from other students—academically less qualified, not attending class and school functions, awarded aid based on athletic participation rather than financial need—college sport attracted critique for departing from the academic mission. (Sack & Staurowsky, 1998). This prompted the NCAA to ban college scholarships and other compensation in 1906, though corruption persisted despite the ban.

For example, the Carnegie Foundation's 1929 report on the state of college athletics confirmed that nearly every college football program was paying players (Smith, 2021). The Southeastern Conference did so openly in the form of athletic scholarships, while schools in other conferences like the Big Ten and Pacific Coast disguised player subsidies as a "jobs programs" that paid athletes for doing imaginary work (Kemper, 2009). In 1948 the NCAA voted to permit member schools to offer tuition and fee payments to athletes who had financial need. In 1956, the Association removed the financial need condition. While some schools—namely the Ivy League and schools that eventually became Division III—retained amateurism by imposing the same admissions and financial aid requirements on athletes that apply to all students, the NCAA's repeal of athletic financial aid restrictions unleashed a "spending spree to buy winning teams" (Sack & Staurowsky, 1998, pp. 47-48). Though the NCAA continued to call this "amateur" sport, colleges and universities continued to operate athletics programs with adherence to commercial rather than educational values. Here I mean "commercial" as the Carnegie Foundation did when it described such practices as "paid professional coaches whose business it is to develop the boy to be an effective unit in a team," and "a system of recruiting and subsidizing has grown up under which boys are offered pecuniary and other inducements to enter a particular college" as "the tendency to commercialize the sport [that] has taken the joy out of the game" (Carnegie Foundation, 1929, pp. xiv-xv). Thus, though varying in degree, the commercialization of college sport occurs across NCAA Divisions that recruit athletes, award athletic scholarships, and prioritize winning over their students' academic pursuits—including but not limited to the schools with the largest, most competitive, and highest-revenue generating programs.

In relation to the college athletics history described above, women's college athletics in general, and women's athletic scholarships in particular, have a distinct origin story. Women's opportunities to attend college arose more slowly than men's,

and the institutions that accepted them did not promote women's sport to enhance their brand. While sport for men raised an institution's social capital, sport for women was less socially acceptable and required its early proponents to constrain the version of sports they offered to female students to those most compatible with Victorian feminine ideals (Suggs, 2005). That meant an intramural model, overseen by professional educators, that emphasized participation more than competition and that complimented rather than detracted from a student's educational experience. As the opposite of the commercial model that had evolved in men's sport, which used sport for promotional and revenue purposes in ways that conflicted with, rather than supported educational values, women's sports faced no internal pressure to recruit the best players or induce them with athletic scholarships or other forms of remuneration. The education model of sport embraced by physical educators sought to ensure "a game for every girl and every girl in a game" rather than providing opportunities only to the most talented athletes who were likely to win (Sack & Staurowsky, 1998, p. 69).

These physical educators, organized as the Division on Girls' and Women's Sports (DGWS) and associated with the American Association for Health, Physical Education and Recreation (AAHPER), eventually embraced a varsity, intercollegiate model for women's sports, but one distinct from the prevailing, male model of sport and designed specifically to maintain an educational approach to sport (Suggs, 2005). They created the Association of Intercollegiate Athletics for Women (AIAW) in 1972 to oversee collegiate women's sports. The AIAW's rules for member institutions promoted broad participation more than competition and sought to ensure that athletics supplemented and supported the student's educational objectives rather than supplant them. For example, the AIAW required member institutions to set practice and competition schedules that provided students "sufficient time to gain personal satisfaction from skill achievement, but ...not deny the student the time to participate in other activities" (Suggs, 2005, p. 51). It also prohibited athletic scholarships and recruiting, which conflicted with their priority of seeking to enhance the student experience by providing opportunities to play sports, rather than selecting (only) those students who were athletically gifted. Scholarships would also diminish the educational model because awarding them would require coaches to spend more time recruiting, which meant less time teaching.

However, the AIAW's efforts to maintain a distinctive educational model for women's sports was short-lived, when its values came in conflict with the emerging notions of men's and women's equality reflected in the Constitution's Equal Protection Clause and Title IX. Equality does not inherently prefer either a commercial or educational model of sport, but it does make it difficult to justify one model for men and the other for women. When female athletes sued the AIAW in 1973 over its scholarship ban, arguing that it amounted to unconstitutional discrimination against its own athletes (Smith, 2021, p. 170), the AIAW conceded. To avoid a costly legal battle, the Association settled the case and changed its rules to permit scholarships. Still, it continued to speak out against athletic scholarships and tried to persuade schools not to implement them. At the very least, it sought to contain the harm in-



herent in the associated practice of recruiting, like pressure tactics and “exploitation” (Suggs, 2005, pp. 60-61). The AIAW attempted to reconcile the athletic scholarship with the educational model of sport by banning off-campus recruiting, capping the number of athletic scholarships that could be offered (8 per year in larger sports, 4 per year in smaller ones), and insisting that athletes had to be academically qualified to have their scholarships renewed. But the AIAW folded in 1983, and its distinct features in service of a pure education model were sacrificed in exchange for women’s equal opportunity to be used like men for the generation of institutional revenue, marketing, and other features of commercial model of sport (Smith, 2021, p. 175).<sup>1</sup> Given the exploitative nature of the commercial model employed by many college sports programs today, it is easy to have mixed feelings about this moment in sports history.

