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Title IX and Athletics: Legal Basics

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in education programs and activities that receive federal financial assistance. 20 U.S.C. § 1681. Although the statute does not mention athletics, long-standing regulations implementing Title IX provide that recipients may not discriminate based on sex in athletics programs or activities. 34 C.F.R. §§ 106.41 (athletics); 106.37 (financial assistance). As recipients of federal funding, most private and public postsecondary institutions, as well as public schools at the K-12 level, are subject to Title IX (the statute does have exemptions, including for admissions policies at certain educational institutions). Since the law's passage, women's participation in athletics has increased substantially at both the high school and college levels.

To clarify the requirements in Title IX's athletics regulations, the U.S. Department of Health, Education, and Welfare issued a Policy Interpretation in 1979 to offer guidance for covered colleges and universities operating intercollegiate athletics programs. Congress soon after split that agency into the Department of Health and Human Services and the Department of Education (ED). Drawing from Title IX's athletics regulations, the Policy Interpretation lays out three basic categories in which recipient schools face Title IX obligations with respect to their athletics programs and activities:

- Proportional Financial Assistance (i.e., scholarships)
- Equivalent Benefits and Opportunities
- Effective Accommodation of Interest and Abilities

While directed toward intercollegiate athletics, the general principles and standards in the Policy Interpretation often apply to interscholastic athletics programs at the elementary and secondary levels, as well as to club and intramural programs. This In Focus provides background on Title IX's athletics requirements, including the basics of what legal obligations recipient schools face, how the law is enforced, and emerging legal questions relevant to athletics.

Enforcement

Title IX is generally enforced in two ways: (1) through private lawsuits brought directly against recipients in federal court and (2) by federal agencies that provide funding to recipients. Federal agencies that distribute federal financial assistance to education programs are responsible for promulgating regulations to implement Title IX and may terminate or suspend assistance in cases of non-compliance. Because ED distributes substantial financial assistance in the elementary, secondary, and postsecondary contexts, ED's Office for Civil Rights (OCR) plays a lead

role in enforcing Title IX against schools that receive ED funding. OCR investigates complaints of discrimination against recipients and also publishes guidance, such as "Dear Colleague" letters, explaining the meaning of, and how to comply with, Title IX and its implementing regulations.

Separate Athletics Teams

While Title IX prohibits sex discrimination in recipient schools' athletics programs, this does not mean all sex-based distinctions are banned. According to Title IX regulations, schools may offer separate athletics teams for each sex where selection is based on competitive skill or the activity is a contact sport. In addition, subject to the obligations described below, while schools must provide equal athletics opportunity to members of both sexes, they do not necessarily need to offer the same sports for each sex. That said, if a school only offers a sport for one sex, and opportunities for the other sex have been previously limited, a student from the excluded sex must be allowed to try out for the team unless it is a contact sport. (Contact sports include boxing, wrestling, rugby, ice hockey, football, and basketball.)

Three Categories of Obligations

The three general categories of legal obligations that Title IX imposes on school athletics programs relate to (1) scholarships; (2) equivalent program treatment; and (3) accommodation of interest and abilities.

Proportional Scholarships

When colleges and universities award athletics scholarships, they must offer reasonable opportunities for awards for members of each sex in proportion to the number of students participating in intercollegiate athletics. This obligation does not mean the dollar amount of scholarships for men and women must be perfectly equal. Instead, total assistance awarded to each sex must be substantially proportionate to the participation rates of men and women. Put another way, if 60% of an institution's intercollegiate athletes are women, then the total amount of aid to women athletes should be approximately 60%. Disparities can be justified by certain legitimate, nondiscriminatory factors.

Equivalent Benefits and Opportunities

Title IX regulations require recipients that operate athletics programs to provide "equal athletic opportunity for members of both sexes." In determining whether this standard is met, a range of factors are relevant, including equipment; scheduling; travel expenses; coaching and tutoring, including compensation thereof; practice and competitive facilities; medical and training facilities and

services; and publicity, as well as recruitment and support services.

