

# Title IX Compliance – Part III: The Definition of a Sport

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## Preface

Throughout the spring of 2022, as HST celebrates the upcoming 50th anniversary on June 23rd of the enactment of Title IX, each monthly sports law article in the magazine will address a component of Title IX compliance for high school athletic programs with respect to the legally-mandated equal treatment of female and male student-athletes. Title IX is, of course, a broad-based statute prohibiting gender discrimination in all aspects of educational programs and activities, not merely a law governing athletics.

However – for want of the space for a book-length treatment to discuss Title IX's full application to other topics such as academic curriculum, fine arts programs, school clubs and activities, sexual harassment, hazing, bullying, and LGBTQ rights – this series of articles will address only the law's impact on school sports programs, specifically the development and implementation of compliance strategies to avoid gender-based inequities between girls and boys teams: Part I (February) – Title IX's Three-Prong Test; Part II (March) – Title IX's 11 Areas of Athletics Benefits & Opportunities; Part III (April) – Title IX's Definition of a Sport; and Part IV (May) – Frequently Asked Questions About Title IX Law.

Following the conclusion of the four-part series, to print out the articles and compile a comprehensive guide to compliance for your athletic program, visit [www.nfhs.org/resources/highschool-today](http://www.nfhs.org/resources/highschool-today).

## The Title IX Compliance Framework

In the HST February 2022 issue's sports law article, the following Title IX Compliance Framework providing an overview of all of the sources of Title IX law was set forth as a tool that could be used by school and athletic administrators as the infrastructure to conduct a self-audit to determine whether school's sports programs were in compliance with the law:

### TITLE IX COMPLIANCE FRAMEWORK

#### COMPONENT I: SPORTS PARTICIPATION OFFERINGS

##### A. Participation Opportunities – The Three-Prong Test

- Substantial Proportionality or
- History & Continuing Practice of Program Expansion or
- Full & Effective Accommodation of Athletic Interests

##### B. Levels of Competition – The Two-Prong Test

- Equivalently Advanced Competitive Opportunities or
- History & Continuing Practice of Improvement

#### COMPONENT II: FINANCIAL AID FLOWING TO ATHLETES

## COMPONENT III: OTHER ATHLETICS BENEFITS/ OPPORTUNITIES

### P - L - A - Y - I - N - G - F - A - I - R

The February article explained the nuances of Component I of the Framework and the application of both the Participation Offerings “three-prong test” and the Levels of Competition “two-prong test.” Component II of the framework, the analysis whether any financial aid related to athletics is being distributed on an equitable basis, typically is relevant only in college-level Title IX disputes and is rarely an issue in high school cases. The March article addressed the Component III and the issue whether the “amenities” tied to sports participation are being allocated fairly, specifically the 11 categories referred to by the OCR and federal courts as the “laundry list” (the benefits represented by the acronym PLAYING FAIR).

This article deals with the definition of a sport – the types of interscholastic activities that may be classified as a sport and used by a school as evidence of compliance with the three-prong test and which must be evaluated to establish conformity with the 11 areas of other athletics benefits.

#### **The 2008 OCR Dear Colleague Letter: Criteria for a “Sport”**

On September 17, 2008, the OCR released a “Dear Colleague Letter” – a document intended to provide guidance for educational institutions – titled Athletic Activities Counted for Title IX Compliance. The full-text of the document can be found on the [OCR’s website](#).

The “Dear Colleague Letter” begins with a statement by the Assistant Secretary for Civil Rights that the purpose of the document is to provide “clarifying information to help institutions determine which intercollegiate or interscholastic athletic activities can be counted for the purpose of Title IX compliance.” The guidance continues by stating that “in its case-by-case evaluation of whether an activity can be counted as an intercollegiate or interscholastic sport for the purpose of Title IX compliance, OCR will consider all of the following factors:

▣ **PROGRAM STRUCTURE AND ADMINISTRATION** – Taking into account the unique aspects inherent in the nature and basic operation of specific sports, OCR considers whether the activity is structured and administered in a manner consistent with established intercollegiate or interscholastic varsity sports in the institution’s athletics program, including:

Whether the operating budget, support services (including academic, sports medicine and strength and conditioning support) and coaching staff are administered by the athletics department or another entity, and are provided in a manner consistent with established varsity sports; and

Whether the participants in the activity are eligible to receive athletic scholarships and athletic awards (e.g., varsity awards) if available to athletes in established varsity sports; to the extent that an institution recruits participants in its athletics program, whether participants in the activity are recruited in a manner consistent with established varsity sports.