The most competitive college sports continued to develop on a commercialized model, with many institutions seeking to operate sports programs—typically men’s sports of football and basketball—with winning and therefore profit at top of mind. Echoing the AIAW’s concerns about “exploitation,” some contemporary critics of college sport argue that college athletes are not sufficiently compensated for their labor that universities are so eager to monetize (e.g., Branch 2011; McCormick & McCormick, 2010), and athletes themselves have used political advocacy, collective bargaining, and litigation as tools to expand their compensation beyond the value of traditional “grant-in-aid” athletic scholarships (tuition, room and board, books and supplies). As a result, more than half of U.S. states now codify the rights of college athletes to receive compensation from third parties licensing their name, image and likeness (Murphy, 2021). In 2021, the Supreme Court unanimously ruled the NCAA could not lawfully prohibit member institutions from paying athletes’ “non-cash education-related benefits” beyond the cost of attendance, such as post-eligibility scholarships, tutoring, study abroad expenses, and paid post-eligibility externships (*NCAA v. Alston*, 2021). This decision will likely fuel further challenges to NCAA’s amateurism rules, including rules that prevent athletes from receiving compensation not related to education, so-called pay for play.

Given its role in recruiting, colleges and universities have or will likely increase athletic financial aid awards to maximize all legally permissible athletic financial aid (i.e., education-related benefits) and to position themselves to benefit from NIL compensation by third parties without technically arranging it themselves—such as by offering training to its athletes on how to navigate contracts offered by third-party licensees, or make its logo available for athletes to use in their licensed image (Bryant & Joshi, 2021). Whether and how this kind of compensation-generating conduct on the part of a university will be done in a gender-equitable manner remains to be seen and serves as an important reason for frequent assessment of compliance in this regard.

---

1. The NCAA’s move to offer championships to women in 1980 was viewed by AIAW leaders as a hostile takeover (Rhoden, 2022; Staurowsky, Abney, & Watanabe, 2022). The AIAW unsuccessfully challenged the NCAA, alleging that the NCAA was violating antitrust law by exercising its power as a monopoly in men’s sports to intrude into women’s sports and effectively eliminate the AIAW as an organization (*Association for Intercollegiate Athletics for Women, v. National Collegiate Athletic Association*, 735 F.2d 577 (D.C. Cir. 1984).

## Title IX

In 1972, Congress passed statutory provisions known as Title IX, which prohibit sex discrimination in federally funded education programs (Title IX of the Education Amendments Act of 1972). While the statute itself does not address athletics expressly, the Department of Education's regulations implementing Title IX, promulgated in 1976 by its predecessor agency, the Department of Health, Education and Welfare, provide that compliance in athletics is governed by a "separate but equal" framework for equality. Instead of a formal equality model that would prohibit using sex as a selection criterion, as Title IX does in admissions and other facets of education, athletic programs may offer separate programs for men and women if those programs are equitable in both quantity and quality (Athletics, § 106.41).

Whether athletic programs offer an equitable number of opportunities is assessed by a three-part test, one of which must be satisfied: (1) proportionality—athletic opportunities distributed in the same ratio as the gender breakdown of the undergraduate student body; (2) program expansion—regardless of actual numbers, a history and continuing practice of expanding opportunities for the underrepresented sex; or (3) no unmet interest—regardless of the numbers, the underrepresented sex is fully satisfied with the opportunities that exist (A Policy Interpretation, 1979). The quality of athletic opportunities in women's sport must be similar to that of men's sport, taking into account such factors as facilities, equipment, coaching, medical support, academic support, and publicity and promotion (Athletics, § 106.41(c)).

In addition to these requirements, athletic programs must ensure that athletic scholarships or other athletic financial aid is awarded to "members of each sex in proportion to the number of students of each sex participating in ...intercollegiate athletics" (Financial Aid, § 106.37(c)). Like the first prong of the three-part test, the regulation governing equity in athletic financial aid employs the concept of proportionality. Proportionality requires schools to distribute benefits disparately to different groups of students, male and female, to ensure that male and female students have the same rate of access to that benefit. In a seemingly similar spirit, the regulation requires that schools with more male athletes than female (for example) allocate more money for male students' athletic scholarships, so that male student-athletes are not disadvantaged in the aggregate in the total scholarship dollars awarded to student-athletes. If a school has more female students but awarded an equal number of athletic opportunities to male and female students, female students would be disadvantaged by the lower rate of opportunity to participate in athletics. Assuming a proportionate allocation of scholarship dollars to athletes of each sex in this scenario, female students would also, be disadvantaged by their proportionately lower access to athletic financial aid.