According to OCR, institutions must provide equivalent treatment, benefits, and services with respect to these components of the athletics program. Each component is examined by comparing availability, quality, the kinds of benefits, the kinds of opportunities, and the kinds of treatment. According to the equivalency standard, identical benefits or treatment are not required, as long as the overall effects of any differences are negligible. Compliance issues can arise if disparities are “of a substantial and unjustified nature in a school’s overall athletics program” or “if disparities in individual program areas are substantial enough” to deny equal athletic opportunity.

Equality of opportunity is not measured through a sport-specific comparison. Instead, schools have flexibility in distributing athletics resources.

Effective Accommodation of Interests and Abilities

Title IX regulations require schools that offer athletics programs to “effectively accommodate the interests and abilities of members of both sexes.” OCR assesses whether an institution has effectively accommodated the athletic interests and abilities of students sufficient to provide equal athletic opportunities by using a “Three-Part Test.” Under this test, institutions will be in compliance with the effective accommodation requirement if

1. “Intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments”; or
2. “[T]he institution can show a history and continuing practice of program expansion” responsive to the interests of an underrepresented sex; or
3. The institution is “fully and effectively” accommodating the interests and abilities of an underrepresented sex.

Recipient schools need to meet only one of the prongs to comply with the effective accommodation requirement.

Substantially Proportionate: An inquiry into whether participation opportunities are substantially proportionate to male and female enrollment is conducted on a case-by-case basis, with consideration of the specific circumstances and size of a program. For instance, if an institution’s enrollment percentages for each sex match participation rates, this prong is satisfied. According to OCR, the test can also be met if the number of opportunities “required to achieve proportionality would not be sufficient to sustain a viable team.” In other words, if the participation rate for a given sex is less than the enrollment figures but the difference in prospective additional athletes would not be enough to sustain a viable intercollegiate team, then the test may be satisfied.

Program Expansion: The second prong of the three-part test asks if an institution can show a history and continuing practice of program expansion that is demonstrably

responsive to the developing interests and abilities of an underrepresented sex. A history of program expansion could be shown through adding or upgrading teams to intercollegiate status as well as increasing the number of participants for the underrepresented sex. Evidence of a continuing practice of expansion may be shown through factors such as current implementation of a nondiscriminatory policy for requesting the addition or elevation of sports and communication of this policy to students.

Full and Effective Accommodation: The third prong of the test can be satisfied if a school can show that students of an underrepresented sex are not denied opportunities because their interests and abilities are fully and effectively accommodated. OCR is to consider whether there is an unmet interest in a sport, ability to sustain a team in that sport, and “a reasonable expectation of competition for the team.” If each of these factors is present, then a recipient has not satisfied the third prong.

OCR recommends that institutions have procedures for determining the interests and abilities of students of the underrepresented sex, including documentation and monitoring of the underrepresented sex’s participation in club and intramural sports. OCR recommends similar examination of the participation of the underrepresented sex in high school athletics programs, amateur associations, and community leagues in the areas from which an institution draws its students. This type of documentation may be needed to demonstrate that an institution is properly assessing the interests and abilities of its students. Surveys are one method of accomplishing this goal.

Emerging Legal Issues

One developing legal issue regarding athletics and Title IX is the participation of transgender students on sports teams. State laws and policies on the matter range from permitting transgender students to participate consistent with their gender identity to prohibitions on doing so. In turn, legal challenges alleging Title IX violations have been brought against both approaches. For instance, students have challenged policies that permit transgender girls to participate in sports consistent with their gender identity, arguing it deprives them of equal athletic opportunities. Likewise, transgender students prohibited from competing in sports consistent with their gender identity have challenged such policies as discrimination based on sex in violation of Title IX.

In June 2022, ED issued a Notice of Proposed Rulemaking that would address other aspects of Title IX, such as sex-based harassment and gender identity more generally. See CRS Legal Sidebar LSB10804, *Education Department Proposes New Title IX Regulations: Responding to Sex Discrimination and Harassment at School*, by Jared P. Cole; and CRS Legal Sidebar LSB10830, *Education Department Proposes New Title IX Regulations: Sexual Orientation and Gender Identity*, by Jared P. Cole. The agency indicated it would conduct a separate rulemaking addressing athletics that would specifically establish what criteria schools may use to determine a student’s ability to participate on a particular female or male team.

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