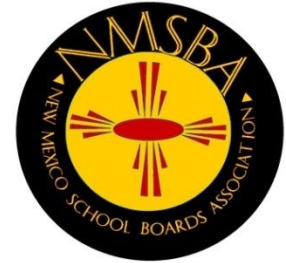




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TITLE IX: Investigation thru Resolution

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What is Title IX?

- Title IX is the portion of the Education Amendments of 1972 that provides:
 - No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.



Gender Equity

- “Gender equity is an atmosphere and a reality where fair distribution of overall athletic opportunity and resources are proportionate to women and men and where no student-athlete, coach or athletic administrator is discriminated against in any way in the athletic program on the basis of gender.”
- **“That is to say, an athletic program is gender equitable when the men’s sports program would be *pleased to accept for its own* the overall participation, opportunities and resources currently allocated to the women’s program and vice versa.”**



Statutory and Regulatory Framework

- 20 U.S.C. § 1681 prohibits gender discrimination in education programs that receive federal funds, either directly or indirectly
- Enforcement power is vested in U. S. Department of Education's Office of Civil Rights ("OCR")
- Title IX does not reference athletic programs. Regulations promulgated by OCR at 34 C.F.R. Part 106 address athletics.



Discrimination and Harassment

- **“Transgender”** is an umbrella term used to describe individuals “whose gender identity, expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth.”-- American Psychological Association
- **Gender identity** is not **sexual orientation**.



Bathrooms and Locker rooms

- Although Title IX does not specifically prohibit discrimination on the basis of sexual orientation, gender identity or gender expression, this federal law has been invoked by the federal courts to address sexual or gender-based harassment in schools based on gender stereotypes.
- OCR's *Revised Sexual Harassment Guidance* states, "gender-based harassment....is also a form of sex discrimination to which a school must respond."



Bathrooms and Locker rooms

- Claims under the First Amendment as well as the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment have been raised in cases involving gender identity.
- The Massachusetts Superior Court, in 2000 held that a transgender student had the First Amendment right to wear clothes consistent with her gender identity and a due process liberty interest in her personal appearance.
- In several cases involving harassment and discrimination against lesbian, gay, bisexual, and transgender (LGBT) students, the Equal Protection Clause has been used to impose a duty on schools to protect transgender students from harassment on an equal basis with other students.



Bathroom and Locker rooms

- New Mexico is one of sixteen (16) states that provides under its the Human Rights Act protection against discrimination based on their gender identity. *See* N.M. Stat. Ann. § 28-1-2 (2012).
- The DOJ and OCR have taken the legal position that under Title IX transgender students at any age should have access to the restroom that corresponds to their gender identity, particularly if it aligns with their gender presentation.



Bathrooms

- Where a student desires privacy, OCR advises that a single stall bathroom should be made available. OCR believes that it is important that the use of a single stall facility be the personal choice of the student and not forced or mandated in any way by the school.
- In 2009, the Maine Human Rights Commission ruled that the Orono School District discriminated against a fifth grade student, "Susan Doe," at Asa Adams Elementary School, who was biologically male but presented as female, when she was forced to use a staff bathroom.
- The local state district court ruled that the discrimination claim could go to trial, but did not rule on whether the school must allow access to girls' bathroom.



Bathrooms

- In an interpretation Letter, dated January 7, 2015, OCR interpreted how its regulation should apply to transgender individuals: “When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity.”
- “We conclude that the Department's interpretation of its own regulation, ... as it relates to restroom access by transgender individuals, is entitled to ... deference and is to be accorded controlling weight in this case.” *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 2016 WL 1567467, at *8 (4th Cir. April 19, 2016).



Bathrooms and Locker rooms

- “We agree that it has indeed been commonplace and widely accepted to separate public restrooms, locker rooms, and shower facilities on the basis of sex. We agree that ‘an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts’ are not involuntarily exposed. It is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach regarding the level of deference due to the Department's interpretation of its own regulations.” *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 2016 WL 1567467, at *8 (4th Cir. April 19, 2016).
- Balancing of interests is the next legal battle
 - Stalls in bathrooms
 - Stalls or cubicles in locker rooms



How is Title IX applied to athletics programs?

- Title IX applies:
- to the overall athletic *program* of a school—not to specific sports or teams.
- intramural sports, physical education courses and all other school sponsored athletic programs.



Title ix: EQUIVALENCE

- The basic test of compliance is – *equivalence*.
- The benefits, opportunities and treatment of each gender must be equal or equal in effect.
- There must be no disparity between boys' and girls' programs.



Title ix: EQUIVALENCE

- Disparity—a difference on the basis of gender, in benefits or services, that has a negative impact on athletics of one gender when compared to the benefits or services available to athletes of the other gender.



