Title IX's Legal Arena: Stipends, Payments, and Pay Equity

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Framework

- NCAA Legislation
  - Full Cost of Attendance and Meals
- Litigation
  - NLRB Decisions
  - O'Bannon Decision
  - FLSA Case (minimum wage and overtime)
- Pay Equity

NCAA Legislation: Full Cost of Attendance

- Full Cost of Attendance (autonomy conferences)
  - Full scholarship: now includes expenses that meet the federal definition of “cost of attendance” .
  - In addition to tuition, fees, books and room and board.
    - Can include expenses such as academic-related supplies, transportation and other similar items.
    - Value of those benefits can differ from campus to campus.

Legislation - Meals

- Division I: student-athletes can receive unlimited meals and snacks in conjunction with their athletics participation.
  - Applies to walk-ons as well as scholarship student-athletes.
  - In addition to the meal plan provided as part of a full scholarship.
  - Before this: scholarship student-athletes received three meals a day or a food stipend.
- Division II: student-athletes can now receive unlimited meals and snacks incidental to their athletics participation.

Student-Athletes and Unionization

- 2014: Northwestern scholarship players wanted to unionize
- Key issue was whether they are employees
- Initial decision by regional director of the National Labor Relations Board concluded they were employees
- On Appeal, the full National Labor Relations Board "punted" on the issue and decided that the NLRB did not have jurisdiction and therefore vacated the decision.

Initial Determination – Not Primarily Students

- Spend 50 to 60 hours in training camp and no studies
- Spend 40 to 50 hours in football activities in season, but only attend 20 hours of classes
- Athletic duties – not a core element of educational degree requirements
  - (But that ignores intangible life lessons learned on practice field and in competition)
- Academic Faculty does not supervise athletic duties
- Scholarships are effectively compensation for athletic duties and not financial aid (Scholarship = transfer of value = compensation
- $250,000 over 4 or 5 years
- School can receive millions in revenue and reputation

Full NLRB Decision

- NLRB recognized that only 17 of the 125 Football Bowl Subdivision (FBS) schools are private institutions which are subject to the jurisdiction of the NLRB
  - As a result, any decision would not apply to the overwhelming number of FBS schools
- It observed that two of the states specifically excluded scholarship athletes from their definitions of “employee”
- The NLRB also recognized that there were no case precedents governing collegiate athletes and that even if they were analogized to professional athletes, there had never been a bargaining unit consisting of players on one team.
- From the perspective of the NLRB, the allowance of collective bargaining with just one team would not lead to labor stability in collegiate athletics.

O'Bannon Decision by Court of Appeals - Ninth Circuit

Key Holdings:

- NCAA regulations are subject to antitrust scrutiny
- When those regulations truly serve procompetitive purposes, courts should not hesitate to uphold them
- "In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market."
- "The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more."
- Reversed District Court's ruling allowing students to be paid compensation for their NILs

Important Observations

Rejected NCAA argument that the compensation rules are not subject to the Sherman Act

- Definition of "commerce" is broad, "including almost every activity from which the actor anticipates economic gain."
- Includes the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it.

Rejected NCAA argument that the compensation rules are "eligibility rules" rather than direct restraints on the terms of agreements between schools and recruits.

- Mere fact that a rule can be characterized as an "eligibility rule," however, does not mean the rule is not a restraint of trade; were the law otherwise, the NCAA could be insulated from antitrust scrutiny by renaming every rule governing student-athletes an "eligibility rule." The antitrust laws are not to be avoided by such "clever manipulation of words."

Rules regulate the terms of commercial transactions between athletic recruits and their chosen schools:

"We therefore do not reach the thornier questions of whether participants in live TV broadcasts of college sporting events have enforceable rights of publicity or whether the plaintiffs are injured by the NCAA's current licensing arrangement for archival footage."

Amateurism

- NCAA argued “promoting amateurism” was procompetitive justification for rule
- Court's view: it is primarily “the opportunity to earn a higher education” that attracts athletes to college sports rather than professional sports, and that opportunity would still be available to student-athletes if they were paid some compensation in addition to their athletic scholarships
  - Loosening or abandoning the compensation rules might be the best way to “widen” recruits' range of choices; athletes might well be more likely to attend college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school
- NCAA’s commitment to amateurism …. the amateur nature of collegiate sports increases their appeal to consumers = procompetitive effect
  - NCAA’s compensation rules serve the two procompetitive purposes: integrating academics with athletics, and “preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism.”

Can’t Pay Them

“We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both *equally* effective in promoting amateurism and preserving consumer demand.

