



Title IX Athletics: How it All Started and Where We Unexpectedly Find Ourselves

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TITLE IX ATHLETICS: HOW IT ALL STARTED AND WHERE WE UNEXPECTEDLY FIND OURSELVES

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TITLE IX JUNE 23, 1972

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education programs or activity receiving federal financial assistance.”

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THE RULEBOOK: T9 BASICS

- Enacted in 1972 to prohibit sex discrimination in federally funded education programs
- Applies to all K–12 districts and most colleges/universities
- Enforced through:
 - Private lawsuits
 - Federal agency investigations (primarily DOE’s Office for Civil Rights)
 - Regulations allow separate athletic teams by sex, but schools must ensure equal opportunity overall

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THE RULEBOOK: VIOLATIONS

- Agencies can terminate or suspend funding for violations
- Can refer violations to DOJ for court enforcement
- Funding loss has been rare; most cases resolved via resolution agreements

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DIVIDED PLAYING FIELDS: TRANSGENDER PARTICIPATION

States split between *permissive* and *restrictive* approaches

Permissive: athletes compete consistent with gender identity

Restrictive: participation limited to sex assigned at birth

At least 25 states have enacted restrictive laws

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CONFLICTING COURT DECISIONS

- Some courts strike down restrictive participation laws as Title IX violations
- Others allow cisgender athletes to challenge permissive policies
- Mixed appellate rulings create national uncertainty
- Constitutional Equal Protection challenges also pending

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RULEMAKING UNDER PRIOR AND CURRENT ADMINISTRATIONS

- 2023: Proposed rule banning categorical bans on transgender participation but allowing narrow limits
- 2024: DOE finalizes new Title IX regulations including gender identity protections
- January 2025: Federal court vacates regulations nationwide
- Notice of Proposed Rulemaking (“NPRM”) withdrawn before implementation

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RULEMAKING UNDER PRIOR AND CURRENT ADMINISTRATIONS (CONT'D)

- Feb. 5, 2025: EO “Keeping Men Out of Women’s Sports” signed
 - Defines sex as “biological and immutable”
- Directs DOE to enforce Title IX against inclusive policies
- DOJ to align all agencies with this interpretation
- OCR staffing reduced by nearly 50% (litigation pending)

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FLAG ON THE PLAY: CONSEQUENCES FOR NONCOMPLIANCE?

- OCR launches investigations into permissive athletics policies
- April 2, 2025: USDA freezes funds to Maine for alleged Title IX violations
- Court issues TRO: USDA failed to follow notice/hearing requirements
- Settlement: USDA agrees to follow “proper” procedures

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UP IN THE AIR: WHAT’S NEXT?

- Title IX’s application to transgender athletes remains unsettled
- State laws, federal regulations, and court rulings conflict
- Executive Orders rapidly shift enforcement priorities
- Future clarity likely depends on new legislation or Supreme Court review

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SB 12: TRANSGENDER PARTICIPATION AND SOCIAL TRANSITIONING

- New Law: Texas Education Code §§ 11.401 & 11.402 (SB 12, 89th Legislature)
- Prohibition: School boards must adopt a policy barring employees from assisting students with social transitioning (including athletic participation?)

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SB 12: PARTICIPATION AND SOCIAL TRANSITIONING

- Definition: Social transition = moving from biological sex at birth to the opposite sex via:
 - New name
 - New pronouns
 - Other gender expressions that deny or encourage denial of biological sex at birth

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SB 12: PARTICIPATION AND SOCIAL TRANSITIONING

- Enforcement:
 - Parents or employees may report suspected violations to the school board
 - Board investigates and makes a determination
 - Violations must be reported immediately to the Commissioner
- Parent Remedies: Parents may file a grievance to seek relief under the law

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SB 8 – SECOND SPECIAL SESSION – 89TH

- Covered more in-depth during the TX v. T9 session.
- But, as a reminder, district must prevent individuals of opposite sex from entering a restroom, **locker room, changing room, or shower room**, with only limited exceptions.
- So, challenges to this law may very well arise in athletics.

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SB 8 – SECOND SPECIAL SESSION – 89TH

- Athletic directors should post clear, durable signage at every locker room entrance.
- Train staff on the requirement and specific statutory exceptions (custodial, maintenance, emergency, disability, children ≤9).
- May need to retrofit facilities, e.g., convert seldom-used coach offices to single-occupancy changing rooms.
- Establish a written accommodation request protocol for students needing privacy or disability assistance.
- Maintain an incident log for any opposite-sex entry, citing the relevant SB 8 exception.