We can tell the original intent of the athletic scholarship regulation was to ensure equitable distribution of athletic financial aid within the population of student athletes, rather than the student body as a whole, and without regard whether opportunities to become student athletes are themselves equitably distributed. When HEW's Office for Civil Rights (OCR) issued interpretive guidance of the Title IX regulations



in 1979, it included context for the regulation's proportionality requirement with respect to scholarships:

On most campuses, the primary problem confronting women athletes is the absence of a fair and adequate level of resources, services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that are members of both the National Collegiate Athletic Association (NCAA) and the Association for Intercollegiate Athletics for Women (AIAW), the average annual scholarship budget is \$39,000. Male athletes receive \$32,000 or 78 percent of this amount, and female athletes receive \$7,000 or 22 percent, although women are 30 percent of all the athletes eligible for scholarships (Office for Civil Rights, 1979, p. 71419).

This paragraph suggests that OCR's chief concern with scholarships is a narrowly defined formal inequality: female students similarly situated to male students in terms of their status as athletes were being treated dissimilarly and receiving lower athletic scholarship awards. The regulation's proportionality standard was aimed at addressing this problem, insisting simply that an institutions' scholarship budget be divvied up fairly between existing male and female athletes. OCR likely anticipated that the percentage of student athletes who are female would increase as institutions moved into compliance with the athletic opportunity regulation, § 106.41(c), so it made sense to measure equitable scholarship dollars with reference to the percentage of student athletes of each sex. Perhaps the regulation's drafters did not anticipate over forty years later that female college students would still receive the minority (44%) of athletic opportunities (National Collegiate Athletic Association, 2021), despite having become the majority (56%) of undergraduates (National Center for Education Statistics, 2020). The persistence of athletic opportunity disparity ensures the compliance bar for athletics set by the financial aid regulation is too low. Viewed today, it is apparent the athletic financial aid regulation does not take aim at a wider inequality: a commercial model of sport, having been eventually embraced by women's sports, still provides more opportunity for men to subsidize their college tuition by playing sport because male athletic opportunities are disproportionately favored.

## **OCR Enforcement of the Scholarship Regulation**

In 1998, OCR published its response to Bowling Green University's inquiry about the scholarship regulation and the agency's expectations for compliance. At the time, OCR was investigating 25 complaints of inequitable distribution of athletic financial aid, and presumably intended the circulation of this response as an educational tool to help promote compliance. One clarification that OCR made in the Bowling Green letter was the permissible leeway between the AFA distribution ratio and the gender ratio of student-athletes:

If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on

legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the “substantially proportionate” requirement (O’Shea, 1998, para. 11).

This clarification was necessary because OCR had earlier instructed its investigators that they could determine proportionality using statistical tests to measure whether the disparity was statistically significant. The Bowling Green letter explained that OCR was no longer relying on these tests to measure compliance because they were too permissive and lead the agencies to endorse disparities as great as 3-5 percentage points. Statistical significance is appropriate for establishing whether a disparity is caused by intentional decision-making or simply exists by chance. Here, where colleges have direct control over the distribution of athletic financial aid to its men’s and women’s teams, “chance simply is not a possible explanation for disproportionate aid to one sex” (O’Shea, 1998, para. 11).

The Bowling Green Letter also deepened public understanding of what would constitute a “legitimate, nondiscriminatory factor” that could overcome the presumption of noncompliance in the face of a disparity greater than 1%. For example, a school with a disparity favoring one sex by more than 1% might nevertheless comply with the scholarship regulation if athletes of the favored sex have a higher percentage of out-of-state students (and thus larger scholarship awards) than athletes of the other sex—as long as this does not reflect some underlying discriminatory practice like sex-based differences in recruiting practices and resources. Another legitimate, nondiscriminatory factor is “unexpected fluctuations in the participation rates of males and females” which would exist, for example, if an athlete who had accepted a scholarship “decided at the last minute to enroll at another school” (O’Shea, 1998, para. 9):

Program expansion can constitute a legitimate nondiscriminatory factor. OCR recognized that a school might need to offer higher awards to attract athletes to a new program compared to one that is already established, though the Letter cautions that this rationale is only legitimate for a reasonable period of time, “in light of college sports practices to aggressively recruit athletes to build start-up teams quickly”

OCR also permitted schools to explain disparities by “legitimate efforts undertaken to comply with Title IX requirements, such as participation requirements” (O’Shea, 1998, para 9). Unlike the other legitimate, nondiscriminatory factors mentioned in the letter, this one contains no textual explanation, only a cite to a federal district court decision, *Gonyo v. Drake University* (1995). In this case, former members of Drake University’s discontinued wrestling team argued that the decision was unlawful because it exacerbated a disparity between the share of scholarship dollars afforded to male athletes, and the percentage of student athletes who are male. When Drake made the decision to cut wrestling for budgetary reasons, it had a predominantly female student body (57.2%) yet allocated less than a quarter (24.7%) of athletic opportunities to women (*Gonyo v. Drake University*, 1995, p. 1004). The elimination of wrestling did not eliminate this gap, but it did increase women’s share of athletic opportunities. It also reduced male athletes’ share of the scholarship budget, which



was already 47%—far below the 75% that would be expected if Drake had complied with the proportionality principle of the scholarship regulation. The court rejected the disappointed wrestlers' argument that this consequence of Drake's decision to terminate wrestling rendered its decision unlawful under Title IX.

