

Courtney Bullar...: Welcome to The Law and Education podcast. I'm your host, Courtney Bullard, lawyer and owner of Institutional Compliance Solutions. You can learn about myself and my company on our website, www.icslawyer.com, and an even deeper dive into my background in episode one of this podcast.

Before I get into my introduction of this guest and lay some foundation for you, I just want to say that all of us at ICS hope that you are doing well, that everyone is safe and well in this crazy COVID environment. I know I talked about it in our relaunch podcast, but I genuinely mean it. I know it is crazy on the ground for those of you at school districts and institutions, and I hope you're hanging in there.

This is part one of my conversation with Nancy Hogshead-Makar. Before I go through Nancy's full and impressive bio, I want to note that we recorded this some time ago, but the topics are as timely as ever. As you will hear, Nancy is passionate about her work. It was an honor to get to interview her, because you're going to hear about her background with the Olympics, being a former Olympic gold medalist, and I love everything Olympics. But in addition, it was an honor talking to her just because of her knowledge in this area.

Nancy is a lifelong advocate for access and equality in athletics. She's internationally recognized as a legal expert on sports issues. She's a scholar and she's an author. She's committed to equality, using sport as a vehicle for social change. As one of the foremost exponents for gender equity, she advocates for access and equality in sports participation. Legal issues that she addresses includes sexual harassment, sexual abuse and assault, employment, pregnancy, and legal enforcement under Title IX.

She co-authored a book called Equal Play: Title IX and Social Change. She was the lead author of Pregnant and Parenting Student Athletes: Resources and Model Policies, published by the NCAA. Her book chapter The Ethics of Title IX and Gender Equity for Coaches appears in The Ethics of Coaching Sports: Moral, Social, and Legal Issues.

She's testified in Congress numerous times on the topic of gender equity and athletics, written numerous scholarly and lay articles, and has been a frequent guest on national news programs on the topic, including 60 Minutes, Fox News, CNN, ESPN, NPR, MSNBC, and network morning news programs. She serves as an expert witness in Title IX cases and has written amicus briefs representing athletics organizations and precedent-setting litigation. From 2003 to 2012, she was the co-chair of the American Bar Association Committee on the Rights of Women. She was elected to the editorial board of the Journal of Intercollegiate Sports. Sports Illustrated magazine listed her as one of the most influential people in the history of Title IX.

Nancy is a practicing attorney. She was a tenured professor of law at the Florida Coastal School of Law, where she taught sports law and gender equity in

athletics courses. She has a 30-year history with the Women's Sports Foundation, starting as a college intern and becoming the third president from 1992 to 1994, and then its legal advisor from 2003 to 2010, and serving as a consultant as the senior director of advocacy until 2014. She earned her law degree from Georgetown University Law Center and is an honors graduate of Duke University.

She has received all kinds of awards and recognition for her commitment to athletics, including an induction into the Academic All-America Hall of Fame and the International Scholar-Athlete Hall Of Fame, and the recipient of the National Association of Collegiate Women Athletic Administrators Honor Award. In 2011, she was presented with the National Organization for Women's Courage Award, and was inducted into the National Consortium for Academics and Sports Hall of Fame. In 2012, she was awarded the Title IX Advocate Award from the Alliance of Women Coaches.

My favorite part, of course, all of this is so impressive, but she capped eight years as a world-class swimmer at the 1984 Olympics, where she won three gold medals and one silver medal. Through high school and college dual meets, she was undefeated. Other major awards include the Nathan Malison Award, given to Florida's outstanding athlete, and an award given to the best all-around swimmer nationally. She's been inducted into 11 halls of fame, including the International Swimming Hall of Fame and the International Women's Sports Hall of Fame. As I said, really impressive bio.

In this episode, Nancy shares her experience at Duke as an undergrad and a student athlete. As a survivor of a brutal rape, her story is a reminder to all of us doing the work of the importance of supportive measures and thinking outside of the box. Note, as you'll hear in our discussion, she experienced all of that as an undergrad 10 years before that 2011 Dear Colleague letter, and the takeaways are still pertinent today. Nancy also breaks down gender equity in athletics, from the importance of the Title IX coordinator's involvement with compliance for a school or institution to the three-part test and the work of her organization. She'll go more into her background and what she's doing today, as you'll hear.

This episode is chock-full of information. Be sure to also tune in next week for part two of our discussion, which covers transgender rights and participation in athletics.

Nancy Hogshead-...: That is part of your job, is making sure that the athletic department is not discriminating against women in your department. Don't let somebody try to tell you like, "Oh, you don't really know, and it's very complex." Swear to God, it's one of the easiest places in all of law to be able to measure sex discrimination.

