

2026 Title IX Summer Summit

Gender Equity In Athletics

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Presented by **Church, Church, Hittle + Antrim**
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James Nussbaum, JD



10+ AS HIGHER EDUCATION COUNSEL

- In-house counsel responsible for athletics, employment, student affairs
- Outside counsel for schools in Indiana and across the country
- Presents for national associations on issues facing higher education



TITLE IX EXPERIENCE

- Investigator
- Adjudicator
- Managing litigation
- Agency complaints
- Training
- Gender equity in athletics



FEATURED IN

Forbes | The Hill | Inside Higher Ed | Bloomberg Law | Chronicle of Higher Education | CBS Sports | USA Today



Agenda

1. Title IX, Gender Equity, and Athletics
2. Participation Opportunities
3. Financial Assistance
4. Treatment Areas
5. Retaliation
6. Transgender issues
7. *Fisk* Case
8. OCR Process

Disclaimer on language.

Vocabulary concerning gender identity + sexual orientation continues to evolve. There is no universal agreement on the meaning of all terms or the best terms to use. We strive to use language and examples that are respectful and appropriate but welcome feedback on how we can improve. Please be patient with your colleagues today and assume good faith even if they use language or terms that you would not.

Gender Equity + Athletics

Title IX

“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.”

34 C.F.R. §106.31

Overview of Title IX:

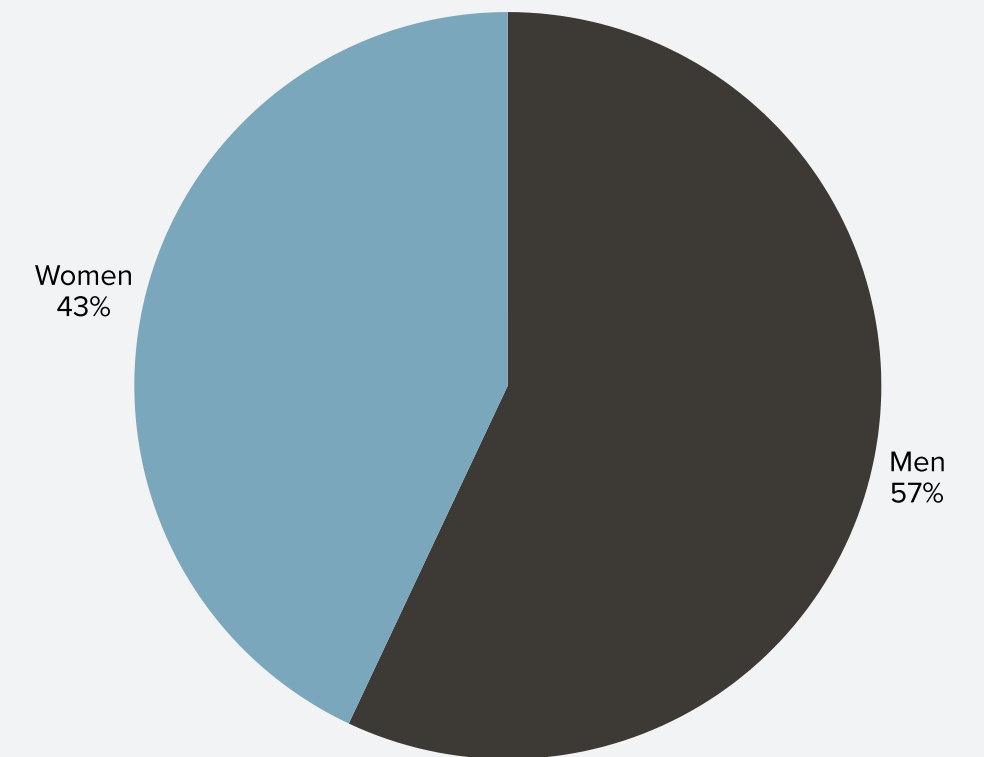
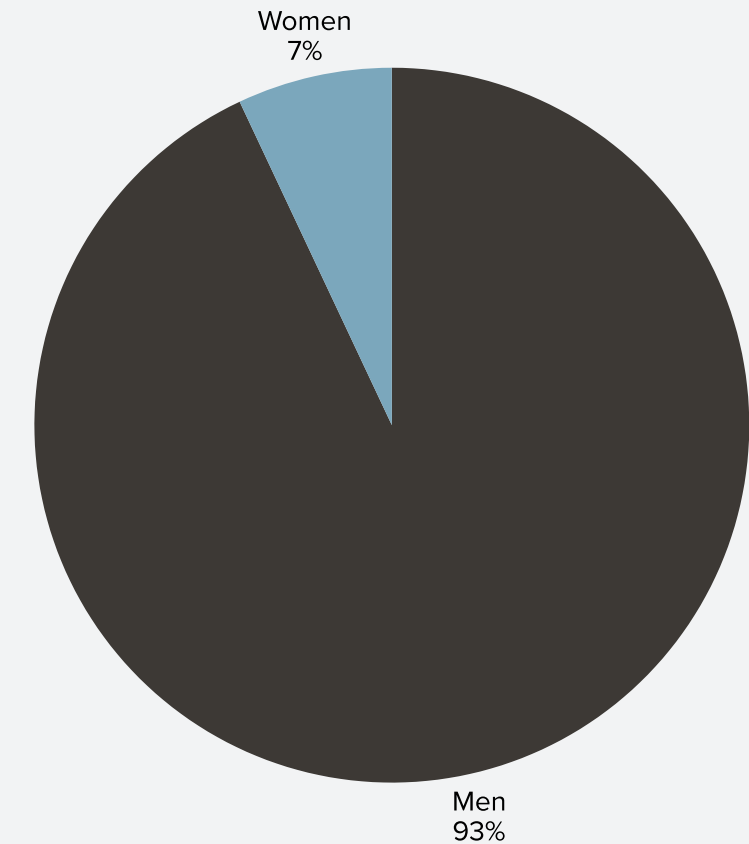
Regulatory Structure