Federal Requirements for Accommodation of Interests and Abilities

- OCR issues a three test examination in 1996
- Participation/Opportunities Tests
 - 1. participation is substantially proportionate to enrollment: or
 - 2. demonstrates history and continuing practice of program expansion responsive to developing interests and abilities of under-represented sex; or
 - 3. fully and effectively accommodate interests and abilities of under-represented sex



Federal Requirements for Accommodation of Interests and Abilities

- Participation/Opportunities Tests
- First test
 - Participation of female student athletes in the school's athletics program is *substantially proportional* to the percentage of females enrolled in the school
 - No requirement for strict proportionality
 - No clear rule setting a definitive percentage



Federal Requirements for Accommodation of Interests and Abilities

- Participation/Opportunities Tests

- Second Test
 - demonstrate history and continuing practice of expanding its sports offerings for females
 - Adding sports
 - Responding to requests for adding sports
 - Monitoring interests and abilities of student athletes



Federal Requirements for Accommodation of Interests and Abilities

- Participation/Opportunities Tests

- Third Test
 - Fully and effectively accommodating the athletic interests and abilities of females in the student body.
 - Surveys
 - Reviews
 - Assessments



Federal Requirements for Accommodation of Interests and Abilities

Major OCR compliance emphasis is on the participation opportunities tests. Failure to comply with at least **one** of the three part tests will likely result in a finding of a violation by OCR.



ATHLETIC PROGRAM AREAS EXAMINED TO DETERMINE COMPLIANCE

- Travel and per diem allowance
- Tutors
- Coaches
 - Pay and assignment
 - Office/facilities



ATHLETIC PROGRAM AREAS EXAMINED TO DETERMINE COMPLIANCE

- Facilities: Locker rooms, practice etc.
- Publicity and Support services
- Recruitment



COMPLIANCE ISSUES

Athletics

- Compliance is an examination of the overall benefits provided to girls' athletics compared to boys' athletics.
- Compliance = overall benefits
- **NOT** boys' soccer = girls' soccer



COMPLIANCE ISSUES

Athletics

- compliance may mean that equivalent benefits can only be established by providing equivalent benefits to more girls' teams than boys' teams



COMPLIANCE ISSUES

Athletics

- Example: New Uniforms
- 2 of 8 boys' teams
- 50% of boys' participation
- **Equivalence**
- New uniforms for 50% of girls' participation
- 4 of 9 girls' teams or 5 of 9 girls' teams



COMPLIANCE ISSUES

Athletics

- teams may be provided different benefits as long as balance of benefits in women's programs is equal to balance in men's programs
- Boys' football team requires more equipment and storage space than girls' tennis. Are benefits given to the other girls' teams, when aggregated, equal to benefits given to the football team?



COMPLIANCE ISSUES

Athletics

- Proportionality of benefits--
- **NOT** \$ girls = \$ boys
- able to demonstrate amount, quality and suitability of equipment is equivalent



COMPLIANCE ISSUES

Booster clubs, donations and fundraiser impact

- Differences in donations may not be used to justify imbalance in benefits or services provided
- Disproportionate benefits from team booster clubs may require reallocation of budgeted funds from teams receiving donations to teams which are not.
- Donations policy—direct donations to school's athletics program not to specific team or program.



TITLE IX COMPLIANCE OFFICER

- At least one employee MUST be designated as a Title IX coordinator for the school district to oversee compliance.
- All students and employees must be notified of the name, office address and telephone number of the designated Title IX coordinator.
- Coordinator oversees compliance by departments, programs and employees and investigates complaints of violations of Title IX



TITLE IX BOARD POLICIES

- Generic EEOC nondiscrimination policy statement **will not** satisfy OCR
- OCR will require the implementation of a Title IX Nondiscrimination Policy
- “Notification” of compliance officer and policy includes
 - publication in local newspapers
 - publication in school newspapers
 - mailing/distributing to students and their parents
 - Publishing in student and employee handbooks
 - any other written communication actually distributed to employees, parents and students



TITLE IX BOARD POLICIES

- Policy requirements include Title IX Grievance Procedures
- Superintendent Directives
 - Coordinator: authority to intake and investigate
 - Separate from informal dispute resolution regulations
 - Appeal rights to Title IX Grievance Committee
 - Appeal rights for final review by Board of Education
 - Hearing includes Evidence and witnesses



TITLE IX BOARD POLICIES

- Sexual Harassment Policy
 - Actual Notice is key to liability
 - *Bostic v. Smyrna School District* (Third Circuit)
 - Principal and assistant principal are not appropriate persons based on position alone
 - Deliberate indifferent to known acts of teacher-student discrimination
- Student-on-Student Policy
- Employee-on-Student
- Employee-on-Employee
 - Title VII
 - Separate Policy



TITLE IX BOARD POLICIES

- Training
 - All Employees
 - Yearly
 - Coaches/Athletes
 - Prior to each season of sports
 - Provide means for athletes to report with athletic dept.
- Take appropriate action
 - Investigate
 - Stop conduct
 - Discipline/law enforcement



School Athletics Equity Act

- The School Athletics Equity Act (“SAEA”) applies to each public school that has an athletics program for grades seven through twelve.
- Each public school shall operate its program in a manner that does not discriminate against students or staff on the basis of gender.



