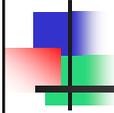


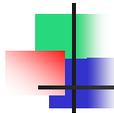


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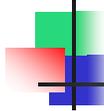
## **2017 School Law Practice Seminar** **TITLE IX: Overview and Recent Interpretations**

*Andrew M. Sanchez*



## **What is Title IX?**

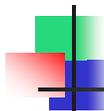
- Title IX is the portion of the Education Amendments of 1972 that provides:
  - No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial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

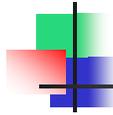
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## Statutory and Regulatory Framework

- 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 for Civil Rights (“OCR”)
- Title IX does not reference athletic programs. Regulations promulgated by OCR at 34 C.F.R. Part 106 address athletics.

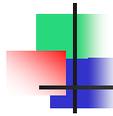
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## Discrimination and Harassment

- 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, "genderbased harassment....is also a form of sex discrimination to which a school must respond."

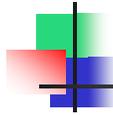
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## Discrimination and Harassment

- 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.

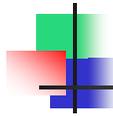
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## Discrimination and Harassment

- 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 **rescinded** the enforcement 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.

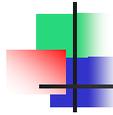
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## TITLE IX: Sexual Harassment

- Gender discrimination.
  - Student-on-Student sexual harassment
  - Employee-on-Student sexual harassment
- Potential Liability
  - Complaint to OCR
    - Loss of federal funding
  - Lawsuit
    - No administrative remedy requirement
    - No cap on award

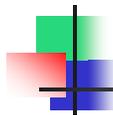
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## TITLE IX: Sexual Harassment

- Title IX Anti-Discrimination Policy
- Other Policies
  - Prohibiting Student-on-Student Sexual Harassment
    - How to Report allegations
    - Who to Report allegations to
    - Train staff to report allegations
    - Teachers/staff must act when observed

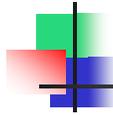
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## TITLE IX: Sexual Harassment

- Other Policies
  - Prohibiting Employee-on-Student Sexual Harassment
    - Prohibits inappropriate relationships between employees and students regardless of sexual or romantic contact.
    - How to Report allegations
    - Who to Report allegations to
    - Train staff to report allegations
    - Administration must act

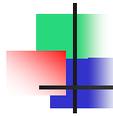
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## TITLE IX: Retaliation

- *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (U.S. 2005).
  - School district employees who have not been the victim of gender discrimination have a private right of action against the school district for retaliation.
  - No administrative remedy requirement – direct to court
  
- Disgruntled coach.
  - Retaliation claim
  - OCR investigation
    - Title IX Compliance
    - OCR Oversight

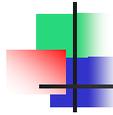
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## How is Title IX applied to athletics programs?

- 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.

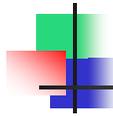
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## Title ix: EQUIVALENCE

- 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.

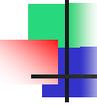
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## Title ix: EQUIVALENCE

- 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.

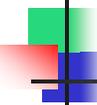
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## Federal Requirements for Accommodation of Interests and Abilities

- 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

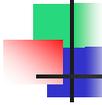
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## Federal Requirements for Accommodation of Interests and Abilities

- Participation/Opportunities Tests
- First test (“prong”)
  - 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

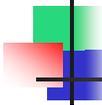
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## Federal Requirements for Accommodation of Interests and Abilities

- Participation/Opportunities Tests
  
- Second Test (“prong”)
  - 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

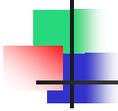
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## Federal Requirements for Accommodation of Interests and Abilities

- Participation/Opportunities Tests
  
- Third Test (“prong”)
  - Fully and effectively accommodating the athletic interests and abilities of females in the student body.
    - Surveys
    - Reviews
    - Assessments

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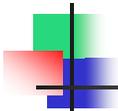


## Federal Requirements for Accommodation of Interests and Abilities

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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.

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## ATHLETIC PROGRAM AREAS EXAMINED TO DETERMINE COMPLIANCE

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

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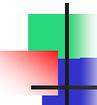


## ATHLETIC PROGRAM AREAS EXAMINED TO DETERMINE COMPLIANCE

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

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## COMPLIANCE ISSUES

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### 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

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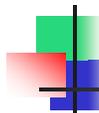
## COMPLIANCE ISSUES

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### Athletics

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

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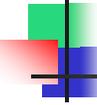
## COMPLIANCE ISSUES

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### 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

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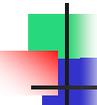
## COMPLIANCE ISSUES

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### 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?

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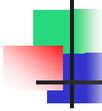
## COMPLIANCE ISSUES

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### Athletics

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

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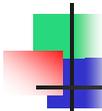


## COMPLIANCE ISSUES

### 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.

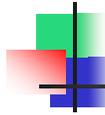
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## TITLE IX COMPLIANCE OFFICER

- 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

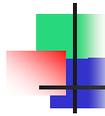
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## TITLE IX BOARD POLICIES

- 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

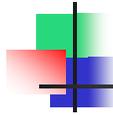
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## TITLE IX BOARD POLICIES

- 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

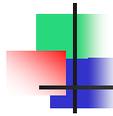
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## TITLE IX BOARD POLICIES

- Sexual Harassment Policy
  - Actual Notice is key to liability
    - *Bostic v. Smyrna School District*, 418 F.3d 355 (3<sup>rd</sup> Cir. 2005).
      - Principal and assistant principal are not appropriate persons based on position alone
      - Deliberate indifference to known acts of teacher-student discrimination
  - Student-on-Student Policy
  - Employee-on-Student
  - Employee-on-Employee
    - Title VII
    - Separate Policy

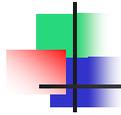
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## TITLE IX BOARD POLICIES

- 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

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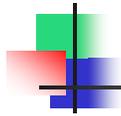


## Suggestions

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

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## Suggestions

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

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## 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

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## Questions



- Thank you

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## Contact Information



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