OCR'S NEW ATHLETICS GUIDANCE

Assessing and Addressing Your School's Athletic Opportunities Before OCR (and Your Community) Does

Webinar: April 27, 2023

Thompson & Horton

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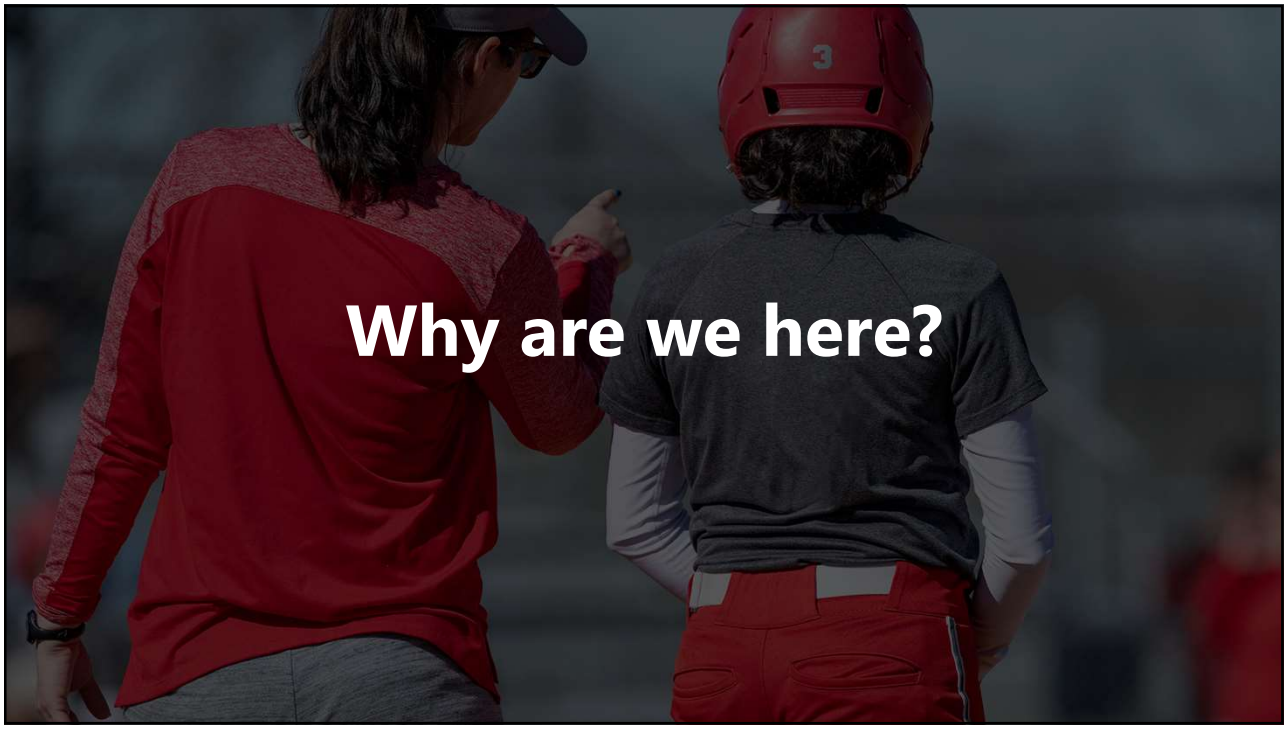
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THIS IS OUR AGENDA

- Why are we here?
- Equal Benefits, Opportunities, and Treatment
- Meeting Student Athletic Interests and Abilities
- New rules?

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Why are we here?

POVICH CENTER AND HOWARD CENTER (HTTPS://CNSMARYLAND.ORG/CATEGORY/POVICH-CENTER-AND-HOWARD-CENTER/)

Title IX a mystery to most parents and students, poll says

BY KARA NEWHOUSE (HTTPS://CNSMARYLAND.ORG/AUTHOR/KARA-NEWHOUSE/) - 1 MONTH AGO 353

Title IX is 50 years old, but a poll has found that nearly three-quarters of secondary school students and nearly 60% of parents said they know "nothing at all" about the landmark civil rights law meant to ensure gender equity in education, including athletics.

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Why are we here?



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OCR's "Overview" Resource Document



What can I do if I think a school is not offering equal opportunity under Title IX in its athletic program?