Courtney Bullar...: A little foundation before we transition into my conversation with Nancy. As I mentioned, we talk about gender equity in athletics and the three-part test. I just wanted to direct you to the 2010 Dear Colleague letter, April 20th, 2010, Dear Colleague letter issued by the Office for Civil Rights, that provides us with guidance on the three-part test that Nancy discusses. It is something that we include as a course download in our Title IX U course specifically on athletics, because it is complex.

But a reminder, and what is stated in this Dear Colleague letter as well, it states, "OCR enforce Title IX and its implementing regulation. The regulation contains specific provisions governing athletic programs and the awarding of athletic scholarships. Specifically, the Title IX regulation provides that if an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes. In determining whether equal athletic opportunities are available, the regulation requires OCR to consider whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes." Again, I read that directly from the 2010 Dear Colleague letter, and will provide a link to it in our show notes as well.

This Dear Colleague letter goes through other subregulatory guidance that's been issued by OCR on this topic over the past years, and then goes into breaking down the three-part test that OCR uses to determine whether a school is providing non-discriminatory athletic participation opportunities in compliance with the Title IX regulation. Nancy will break this down further.

The test provides the following three compliance options, whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or where the members of one sex are underrepresented among intercollegiate athletes, and the school cannot show a history in continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. One of those three parts must be satisfied. As OCR goes on to state, "The three-part test is intended to allow schools to maintain flexibility and control over their athletics programs consistent with Title IX's nondiscrimination requirements."

Lastly, a reminder that, apart from the three-part test, there are 12 treatment issues, which include scholarships, coaching, facilities, recruitment, equipment, scheduling, team travel, tutoring, medical services, housing and dining, support services, and publicity. All have to be evaluated. We go through that, again, in our course.

All right. Without further ado, here's part one of my conversation with Nancy.

All right, so thanks for being here with me today, Nancy, and agreeing to be a guest on the podcast. I've been wanting to have a guest that had some gender equity in athletics experience to talk more about that side of Title IX compliance, but beyond compliance, all the things. I want to start off with just those introductory questions, knowing your story, how you got into the area that you're working in, and specifically, of course, your organization that you're the CEO of with Champion Women, so let's start there. Does that sound good?

Nancy Hogshead-....: Sounds good. Sounds good. Most people want to start with my swimming career. I was a world-class swimmer for eight years, between 1976 and 1984. I was between, roughly, first and third in the world, and got second place to Tracy Caulkins many, many, many times. I made the 1980 Olympic team. We boycotted those Olympics, did not get to go.

But because of Title IX, because of this new federal statute that got passed in 1972, suddenly I had opportunities to be able to go to college on full scholarship pretty much wherever I wanted to go. I chose Duke University, one of the best decisions I ever made in my life. Duke University was really, really good to me, and I say that as somebody who was sexually assaulted on campus. I know a lot of the people that are listening here deal a lot with sexual violence on campus. I got healing and I got accommodations that made it so that my violent rape did not prevent me from graduating, did not derail my academic pursuits.

Dean Sue Wasiolek, I cannot say enough nice things about her, and it really sparked this intellectual journey with women's studies, and Jean O'Barr, who I... Back then, you could only get a certificate in women's studies; you couldn't major in women's studies, but just-

Courtney Bullar...: I minored in women's studies, by the way. I think when I was in college and I minored in women's studies at Indiana University, there wasn't a major yet. Of course, now there's a major, so it's awesome.

Nancy Hogshead-....: Yeah. Then when I swam in the 1984 Olympics, I had thought I was going to go directly from swimming into the law, and I ended up making a lot of money and doing a lot of other... I endorsed a lot of products and was on the speaking tour, and was probably traveling a bit too much. Anyway, but did go to law school at Georgetown and have loved being a lawyer. I can't express enough how much I love it, so much that I've been teaching sports law and sports topics for 20 years now.

Courtney Bullar...: That's great. I love being a lawyer, but I think that's not normally the feeling of lawyers. I always say some of it's because, just like you, I've been able to start my own business and work in an area that I'm passionate about. It's not like working in a law firm. It's just a different type of situation, and so I love it. I'm right there with you.

Your experience as a survivor on a college campus, I can't even imagine how helpful that would be to hear about why that was a good experience a little bit more, if you're willing to talk about it, and why you felt like the actions that were taken didn't derail, helped you to stay on track, not just academically, but also it sounds like in your sport, obviously.

