Title IX’s Three-Prong Test in Athletics

Diane Marshall-Freeman, Partner
Fagen Friedman & Fulfrost

Today’s Presentation

1. An Overview of Title IX
2. The Statute
3. OCR Policy Interpretations
4. The Evolution of Title IX in the Courts
5. The Three-Prong Test
6. Where Do We Go From Here?

Information in this presentation, including but not limited to PowerPoint handouts and the presenters’ comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

© 2017 National School Boards Association. All Rights Reserved.
What Brought Us From There?

Prior to the implementation of Title IX in 1972, opportunities for women to participate in organized sports were limited to primarily intramurals and club teams.

To Here!

Information in this presentation, including but not limited to PowerPoint handouts and the presenters’ comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.
Title IX of the Education Amendment of 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 subjected to discrimination under any education program or activity receiving Federal financial assistance.”
Where were you in 1972?

On June 23, 1972, President Richard Nixon signed Title IX into law. Title IX was an outgrowth of the Civil Rights Act of 1964. Title IX filled the void that permitted the discriminatory treatment of women in education.
Pre-Title IX - Academics

- Discrimination of girls and women in academics
- Exclusion of girls from specific education programs
- Girls were deterred from taking advanced math and science classes
- There was a lack of principal positions for women
- Quota system used by law school and medical school limiting women to 10% of the class

Pre-Title IX - Academics

- There is no mention of “sports” or “athletics” in the statute
- The original intent of the legislation was to address inequities based on sex within educational institutions in areas such as teaching positions and enrollment
Pre-Title IX - Academics

“Athletic competition builds character in our boys. We do not need that kind of character in our girls, the women of tomorrow. . .”

The Civil Rights Act of 1964

- The nation's premier civil rights legislation
- The Civil Rights Act outlawed discrimination on the basis of race, color, religion, sex, or national origin, required equal access to public places and employment, and enforced desegregation of schools and the right to vote
Title VII of the Civil Rights Act

- Prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion
- Applies to federal, state, and local governments
- Also applies to private and public colleges and universities, employment agencies, and labor organizations

The Evolution of Title IX

- Military schools and some private schools are exempt from Title IX
- After passage of Title IX, intercollegiate athletics became part of a national debate
The Title IX Regulations - 1974

- In 1973, Congress formalized the inclusion of athletics under Title IX when it directed the Department of Health, Education, and Welfare to prepare regulations that included athletics.

Attempts to Limit Title IX

- The 1974 Tower Amendment
- Supported by the NCAA
- Sought to exempt revenue-producing sports from the jurisdiction of Title IX
- Failed to pass

As you are aware, considerable controversy has surrounded the subject of sex discrimination in collegiate athletics. Generating most of the debate on the subject has been the NCAA whose concerns seem to be premised on a misinterpretation of an early, preliminary draft of the proposed Title IX regulations, which unfortunately was leaked to the public in mid-winter. The NCAA misinterpreted that draft as requiring equal expenditures for male and female competitive athletic programs. As a result, the NCAA proposed language that would exempt from Title IX monies generated by revenue-producing sports, such as football and basketball, to the extent that such monies were used to support those revenue-producing sports. The Tower Amendment which is ambiguously drafted and was recently passed by the Senate during debate on the Elementary and Secondary Education Act, attempts ineffectively to incorporate the intent of the NCAA proposal. That amendment is now in the Conference Committee.

The Office for Civil Rights

- The Javits Amendment
- Charged the US Department of Education Office for Civil Rights ("OCR") as the primary federal agency for enforcing Title IX
OCR Policy Interpretations

1. The 1979 Policy Interpretation ("The 1979 Policy Interpretation")
2. Clarification of Intercollegiate Athletic Policy Guidance: The Three Part Test ("The 1996 Clarification")
3. The 2003 "Dear Colleague" Letter ("Further Clarification")
4. The 2005 Additional Clarification of Intercollegiate Athletic Policy: Three-Part Test ("The 2005 Clarification")
5. The 2010 Dear Colleague Letter ("2010 Clarification")

The 1979 Policy Interpretation

- OCR issued a test that includes three parts:
  1. Compliance in Financial Assistance (Scholarships) Based on Athletic Ability - Such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.
The 1979 Policy Interpretation

2. Compliance in Other Program Areas – The Laundry List (equivalent treatment, benefits, and opportunities)
   - equipment and supplies;
   - games and practice times;
   - travel and per diem;
   - coaching and academic tutoring;
   - assignment and compensation of coaches and tutors;
   - locker rooms, and practice and competitive facilities;
   - medical and training facilities;
   - housing and dining facilities; publicity; recruitment; and support services

3. Compliance in Meeting the Interests and Abilities of Male and Female Students - the athletic interests and abilities of male and female students must be equally effectively accommodated
The 1996 Clarification

- A covered institution need only comply with one of the three prongs of the Three-Prong test in order to comply with Title IX

   it just takes one.