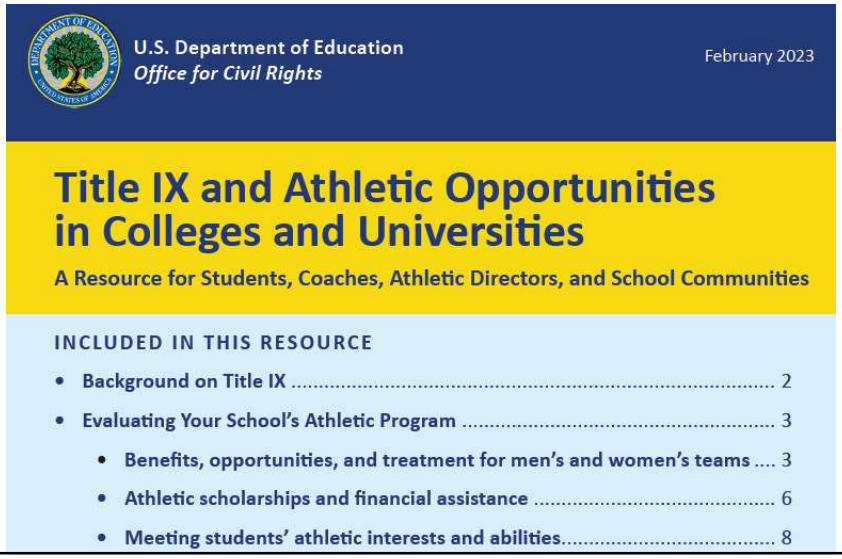
If you believe a school is not fulfilling its responsibility to provide equal athletic opportunities under Title IX, there are a number of actions you can take:

- Notify the athletic director or another school official, such as a principal or dean. You can also reach out to the Title IX Coordinator in your school for information or to file a complaint.
- Anyone who believes that a school is not offering equal athletic opportunities based on sex can file a complaint with the Office for Civil Rights ("OCR"). To file a complaint, visit https://www2.ed.gov/ocr/complaintintro.html.

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OCR's K-12 and Collegiate Resource Documents



U.S. Department of Education
Office for Civil Rights

February 2023

Title IX and Athletic Opportunities in Colleges and Universities

A Resource for Students, Coaches, Athletic Directors, and School Communities

INCLUDED IN THIS RESOURCE

- Background on Title IX 2
- Evaluating Your School's Athletic Program 3
  - Benefits, opportunities, and treatment for men's and women's teams 3
  - Athletic scholarships and financial assistance 6
  - Meeting students' athletic interests and abilities..... 8

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OCR's Collegiate Resource Document

Background on Title IX

What is Title IX?

Title IX is a Federal civil rights law. It prohibits schools that receive Federal funding from discriminating based on sex in their programs or activities. The Department's Title IX regulations include requirements for how schools must comply with Title IX, including in their athletic programs.

How does Title IX cover athletic programs at colleges and universities?

All of your school's programs and activities, including its athletic program, are covered by Title IX if your school receives Federal funding. Schools that participate in Federal Student Aid programs receive Federal funding, which allows colleges and universities to provide Federal financial aid to their students through grants, loans, and work-study funds. So, if your school provides Federal financial aid to students, it is covered by Title IX. Schools that receive Federal funding for research or other purposes are also covered by Title IX.

What does Title IX require for schools' athletic programs?

The Title IX regulations require schools to provide *equal opportunity* based on sex. This requirement applies to schools' athletic programs, including club, intramural, and intercollegiate teams.

Equal opportunity in college and university athletic programs is measured by:

1. The benefits, opportunities, and treatment given to men's and women's teams;[3]
2. How a school is awarding athletic scholarships and financial assistance;[4] and
3. How a school is meeting students' athletic interests and abilities.[5]

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Evaluation of Benefits, Opportunities, & Treatment



1. Equipment & Supplies
2. Game & Practice Scheduling
3. Travel & Daily Allowance
4. Coaching
5. Academic Tutors
6. Practice & Competition Facilities
7. Medical & Training Facilities & Services
8. Housing & Dining Services
9. Publicity
10. Recruitment