Both we and the district court agree that the NCAA's amateurism rule has procompetitive benefits. But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs.*

Having found that amateurism is integral to the NCAA's market, the district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is “virtually as effective” for that market as being as amateur. Or, to borrow the Supreme Court's analogy, the market for college football is distinct from other sports markets and must be “differentiate[d]” from professional sports lest it become “minor league [football].” *Bd. of Regents,* 468 U.S. at 102.”

Education Expenses vs. Cash

The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL.

At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status. *Bd. of Regents,* 468 U.S. at 101–02.

In light of that, the meager evidence in the record, and the Supreme Court's admonition that we must afford the NCAA "ample latitude" to superintend college athletics, *Bd. of Regents,* 468 U.S. at 120, we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint.

We thus vacate that portion of the district court's decision and the portion of its injunction requiring the NCAA to allow its member schools to pay this deferred compensation."

FLSA Case Against NCAA, Penn & Other Schools

Berger v. Nat'l Collegiate Athletic Ass'n, No. 1:14-CV-1710-WTL-MJD, 2016 WL 614365 (S.D. Ind. Feb. 16, 2016) https://ecf.insd.uscourts.gov/cgi-bin/show_public_doc?12014cv1710-238

- The Supreme Court has recognized that there exists in this country a "revered tradition of amateurism in college sports,"
- That tradition is an essential part of the "economic reality" of the relationship between the Plaintiffs and Penn
- Generations of Penn students have vied for the opportunity to be part of that revered tradition with no thought of any compensation
- Students at Penn who choose to participate in sports (NCAA sports, club sports, or intramural sport) as part of their educational experience
  - Because they view it as beneficial to them.
  - Millions of Americans participate in amateur sports in countless contexts
    - For myriad reasons,
    - None of them, by definition, involving monetary compensation
    - But all of them, it is fair to assume, involving benefit of some sort to the participants
    - Enough benefit to justify the amount of effort the participants choose to put into it.

Only Penn is a Viable Defendant

- Plaintiffs do not allege that each of the Defendants is their employer;
  - Rather, they expressly allege that the Defendants employ those students “participating in their respective NCAA athletics programs.”
  - Court agrees that Complaint does not allege Plaintiffs are employees of any Defendant other than Penn.
- Plaintiffs make "fairness argument"
  - Accusing the Defendants of taking the position that “student athletes are less deserving of employee status and pay, under the FLSA, than work study participants, ‘who work at food service counters or sell programs at athletic events, or who wait on tables or wash dishes in dormitories,’ ” all of whom are designated as employees by the United States Department of Labor.
- Because status as an ‘employee’ for purposes of the FLSA depends on the totality of circumstances rather than on any technical label, courts must examine the ‘economic reality’ of the working relationship.”

Not Employment

- The Court recognized that the extremely broad definition of "employ" in the FLSA could be read to cover virtually any situation:
  - It defines "employ" as including "to suffer or permit to work" and defines "employee" as "any individual employed by an employer."
  - The definition "suffer or permit to work" - not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.
  - Otherwise, all students would be employees of the school, and as such entitled to receive minimum wages.
- Thousands of unpaid college athletes on college campuses each year is not a secret, and yet the Department of Labor has not taken any action to characterize them as employees and apply the FLSA to them
- To the contrary, the DOL has expressly taken the position that
  - [a]s part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as part of the educational opportunities provided to the students by the school or institution, are not "work" [under the FLSA] and do not result in an employee–employer relationship between the student and the school or institution. Also, the fact that a student may receive minimal payment for participation in such activities would not necessarily create an employment relationship.
- The economic reality of the situation and the DOL's position support the conclusion that the fact that the Plaintiffs participate in an NCAA athletic team at Penn does not make them employees of Penn for FLSA purposes.

Implications for Title IX

- What if the football players/basketball players are provided the extra benefits, cost of attendance, "compensation" etc…
- What if they are employees?
- Will the extraordinary revenue generating nature of the sport (on some campuses) be an excuse to provide them the greater level of benefits?
- Need to look at the Law, Regulations, Policy Interpretation, Other OCR documents, and Court Decisions for the answer

Title IX

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

20 U.S.C. § 1681(a)

Cohen v. Brown University

For college students, athletics offers an opportunity to exacuate leadership skills, learn teamwork, build self-confidence, and perfect self-discipline. In addition, for many student-athletes, physical skills are a passport to college admissions and scholarships, allowing them to attend otherwise inaccessible schools. These opportunities, and the lessons learned on the playing fields, are invaluable in attaining career and life successes in and out of professional sports.