- **Regulatory Structure**
- **Federal laws**
- **Federal Administrative Rules (ED)**
- **Federal Investigative Resolutions (ED OCR)**
- **State Laws**
- **Court Decisions**
- **Athletic Association Policies (NCAA, NAIA, NJCAA)**

Overview of Title IX:

Impact

- Male and female sports continue to set participation records
- About 43% all NCAA student-athletes are female
- In 1972, about 7% of all NCAA student-athletes were female



Why Compliance Matters

- **Because it's the right thing to do.**
- **Complaint filed with or initiated by a federal agency**
 - **Remedy the violation**
 - **Ongoing oversight from federal agencies**
 - **Terminate federal funding (can-but hasn't-occurred)**
 - **Refer case to DOJ (only if school refuses to remedy)**
- **Federal Litigation**
 - **Monetary damages may be awarded + attorneys' fees**
 - **Reinstatement of athletic programs**

Three Primary Areas of Title IX Compliance

1

**Participation
Opportunities**

2

**Financial
Assistance**

3

**Treatment
Areas**

Participation Opportunities

- **Three Prong Test**
- **Separate Teams**



Participation Opportunities

Three Prong Test

Prong 1. Substantial Proportionality

Prong 2. History and Continuing Practice of Program Expansion

Prong 3. Fully Accommodating Interests + Abilities (“Survey Prong”)

Participation Opportunities

Prong 1: Substantial Proportionality

Percentage of athletic opportunities the school provides to male + female student-athletes are substantially proportionate to the percentage of male and female students enrolled.

Participation Opportunities

of Female Students
of Total Students



of Female Participation Opportunities
of Total Participation Opportunities

Example: If you have 6,000 women and 4,000 men, 60% of your athletic opportunities need to be for women and 40% for men.

Participation Opportunities

Prong 1: Substantial Proportionality

- *What counts as a sport?*
- *Who counts as a participant?*
- *What is substantially proportionate?*

Participation Opportunities

What Counts as a Sport

If a school is a member of a recognized intercollegiate athletic organization that subjects the activity at issue to its organizational requirements, OCR will “presume” that the activity is a sport + that participation can be counted under Title IX.