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Equipment & Supplies



5 Compliance Factors

1. Quality
2. Quantity
3. Suitability
4. Condition
   (Maintenance and Replacement)
5. Availability

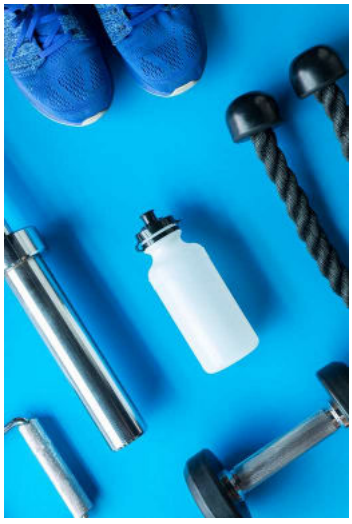
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FOCUS: Equipment & Supplies

Real World: Howland Local School District – Warren, Ohio

Issue: Complaint that the District did not provide high school girls' sports teams with uniforms and/or apparel equivalent to those provided to boys' teams

Resolution: District required to conduct an equity assessment and then prepare written guidelines—to be approved by OCR—to ensure the District provides equivalent athletic opportunities for boys and girls in its high school athletic programs



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Game & Practice Scheduling



5 Compliance Factors

1. Number of competitive events per sport
2. Number and length of practice opportunities
3. Time of day competitive events are scheduled
4. Time of day practice opportunities are scheduled
5. Opportunities to engage in available pre-season and post-season competition

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FOCUS: Game & Practice Scheduling

Real World: Bennington School District – Bennington, Nebraska

Issue: Boys' basketball games routinely scheduled for later time slot

Resolution: Consent decree requiring district to rotate boys' and girls' basketball games at later time



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FOCUS: Game & Practice Scheduling

Real World: Bullitt County Public Schools – Bullitt County, Kentucky

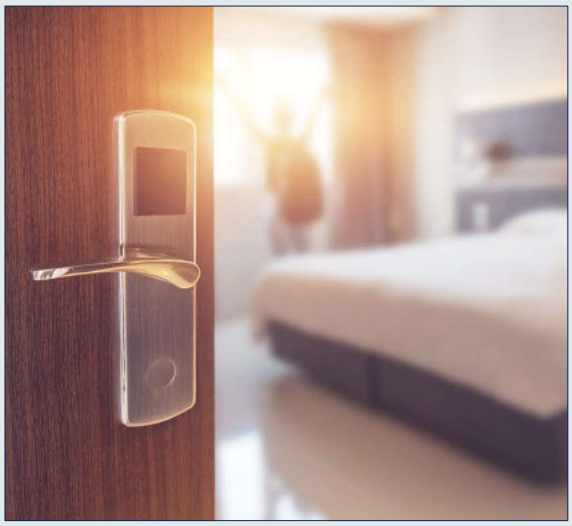
Issue: The School's girls' basketball team did not practice as frequently as the boys' basketball team.

Resolution: The District agreed to a resolution agreement to provide equivalent treatment, benefits, and opportunities to female and male students.



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Travel & Daily Allowance



5 Compliance Factors

1. Modes of transportation
2. Housing furnished during travel
3. Length of stay before and after competitive events
4. Per diem allowances
5. Dining arrangements

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FOCUS: Travel & Daily Allowance

Real World: ISD 16 of Payne County – Stillwater, Oklahoma

Issue: Softball team routinely traveled by older buses

Resolution: Settlement agreement requiring the district to ensure equitable use of the newer buses



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FOCUS: Travel & Daily Allowance

Real World: Santa Maria Joint Union School District – Santa Maria, California

Issues: Disparities in the amount of travel to competitions between girls' and boys' varsity teams, as well as disparities in the mode of transportation (bus vs. van)

Resolution: The District entered into resolution agreement calling for equivalent travel and transportation benefits, as well as Title IX training for Title IX Coordinator, Athletic Director, Principal, and all coaches



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Coaching



3 Compliance Factors

1. Availability of coaches (opportunity for male and female athletes to receive coaching)
2. Assignment of coaches
3. Compensation of coaches

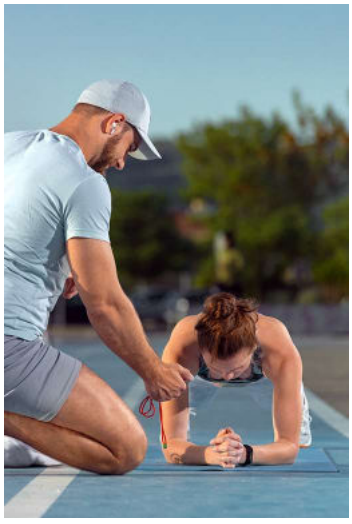
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FOCUS: Coaching