□ **TEAM PREPARATION AND COMPETITION** – Taking into account the unique aspects inherent in the nature and basic operation of specific sports, OCR considers whether the team prepares for and engages in competition in a manner consistent with established varsity sports in the institution’s intercollegiate or interscholastic athletics program, including:

Whether the practice opportunities (e.g., number, length and quality) are available in a manner consistent with established varsity sports in the institution’s athletics program; and

Whether the regular season competitive opportunities differ quantitatively and/or qualitatively from established varsity sports; whether the team competes against intercollegiate or interscholastic varsity opponents in a manner consistent with established varsity sports;

**When analyzing this factor, the following may be taken into consideration:**

Whether the number of competitions and length of play are predetermined by a governing athletics organization, an athletic conference, or a consortium of institutions;

Whether the competitive schedule reflects the abilities of the team; and

Whether the activity has a defined season; whether the season is determined by a governing athletics organization, an athletic conference, or a consortium.

If pre-season and/or post-season competition exists for the activity, whether the activity provides an opportunity for student-athletes to engage in the pre-season and/ or post-season competition in a manner consistent with established varsity sports; for example, whether state, national and/or conference championships exist for the activity; and

Whether the primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels rather than to support or promote other athletic activities. **When analyzing this factor, the following may be taken into consideration:**

Whether the activity is governed by a specific set of rules of play adopted by a state, national or conference organization and/or consistent with established varsity sports, which include objective, standardized criteria by which competition must be judged;

Whether resources for the activity (e.g., practice and competition schedules, coaching staff) are based on the competitive needs of the team;

If post-season competition opportunities are available, whether participation in post-season competition is dependent on or related to regular season results in a manner consistent with established varsity sports; and

Whether the selection of teams/participants is based on factors related primarily to athletic ability.

### **A Court Case Example**

On July 21, 2010, in *Biediger v. Quinnipiac University*, the landmark court case applying the criteria set forth defining a sport in the OCR's 2008 Dear Colleague Letter – a decision applicable to both colleges and high schools – a U.S. District Court judge in Connecticut ruled that members of Quinnipiac University's competitive cheerleading squad could not be counted as varsity athletes for purposes of the school's compliance with Title IX.

In March 2009, Quinnipiac administrators announced that, beginning with the 2009-10 academic year, as a cost-cutting measure designed to address budget shortfalls, the school would eliminate three sports: the men's golf team, the men's outdoor track team, and the women's volleyball team. The volleyball squad was to be replaced with a competitive cheerleading squad. Five members of the volleyball team and its coach filed a federal lawsuit arguing that the school's plan violated Title IX and seeking reinstatement of the volleyball program.

Relying on the legal standards set forth in the 2008 DCL, the court's 95-page decision included a detailed analysis whether competition was the primary objective of Quinnipiac's competitive cheer squad; whether the team operated under the umbrella of a governing organization; whether consistent rules and scoring systems were used for all competitions; whether the squad competed against appropriate levels of competition; and whether the team was structured and operated similar to all other varsity sports at the university.

The court acknowledged that Quinnipiac and seven other schools had founded a governing body, the National Competitive Stunt and Tumbling Association, but concluded that inconsistency of competition and scoring systems doomed Quinnipiac's compliance with the standards necessary for classification of its competitive cheer squad as a sport. In the ten events in which the team competed, five different scoring systems were used. Furthermore, the squad's competition included a mixture of college competitive cheer teams, college sideline cheer squads, all-star teams with no school affiliation, and high school cheer squads.

Essentially, the court decided that Quinnipiac had attempted to game the system in a form-over-substance way to demonstrate compliance with Title IX. The ruling was highly fact-specific and it is important to note that the court did not decree that competitive cheer squad members could never be counted towards Title IX compliance, but rather that the structure and administration of Quinnipiac's competitive cheer program failed to satisfy the standards set forth in the DCL for an activity to be considered a sport under Title IX.

In his written decision, U.S. District Court Judge Stefan R. Underhill stated that, "in reaching my conclusion, I do not mean to belittle competitive cheer as an athletic endeavor. Competitive cheerleading is a difficult, physical task that requires strength, agility, and grace. I have little doubt that at some point in the near

future – once competitive cheer is better organized and defined ... competitive cheer will be acknowledged as a bona fide sporting activity by academic institutions, the public, and the law.”

In August 2012, the U.S. Second Circuit Court of Appeals upheld the decision and in April of 2013, Quinnipiac University settled the case by agreeing to reinstate the women’s sports that were to be eliminated and to invest millions of dollars into facilities, scholarships, and other aspects of its women’s sports programs.