Program Structure and Administration: whether the activity is structured + administered in a manner consistent with established intercollegiate varsity sports in the institution’s athletics program

Team Preparation and Competition: whether the team prepares for + engages in competition in a manner consistent with established varsity sports at institution

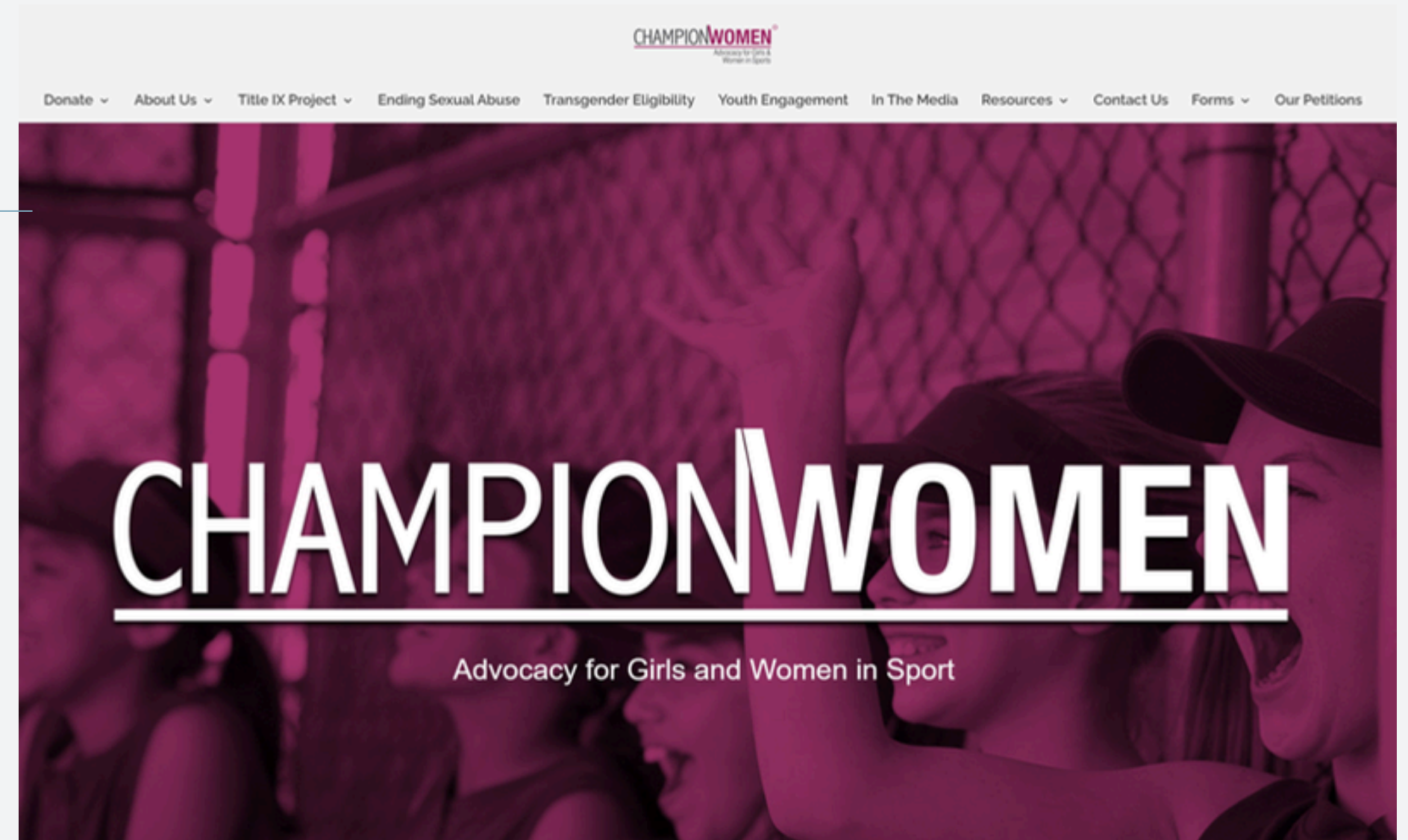
Participation Opportunities

Prong 1: Substantial Proportionality

?	Title IX	EADA
On roster first date of competition?	Yes	Yes
Joins after first date of competition?	Yes	No
Male practice players for female sports?	No	Yes
Medical non-counters?	Yes	Yes
Participant on two teams?	Both	Both

Participation Opportunities

Prong 1: Substantial Proportionality



Participation Opportunities

Prong 2: History + Continuing Practice

Schools that have been steadily expanding the percentage of participation for the underrepresented sex over the years and have a credible plan to continue to do so may be deemed temporarily compliant.