Real World: Salem-Keizer School District 24J – Salem, Oregon

Issue: Softball coach had no prep period; baseball coach did

Resolution: Voluntary resolution agreement requiring district to investigate and correct the issue



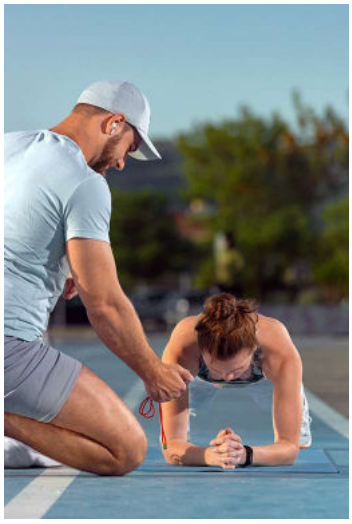
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FOCUS: Coaching

Real World: Western Illinois University – Macomb, Illinois

Issues: Average men's coach salaries nearly double that of average women's coaching salaries; ratio of coaches to athletes higher in men's programs than in women's programs

Resolution: The University signed a resolution agreement to resolve the issues, including development of written policies regarding number of coaches per team and coaching salaries



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Academic Tutors



4 Compliance Factors

1. Tutor availability
2. Tutor qualifications and experience
3. Tutor rate of pay
4. Tutor employment conditions

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Practice & Competition Facilities



6 Compliance Factors

1. Quality and availability of practice and competition facilities
2. Exclusivity of use of practice and competition facilities
3. Availability of locker rooms
4. Quality of locker rooms
5. Maintenance of practice and competitive facilities
6. Preparation of practice and competitive facilities

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FOCUS: Practice & Competition Facilities

Real World: Claremont High School – Claremont, California

Issue: First-rate baseball field on-campus with clubhouse v. softball in public park with no private locker room facility

Resolution: Resolution agreement for $2M softball field on-campus



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FOCUS: Practice & Competition Facilities

Real World: Union City High School – Union City, New Jersey

Issue: New on-campus rooftop football/baseball field v. off-campus, irregular softball field

Resolution: Voluntary agreement to use best efforts to provide girls access to the school's state-of-the-art rooftop field overlooking Manhattan



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FOCUS: Practice & Competition Facilities

Real World: Northshore School District – Bothell, Washington

Issue: Disparities between baseball facility, which had lights, and softball facility, which did not, and needed additional repairs and improvements.

Resolution: District agreed to address the concerns identified voluntarily



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FOCUS: Practice & Competition Facilities

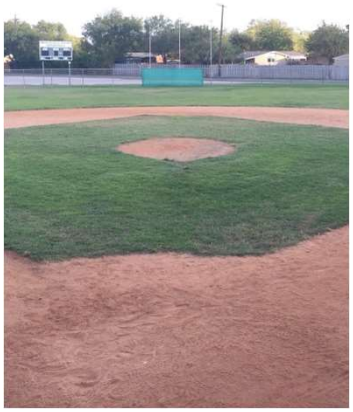
Real World: Brownsville ISD – Brownsville, Texas

Issues: Girls' softball field did not have a press box, concession stand, or built in speakers, whereas boys' baseball field did.

Concession stand revenues used for boys' baseball team, not softball team.

Smaller bleacher areas for girls' softball field, and OCR found repeated work orders to fix bleachers for the softball team that were not completed due to lack of funds.

Resolution: District voluntarily agreed to perform comprehensive self-assessment of locker rooms, practice and competitive facilities, and provide OCR with results of the assessment, and to develop and implement a written corrective action plan



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A.B. v. Hawaii State Dep't of Education, 30 F.4th 828 (9th Cir. 2022)

Issues: Locker rooms; equipment/supplies; practice and competitive facilities; substantial proportionality



Female Athletes Get The Short End Of The Stick At Some Hawaii High Schools

Federal law requires gender equity, but that's not happening in places like Campbell High School.

By Suevon Lee / February 7, 2018
Reading time: 11 minutes.

Without an athletic locker room, the girls at James Campbell High School who play after-school sports are forced to get creative.

They change clothes in school restrooms, empty classrooms or sometimes on the bleachers outside as teammates provide cover. They lug their heavy sports bags during the day or convince a teacher to let them store their gear in a classroom.

