All Tied Up: OCR Issues New Resources on Equal Athletic Opportunity Under Title IX

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Practice Area: School Law & Sports Law

Enacted in 1972, Title IX prohibits discrimination based on sex in educational activities that receive federal funds and requires public elementary and secondary schools, as well as colleges and universities, to effectively accommodate the athletic interests and abilities of students and provide equal opportunity in the benefits, opportunities, and treatment provided for athletic teams.

While Title IX does not directly address gender identity, the Department of Education recently released a notice of proposed rulemaking related to a transgender student's ability to participate on athletic teams consistent with that student's gender identity. The rule seeks to allow individual school districts to implement policies concerning participation in sports based on one's gender identity, but if a school district enacts such policies, those policies must be connected to an important educational objective, be reasonably related to the sport at-issue, and minimize the harm in the context of the overall athletic opportunities offered to those denied by the policies. The regulations also provide additional guidance for evaluating programs in general to ensure equality, regardless of sex.

The Department hopes to release final revisions to the Title IX regulations in October 2023. Nonetheless, under the proposed regulation, a primary consideration in determining whether a school district's sport participation policy is sufficient is whether the policy negatively impacts the athletic opportunities provided to other students. Accordingly, schools will need to evaluate the quality and comparability of their athletic programs, a process discussed further below.

The Department's Office for Civil Rights ("OCR") recently published three new resources to support equal opportunity in athletic programs consistent with Title IX. These resources were created to help school officials evaluate whether a school is satisfying its legal duty to provide equal athletic opportunities, regardless of sex.

What should the School District Administrator take away from OCR's new resources?

1. **Examples of situations that might raise Title IX concerns.** In *Supporting Equal Opportunity in School Athletic Programs*, OCR provides several examples of situations that could raise Title IX concerns at any education level, depending upon the facts and circumstances. One example states, at a high school, the boys' baseball team plays on a turf field of excellent quality, but the girls' softball team plays on a poorly maintained grass field with holes and drainage problems. The girls' softball field also lacks proper fencing and lighting needed for evening practices and games. Another example states, a university provides funds for its coaches to recruit athletes for its men's football and basketball teams because it considers those teams to be "flagship sports," but provides no funds for coaches to recruit women athletes. As a result, the university has difficulty attracting women to participate in its athletic programs. According to OCR, these facts may raise Title IX concerns.
2. **Tips for evaluating your school's athletic program.** In *Title IX and Athletic Opportunities in K-12 Schools*, OCR provides strategies for evaluating school athletic programs. First, OCR recommends considering the benefits, opportunities, and treatment for boys and girls teams. Such items may include equipment and supplies, practice and game schedules, daily and travel allowances, coaching services, practice and competition facilities, medical and training services, and publicity opportunities. Second, OCR recommends following one of three tests to determine whether a school athletic program is fulfilling its legal duty to meet the athletic interests and abilities of its student body. The three test options include the substantial proportionality test, the history and continuing practice test, and the interests and abilities of students test. The substantial proportionality test looks to whether the percentages of girl and boy participants on athletic teams are about the same as the percentages of girls and boys enrolled at a school. The history and continuing practice test looks to whether a school can show it has a history and continuing practice of expanding its athletic program to respond to the interests and abilities of girls, if girls have been underrepresented, or boys, if boys have been underrepresented. The interests and abilities of students test asks whether a school can show that, despite the disproportionality, it is otherwise meeting the interests and abilities of the underrepresented sex. A school can choose any of these test options to show compliance with Title IX.
3. **Tips for evaluating how your institution awards athletic scholarships and financial assistance.** In *Title IX and Athletic Opportunities in Colleges and Universities*, OCR provides guidance for evaluating how a college or university awards athletic scholarships and financial assistance. In determining whether a college or university is providing equal opportunity based on sex in athletic scholarships and financial assistance, OCR considers whether the total amount of athletic scholarship aid a college or university makes available to men and women is proportional to their participation rates. OCR recommends calculating the percentages of women and men participants, calculating the percentage of scholarship awards, and comparing the percentages of participants to the athletic scholarship money awarded.

What are the School District Administrator's next steps?
OCR's new resources serve as a reminder to review all policies, guidelines, and practices that impact equal athletic opportunity. A school's compliance with Title IX is dynamic, not static. Regularly audit or review your athletic program to ensure Title IX compliance. Anyone can file a complaint with a Title IX coordinator or OCR. School officials, especially athletic directors and Title IX coordinators, should be prepared to produce data illustrating how their school accommodates the athletic interests and abilities of its students.

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