

Title IX and athletics: separate ... but equal?

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Much has been made about the effect that Title IX of the Education Amendments of 1972 has had on interscholastic athletics. Simply put, Title IX prohibits discrimination based on sex in educational programs or activities that receive federal financial assistance. This includes athletics and other extracurricular activities at all public and chartered nonpublic schools, colleges and universities.

This article examines what the law requires, its impact on high school sports and what districts need to do to ensure compliance.

According to the U.S. Department of Education, which is charged with enforcing the law's provisions, female participation in high school athletics increased from 295,000 in 1971 to 2.7 million 30 years later.

While these figures highlight the gains in female participation and inclusion that Title IX was intended to create, they do not come without controversy.

Title IX prohibits the exclusion, denial of benefits, disparate treatment or discrimination of any person in interscholastic, intercollegiate, club or intramural athletics on the basis of sex.

I'm sure some of you are wondering, if you can't exclude individuals from participation because of their sex, how does your district have all-male and all-female soccer teams, and how do Ohio State and other universities maintain male-only sports programs such as football and wrestling? The answer lies in a broad exception to the regulations, which provides for separate teams based on sex.

Recipients of federal funds may operate or sponsor separate teams for each sex, so long as the process used to determine team membership is based on

skill or the sport involves contact. Accordingly, since sports such as basketball, soccer, hockey and lacrosse all involve a certain level of competitive skill that members of the teams must possess, and involve some repetitive physical contact among participants, schools are well within their rights to maintain separate teams for girls and boys.

However, when an educational institution receiving federal funds operates or sponsors a team in a particular sport for members of one sex and not the other, and the opportunities to participate in athletic activities have previously been limited for members of the excluded sex in that district, members of the excluded sex must be allowed to try out for the team. This means that if a district has a baseball team, but doesn't have, and never has had, a softball team, girls must be allowed to try out for the baseball team.

Interestingly enough, the same district could operate a girls-only field hockey team, but would not have to allow boys to try out unless boys in that district had been previously denied opportunities to participate in athletic activities. On the other hand, schools operating teams in sports such as football and wrestling are not required to allow girls to participate under the law because those sports are considered to be "contact sports."

A common but mistaken perception is that for districts to comply with these regulations, they will have to cut boys athletic programs in order to create and fund additional programs for girls. However, Title IX is not a quota system, and nothing in the law requires the reduction of sports offered to one sex in

order to benefit the other.

Every school district and institution can substantiate compliance with Title IX by satisfying any portion of the

following three-part test:

- the number of male and female athletes is substantially proportionate to the number of male and female students enrolled;
- demonstrating that the institution has a history of expanding and developing programs that further the interests and abilities of the underrepresented sex and continues to do so;
- demonstrating that the interests and abilities of the

underrepresented sex have been fully addressed and accommodated by the present program.

In determining if a recipient of federal funding is complying with the law, the U.S. Department of Education's Office of Civil Rights (OCR) examines whether the sports and levels of competition offered effectively accommodate the interests and abilities of both sexes; whether the equipment, supplies and scheduling of practice and game times are equivalent; and whether financial assistance to male and female athletes is distributed on an equitable basis.

Under the first part of this analysis, OCR will review athletic department files and interview coaches and students of middle school and high school age to determine if students' athletic interests are being addressed. For instance, if students in a particular school district have been clamoring for a girls gymnastics team, but not enough girls show interest when the district holds sign-ups, the district will likely have met its burden of accommodation of interests for that program.

For the second part of the analysis,



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OCR looks to the quality, suitability and maintenance of equipment; the number of competitive events per sport; and the quality and availability of facilities. This does not mean that the equipment must be of equal value. If a district operates separate girls and boys hockey teams and spends \$35 per team member to provide the girls with all of their required equipment while spending \$70 per member on the boys team for their required equipment, that practice is likely to draw Title IX scrutiny.

However, if it were found that the Ohio High School Athletic Association (OHSAA) requires male hockey players to wear more protective gear than females, the district may very well be justified in spending more funds on equipment for the boys team. If fact, were the district to attempt to reconcile this difference by providing the girls team with skates, while requiring the boys team to purchase their own, the district would probably be guilty of Title IX discrimination against the boys.

The scheduling of games and practice times is also an area where Title IX complaints frequently arise. If a district were to schedule all boys' basketball games on Friday nights, but made the girls team play on Sunday mornings, a Title IX violation would exist if it were established that Friday is a more favorable day.

The same goes for scheduling practice time. If a district scheduled all girls basketball practices for 3:30 p.m., but required the boys team to return to school at 5:30 p.m. in order to use the facility, that would most likely be a violation, as would scheduling practice for both teams at 3:30 p.m., but letting the boys practice in the school gymnasium while forcing the girls team to use the local recreation center. Compliance would require a district to alternate the practice times and venues so that each team had an equal number of 3:30 p.m. and 5:30 p.m. practices, or an equal number of practices in the gymnasium.

The final prong of this analysis requires school districts to provide services and benefits to athletes on an equitable basis, regardless of where the

funds come from.

So what happens if a supporter of a district's baseball team leaves a \$50,000 bequest for the program in his will? Title IX does not require that the district disregard the purpose for which the booster donated the money, so the district would be able to allocate the entire amount to the baseball program. However, the district would also need to divert funds that would have gone to the baseball program to girls athletic programs in order to re-establish equity among the sexes.

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Another common situation is the construction of a large stadium for the football team. How in the world can a district treat both sexes equitably when

there are only enough funds for this one substantial construction project? A reasonable solution would be to allow the girls soccer and field hockey teams to use the field, as well. The district might also include a track in the project and allow the girls track team access to the facility. In this situation, the district would have to allow the boys soccer and track teams to use the stadium as well, in order to fully comply with the regulations.

Whether deciding on transportation arrangements and practice times for your athletic programs, hiring and compensating coaches, or upgrading your facilities, Title IX compliance is essential. With damages, attorney fees, and ultimately, withdrawal of federal funding as penalties, non-compliance may be something that your district truly cannot afford. □

"According to law" is designed to provide authoritative general information, sometimes with commentary. It should not be relied upon as legal advice. If legal advice is required, the services of an attorney should be obtained.

Opportunities abound for girls

Since Title IX became law, Ohio school districts have expanded opportunities for girls. Through membership in the Ohio High School Athletic Association (OHSAA), girls sports now have as many recognized high school championships as boys. And going beyond the requirements of Title IX, girls have played on boys high school football, wrestling, golf and tennis teams.

OHSAA allows girls to play on boys teams if there is no girls team or if the overall opportunities for interscholastic competition are less for girls (OHSAA Bylaw 1-6-1). Boys may not play on girls teams unless the overall opportunities for interscholastic competition for boys are less than for girls and the competing schools mutually agree

(OHSAA Bylaw 1-6-3).

OHSAA conducts championships in 12 sports for each gender (Boys: baseball, basketball, bowling, cross-country, football, golf, ice hockey, soccer, swimming and diving, tennis, track and field, and wrestling. Girls: basketball, bowling, cross-country, field hockey, golf, gymnastics, soccer, fast-pitch softball, swimming and diving, tennis, track and field, and volleyball. Boys gymnastics is a recognized sport, but there is no state championship.)

Many schools offer additional varsity and club teams, and other cocurricular activities, which are not recognized by OHSAA.

For a copy of OHSAA's *Gender Equity in Interscholastic Athletics*, contact OHSAA's **Renee Moore** at rmoore@ohsaa.org.