"Everyone comes up to me and says, 'Is that a body in there or something? It looks like a body bag,'" joked Chloe Poniatowski, 15, a sophomore catcher on the softball team who often has to haul her

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A.B. v. Hawaii State Dep't of Education, 30 F.4th 828 (9th Cir. 2022)

Issues: Locker rooms; equipment/supplies; practice and competitive facilities; substantial proportionality



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Medical & Training Facilities & Services



5 Compliance Factors

1. Availability of medical personnel and assistance
2. Health, accident, and injury insurance coverage
3. Availability and quality of weight and training facilities
4. Availability and quality of conditioning facilities
5. Availability and qualifications of athletic trainers

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FOCUS: Medical & Training Facilities & Services

Real World: Bennington School District – Bennington, Nebraska

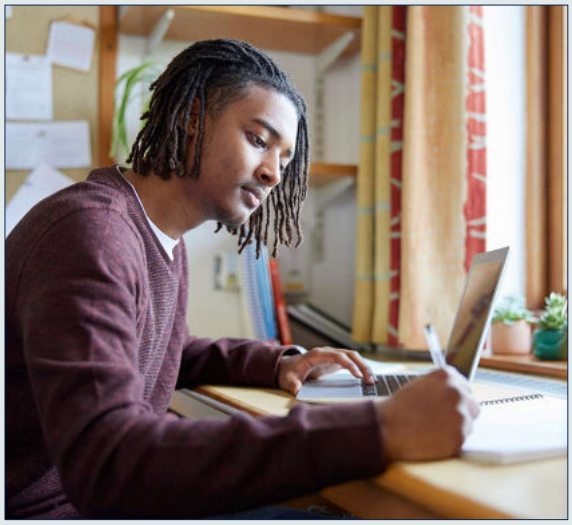
Issue: Boys' teams provided superior access to weight training

Resolution: Reorientation of the entire program to better include girls



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Housing & Dining Services

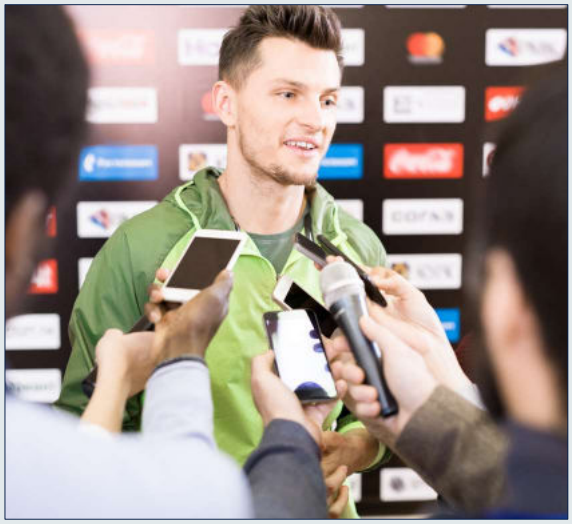


2 Compliance Factors

1. Housing provided
2. Special services as part of housing arrangements (e.g., laundry facilities, parking spaces, housekeeping service)

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Publicity



3 Compliance Factors

1. Availability and quality of sports information personnel
2. Access to other publicity resources
3. Quantity and quality of publications and other promotional devices

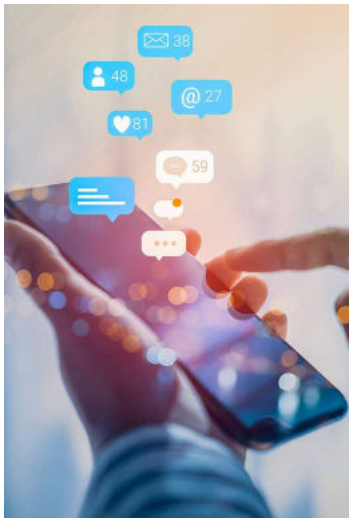
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FOCUS: Publicity (Social Media)

Real World: Bullitt County School District – Bullitt County, Kentucky

Issue: District had no written publicity policy; just published what their coaches sent. School included a large picture of the boys' basketball team in the gymnasium after renovations, but did not include similar picture of girls' basketball team

Resolution: Voluntary resolution agreement requiring district to investigate and correct the issue



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FOCUS: Publicity (Cheer/Pep/Drill)

Real World: Glenwood High School – Chatham, Illinois

Issue: Cheer and dance teams and band performed at boys' games far more than girls' games

Resolution: Voluntary resolution agreement requiring the district to ensure cheer and dance teams performed equally for boys' and girls' games