Nancy Hogshead-...: Yeah. What I got that most survivors don't get, number one, is they believed me. I didn't have to convince them that it happened. I didn't have to be defensive. Number two is they believed in the depth of my emotional harm.

I was telling myself, "Come on, Nancy, why can't you buck up?" I had what today we would call a great case of PTSD. I didn't know what that was. Nobody talked about that, but it felt like the rug got pulled out from under me. It felt like who I knew that I was, was not that person anymore, and I couldn't count on my own emotional reactions.

I grew up in a household that says people are as happy as they make up their mind to be, and that philosophy didn't work. I couldn't sleep. I was scared all the time.

Here's what Duke did for me, which was they moved me onto main west. It's the most desirable. It's where everybody wants to live. They gave me a single in Main West. I'm quite sure it didn't just happen; they made it happen for me. They redshirted me. Here I am, the best athlete on campus, and I did not swim for that whole season it happened.

I was out running. Duke has two campuses and I was running between them, and a guy grabbed me and pulled me into the woods and raped me for about two and a half hours. That was right before Thanksgiving, and so I did not swim that whole season.

Courtney Bullar...: Was that by request? Obviously, because you couldn't... You went to them and said, "There's no way," or was it they suggested it to you? How did that happen?

Nancy Hogshead-...: Well, things were happening. It kind of was red flag after red flag. I got into two car accidents right away. I've never been in one before. I have never been in one since. After the second one, that was the culmination of a lot of things happening.

I was a stutterer, that I would classify myself as a two or three on a 10-point scale beforehand, and it zoomed up to a 10. I had a very hard time just speaking. They could tell that I wasn't sleeping, and I had weird behaviors that I couldn't make myself stop, which is I would go and check the door and make sure it was locked. Now, one week after checking the door to make sure that it's locked 10 times, I knew that the door was locked, and I knew that it was crazy that I kept checking the door to make sure it was locked, a little OCD, but I

couldn't stop myself. I was embarrassed to tell anybody that I couldn't stop myself.

I would look through the door, and you can see that the deadbolt was either there, but I just could not feel safe no matter what I did, if I was in big crowd of people. Anyway, so I dropped two classes almost right away, and then I ended up not even taking the classes that were left. I remember trying to go talk to a professor, and I was stuttering so badly I really couldn't communicate. Anyway, so when I compare...

I've been an expert witness in cases of how sometimes schools take this punitive response. I think they don't believe that the kid was sexually assaulted. Then two is they're like, "Come on, buck up. Go get tougher." I so empathize with them, because I really couldn't.

Here's a phenomenal example of what Duke did that made all the difference in the world. Okay, so I come back to school. Again, I'm still feeling really anxious. Duke has two parking lots, and the one was very close where I lived. The other one was, we called it Guam. In order for me to walk from Guam to my dorm, I had to go through a woods. I would kind of lie to myself, frankly, and say, "Oh, it's no big deal. I can park here just for today," and then I kept getting tickets. .

Okay, so I ended up with a pile of tickets, like 500 bucks' worth of tickets, which back then was a lot of money. When I went to the police station to go pay the tickets, that's all I was going to do is pay the tickets, they said, "Nancy, why do you have all these tickets?" I just said, "Look, I just cannot walk from Guam to my dorm room." They said, "We're going to forgive the tickets, and we're going to give you a special parking pass. You can park pretty much anywhere you want to on campus." I just couldn't park where the police cars parked, but I could park where the chaplain parked. I could park pretty much-

Courtney Bullar...: Well, and that's so remarkable because it's well before the 2011 Dear Colleague letter. It's really well before-

Nancy Hogshead-...: Yeah, years before, like 30 years before. Right. 1981.

Courtney Bullar...: ... Title IX coordinators even existed, well before. That's remarkable.

Nancy Hogshead-...: There was no legal mandate that they do this. They did it because... Number one is I'm crazy privileged being a white woman who was sexually assaulted by someone with no power. My rapist, they never caught him, but he was African American, probably not a professor or a fellow student on campus. It wasn't like I didn't have-

Courtney Bullar...: There's no power struggle. Right.

Nancy Hogshead-...: Right. I didn't have a Weinstein or a famous athlete that was on the other side. It was just me. I was very badly beaten up, and it was this classic... But listen, it took generations of feminists before me, for me to be able to get that kind of treatment.