Participation Opportunities

Prong 2: History + Continuing Practice

OCR will review:

- Entire history of athletic programs
- Focus on participation opportunities
- Look for demonstrative evidence of expanding opportunities in response to interests and abilities

What does history mean?

What is a “continuing practice”?

Participation Opportunities

Prong 2: History + Continuing Practice

Prong 2 History + Continuing Practice Best Practices

- **Documentation is key – timeline of events, policy on adding teams, policy on participation for existing teams, gender equity plan**
- **Appropriate squad/roster management**
- **Multidisciplinary approach to addition/elimination of a sport**

Participation Opportunities

Prong 3: Full + Effective Accommodation of Interests + Abilities

- The “Survey Prong”
- Must show that institution is “fully and effectively” accommodating the interests and abilities of the underrepresented gender
- Ask:
 - Are underrepresented sex interested in competing in a particular sport?
 - Sufficient ability among them to sustain a team in that sport?
 - Is there a reasonable expectation of competition for that team?

Participation Opportunities

Prong 3: Full + Effective Accommodation of Interests + Abilities

- *If institution eliminates a team, can still meet Prong 3?*
- *How will OCR determine if sufficient unmet interest?*
- *Any additional ways to assess interest in a sport?*
- *Can we use surveys?*

Participation Opportunities

Separate Teams

A school may operate separate teams for members of each sex.

Generally, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

“...sports the purpose or major activity of which involves bodily contact.”

Financial Assistance

"To the extent that [an institution] awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics."

34 C.F.R. § 106.37(c)





What does this mean?

- No requirement to provide the same number of scholarships for men + women or scholarships of equal value
- Instead, must be "substantially proportionate"



What does this mean?

- *What is “financial assistance”?*
- *What is “substantially proportionate”?*
- *What are examples of legitimate, nondiscriminatory reasons?*

Financial Assistance

“...such awards for members of each sex in proportion...”

$$\frac{\$ \text{ female athletic assistance}}{\$ \text{ total athletic assistance}}$$



$$\frac{\# \text{ of Female Athletes}}{\# \text{ of Total Athletes}}$$

1% Discrepancy:

If you have 300 women and 200 men, 59% - 61% of your athletics aid must go to women.

Equitable Treatment + Benefits

“The Laundry List”



Equitable Treatment + Benefits

“The Laundry List”

Equipment and Supplies	Scheduling of Games and Practice Time	Travel and Per Diem Expenses
Opportunity to Receive Tutoring	Assigning and Compensation of Coaches	Opportunity to Receive Coaching
Locker Rooms and Competition Facilities	Medical and Training Services	Housing and Dining Services
Support Services	Recruiting	Publicity

Equitable Treatment + Benefits

Source of Funds

“Title IX requires that equitable benefits, including equipment and supplies, be provided to both male and female team[s] irrespective of the source of the funds for those benefits.”

Equitable Treatment + Benefits

Source of Funds

Women's
Sports

Men's
Sports

opportunity
to receive
COACHING

PUBLICITY

SCHEDULING

FACILITIES

equipment +
SUPPLIES

- Student-led fundraiser
 - Booster club funds
 - Head coach provided
 - Private donations



Equitable Treatment + Benefits

Equipment and Supplies

- **Quality** (e.g., how nice are the uniforms?);
- **Suitability** (e.g., are the sizes appropriate? Should a woman wear a male wrestling singlet?);
- **Amount** (e.g., how many uniforms? Does one team get access to specialized equipment?);
- **Maintenance and replacement** (e.g., how often are uniforms replaced?); and
- **Availability of equipment and supplies** (e.g., Does one team get access to specialized equipment?).

Equitable Treatment + Benefits

Scheduling of Practice and Games

- **Number of competitive events per sport;**
- **Number and length of practice opportunities;**
- **Time of day competitive events are scheduled (e.g., how many games does each sex play in “primetime?”);**
- **Time of day practice opportunities are scheduled (e.g., are the practice times for one sex more convenient than for another?); and**
- **Opportunities to engage in available pre-season and post-season competition.**

Equitable Treatment + Benefits

Travel and Per Diem



Equitable Treatment + Benefits

Opportunity to Receive Tutoring

- **The availability of tutoring; and**
- **Procedures and criteria for obtaining tutorial assistance.**