School Athletics Equity Act

- PED shall collect annual data from public schools on their athletics programs.
- Each public school shall collect and submit the prior-year data required in SAEA in a format required by PED.



School Athletics Equity Act

- The data submitted shall include:
 - The following information pertaining to enrollment:
 - (1) the total enrollment in each public school as an average of enrollment at the eightieth and one hundred twentieth days of the school year;
 - (2) student enrollment by gender;
 - (3) total number of students participating in athletics;
 - (4) athletics participation by gender; and;
 - (5) the number of boys' teams and girls' teams by sport and by competition level;



School Athletics Equity Act

- The data submitted shall include:
 - The following information pertaining to athletic directors, coaches and other school personnel:
 - (1) the name and gender of each public school's athletic director;
 - (2) the name of each team's coaches and other team personnel, with their gender, job title and employment status, such as full-time, part-time, contract or seasonal, specified;
 - (3) the coach-to-athlete and staff-to-athlete ratio for each team; and;
 - (4) the stipend or other compensation for coaching paid to coaches of boys' teams and to coaches of girls' teams for each public school;



School Athletics Equity Act

- The data submitted shall include:
 - An accounting of the funding sources that are used to support the school's athletics programs and to which teams those funds are allocated; funding sources include state funding, federal funding, fundraising or booster clubs, game and concession receipts, gate receipts, cash or in-kind donations, grants and any other source;



School Athletics Equity Act

- The data submitted shall include:
 - The following information regarding expenses, including:
 - (1) any capital outlay expenditures for each public school's athletics programs;
 - (2) the expenditures for each public school's athletics programs; and;
 - (3) the expenditures for individual teams, including travel expenses such as transportation, meal allowances and overnight accommodations; equipment; uniforms; facilities; facilities improvements; publicity expenses; awards; banquets; insurance; and any other expenses incurred by each team; and



School Athletics Equity Act

- The data submitted shall include:
 - A statement of benefits and services to each team, including:
 - (1) replacement schedules for equipment, uniforms and supplies;
 - (2) practice and game schedules;
 - (3) access to locker rooms, weight rooms and practice, competitive and training facilities; and;
 - (4) assistance in obtaining scholarships.



School Athletics Equity Act

- Each public school shall make its data available to the public, including all materials relied upon to compile the data.
- Each public school shall inform all students at the public school of their right to review the data.
- PED shall publish the following information:
 - (1) each public school's data; and;
 - (2) a list of public schools that did not submit fully completed data.



School Athletics Equity Act

- Each public school shall maintain its data and all materials relied upon to complete the data for at least three years.
 - Statute of Limitations for Title IX cases.
- Each public school shall publish its data in a newspaper of general circulation in the state or make the data available on a publicly accessible web site.



School Athletics Equity Act

- Each public school shall submit an assurance of compliance with Title IX to its local school board or governing body and provide a copy to PED no later than August 31 of each year.
- The assurance shall be signed by the superintendent or the head administrator of the charter school.
- PED shall publish, in a newspaper of general circulation in the state or on a publicly accessible web site, a list of public schools that fail to submit the assurance of compliance with Title IX.



School Athletics Equity Act

- REPORT TO GOVERNOR AND LEGISLATURE.
 - PED shall submit annually a report on the School Athletics Equity Act to the Governor and the Legislature, including a summary of the data received from the public schools.
 - The report shall include recommendations on how to increase gender equity in athletics in public schools.
 - PED shall post the report on its web site.



Suggestions

- Conduct a Title IX Audit
 - Work with the NMAA
 - Review your numbers as to enrollment and participation in athletics
 - Surveys of interest
 - Finances in athletics
 - Benefits to each team
 - Review of booster clubs



Suggestions

- Begin the culture change now
 - Administrators
 - Athletic Directors
 - Coaches
 - Parents
 - Students



Suggestions

- Begin making necessary changes now
 - Be open with parents, coaches and public
 - Address threats of litigation and complaints to OCR
 - Work with booster clubs or have plan to address booster clubs
 - Donations policy
 - Control of name and logo
 - Control of athletes.

Questions



- Thank you

Contact Information



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