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SB 8 – SECOND SPECIAL SESSION – 89TH

- **Scenario:** A PE student whose birth certificate lists male but who lives and as female asks to change with the girls.
- **Legal impact**
 - Request must be denied; offering a single-occupancy changing area is permissible (§3002.052(a)(2)).
 - Allowing the student to use the girls' facility would violate law and expose district to a \$25,000 first-day penalty and \$125,000 per day thereafter.

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SB 8 – SECOND SPECIAL SESSION – 89TH

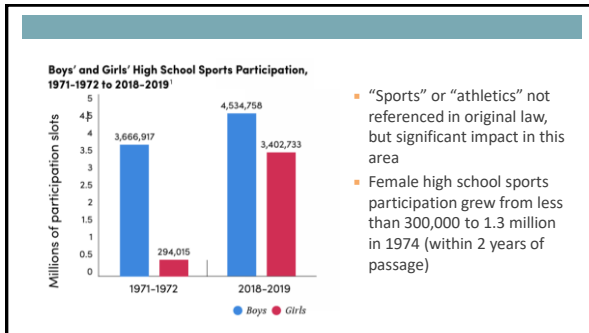
- **Scenario:** A male athlete with limited mobility needs help dressing after practice; his assigned aide is female.
- **Legal impact:** The aide may lawfully enter the boys' locker room because SB 8 makes an explicit exception for someone "accompany[ing] and provid[ing] assistance to an individual who needs assistance."

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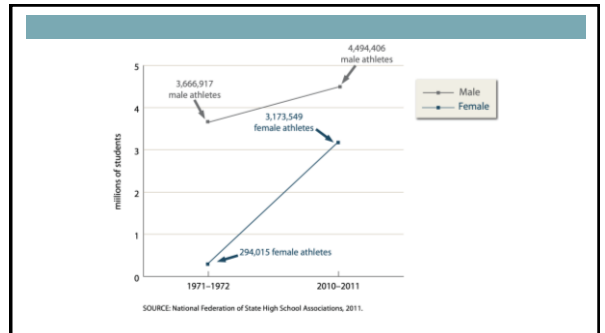
SB 8 – SECOND SPECIAL SESSION – 89TH

- **Scenario:** A female athletic trainer must render immediate aid to a concussed male swimmer in the team shower.
- **Legal impact:** Emergency medical entry is expressly allowed.
- Documentation of the incident and purpose of entry should be kept for any future complaint.

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WHAT TITLE IX PROVIDES FOR

- Equal Access to the program
- Equal Treatment once in the program

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Title IX does **NOT** require an institution to provide:

- An athletics program **at all**
- A **good** athletics program—programs need not be equally good or equally pathetic for male and female students
- The **same** funding:
 - to the overall women’s and men’s programs
 - to men’s and women’s teams in the same sports (funding source cannot justify disparities)

Courtesy of: Valerie McMurtrie Bonnette, *Title IX and Interscholastic Athletics: How it all Works – In Plain English*

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Title IX does **NOT** require an institution to provide (cont’d):

- Specific benefits such as coaching, facilities, equipment
- Same number of teams or same sports for men and women
- Same benefits to men’s and women’s teams in the same sport
- Compete at a specific level or join a specific conference

Courtesy of: Valerie McMurtrie Bonnette, *Title IX and Interscholastic Athletics: How it all Works – In Plain English*

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EQUAL ACCESS TO THE PROGRAM

- OCR addresses this by looking at accommodation of interests and abilities, which includes what is known as the **three-part test**.

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THREE-PART TEST

Institutions must meet ONE of the following:

1. Test One – Proportionality
2. Test Two – Program Expansion – underrepresented sex
3. Test Three – Full Accommodation – underrepresented sex

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TEST ONE - PROPORTIONALITY

- Provide male and female students with interscholastic participation opportunities at rates substantially proportionate to their respective rates of enrollment.
 - Step 1: Count the athletes participating in the athletics program
 - Step 2: Compare whether opportunities are proportionate for men and women

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TEST ONE - PROPORTIONALITY

- **Step one:** Calculate the rate of enrollment.
- Example: A district has 74 students, 45 girls and 29 boys, so the girl's enrollment rate is .61.