Equitable Treatment + Benefits

Assignment of Coaches

- **Training, experience, and other professional qualifications; and**
- **Professional standing.**



Equitable Treatment + Benefits

Compensation of Coaches

- **Rate of compensation (per sport, per season);**
- **Duration of contracts;**
- **Conditions relating to contract renewal;**
- **Experience;**
- **Nature of coaching duties performed;**
- **Working conditions**
- **Other terms and conditions of employment.**

Equitable Treatment + Benefits

Provision of Locker Rooms and Practice + Competition Facilities

- **Quality and availability of the facilities provided for practice + competitive events;**
- **Exclusivity of use of facilities provided for practice + competitive events;**
- **Availability of locker rooms;**
- **Quality of locker rooms;**
- **Maintenance of practice and competitive facilities**
- **Preparation of facilities for practice + competitive events**



Equitable Treatment + Benefits

Medical and Training Services + Facilities

- **Availability of medical personnel + assistance;**
- **Health, accident + injury insurance coverage;**
- **Availability + quality of weight/training facilities;**
- **Availability + quality of conditioning facilities;**
- **Availability + qualifications of athletic trainers.**



Equitable Treatment + Benefits

Dining Services + Housing Facilities

- **Housing provided**
- **Special services as a part of housing arrangements**



Equitable Treatment + Benefits

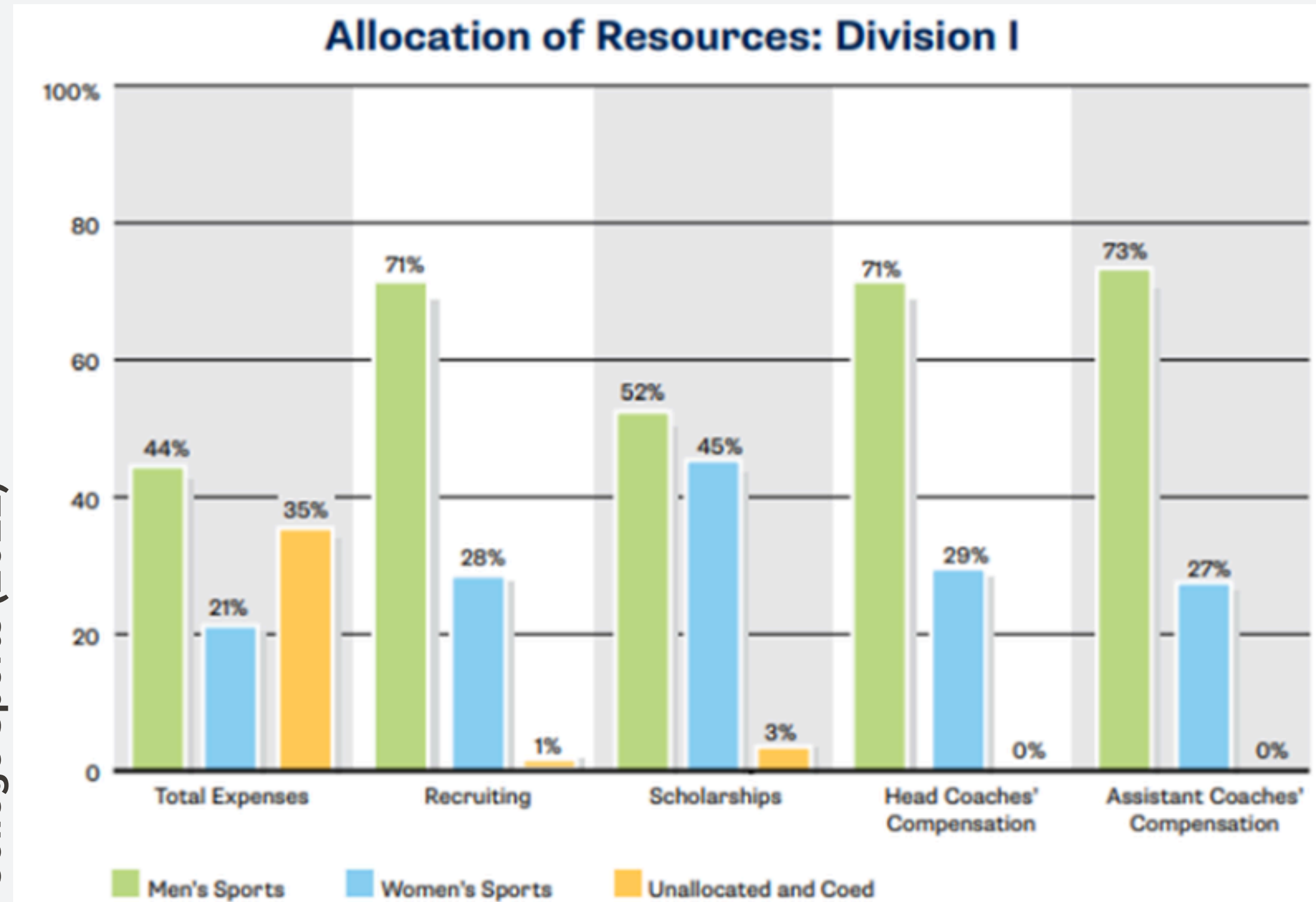
Publicity

- **Availability of quality sports information personnel;**
- **Access to other publicity resources for men's and women's programs; and**
- **Quantity and quality of publications and other promotional devices featuring men's and women's programs**