The court recognized Drake's dilemma, which was that to solve the budget problem it either had to cut from women's or men's athletics. If Drake had cut from women's, it might have improved compliance with the financial aid regulation (helping male athletes) but exacerbated the disparity in opportunity (hurting female students). Cutting men's opportunities, which narrowed the gap in opportunity (helping female students) while exacerbating noncompliance with the scholarship regulation (hurting male students), was the preferable approach to resolving that dilemma. This is because "the paramount goal of Title IX is equal opportunity to participate" (*Gonyo v. Drake University*, 1995, p. 1005). Violations of § 106.37 (the scholarship regulation) and § 106.41 (the opportunity regulation) are not weighed the same, which the court illustrated by imagining the consequence for athletics if the plaintiffs' argument had prevailed: Drake would have been prohibited from downsizing its athletic program by either cuts to men's scholarship or women's teams (*Gonyo v. Drake University*, 1995, pp. 1005-06). In invoking the *Gonyo* decision in the Bowling Green letter, which was not prompted by a dispute about the termination of men's team, OCR appears to have been endorsing the idea that schools should prioritize participation equity over scholarship equity as a prospective compliance strategy, not just when resolving the dilemma that arises when budgets require either men's or women's teams to be cut.

In recent years, OCR's enforcement actions have taken positions consistent with that view in matters involving schools where female students received disproportionately low athletic opportunities but also disproportionately high scholarship dollars. Many of these cases involved double-digit percentage-point disparities in opportunity, such as Butler University where women received 36.5% of athletic opportunities despite constituting 59.6% of the undergraduate student population in 2010. However, that tiny population of female athletes was favored in the allocation of scholarship dollars—receiving 53.4% of scholarship dollars despite constituting 35.4% of the student athlete population. The charge that Butler violated Title IX's scholarship regulation was resolved by Butler's agreement to "examine" whether there are any legitimate nondiscriminatory explanations for disparity "such as differences related to reasonable professional decisions appropriate for program development" (Butler University Resolution Agreement, 2012, p. 8). Other schools in a similar position of drastically underserving female students with respect to athletic opportunities, but overserving female athletes with respect to scholarship dollars—including Louisiana State, Missouri Western, and University of Kentucky—were permitted the opportunity to justify scholarship non-compliance by showing "legitimate efforts undertaken to comply with Title IX requirements, such as participation requirements" (Louisiana State University Resolution Agreement, 2012, n.p.; see also Missouri Western State University Resolution Agreement, 2018; University of Kentucky Resolution Agreement, 2016).

In another case that follows this pattern, OCR noted the fact that Pittsburg State in Kansas wasn't yet fully funding the equivalency scholarships permitted in the women's sports that the athletic department claimed to prioritize for program development helped the university's case that this disparity was due to nondiscriminatory factors (Douglas, 2017). In its enforcement action against Southeastern Louisiana University, OCR offered its clearest endorsement of the relationship between scholarship noncompliance and participation compliance when it specifically acknowledged that the university would have to create 169 new athletic opportunities for women if it wanted to close its 22-percentage-point participation gap without eliminating any opportunities for men. It continued,

“Recruiting female athletes and providing them with scholarships is one way to add participation opportunities for female athletes. As the female participation rate increases, additional scholarships for women would be required for the University to demonstrate that it is in full compliance with its Title IX obligation to provide athletic scholarships in a non-discriminatory manner” (August, 2014, n.p.).

## **Institutional Response to OCR Enforcement**

But while it seems like OCR is open to letting universities favor female athletes in the allocation of scholarships to help close gaps in participation, it is not clear from the examples of the compliance matters noted above that universities are getting the message. As part of my analysis for this work, I reviewed all enforcement actions that challenged universities' compliance with the participation regulation, for which material was made public in OCR's Resolution Database (U.S. Department of Education, 2022). This list includes those compliance matters in which OCR found violations of 34 C.F.R. 106.37 favoring female athletes that also involved serious underrepresentation of women in athletic opportunities, 34 C.F.R. 106.41(c)(1), as measured by a difference of 10 or more percentage points between the percentage of female undergraduates and the percentage of athletic opportunities for women. Nine compliance actions undertaken in the 2010s gave OCR opportunity to examine a disparity in scholarship dollars that favored female athletes by schools with a double-digit disparity favoring male athletes in the distribution of opportunities. I then used current data (2019-2020) from OCR's Equity in Athletics Data Analysis website to present a comparison between each institutions' compliance with the participation and financial regulations at the time of enforcement and today. Those compliance actions are summarized in Table 1 below.