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TEST ONE - PROPORTIONALITY

- **Step two:** Calculate the rate of participation
- Who to count?
 - Anyone on the squad list as of the first countable contest, those who join after
 - Count the same individual more than once – once for each team
 - Count all levels of participation, not just varsity
 - If someone quits or is cut after first contest, they still count
 - Don't count academically ineligible
 - Don't count student managers
- Ex: there are 116 participants, 54 girls and 62 boys, so the girls' rate of participation is .47

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TEST ONE - PROPORTIONALITY

- **Step three:** Compare the rate of participation to the rate of enrollment.
- Ex.: the girls' rate of enrollment compared to participation (.61 - .47) is a difference of .14

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TEST ONE - PROPORTIONALITY

- OCR deems opportunities substantially proportionate when "the additional number of participants required to achieve proportionality would not be sufficient to sustain a viable team."

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TEST ONE - PROPORTIONALITY

- **Step four:** Is the rate of participation substantially proportionate to the rate of enrollment?
- OCR will generally tolerate differences between two and five percentage points with the smaller differential tolerated for programs with the largest participation numbers.
- Ex.: 14 percentage points is not close enough – the rates are not substantially proportionate – girls are underrepresented so test one is not met.

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TEST TWO – PROGRAM EXPANSION

- Must demonstrate a history of and continuing practice of program expansion for the underrepresented sex
- **Expansion is:**
 - adding teams that increases opportunities for participation
 - adding opportunities on existing teams
- **Expansion is not:**
 - increasing the rate of participation
 - improving benefits for existing team (equipment, scheduling, travel)

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TEST TWO – PROGRAM EXPANSION

- A school cannot meet this prong merely by:
 - Reducing opportunities for the overrepresented sex, or
 - Doing so to a greater proportional degree than for the underrepresented sex
- Compliance requires active, ongoing expansion, not just adjustment by subtraction

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TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- Must show that you are fully and effectively accommodating the interests and abilities of the underrepresented sex.
- That means offering every sport and team for girls for which there is sufficient **interest** and **ability** for a viable team and sufficient interscholastic **competition** for that team in the school's normal competitive region.
- All three factors must exist before a school is obligated to offer a team under test three.

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TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- For interest – look at on-campus programs and off-campus programs.
- On campus
 - Participation in intramural sports, recreation programs, or elective PE courses can be evidence of interest on campus.
 - Surveys can be used to identify interest levels for a team not currently offered to the underrepresented sex.
- Off campus
 - Participation at other schools in the local community can be evidence of potential interest in that sport.
 - Participation in community and regional recreation programs can also be evidence of interest.

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TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- For ability OCR looks at students' athletic experience and accomplishments in on-campus and off-campus programs.
- However, at interscholastic level, lack of ability is unlikely to justify failure to offer a team.

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TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- For competition there must be sufficient interscholastic competition in the school's normal competitive region.
- Normal competitive region can be identified by looking at miles from campus or geographic area.
- Once the region is identified, all schools within that region offering interscholastic sports for girls that are currently not offered at the school should be identified.
- At that point you can analyze whether there is sufficient competition at an appropriate competitive level for that sport
- It can make sense to start with this analysis rather than interest and abilities because if there is not sufficient competition, then the school complies with test three regardless of interest or ability levels.

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RELATED CONSIDERATIONS

- Financial constraints are not a justification for noncompliance with Title IX.
- In some situations, girls must be allowed to tryout for boys' teams:
 - no girls' team for the sport
 - noncontact sport
 - girls' athletic opportunities have been limited previously
- UIL sponsorship not required to add sports.

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RELATED CONSIDERATIONS

- "Roster management" may be used to achieve compliance with Test One.
 - Can avoid the expense of adding a girls' team and the difficulties of eliminating a boys' team.
 - It involves boys' teams cutting participants while girls' teams retain more participants.

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RELATED CONSIDERATIONS

- Cheerleading and dance teams generally don't count.
 - OCR considers them extracurricular activities, not athletic teams.
 - OCR will recognize a competitive cheer team if they schedule enough contests to form a reasonable competitive schedule and don't perform at events for other sports.
- Stephen F. Austin University currently involved in Title IX litigation, arguing that competitive cheer and dance teams should be included in "the count."