I say that if every sexual assault survivor got what I got, whether or not they were drunk or they were flirting with the guy, or whatever, if they got what I got, that there would be much less interference with people's lives, because I have had plenty of friends and colleagues, and whatever, who were sexually assaulted in very different circumstances, but had the same emotional freakout as I did, and did not get help. Instead, they got nothing but blame and shame. It just makes recovering that much harder. So the main thing that I got was people believed that it happened, and they believed that I really needed help, and they did help.

Courtney Bullar...: That's an incredible story, and one that I think will resonate, hopefully, with a lot of folks on the ground doing the work and trying to support students on both sides, but, of course, survivors.

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Courtney Bullar...: I wanted to move our conversation, it dovetails, but to this titleixschools.com website that you all have, where you pull data, or data, depending on who you are, to apply a mathematical formula to measure sex discrimination in higher education, which I find fascinating. Do you mind talking a little bit about what you all did, what you all found, that sort of thing?

Nancy Hogshead-...: Sure. Well, let me just say that when I did go to law school, I really thought that sexism in athletic departments was going to be over, because we had come so far so fast after Title IX got passed. We now had really good case law. We had really good regulations dealing with athletics, and we had the statute. So I

thought, "It's going to be a done deal. When I go to law school, I better figure out something else to do."

Champion Women, since 2015, we've been writing letters to universities who have not been complying with Title IX. Our goal was, we thought, well, surely, if not just the athletic director, the general counsel and the SWA and the Title IX coordinator, if not just they knew, but if the entire university knew, then people would treat this differently. It's hard to look at an EADA report, be able to tell is it fair to ask for more sports opportunities or more scholarship money.

First of all, the project that we did from 2015 to 2019 was a total failure, meaning it didn't do anything. We were actually trying to do it without shaming the university. We didn't want to go to the press. We just thought, "Oh, this is such good information. Surely people would change it," and they didn't. So we-

Courtney Bullar...: The hope was to take that information and leverage it for change, and that that would be instructive, and universities would say, "Aha. Okay, we've got data. We have to have data. We need something. We need benchmarking," and so boom, you did it, and here you go.

Nancy Hogshead-...: Right. Yeah, that's what I thought would happen. Didn't happen.

Instead, I hired [Janine Kissner]. She's phenomenal. She's a math data whiz, and we were able to take all the data and put a mathematical formula on it to show a couple things. Number one is those of you...

First of all, all Title IX coordinators should not be afraid to get involved in the athletic department. That is part of your job, is making sure that the athletic department is not discriminating against women in your department. Don't let somebody try to tell you, "Oh, you don't really know, and it's very complex." Swear to God, it's one of the easiest places in all of law to be able to measure sex discrimination. Why? Because you have separate but equal.

We've all been trained since 1954 not to have separate but equal, that that is discrimination, Brown v. Board of Education saying that separate but equal was the antithesis of equality. But in sports, because of physiology, because of biology, there is a real difference between men and women. If you want to give half the population an equal opportunity to participate in sports, they have to have their own team. I've been saying that sentence without exaggeration for literally the past 30 years, because people often wanted to know, "Why don't we just have one basketball team and just see who makes it, the same way we would do with the chemistry department or the English department, et cetera?"

We took all the data from the EADA, which most families cannot look at, and see, is it fair for me to ask for more? We applied this mathematical formula to it that looks at how many more sports opportunities would you have to give women in order to be giving them equal opportunities.

Courtney Bullar...: That was a number I think I saw on Twitter, I think, where it was like you put this... It caught my attention immediately. I was like, "Whoa." So go ahead. I'm sorry.

Nancy Hogshead-...: Right. Yeah. No. When you add 30 here and 50 here and 200 here and 300 here, it adds up to 183,000 opportunities, which is, depending on the size of the team, it's about 27,000 teams. What's sad is most girls and women who don't get to play in college think that they weren't good enough, and that's not true. They are the victim of intentional sex discrimination. That school is not giving enough teams or opportunities.

Number one is we saw just how big... The gap is actually a third behind where it should be. Women are being intentionally denied a third of the opportunities that they should have. If you go onto our website, it'll tell you every single school, NAIA, NCAA, HBCUs, junior colleges, the whole ball of wax. If a school receives federal funds, tax-

Courtney Bullar...: Okay, and we'll make sure to put... Yeah, we'll make sure to put that link in the-

Nancy Hogshead-...: The notes.

Courtney Bullar...: ... the show notes. But when you say intentional discrimination, I can just hear institutions say, "We're not intentionally discriminating."

Nancy Hogshead-...: Oh, yes, you are.

Courtney Bullar...: Yeah, so I wanted to see... Okay, number one, I'm Title IX coordinator, ABC institution, I'm listening to this podcast, and I'm like, "Are we intentionally doing this?" What do I do? How do I go about figuring that out? Obviously, your website, but where else do I go? What do I do?

