

FAR FROM THE FINISH LINE: HIGH SCHOOLS SPORTS AND TITLE IX

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INTRODUCTION

Title IX of the Education Amendments of 1972 (“Title IX”) states that, “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.”¹ Under Title IX, educational institutions that receive federal funding are required to comply in a manner that is nondiscriminatory towards “sex, including sexual orientation and gender identity,” in a variety of areas, including athletics.² Since its passing, Title IX has helped girls and women make “great strides in their educational attainment,”³ but progress in athletics is lacking at the elementary and secondary school level. As of January 2023, there are 118 total Title IX Athletics cases under investigation by the Department of Education’s Office for Civil Rights; 90 of those cases are against school districts.⁴ This is likely because despite the law being passed in 1972, compliance is still not where it should be, particularly at the high school level.

I. BACKGROUND

A. THE ENACTMENT OF TITLE IX

In 1970, Rep. Martha Griffiths was the first representative to urge Congress to consider the discrimination that women faced in education.⁵ At the time, female students were banned from taking “certain courses, such as auto mechanics or criminal justice,”⁶ and professional schools “limited the number of women admitted.”⁷

¹ *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC., <https://www2.ed.gov> [https://perma.cc/BLA3-DQE3] (last updated August 2021).

² *Id.*

³ U.S. DEP’T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 2 (2012).

⁴ *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of January 27, 2023*, U.S. DEP’T OF EDUC., <https://www2.ed.gov> [https://perma.cc/5467-XDUB].

⁵ Valentin, *supra* note 10, at 2.

⁶ WEEA EQUITY RESOURCES CENTER, *supra* note 6.

⁷ *Id.*

During that summer, Rep. Edith Green joined in on the cause and began drafting “legislation prohibiting sex discrimination in education.”⁸ The bill included “provisions for gender equity in education”⁹ and was sponsored by other House representatives, including Rep. Patsy Mink.¹⁰ The bill was first passed by Congress in March 1972, and then by the House in May of that year.¹¹ This bill, which included Title IX, was subsequently signed into law by President Nixon on June 23, 1972.¹²

B. ATHLETICS AS AN EDUCATIONAL ACTIVITY

Recipients of federal financial assistance must conduct any and all educational programs and activities “in a nondiscriminatory manner free of discrimination based on sex.”¹³ Title IX obligations exist in a variety of areas of programs and activities, including recruitment, admissions, scholarships, discipline, and athletics.¹⁴ Athletics are widely considered to be an “integral part” of education programs, which is why they are included in the scope of Title IX’s protections.¹⁵ Studies have shown that high school athletics have an impact on “retention rates, grades, graduation rates, and the probability of enrollment in higher education.”¹⁶ Additionally, it has been discovered that athletics promote the development of important skills that are not always taught in the classroom, including social and intellectual skills such as teambuilding and adaptability.¹⁷ Through athletics, students “learn self-discipline, build self-confidence, and develop skills to handle competitive

⁸ *Id.*

⁹ *Title IX – The Nine*, ACLU, <https://www.aclu.org> [https://perma.cc/T7TQ-XT3X].

¹⁰ Shanna McCarriston, *Title IX 50th anniversary: What is Title IX, how it became law and how it changed athletics forever*, CBS SPORTS (Mar. 4, 2022, 6:37 PM), <https://www.cbssports.com> [https://perma.cc/6NMF-DBFE].

¹¹ *Id.*

¹² *Id.*

¹³ U.S. DEP’T OF EDUC, *supra* note 1.

¹⁴ *Id.*

¹⁵ *Requirements Under Title IX of the Education Amendments of 1972*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF ED., <https://www2.ed.gov> [https://perma.cc/856Z-56YR] (last modified Jan. 10, 2020).

¹⁶ Cassie Merkel, *Misspent Money: How Inequities in Athletic Funding in New Jersey Public Schools May Be the Key to Underperformance*, 23.2 SETON HALL J. OF SPORTS AND ENTERTAINMENT L., 385, 401 (2013).