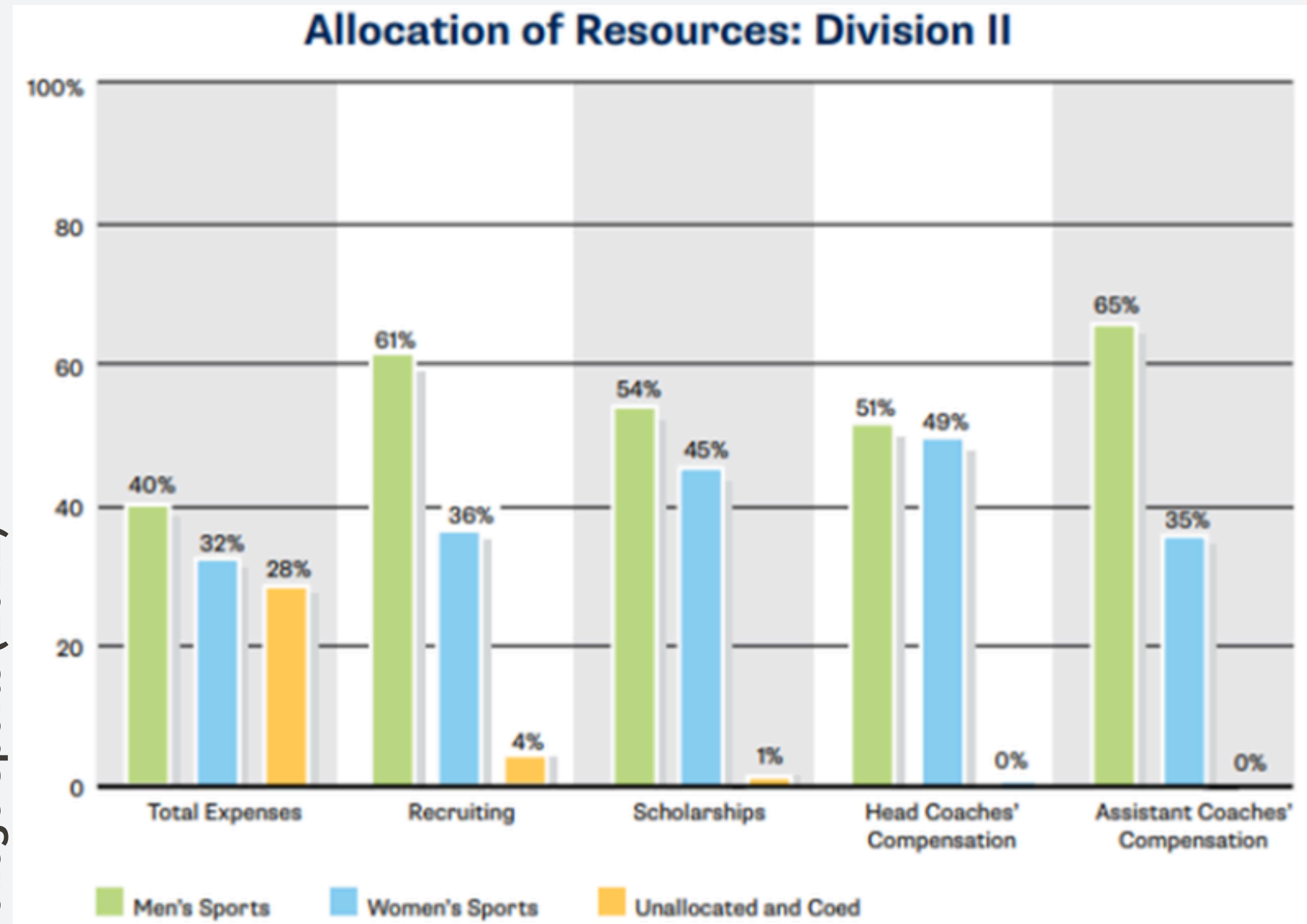
Equitable Treatment + Benefits

Source: NCAA, The State of Women in College Sports (2022)



