

Insights

CONSIDERING CUTTING VARSITY SPORTS TEAMS DUE TO COVID-19 FINANCIAL STRAINS? MAKE SURE YOU COMPLY WITH TITLE IX FIRST!

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SUMMARY

The COVID-19 pandemic has dealt a heavy blow to college and university athletic programs over the past 10 months. The institution-wide budgetary challenges caused by the pandemic have been particularly acute in many athletic departments. In reaction to these budgetary issues, many institutions have decided to pare down their athletic programs. As of November 2020, more than 350 teams had been cut nationally. With long-lasting impacts of the pandemic on institutional budgets anticipated, more athletic programs may be compelled to tighten their belts and sorely tempted to eliminate non-revenue sports. This alert provides insights into the gender equity concerns raised by team elimination decisions.

This past Friday, January 29, 2021, Dartmouth University announced that, as part of a settlement with student-athletes, it would be reinstating the five teams it cut in July 2020 in response to pandemic-related budget deficits: men's and women's swimming and diving, men's and women's golf, and men's lightweight rowing. This settlement came in response to complaints from members of the women's swimming and diving and golf teams that eliminating their teams violated Title IX, the federal law that requires institutions to offer an equal opportunity to men and women to play sports, including athletic scholarship dollars proportional to their participation. Not only did Dartmouth agree to reinstate the teams, it also agreed to do a full gender equity review by March 15, 2022, and then to adopt a gender equity plan to ensure on-going compliance.

The Dartmouth administration's frank acknowledgment that its elimination decision was predicated on "incomplete" (perhaps dated) Title IX compliance data on campus serves as a cautionary tale for other institutions. Any institution contemplating cutting a women's sports team, whether to address pandemic budget shortfalls or otherwise, should be sure to perform a complete gender equity review first. Institutions that fail to take Title IX compliance into account when deciding whether and which varsity teams to eliminate face significant litigation risk, including a potential judicial

directive to reinstate programs, and damage to the institution's reputation and recruitment of female athletes and students more generally. With a new Department of Education and Office of Civil Rights staff under the Biden administration, institutions may be subject to more intensive enforcement scrutiny as well.

A prime example of the exposure risk from failing to adequately account for Title IX in team elimination decisions is the University of Iowa. Iowa had an historic gap between the percentage of its female student population and the athletic opportunities for women, but still decided to cut certain women's sports in 2020 based on budget shortfalls and anticipated deficits due to COVID-19. Members of Iowa's women's swimming and diving team sued under Title IX and, in late December 2020, obtained a preliminary injunction barring the university from eliminating their team – or any other women's teams – before a trial on the merits. When, as in this case, the data proves the unequal opportunities for female athletes, an institution is likely to be enjoined from implementing its team elimination decision because, on its own, the denial of equal athletic opportunity under Title IX is well-recognized as irreparable harm. *Ohlensehlen v. University of Iowa*, 2020 WL 7651974 at *12 (S.D. Iowa. Dec. 24, 2020).

The financial difficulties an institution is facing and the necessity of paring back athletic department budgets will not eliminate the exposure an institution faces from eliminating women's teams in violation of Title IX. As the federal court in the University of Iowa case made clear, "financial hardship is not a defense to a [probable] Title IX violation." *Id.* at *14. The financial expedience of cutting athletic programs therefore cannot take priority over Title IX compliance.

Moreover, institutions should be aware that courts do not believe that the harm of losing one's athletic opportunity is eliminated or meaningfully mitigated by allowing the student-athlete to retain her scholarship and to complete her degree. The opportunity to continue one's education with continued scholarship does not eliminate the harm from having to give up one's life-long commitment to a sport as a result of team elimination. Nor does the opportunity to transfer eliminate the harm a student-athlete suffers when her team is eliminated, because transfer opportunities are not easy to realize, nor is it certain that the student-athlete could obtain replacement athletic scholarships or financial assistance, or a spot at a university with comparable athletic and academic opportunities.

The fiscal reality for many institutions may continue to necessitate the elimination of athletic programs, but legal exposure can only be mitigated by thoughtful, compliance-based decision-making. We urge any institution contemplating the elimination of any team to conduct a gender equity review first.

If your institution is considering eliminating sports teams, please feel free to reach out to Bryan Cave Leighton Paisner's Higher Education Team for assistance with a Title IX gender equity review.

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MEET THE TEAM



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