The 2003 Further Clarification

- Five Points -
  1. Flexibility with participation portion
  2. Title IX does not require cutting or reducing teams
  3. OCR will work with schools to achieve compliance
  4. Private donations to athletic programs are not exempt for the equity consideration
  5. OCR enforcement will be uniform nationwide
The 2005 Clarification

*Highly criticized –
1. Issued without prior notice or comment
2. Made it easy for school and colleges to avoid offering equal opportunity to women in athletics
3. Allowed schools and colleges to use a simple survey of women to evaluate interests
4. Allowed non-responses with negative responses
5. Allowed the use of electronic surveys as a measure of compliance which allowed institutions to avoid providing equal opportunities

The 2010 Clarification

- Formally rescinded the 2005 Clarification
The Evolution of Title IX in The Courts


- Private college that refused federal funding
- Some students received federal Basic Education Opportunity Grants
- DOE threatened to terminate students financial assistance because the college refused to execute assurances of compliance with Title IX prohibition against sex discrimination
- U.S. Supreme Court ruled the recipient of grants did not trigger institutionwide coverage under Title IX

The Evolution of Title IX

- The U.S. Supreme Court’s position in Grove City College was essentially vindicated by congressional enactment of the Civil Rights Restoration Act of 1987, which stated that if any part of an institution receives federal aid, the institution as a whole must comply with Title IX
The Evolution of Title IX in The Courts


- The court granted injunctive relief reinstating the women’s varsity gymnastics and volleyball programs to varsity status
- In the absence of injunctive relief, the plaintiffs would be unable to attack varsity caliber athletes and the women’s team will be unable to maintain the same level of competition
- The amount of money to restore the programs was minuscule in relation to the university’s overall budget

---

*The Evolution of Title IX in The Courts*

*Miami University Wrestling Club v. Miami University*, 302 F.3d 608 (6th Cir. 2002)

- The court upheld the lower court’s dismissal of Title IX and Equal Protection claims of members of the men’s wrestling, tennis, and soccer teams on the ground that Title IX focuses on opportunities for the underrepresented gender and does not bestow rights on the historically overrepresented gender
The Evolution of Title IX in The Courts

*Communities of Equity v. Michigan High School Athletic Association*, 459 F.3d 676 (6th Cir. 2004)

- The high school state athletic association was found to have violated Title IX, the Equal Protection Clause, and Michigan’s Elliott-Larsen Civil Rights Act by scheduling sports seasons in a manner that discriminated against female athletes.

The Evolution of Title IX in The Courts


- The U.S. Supreme Court held that a male coach was protected from retaliation under Title IX after he received a negative evaluation and lost his coaching position after he complained about female athletes not receiving equal funding and equal access to athletic equipment and facilities.
The Three-Prong Test

First Prong – Substantial Proportionality

- Substantial Proportionate Participation Opportunities:
  - Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments
First Prong – Substantial Proportionality

Total students = 11,005  
Female students = 6,676 or 61%  
Male students = 4,329 or 39%  
Total athletes = 303  
Female athletes = 119 or 39%  
Male athletes = 184 or 67%  
*Differential = 22% between female enrollment and athletic participation

(Derived from Southern Louisiana University Compliance Resolution No.06-10-6001, March 14, 2014)

Ollier v. Sweetwater Unified School District, 768 F.3d 843, 856 (9th Cir. 2014)

- The Ninth Circuit determined that “in no point in that ten-year (1998-2008) was the disparity between the percentage of female athletes and the percentage of female athletes and the percentage of female students less than 6.7 percent”
- The Court found that female athletic participation and overall female enrollment were not “substantially proportionate” at the relevant times
First Prong - Considerations

- Actual Athletes, not "unfilled slots"
- Exact proportionality is not required, "there is no magic number at which substantial proportionality is achieved"
- Substantial proportionality is determined on a case-by-case basis in light of the "institution's specific circumstances and the size of its athletic program"
- As a general rule, there is substantial proportionality "if the number of additional participants . . . required for exact proportionality 'would be sufficient to sustain a viable team'"

Second Prong – History and Continuing Practice of Program Expansion

- Continued Expansion
  - Whether the members of one sex have been and are underrepresented among athletes
  - Whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex
Second Prong – Considerations

- The test "looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion"
- There are no fixed intervals of time within which a must have added participation opportunities
- The focus is on whether the program expansion was responsive to developing interests and abilities of female students
- An institution must show more than a history of program expansion; it "must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities"

Three-Prong – Effective Accommodations

- Third Prong - Effective Accommodations
  - OCR considers a multitude of indicators in the context of evaluating the following three questions to determine whether an institution is in compliance with Part Three
    - (1) Is there unmet interest in a particular sport?
    - (2) Is there sufficient ability to sustain a team in the sport?
    - (3) Is there a reasonable expectation of competition for the team?
  - If the answer to all three questions is "Yes," OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three
Three-Prong Test - Considerations

- Consider whether a gender imbalance in athletics is the product of impermissible discrimination or merely of the genders' varying levels of interest in sports.
- A school where fewer girls than boys play sports does not violate Title IX if the imbalance is the result of girls' lack of interest in athletics.

Where Do We Go From Here?

1. New administration?
2. Voluntary Resolution Plans?
3. Expansion of athletic opportunities?
Information in this presentation, including but not limited to PowerPoint handouts and the presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.