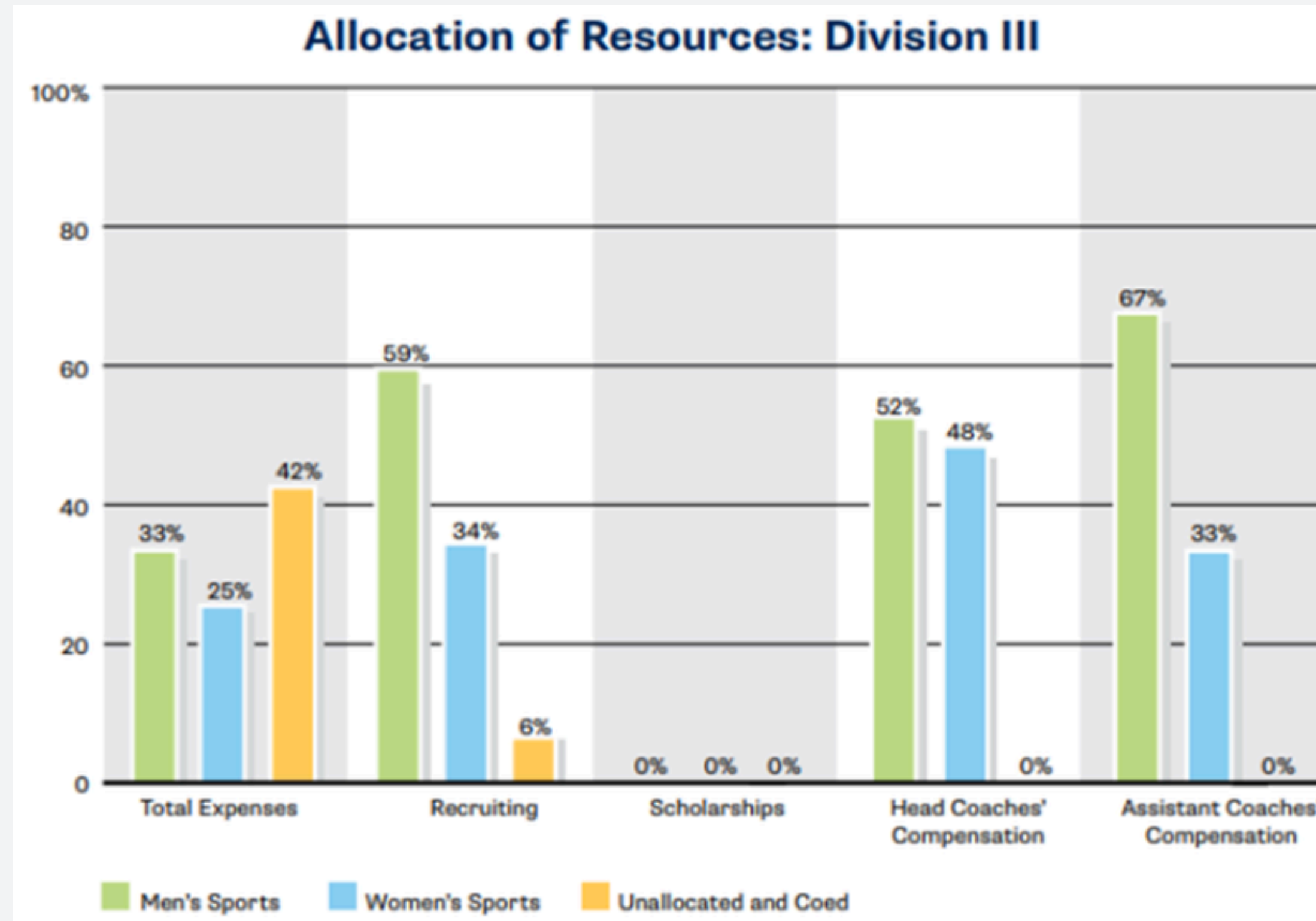
Equitable Treatment + Benefits

Source: NCAA, The State of Women in College Sports (2022)