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FOCUS: Publicity (in Media and at School)

Real World: Howland Local School District – Warren, Ohio

Issue: Discrepancies in advertisements for boys' teams and girls' teams in local newspaper. Discrepancies between promotion of girls and boys teams in school, including banners and signs for boys team send-offs but not for girls team send-offs

Resolution: District required to conduct an equity assessment and then prepare written guidelines—to be approved by OCR—to ensure the District provides equivalent publicity for boys and girls in its high school athletic programs



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Recruitment



3 Compliance Factors

1. Whether coaches/personnel have substantially equal opportunities to recruit
2. Whether financial and other resources are equivalently adequate to meet the need of the team
3. Whether differences in benefits, opportunities, and treatment of prospective student athletes have a disproportionately limiting effect on recruitment

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A word from OCR about boosters…



A school can accept voluntary support from boosters, BUT it is the school's responsibility to prevent inequitable results.

So, if a booster donates money only to a men's team, "your school must ensure that the benefits, opportunities, and treatment are equivalent for both men and women in its athletic programs."

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Evaluation of Athletic Scholarships



A school can accept voluntary support from boosters, BUT it is the school's responsibility to prevent inequitable results.

So, if a booster donates money only to a men's team, "your school must ensure that the benefits, opportunities, and treatment are equivalent for both men and women in its athletic programs."

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Accommodation of Student Interests and Abilities

Three-part test

- Substantial proportionality
- History and continuing practice of program expansion
- Effective accommodation of student interests and abilities

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Balow v. Michigan State University, 24 F.4th 1051 (6th Cir. 2022)

- MSU announced the elimination of the men's and women's swimming and diving teams
- Eleven women student-athletes sought a preliminary injunction to prevent MSU from eliminating the women's swimming-and-diving team.

Men	Women
Baseball	Softball
Basketball	Basketball
Cross Country	Cross Country
Football	Field Hockey
Golf	Golf
Ice Hockey	Gymnastics
Soccer	Soccer
Swimming and Diving	Swimming and Diving
Tennis	Tennis
Track and Field	Track and Field
Wrestling	Rowing
	Volleyball

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Balow v. Michigan State University, 24 F.4th 1051 (6th Cir. 2022)

- Circuit court agreed with district court that "novice rowers" counted toward the women's participation numbers and that track and field athletes who practiced but did not compete counted



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Balow v. Michigan State University, 24 F.4th 1051 (6th Cir. 2022)

- However, the 6th Circuit rejected the analysis of the district court, which found that the participation gap did not indicate a Title IX violation because it was less than 2% and numerically less than the average team size at the school
- Operative question is whether the gap is enough to create a viable team
- Remanded to the district court for analysis



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2 Program Expansion

Where the members of one sex have been and are underrepresented among 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

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Program Expansion

1	2	3	4
Past actions have expanded participation opportunities for the underrepresented sex in a manner that is demonstrably responsive to their developing interests and abilities	Continuing (present) practice of program expansion as warranted by developing interests and abilities	A non-discriminatory policy for requesting the addition of a sport and effective communication of that policy	A plan of program expansion to developing interests and abilities

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3 Effective Accommodation of Interests and Abilities

Whether it can be demonstrated that the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program

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Effective Accommodation of Interests and Abilities

School must show it is fully and effectively accommodating the interests and abilities of the underrepresented sex

- Is there unmet interest in a particular sport?
- Is the talent and skill sufficient to sustain a team in the report?
- Is there a reasonable expectation of competition for the team?

If the answer to all 3 is yes, the school has not fully and effectively accommodated the interests and abilities of its students

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Effective Accommodation of Interests and Abilities

Considerations when determining if there is unmet interest and ability:

- Use of non-discriminatory methods of assessment to determine the athletic interests and abilities of students
- Whether a viable team for the underrepresented sex was recently eliminated
- Participation, experience, and accomplishments in existing club or community sports league
- Requests to elevate a club sport or add a team sport
- Opinions of coaches, administrators, and athletes

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Effective Accommodation of Interests and Abilities

Considerations for Student Surveys of Athletic Interest				
Content	Target of population surveyed	Response rates and treatment of non-responses	Confidentiality protections	Frequency of conducting the survey

Caution: student survey alone is not enough to prove a lack of interest

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Effective Accommodation of Interests and Abilities

Considerations when determining if there is an expectation of competition:

What are the available competitive opportunities in the geographic area in which the school's athletes primarily compete?