Nancy Hogshead-...: I taught torts for 12 years, and you spend literally three weeks on the difference between intentional conduct, strict liability conduct, and negligence. Intentional conduct is when you act in a way that you intend the results that happen. You set up an athletic department that has a certain number of teams. You're allocating scholarships. You're intending to do that. That's not a "Whoops..."

Courtney Bullar...: That's not by accident.

Nancy Hogshead-...: "... I didn't mean for that to happen." That's a planned-for decision of what you're expecting.

Okay, so schools are required under Title IX... How do you measure sex discrimination? It's three different ways in the athletic department. I swear for anybody, all these Title IX coordinators, easy to measure. One is equal opportunities. Number two is equal scholarships. Number three is, are you treating them the same way?

Sedona Prince, when she did her video, the TikTok that I think was seen something like 15 million times, she did a great service of just showing, "Look, it's not rocket science." What facilities do the men have? What facilities do the women have?

Courtney Bullar...: Such a good visual.

Nancy Hogshead-...: What uniforms? What food? What medical care? It's an easy analysis because of this unique separate but equal sphere.

Schools have to do three things, opportunities, scholarships, and then there's a thing within looking at equal opportunities. There are three ways of schools to comply. What we did was, the numbers that you'll see all have to do with prong one, meaning is a student body a ratio? Hypothetically, if a school is 50-50, are the athletic opportunities 50-50. We looked at that.

But there are two other ways to comply. One is a history of continuous improvement. If you go onto the EADA website, you can actually pull history, and you can look over a number of years, is this school continuously adding opportunities for its women's department? We couldn't find one. We did not look at all 2,000 schools, but it could be that that does exist.

The third way a school can comply is they can say, "Well, we're not offering that, we don't have this history, but we can show that we're meeting the interests and abilities of the student athletes on campus." So in other words, no unmet demand. Nobody's knocking at the door saying, "Hey, we want to start a women's wrestling program. We want to have a triathlon program. We want equestrian." We don't have that.

But here's the deal. It's roughly 60% of high school students are either in the Olympic club-type sport program or in high school sports, so you got 60%. Then you go down to most of these schools, it's between 1% and 5%. There's just no way, for both men and women, the schools can meet the demand that's out there. They cannot. The demand is almost insatiable.

That's one thing that we include in all of our data, is what percentage of the student body is being given a sports opportunity. The numbers are 183,000 opportunities that women are not getting, almost a billion dollars in college scholarships. As somebody that's paying full freight for their kid to go to Duke University, that's... It's a billion dollars every year.

Courtney Bullar...: Yeah. I can't even conceptualize that number. It's really interesting.

Nancy Hogshead-...: What a benefit it would be if every school, just that one part... But there are schools out there that are denying women \$5 million, \$6 million, \$7 million every year.

Courtney Bullar...: Your organization, I know, is... You have been mobilizing student athletes in challenging this. Then, of course, with COVID, you've got schools that are canceling programs, getting rid of certain sports, saying that it's financial. I know you all have been really active in trying to remedy this, remedy what you're finding. Right?

Nancy Hogshead-...: Correct. What we'll do is... The sweet spot is, how do you create community? It's kind of a long story, but essentially there's nobody else who's minding the store. We looked at the numbers. In the last 15 years, the gap has actually grown by 27%. It's not like we can look at the 50-year anniversary coming up and say, "Oh, time will solve this." It won't. Again, last 15 years, the gap has grown by 27%.

There's nobody minding the store. The NCAA doesn't require schools anymore... That's one of the first things Mark Emmert did, was he said there's no more... This used to be called certification. The OCR is not going in and making schools comply. So who is going to do this? We've left it to 18- to 22-year-old students. And the law is really clear too. We've got phenomenal case law. The regulations are super clear. There may be a-

Courtney Bullar...: Yeah, it's not like on the sexual harassment side of the house, where it's all over the place.

Nancy Hogshead-...: Right. Oh my God. Sexual harassment and sexual assault, sexual violence on campus, night and day in terms of ease of measurement, and yet... That's why I preface this by saying never underestimate the power of sexism.

Courtney Bullar...: My conversation with Nancy is one I have thought about many times because of the tidbits I learned. Gender equity in athletics is very much a part of Title IX compliance obligations of schools and institutions, and as she emphasized, the purview of the Title IX coordinator. Next week, our conversation shifts to transgender rights and participation in athletics. I will also provide some history and current events laying the foundation for that episode.

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