Institutions that have gone through OCR enforcement for violations of both § 106.41(c) (participation) and § 106.37(c) (financial aid) manage to find the motivation to close the scholarship gap that favored women, but not the participation gap that favored men. Only one of these schools, University of San Francisco, has closed its participation gap that used to favor male students (14.2 to 0). It also managed to reduce, but not eliminate, the disparity in scholarship dollars that used to favor fe-

Table 1

*Comparing disparities between the time of enforcement and now*

Institution	Year of non-compliance*	At the time of noncompliance		At present (2019-2020 data)	
		Participation disparity**	Scholarship disparity***	Participation disparity**	Scholarship disparity***
Louisiana State University	2009	11.8	4.4	4.2	-.05
Southeastern Louisiana University	2010	22.0	2.2	22.3	1.5
Merrimack University	2010	12.9	2.7	2.4	2
Butler University	2010	23.1	18	13.9	6.1
University of Southern Mississippi	2014	23.0	1.5	24	-0.1
University of Kentucky	2014	14.0	5.4	12.1	1.5
Pittsburg State University (Kansas)	2014	21.0	6.4	16.5	-0.8
University of San Francisco	2015	14.2	10.7	0	6.7
Missouri Western State University	2015	27.0	9	18.2	6.2

\*In cases where OCR's investigation found multiple years of noncompliance, only the most recent such year is included.

\*\* Participation disparities are reported in percentage points, as favoring male students. The higher the positive number, the more female students are underrepresented in athletic opportunity.

\*\*\* Scholarship disparities are reported in percentage points, as favoring female athletes. The higher the positive number, the more female students are overrepresented in the distribution of athletic financial aid.

male athletes (10.7 to 6.7). Given OCR's suggestion to schools in this position that overfunding women's athletic scholarships can operate as a tool to support program expansion and compliance, it may in fact be the case that USF's initially high disparity in scholarship dollars (one of only two reported in the double digits) *contributed* to its ability to achieve proportionally compliant distribution of opportunities and thus should be viewed favorably rather than carry the stigma of noncompliance.

On the other hand, three schools in Table 1—Louisiana State University, University of Southern Mississippi, and Pittsburg State—have closed the financial aid gap and come into compliance with § 106.37(c), with two more—Southeastern Louisiana University and University of Kentucky—coming very close, within a half



percentage point, of doing so. These schools have still retained (or in SELU's case, *increased*) their double-digit disparity in opportunities, suggesting they emerged from OCR's scrutiny more motivated to fix the scholarship noncompliance issue that favored women than the participation noncompliance issue that favored men. If OCR is trying to give schools with participation disparities some leeway to favor female athletes with scholarship dollars to fix that problem, the examples of schools that have chosen to prioritize compliance with the scholarship provision before addressing egregious disparities in opportunity, suggest this message is not received or strong enough to change compliance incentives.

## Compliance Analysis by the Numbers

When OCR interpreted the athletic financial aid regulation in 1979, women were a minority among college students and an even smaller minority among student-athletes. They also received an even smaller share of athletic financial aid. Today, it is *partially* still the case that women receive a smaller share of the average total scholarship budget than their share of the student athlete population. Using current (2019-2020) data from OCR's Equity in Athletics Data Analysis website, I calculated that among schools in NCAA's Division I Football Bowl Subdivision—the most competitive schools and those with the largest scholarship budgets—women's share of the average athletic financial aid budget (44%) is less than the percentage of student athletes who are female (46%). This disparity is also present in Division II schools that have football programs, where women's share of the average athletic financial aid budget is 40%, despite women's constituting 42% of student athletes. In the other Division I and Division II programs, the inequality narrowly described by OCR in 1979 has disappeared: women now receive a *greater* share of the athletic scholarship budget than their percent of the student-athlete population.

Borrowing from the example Professor Osborne set in her analysis of 2014 data in her article, *Failing to Fund Fairly* (Osborne, 2017), I used the publicly available data that athletic departments are required to report under the Equity in Athletics Disclosure Act to get a sharper view of compliance trends across NCAA subdivisions. From data reported for the 2019-2020 academic year, I assessed compliance with the financial aid regulation by comparing the ratio of athletic scholarship dollars for each sex to the percentage of student athletes of each sex for each education institution in one of the NCAA Division I and II subdivisions (excluding schools in the Ivy League which do not award scholarships, and schools that are single sex). Schools for whom these respective ratios matched within 1% were deemed in compliance; schools that awarded women a greater share of athletic financial aid than the female percentage of athletes had a disparity favoring women, and schools who awarded men a greater share of athletic financial aid than the male percentage of athletes had a disparity favoring men. Table 2 reports by NCAA subdivision the number of schools with each compliance outcome:

Table 2  
*Compliance outcomes by NCAA subdivision*

	N	In compliance		Men favored		Women favored	
		N	%	N	%	N	%
Total schools	<b>649</b>	<b>91</b>	<b>14%</b>	<b>167</b>	<b>26%</b>	<b>389</b>	<b>60%</b>
DIFBS	126	26	21%	73	58%	28	22%
<i>Power Five only</i>	68	2	3%	65	96%	1	1%
DIFCS	119	22	18%	31	26%	66	55%
DI no football	96	2	2%	11	11%	83	86%
DII football	162	31	19%	26	16%	105	65%
DII no football	146	10	7%	26	18%	107	73%

Across all subdivisions, most schools are not in compliance with the scholarship regulation—only 14% ( $n = 91$ ) report distribution of scholarship dollars that is within one percentage point of the gender ratio of their athlete population. Whether those noncompliant schools tend to favor female or male athletes depends on the division: In Division I's Football Bowl Subdivision, more than twice as many noncompliant schools are so because of disparity in scholarship dollars that favors male athletes (73), compared to those noncompliant because of a disparity that favors female athletes (26). Isolating only FBS institutions who are part of the Power Five conferences (ACC, Big 10, Big 12, Pac-12, and SEC) reveals an even stronger tendency to favor men in the allocation of athletic financial aid: nearly all (96%) of the schools in this category fail to comply with Title IX's financial aid regulation because they disproportionately favor men in the allocation of athletic financial aid.

In every other subdivision, noncompliance skews the other way. Sixty percent ( $n = 389$ ) of all schools, and a strong majority of schools in the non-football subdivisions ( $n = 83$ , 86% of Division I no football;  $n = 107$ , 73% of Division II with no football) are out of compliance because female athletes receive a disproportionate share of athletic financial aid. In other words, there are many schools in the position that Drake University faced in *Gonyo*.

Moreover, the overall trend is still the same as when Professor Osborne reported on this data five years prior, only a minority of schools comply with 106.37(c): 99 then, compared to 91 today. Most noncompliant schools favor female athletes, except in Division I FBS, in which most noncompliant schools favor male athletes. Within Division I FBS, there has been a slight decrease in the number of compliant schools (32 then, 26 now) that corresponds to a slight increase in the number of non-compliant schools that favor male athletes (68 then, 73 now). When Professor Osborne reported the data from 2014-15, she noted that NCAA Division I had recently voted to expand athletic scholarship packages to include the full cost of attendance in response to litigation, and she predicted that this rule change could affect compliance with Title IX's scholarship regulation (Osborne, 2017). It is possible the FBS schools who have moved from compliant status to favoring male athletes is the ini-

tial evidence bearing out this concern. It will be worth noting in the future whether compliance trends continue in that direction.

Another way to understand the scope and impact of noncompliance is to consider the amount of money that is at stake. Calculating the dollar amount totals for each subdivision allows us to compare the aggregate impact of noncompliance among divisions and over time. For example, we can see from this chart that male students receive \$252 million more in athletic financial aid than female students. Unlike the trend in compliance, in which male students are disfavored in more subdivisions, the comparison in dollar amounts disfavors female students in more subdivisions—every subdivision except Division I without football. This is due, of course, to the proportionality requirement of Title IX’s financial aid regulation, which provides schools that favor male students with the athletic opportunities to favor them with athletic financial aid as well, and still be counted as compliant with the scholarship regulation.

Table 3  
*Total Athletic Financial Aid by Sex*

	Men AFA total	Women AFA total	Delta (Women minus Men)
All schools	1,899,161,045.00	1,647,075,630.00	(252,085,415.00)
DIFBS	839,983,491.00	657,502,106.00	(182,481,385.00)
DIFCS	422,314,174.00	349,213,356.00	(73,100,818.00)
DI no football	231,014,366.00	300,692,948.00	69,678,582.00
DII football	251,481,948.00	167,914,951.00	(83,566,997.00)
DII no football	154,367,066.00	171,752,269.00	17,385,203.00

When compared to data from five years earlier, the figures in Table 3 show an overall increase in the amount of AFA in total, for both sexes, and across all divisions. The gap between the AFA for men in total and AFA for women has widened in terms of a dollar amount but has not changed much as a percentage of the total dollars overall. Comparing these totals to the aggregate Professor Osborne reported—\$1,537,611,729 for male students and \$1,318,491,018 for female students (Osborne, 2017, p. 95)—we see a percent increase for male students (19.04%), similar to the percent increase for women (19.95%).

By broadening our examination of inequity beyond compliance, we can start to better see unfairness. To this end, we can adjust our expectations for how much female students should receive in athletic financial aid if athletic opportunities were distributed proportionate to the gender breakdown of undergraduate students. This of course, is not what Title IX’s financial aid regulation requires, but it better captures the overall fairness deficiency by factoring in the impact of noncompliance with the participation regulation.