The highway of opportunity runs in both directions. Not only student-athletes, but universities, too, benefit from the magic of intercollegiate sports.

Successful teams generate television revenues and gate receipts which often fund significant percentages of a university's overall athletic program, offering students the opportunity to partake of sports that are not financially self-sustaining.

Even those institutions whose teams do not fill the grandstands of cavernous stadiums or attract national television exposure benefit from increased student and alumni cohesion and the support it engenders. Thus, universities nurture the legends, great or small, inhering in their athletic past, polishing the hardware that adorns field-house trophy cases and reliving heroic exploits in the pages of alumni magazines.

Cohen v. Brown Univ., 991 F.2d 888, 891-892 (1st Cir. 1993).

Title IX Regulation – dealing with Athletics; 34 CFR 106.41

106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, **be treated differently from another person or otherwise be discriminated against** in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. **In determining whether equal opportunities are available the Director will consider, among other factors:** ["Laundry List" omitted]

…

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, **but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.**

Policy Interpretation

A. Athletic Financial Assistance (Scholarships)

1. The Regulation. Section 86.37(c) of the regulation provides:

[Institutions] must provide reasonable opportunities for such award (of financial assistance) for member of each sex in proportion to the number of students of each sex participating in inter-collegiate athletics.

…

3. Application of the Policy - a. This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. **It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.**

b. **When financial assistance is provided in forms other than grants, *the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes.*** A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

(This is one area where analysis of "trust fund"payments would have been triggered)

Policy Interpretation

B. Equivalence in Other Athletic Benefits and Opportunities

1. The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club or intramural athletics. "provide equal athletic opportunities for members of both sexes." In determining whether an institution is providing equal opportunity in intercollegiate athletics the regulation requires **the Department to consider, among others, the following factors:** [Laundry list omitted]

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.

Cost of Attendance

- Considered Part of Athletically Related Financial Aid Award
- Assessed under Financial Aid analysis of Title IX: 1998 Bowling Green Letter:
  - “Colleges' allocation of the scholarship budget among teams, therefore, is invariably sex-based, in the sense that an allocation to a particular team necessarily benefits one sex to the exclusion of the other. See Brown, 101 F.3d at 177. Where, as here, disparate treatment is inevitable and a college's allocation of scholarship funds is "at the discretion of the institution," Brown, 101 F.3d at 177, the statute's nondiscrimination requirement obliges colleges to ensure that men's and women's separate activities receive equitable treatment.”
- OCR Letter – November, 2015
- Consider aid for traditional school year and summer school

Comments to Policy Interpretation Provide Insight

Comment to Policy Interpretation

(7) Comment: Some commentors urged the Department to adopt various forms of team-based comparisons in assessing equality of opportunity between men's and women's athletic programs. They stated that well-developed men's programs are frequently characterized by a few "major" teams that have the greatest spectator appeal, earn the greatest income, cost the most to operate, and dominate the program in other ways. They suggested that women's programs should be similarly constructed and that comparability should then be required only between "men's major" and "women's major" teams, and between "men's minor" and "women's minor" teams. The men's teams most often cited as appropriate for "major" designation have been football and basketball, with women's basketball and volleyball being frequently selected as the counterparts.

Response: …

Second, no subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the "major/minor" classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women's volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to the members of one sex.

Can Revenue Generation and Source of Funds Justify Treatment Disparity?

Comment to the Policy Interpretation:

(1) Comment: Football and other "revenue producing" sports should be totally exempted or should receive special treatment under Title IX.

Response: The April 18, 1978, opinion of the General Counsel, HEW, concludes that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulation in the administration of any revenue producing activity". Therefore, football or other "revenue producing" sports cannot be exempted from coverage of Title IX.

In developing the proposed Policy Interpretation the Department concluded that although the fact of revenue production could not justify disparity in average per capita expenditure between men and women, ***there were characteristics common to most revenue producing sports that could result in legitimate nondiscriminatory differences in per capita expenditures***. For instance, some "revenue producing" sports require ***expensive protective equipment and most require high expenditures for the management of events attended by large numbers of people***. These characteristics and others described in the proposed Policy Interpretation were considered acceptable, nondiscriminatory reasons for differences in per capita average expenditures.

In the final Policy Interpretation, under the equivalent benefits and opportunities standard of compliance, some of these non-discriminatory factors are still relevant and applicable.

Judicial Perspective on Source of Funds

More importantly, however, a public university cannot avoid its legal obligations by substituting funds from private sources for funds from tax revenues.

Once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement.