Equitable Treatment + Benefits

Source: NCAA, The State of Women in College Sports (2022)



Retaliation

“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.”



Transgender Participation



↳ PRESIDENTIAL ACTIONS

Keeping Men Out of Women's Sports

The White House | February 5, 2025

Transgender Participation

January
2025

February 5,
2025

February 6,
2025

February 6,
2025

March
2025

Executive Order 14168

President Trump signs Executive Order 14168 establishing a federal “biological sex” framework for agency interpretation of federal law.

Executive Order 14201

President Trump signs Executive Order 14201, “Keeping Men Out of Women’s Sports,” directing agencies to interpret Title IX as barring transgender women from women’s athletics.

Dep’t of Ed

U.S. Dep’t of Ed OCR opens Title IX investigations into San Jose State University, the University of Pennsylvania, and the Massachusetts Interscholastic Athletic Association

NCAA

NCAA changes its transgender participation policy following the executive order.

HHS

HHS OCR finds Maine education entities violated Title IX by allowing transgender participation in girls’ athletics.

Transgender Participation

April
2025

May 6,
2025

June 25,
2025

January 15,
2026

March 30,
2026

University of Pennsylvania

Department of Education concludes the University of Pennsylvania violated Title IX over transgender athlete participation.

Saratoga Springs

OCR opens investigation into Saratoga Springs City School District, New York, regarding transgender participation policies.

California ED

Department of Education finds the California Department of Education and CIF violated Title IX for permitting transgender participation in girls' sports.

CCCAA

Department of Education and DOJ launch investigation into the California Community College Athletic Association's transgender participation policy.

Minnesota

DOJ files lawsuit against Minnesota Department of Education and Minnesota State High School League alleging transgender participation policies violate Title IX.

Transgender Participation

Indiana statute related to trans participation expanded to higher education effective July 1, 2025.

“ A state educational institution or private postsecondary educational institution that organizes, sanctions, or sponsors an athletic team or sport ... shall expressly designate the athletic team or sport as [male, female, or coed].”

“A male, based on a student's biological sex at birth...may not participate on an athletic team or sport designated under this section as being a female...”



Transgender Participation

Two cases were argued before the Supreme Court in January, and the court will issue its ruling this month.

Little v. Hecox and *West Virginia v. B.P.J.* both involve whether state laws which prohibit students identified as males at birth from participating in athletics are constitutional and compliant with Title IX.



**So you receive an OCR
complaint...**

OCR process for Athletics Issues

- **OCR Title IX Athletics Investigator's Manual**
- **Complaint filed**
- **OCR determines jurisdiction and opens a case**

Lifecycle

- **Phase 1: Document Request**
- **Phase 2: On-Site Review**
- **Phase 3: Report/Remediation/Voluntary Resolution Agreement**

Fisk v. San Diego State University

- **15 women's track and rowing student-athletes alleged that SDSU failed to provide athletic financial aid proportionate to participation opportunities.**
- **The case settled on April 20, 2026, with SDSU agreeing to pay \$1.6M (\$300,000 in class-wide damages; \$1.3M in attorneys' fees).**
- **SDSU also agreed to:**
 - **Retain an external expert to conduct a gender equity review;**
 - **Develop and implement a gender equity plan;**
 - **Ensure equitable athletic financial aid, treatment, and benefits; and**
 - **Achieve full Title IX compliance by May 2027.**

Gender Equity

Best Practices

- **Understand Gender Equity**
 - **Governing body requirements**
 - **Title IX requirements**
- **Assess your institution's current level of compliance**
 - **Collaborate with Athletics**
- **Develop a plan to achieve compliance**
- **Measure, monitor, and report on progress**
- **Regularly reassess compliance**



Questions?

Thank you.

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