I calculated for each school the amount of athletic financial aid that female students would receive if athletic opportunities were distributed proportionate to enroll-



ment. This required, for each school, a determination of women's share of the total undergraduate population. Using that percentage as the target allocation of athletic financial aid, I calculated the additional aid that would need to be allocated to female athletes to bring women's share of AFA up to a proportional level. Table 4 presents, for each subdivision, the aggregate deficiency, i.e., the amount of money that schools in each subdivision would be required to make available for female students' AFA, if proportionate distribution of participation opportunities had first been attained. For comparison, it also reports the aggregate participation disparity in each subdivision, reflected both as the difference between the percent of undergraduates who are female and the percent of athletic opportunities available to female students, and as the absolute number of athletic opportunities that each subdivision would have to add to close that gap.

Table 4

*Additional AFA for female students if participation opportunities were distributed proportionately by sex, by subdivision.*

	Aggregate participation gap		Additional AFA for female students to receive funding proportionate to enrollment (\$)
	Percentage difference	Number of opportunities	
All schools	10.9	68,145	741,061,524.50
DI FBS	6.8	9203	284,552,079.11
DI FCS	13.8	15,885	224,652,440.01
DI no football	5.0	3640	5,538,820.98
DII with football	19.0	28,814	156,897,563.23
DII no football	11.2	10,603	69,420,621.17

In comparison to the analysis of compliance with the scholarship regulation above, this final table captures the true gender disparity in athletic financial aid. The scholarship regulation does not consider missing athletic opportunities for female students, so a compliance analysis does not capture this disparity. When those 68,145 missing opportunities are considered, we can see that female students are being shortchanged in the aggregate \$741 million. We can also see that while the gap between present funding and hypothetical varies widely by subdivision, a disparity disadvantaging female students is present in all of them.

## Conclusion

This article evaluated enforcement practices and compliance trends related to Title IX's requirement for gender equity in the distribution of scholarship dollars. A few key take-aways emerge. First, it continues to be the case that in the most com-

petitive division, schools fail to fairly fund women's athletic scholarships even to the level artificially depressed by the tendency to short-change women's athletic opportunities. Singling out Power Five conference members makes this observation even more stark. Next, it also continues to be the case that women's underrepresentation in participation opportunities forestalls an equitable opportunity for female college students to have the same access to athletic scholarships. The difference between the aggregate dollar amount that female athletes currently receive, and the amount they would receive if athletic opportunities were proportionate to enrollment, is \$741 million. This disparity is easy to overlook if one is focused only on compliance with the scholarship regulation itself. It is important for universities—as well as other Title IX stakeholders, including scholars, advocates, and regulators—to keep the context in mind: compliance with the scholarship regulation doesn't mean much if women are not receiving the opportunity to include in the compliance equation in the first place.

By narrowly focusing on the equitable treatment of male and female student-athletes instead of male and female students, Title IX's financial aid regulation sets a low bar for compliance that is met by shortchanging women in athletic financial aid to the same degree that they are short-changed in athletic opportunities. It does not expect institutions to provide an equal amount of athletic financial aid for male and female students or give male and female students the opportunity to receive those scholarship dollars at an equal rate. Moreover, it also labels "noncompliant" those schools whose athletic financial aid distribution favors female athletes, even if an overall lack of athletic opportunities means that female *students* are still being short changed. Given the handful of examples in recent years, it seems more likely the case that a university emerging from enforcement oversight will have tightened up its compliance with § 106.37, the financial aid regulation, but failed to close the gap on participation—both of which are to women's detriment. OCR should therefore emphasize more strongly an enforcement priority on participation. Title IX's financial aid regulation also reflects the now out-of-date understanding on athletic financial aid that pre-dates the non-cash education-related benefits at issue in *Alston*, and the conduct that universities might engage in to facilitate athletes' NIL compensation from third parties. Though both are clearly covered by the equal treatment principle reflected in Title IX's separate-but-equal approach, they are at risk of being overlooked for not being expressly mentioned in the regulation (Bryant & Joshi, 2021; Buzuvis, 2015). Further clarification from OCR would be helpful in this regard.

Last, as college sport continues to commercialize and offer more opportunities for college athletes to receive remuneration in some form, it is important for scholars and advocates to continue to monitor compliance trends. As we see from the favoritism that is most pronounced in the Football Bowl Subdivision of Division I and especially the subset of those schools in Power Five conferences, the most competitive NCAA divisions already fail to meet the low bar of compliance set by Title IX's financial aid regulation. Thus, it appears likely that the same business incentives leading to the existing disparity in AFA will continue or expand as those schools maximize compensation to athletes in men's revenue sports in response to increasing permission from the NCAA. This could distort even more the inequities



discussed above.