May still need to encourage the development of interscholastic/intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within the school's competitive region have been historically limited for members of that sex

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Northeastern State University – OCR 07156001 (January 2023)

- Substantial proportionality
  - The University's undergraduate population for 2014-15 was 3,011 (60%) female students and 2,042 (40%) male students
  - Five intercollegiate athletic teams for men and five for women
  - Out of 264 athletes at the University during 2014-15, 185 (70%) were male and 79 (30%) were female
  - Participation is not proportionate to enrollment (60% versus 30%) and the gap of 194 positions could form multiple additional women's teams

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Northeastern State University – OCR 07156001 (January 2023)

- Program expansion
  - University had not added an intercollegiate women's athletic team in 21 years
  - Participation numbers had not meaningfully increased
  - No formal process in place for requesting and adding a new sport
- Meeting interests and abilities
  - The University had not undertaken any formal actions to assess the athletic interests and abilities of students such as any surveys, questionnaires, or assessments

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Morton Community Unit School District 709 – OCR 05211346 (March 2022)

- Boys and Girls enrollment at the high school was roughly 50/50
- Participation was 59.9% / 40.1% in 19-20 and 61.4% / 38.6% in 20-21
- No new girls' teams added since 1996
- Girls' badminton cut in 1981
- No interest survey in 6 years
- → Resolution agreement

	Boys		Girls	
	2019-2020	2020-2021	2019-2020	2020-2021
Baseball	57	52	0	0
Basketball	45	42	39	38
Cross Country	27	28	33	25
Football	111	118	0	0
Golf	18	12	14	13
Soccer	45	42	29	40
Softball	0	0	19	14
Tennis	29	29	36	35
Track & Field	11	49	47	45
Volleyball	0	0	33	37
Wrestling	30	21	0	0
Total	**373**	**393**	**250**	**247**

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Proposed Athletic Rule



- April 6, 2023 notice of proposed rulemaking (NPRM) would amend the existing Title IX regulations
- Applicable to schools, colleges, and universities that receive Federal funds
- Based on two years of outreach to stakeholders
- Goal to address uncertainty about when and how transgender students can participate in school sports, particularly because of state laws

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Proposed 106.41(b)(2)

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity

such criteria must, for each sport, level of competition, and grade or education level:

(i) Be substantially related to the achievement of an important educational objective, and

(ii) Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

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Proposed Rule Does Not Chart a Novel Course



- The test borrows heavily from Supreme Court's analysis and test in United States v. Virginia regarding military college exclusively for males
- Language of the proposed rule is consistent with several courts' analysis regarding transgender athletic participation in Equal Protection and Title IX context, such as Hecox v. Little

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Bans on (Total) Bans

Under the proposed regulation, schools would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity

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Two Part Test

1. Substantially related to the achievement of an important educational objective
2. Minimize harm to those students whose opportunities would be limited or denied

Analysis must be specific to each sport, level of competition, and grade or education level

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The Road Ahead



- The NPRM was published in the Federal register April 13, 2023
- The comment period is open for 30 days (until May 15, 2023)
- The Department must review and respond to all comments to the rule before it can go into effect
- Some sources suggest that the Department intends to finalize the rule over the summer to become effective next academic year

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Title IX Proposed Regulations

- Proposed 34 CFR 106.45 would apply to all complaints of sex discrimination, including sexual harassment and different treatment in athletics
- Expecting the final regulations next month
- Institutions will need to ensure their policies for addressing discrimination on the basis of sex (including in athletics) are prompt, equitable, written, and incorporate the requirements of the new regulations



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Title IX Proposed Regulations

Complainant

With respect to complaints of sex discrimination other than sex-based harassment, any student or employee; or third party participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.

Respondent

When a sex discrimination complaint alleges that a recipient's policy or practice discriminates on the basis of sex, the recipient is not considered a respondent.

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Grievance Procedures Highlights



Investigator

- Review all evidence gathered through the investigation and determine relevance
- Provide each party with a description of the evidence that is relevant to the allegations of sex discrimination, as well as a reasonable opportunity to respond



Decisionmaker

- Adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant
- Evaluate relevant evidence for its persuasiveness



Outcome

- Notify the parties of the outcome of the complaint, including the determination of whether sex discrimination occurred under Title IX, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable

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Thank You



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