As the District Court properly explained, outside funding is not a defense for "a university which provides more than substantially proportionate athletic opportunity to one gender in violation of Title IX." *Chalenor v. Univ. of N.D.,* No. 2-99cv-170, slip op. at 7 (Aug. 22, 2000) (reproduced at App. 113).

Thus, the District Court correctly concluded: "A school may not skirt the requirement of providing both sexes equal opportunity in athletic programs by providing one sex more than substantially proportionate opportunity through the guise of 'outside funding.' " *Chalenor,* No. 2-99cv-170, slip op. at 8.

The University had no obligation to accept the donation, and, even if it had, disbursement of the funds still would have been subject to the strictures of Title IX.

Chalenor v. Univ. of North Dakota, 291 F.3d 1042, 1048 (8th Cir. 2002).

Overall Program Issue

- Provision of enhanced scholarship, treatment and benefits to football and men's basketball usually need to be counter-balanced within women's athletic program
  - If schools use an agency or court decision or the NCAA Legislation as the basis to increase or improve scholarship, treatment and benefit issues
  - These actions would trigger a need to assess compliance under Title IX and a possibility of making similar changes in the women's athletic programs.
  - Remember: Tiering has been in existence for years and requires a "balanced" approach.
- If teams operate within the context of an institution's intercollegiate athletic program, an overall assessment of equity must be made consistent with the long established requirements of Title IX
  - Comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes
  - Compliance: if program components are equivalent, that is, equal or equal in effect. Identical benefits, opportunities, or treatment are not required, provided the overall effects of any differences is negligible.
  - If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors

What about possible status as Employees?

106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to **discrimination in employment**, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(3) A recipient **shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination** prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

…

(b) *Application.* The provisions of this subpart apply to:

(3) Rates of pay or any other form of compensation, and changes in compensation;

(5) The terms of any collective bargaining agreement;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(10) Any other term, condition, or privilege of employment.

Pay Equity

- U.S. Women's National Soccer Team: EEOC Complaint
- University of North Florida: Settlement with Coach - $1.25 million
- University of Tennessee: Settlement with two strength coaches and administrator
  - $750,000 for the Plaintiffs and …
  - Between $300,000 and $475,000 for attorney's fees (still to be determined).
- Expansion of claims and concern to staff = wake up call

Legal Issues

- Equal Pay Act
- Sex discrimination claim (or any other protected category) under State or Federal Law (Title VII)
- Title IX: but uses same analysis as Equal Pay Act

Equal Pay Act

- Plaintiff must show that he or she:
  - (1) worked in the same department as another employee of the opposite sex
  - (2) received a wage unequal to that of his or her co-worker
  - (3) for work which required equal skill, effort, and responsibility; and
  - (4) which was performed under similar working conditions.
- Many case interpretations
- Technical distinctions between the comparator positions = Fine Line but Differences

Sex Discrimination Claim

- (or any other protected category)
- Compensation and other treatment issues
  - But Equal Pay Act factors don't apply
- Focus: the totality of all the circumstantial evidence
- More flexible evidentiary approach
  - Tennessee and North Florida cases
- Creates broader legal issues and concerns
- Not just coaches – staff member issues can be as significant

Practical Reality

- Different approaches to pay practices occur/evolve with each change in leadership
  - Some may not be well grounded…
- Reasons/basis for any resulting pay differentials become less clear over time
- Unknowing, unintentional and inconsistent compensation system can develop

Tennessee Case

- Two strength coaches (one female and one male) and an associate athletic director for sports medicine
- Several claims advanced
- One of them: providing less compensation
  - To female employees
  - And those associated with women's teams
- In comparison to employees who performed similar tasks for the men's teams.
- ***Equitable pay practices should be an issue for all positions in an athletics department***

North Florida Case

- Coach claimed:
  - that held to higher performance standards than male counterpart and paid significantly less
  - that women's teams: unequal operating budgets and locker rooms compared to men's teams
  - that the university provided academic exceptions to admissions requirements for male recruits but not for female players
    - Not as much overall support impacted win/loss ratio
  - Men's basketball coach was paid about $80,000 a year more than her; but started coaching at UNF almost 20 years later
- University position:
  - pay difference not discriminatory – coach was hired when switched from Division II to Division I, and higher salary was necessary in order to attract a men's coach who could succeed at that level
  - Coach had 11 losing seasons

Proactive Approach

- Help is there:
  - Coordinate with the General Counsel
- Gather Documentation:
  - Comparable positions; salary levels, payroll histories, hiring files, job descriptions, actual duties
- Market Driven Differences:
  - Need specific data and related information supporting that determination

Questions and Contact Information

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