## References

- Athletics, 34 C.F.R. § 106.41 (2021).
- August, T. (2014, March 14). Letter to Southeastern Louisiana University Re: Compliance Rev. No. 06-10-6001. <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/06106001-a.html>
- Branch, T. (2011). The shame of college sports. *The Atlantic Magazine*, 308(3), 80–110.
- Bryant, A. & Joshi, C. (2021, November 10). *College sport NIL is headed for a collision with Title IX*. Sportico. <https://www.sportico.com/law/analysis/2021/college-sports-nil-title-ix-1234645328/>.
- Butler University Resolution Agreement (2021, April 21). Butler University and The Department of Education, Office of Civil Rights, No. 05116001. <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05116001-b.pdf>
- Buzuvis, E. (2015). Athletic compensation for women too? Title IX implications of Northwestern and O'Bannon. *Journal of College and University Law*, 41(2), 297-341.
- Carnegie Foundation for the Advancement of Teaching (1929). *Bulletin No. 23*. [http://archive.carnegiefoundation.org/publications/pdfs/elibrary/American\\_College\\_Athletics.pdf](http://archive.carnegiefoundation.org/publications/pdfs/elibrary/American_College_Athletics.pdf)
- Financial Assistance, 34 C.F.R. § 106.37 (2021).
- Gonyo v. Drake University, 879 F. Supp. 1000 (S.D. Iowa 1995). Retrieved from <https://law.justia.com/cases/federal/district-courts/FSupp/879/1000/2264259/>
- Kemper, K. E. (2009). *College football and American culture in the Cold War era*. University of Illinois Press.
- Louisiana State University Resolution Agreement (2021, September 12). Louisiana State University and The Department of Education, Office of Civil Rights. Review No. 06-11-6001. <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/06116001-b.html>
- McCormick, R. A., & McCormick, A. (2010). Trail of tears: the exploitation of the college athlete. *Florida Coastal Law Review*, 11(4), 639-666.
- Missouri Western State University Resolution Agreement (2018, April 12). Missouri Western State University and The Department of Education, Office of Civil Rights. Review 07-16-6001. <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07166001-b.pdf>
- Murphy, D. (2021, July 1). *NCAA name, image and likeness FAQ: What the rule changes mean for the athletes, schools and more*. ESPN. Retrieved from [https://www.espn.com/college-sports/story/\\_/id/31740112/rule-changes-mean-athletes-schools-more](https://www.espn.com/college-sports/story/_/id/31740112/rule-changes-mean-athletes-schools-more)
- National Center for Education Statistics. (2020). *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*



- (Table 303.70). Digest of Education Statistics. [https://nces.ed.gov/programs/digest/d20/tables/dt20\\_303.70.asp](https://nces.ed.gov/programs/digest/d20/tables/dt20_303.70.asp)
- National Collegiate Athletic Association (2021). NCAA sports sponsorship and participation rates report. [https://ncaaorg.s3.amazonaws.com/research/sport-part/2021RES\\_SportsSponsorshipParticipationRatesReport.pdf](https://ncaaorg.s3.amazonaws.com/research/sport-part/2021RES_SportsSponsorshipParticipationRatesReport.pdf)
- Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association, 735 F.2d 577 (D.C. Cir. 1984). Retrieved from <https://law.justia.com/cases/federal/appellate-courts/F2/735/577/212153/#:~:text=AIAW%20alleged%20that%20NCAA%20unlawfully.and%20entered%20judgment%20for%20NCAA>
- NCAA v. Alston, 594 U.S. \_\_\_ (2021). [https://www.supremecourt.gov/opinions/20pdf/20-512\\_gfbh.pdf](https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf)
- Office for Civil Rights (1979). A policy interpretation: Title IX and intercollegiate athletics. 44 Fed. Reg. 71413. <https://tile.loc.gov/storage-services/service/ll/fedreg/fr044/fr044239/fr044239.pdf>
- O'Shea, M. F. (1998, July 23). *Dear colleague letter*. U.S Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>
- Osborne, B. (2017). Failing to fund fairly: Title IX athletics scholarships compliance. *Tennessee Journal of Race, Gender, & Social Justice*, 6(1), 83-104.
- Rhoden, W. (2022, April 1). Forty years later, the NCAA's takeover from the AIAW still isn't perfect. *Andscape*. <https://andscape.com/features/forty-years-later-the-ncaas-takeover-from-the-aiaw-still-isnt-perfect/>
- Sack, A. J. & Staurowsky, E. J. (1998). *College athletes for hire: The evolution and legacy of the NCAA's amateur myth*. Praeger Publishers.
- Smith, R. (2021). *The myth of the amateur: A history of college athletic scholarships*. University of Texas Press.
- Staurowsky, E. J., Abney, R., & Watanabe, N. (2022). Intercollegiate athletics. In P. Pedersen, & L. Thibault (Eds.). *Contemporary sport management* (pp. 196-215). Human Kinetics.
- Suggs, W. (2005). *A place on the team: The triumph and tragedy of Title IX*. Princeton University Press.
- Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688. <https://www.law.cornell.edu/uscode/text/20/chapter-38>
- University of Kentucky Resolution Agreement. (2016, December 16). University of Kentucky and The Department of Education, Office of Civil Rights. 03146002 [UCC S](#)
- Yiamouyiannis, A. & Hayes, K. (2015). Title IX and intercollegiate athletics: An analysis of EADA data on student enrollment, sport participation and scholarship allocation. *Women in Sport and Physical Activity Journal*, 23(1), 26-33. DOI: <https://doi.org/10.1123/wspaj.2014-0045>