

# HIGHER EDUCATION INFORMATION MEMO

APRIL 17, 2023

## Hot Topics in Title IX Athletics: Does Having Separate Classifications for “Major” and “Minor” Sports Violate Title IX?

It is a common practice in collegiate athletics to separate teams in two or more “tiers” of “major” and “minor” or “revenue” and “non-revenue” sports. Tiering may not be explicitly intended by administrators, but informal tiering is relatively common by virtue of emphasizing some teams over others. While tiering is not *per se* a violation of Title IX, it must be organized properly to avoid violations.

Title IX requires that all educational institutions receiving federal funds provide equitable opportunities and benefits to both male and female athletes. This does *not* mean that Title IX requires equal division of athletic budgets, the same sports or the same number of sports for male and female athletes. Instead, it focusses on eliminating “significant” disparities in athletic participation, benefits and services for male and female student athletes. A finding of significance can result from either a single large disparity, or by totaling several smaller disparities. The focus is on the school’s athletic program as a whole, to see whether any disparities add up to a denial of equal opportunity to athletes of one sex.

The goal of proper tiering is to save money by providing fewer benefits to “minor”/“non-revenue” sports teams (e.g., less travel, coaching and equipment, or less desirable facilities), while still meeting the participation opportunities and athletic benefits requirements of Title IX. As noted above, Title IX does not prohibit offering differing benefits to different teams, so long as those benefits do not vary on the basis of sex. While Title IX does not explicitly ban tiering, there is a risk of a Title IX violation if the tiering process results in better benefits for a disproportionately higher number of athletes of one sex. As always, analysis of an institution’s Title IX compliance requires a broad view of its entire athletics program, balancing the equities across the entire women’s and men’s programs. The mere existence of tiering does not, itself, constitute a violation.

The case of *Portz v. St. Cloud State Univ.* (16 F.4<sup>th</sup> 577 [8<sup>th</sup> Cir. 2021]) provides a good example. Female student-athletes alleged that St. Cloud State’s three-tier system violated Title IX’s obligation to proportionally allocate athletic opportunities and benefits to men and women. The appellate court ruled that the lower court improperly looked at benefits and opportunities to men and women within each tier, when it should have looked broadly across the university’s entire athletic program. Title IX does not require equity within each tier. (The case was sent back to the lower court, which again found that St. Cloud State failed to provide equitable opportunities and benefits to its male and female athletes. See, 2022 WL 4095912 [D. Minn., Sept. 7, 2022]).

Thus, while it may not be necessary to provide proportionally equivalent benefits to men’s and women’s teams within each tier, care must be taken to ensure that the tiering system results in an equitable balance of benefits throughout the athletic program. For example, if an institution’s top tier includes its large football and men’s basketball teams, while most or all women’s teams (and any remaining men’s teams) are relegated to lower tiers, there is a risk that a significant disparity will result in the program overall. Nor is it enough to simply assign the same number of men’s and women’s teams to each tier. The key is to ensure that the population of men’s and women’s teams – the number of participants being

the focus – are distributed among the tiers in such a manner as to result in proportionally equivalent benefits program-wide.

Another area for attention is the impact of tiering on scholarship funding, which must also be distributed between male and female athletes in a proportionally equitable manner. Because NCAA and/or athletic association limitations on the number of scholarships may vary among sports, how teams are placed in the tiering system may result in Title IX scholarship noncompliance. These externally imposed scholarship limits do not excuse an institution from Title IX compliance in its scholarship programs. If new teams are added to an institution's athletic program, the distribution of scholarship funding should be reviewed to ensure ongoing proportional equity.

Institutions must be cautious and aware of the pitfalls that can result from either formal or informal tiering. The best way to ensure Title IX compliance is to perform a compliance audit of their athletic programs. For assistance with Title IX auditing or if you have questions about Title IX in athletics, please contact Bond attorneys [Kristen Thorsness](#), [E. Katherine Hajjar](#) or the Bond attorney with whom you are regularly in contact.