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TWO-PART TEST – LEVELS OF COMPETITION

- Schools must meet ONE part:
 - Equivalently Advanced Competitive Opportunities
 - Continuous Upgrades of Competitive Opportunities

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TEST ONE – EQUIVALENTLY ADVANCED COMPETITIVE OPPORTUNITIES

- This test involves calculating the percentage of female and male participants competing at each level such as varsity, junior varsity, and freshman levels and comparing those percentages.
- As a general rule, differences within five percentage points are not significant.

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TEST TWO – CONTINUOUS UPGRADES OF COMPETITIVE OPPORTUNITIES

- Must demonstrate a history and continuing practice of upgrading of opportunities.
- This means that opponents from higher competitive levels have been scheduled more over time.

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OTHER ATHLETIC BENEFITS AND OPPORTUNITIES

1. EQUIPMENT AND SUPPLIES
2. SCHEDULING OF GAMES AND PRACTICE TIMES
3. TRAVEL AND PER DIEM ALLOWANCES
4. TUTORING
5. COACHING
6. LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES
7. MEDICAL AND TRAINING FACILITIES AND SERVICES
8. HOUSING AND DINING FACILITIES AND SERVICES
9. PUBLICITY
10. SUPPORT SERVICES
11. RECRUITMENT OF STUDENT-ATHLETES

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REVIEW OF COMPONENTS

- Analyze compliance in the overall program, not by comparing individual sports.
- Offsetting benefits are recognized.
 - Where students of one sex are provided an advantage in some aspect of the program, while students of the other sex are provided an advantage in a different aspect of the program.
 - If the benefits are of equivalent weight or importance, they may offset each other or provide a balance of benefits.

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EQUIPMENT AND SUPPLIES

- **QUALITY**
suitability, replacement schedules
- **AMOUNT**
number of items
- **MAINTENANCE**
storage
professional and student managers
laundry

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SCHEDULING OF GAMES AND PRACTICE TIMES

- Number of competitive events
- Time of day of competitive events
- Number and length of practices
- Time of day of practices
- Opportunities for pre-season and post-season events
- Length of season
- Season of sport
- Number of sports per season

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TRAVEL AND PER DIEM ALLOWANCES

- Modes of transportation
- Housing and dining furnished during travel
- Length of stay before and after competitive events
- Per diem allowances

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COACHING

Opportunity to receive coaching:

- Availability of coaches
- Number of coaches per team
- Length of contract
- Association with school -
on-campus versus off-campus

Assignment of Coaches:

- Qualifications
- Years of experience
- Success as coach

Compensation of Coaches:

- Total dollars proportionate to participation

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LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES

Practice and Competitive Facilities

- Quality
- Availability
- Exclusivity
- Focus on facilities used by just one gender
- Calculate proportions using each facility

Locker Rooms

- Number of Locker Rooms
- Quality of Locker Rooms
- Exclusivity

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MEDICAL AND TRAINING FACILITIES AND SERVICES

- Medical Personnel and Assistance
- Qualifications/Availability of Trainers
- Training Rooms
- Weight Rooms
- Insurance

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PROBLEMS WITH MONEY

- Booster Clubs
 - Any benefits provided by booster clubs are subject to Title IX.
 - If booster club provides benefits that create a disparity under Title IX, then the school is responsible for offsetting that disparity.
 - Example: If a booster club's contributions provide football athletes with benefits superior to those provided to all female athletes, the school may reallocate the funds it would have spent on football to girls' teams as necessary to provide equivalent benefits and achieve compliance.
- Donations
 - It is not the money itself that Title IX is concerned with; it's the benefits that money buys.
 - If the benefits are disparate, look at ways to offset the disparities.

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PROBLEMS WITH MONEY

- Fundraising
 - No specific Title IX requirements
 - Opportunities cannot be limited or imposed discriminatorily.
 - Priority for more lucrative fundraisers cannot be based on sex.
 - Giving benefits to boys' teams that girls' teams must pay for through fundraisers creates compliance problems.
 - Athletes may not receive lesser benefits on the basis of sex because of their coach's inability to fundraise.
 - Disparate benefits on the basis of sex cannot be the result of coaches' differing abilities to fundraise.
 - Funds raised by the students themselves don't have to be offset.

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THANK YOU



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