¹⁷ *Id.*

situations.”¹⁸ In recent years, the National Federation of State High School Associations (NFHS) defined athletics as the “other half of education.”¹⁹ Despite these studies and their findings, there were approximately only 300,000 girls and women collectively playing high school and college sports in the United States at the time of Title IX’s passing, as opposed to the 3.6 million boys who were playing high school sports at that same time.²⁰

II. ANALYSIS

A. THE BASIC FRAMEWORK OF APPLYING TITLE IX TO ATHLETICS

Even though the text of Title IX does not explicitly mention athletics, its language helped change the game for girls and women in sports.²¹ By August of 1978, the Department of Health, Education, and Welfare received almost 100 complaints “alleging discrimination in athletics against more than 50 institutions of higher education.”²² In an effort to preempt future issues and make how to comply with Title IX more clear, the Department of Health, Education, and Welfare published a Policy Interpretation to further explain how Title IX should be implemented in athletics.²³ The Policy Interpretation “explains the regulation as to provide a framework within which complaints can be resolved.”²⁴ After testing the proposed policy on different universities during the summer of 1979, the Policy Interpretation became effective in December of that same year.²⁵ Even though this framework was originally intended to aid compliance with intercollegiate athletics,

¹⁸ *The Case for High School Activities*, NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, <https://www.nfhs.org> [https://perma.cc/H8CY-DHVY].

¹⁹ Bob Gardner, *Defining Education-based Activity Programs*, NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS (Sept. 23, 2015), <https://www.nfhs.org> [https://perma.cc/AHL7-ZUB9].

²⁰ Sarah Pruitt, *How Title IX Transformed Women’s Sports*, HISTORY (June 11, 2021) <https://www.history.com/news/title-nine-womens-sports> (last updated June 23, 2022); NCAA, *THE STATE OF WOMEN IN COLLEGE SPORTS* 13.

²¹ NCAA, *supra* note 31, at 6.

²² *A Policy Interpretation: Title IX and Intercollegiate Athletics*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF ED., <https://www2.ed.gov> [https://perma.cc/6ZGY-DT3Q] (last modified Jan. 20, 2023).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

it is applicable, and therefore followed, at the high school level as well.²⁶

1. PARTICIPATION OPPORTUNITIES

The first piece of the framework is participation opportunities.²⁷ In order to be compliant, an athletic program must be able to show it is satisfying at least one part of what is known as the “three-part test.”²⁸ An athletic program is in compliance if either (1) the athletic opportunities for male and female students are “substantially proportionate to the respective enrollments,” (2) the program can show a “history and continuing practice” of developing athletic opportunities that match the “interest and abilities” of the underrepresented sex, or (3) the program has already “fully and effectively accommodated” those interests and abilities.²⁹ Athletic opportunities can be assessed in a number of ways, including comparing (1) the scheduling of contests and practice times and (2) the condition of equipment and facilities of the girl’s teams with the boy’s teams.³⁰

2. SCHOLARSHIPS AND FINANCIAL ASSISTANCE

A second piece of the framework is scholarships and financial assistance.³¹ If an athletic program provides athletic scholarships, “it is required to provide reasonable opportunities for such awards to members of each sex in proportion to the participation rate” in athletics.³² However, that does not mean a program must give the same number of scholarships to male and female athletes, nor does it mean the scholarships need to be of equal value.³³ What is required, however, is that if 50 percent of an athletic program’s athletes are female, then approximately 50 percent of the total

²⁶ *Id.*; See also *Title IX Compliance – Part I: The Three-Prong Test*, NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS (Feb. 8, 2022) <https://nfhs.org> [<https://perma.cc/EGY2-7NN3>] (explaining that this same framework is used in high schools as well).

²⁷ Ethan Brown, *Athletics and Title IX of the 1972 Education Amendments*, 10 *Geo. J. Gender & L.* 505, 514 (2009).

²⁸ *Intercollegiate Athletics Policy: Three-Part Test – Part Three*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF ED., <https://www2.ed.gov> [<https://perma.cc/72Z9-92XB>] (last modified June 29, 2020).

²⁹ *Id.*

³⁰ OFFICE FOR CIVIL RIGHTS, *supra* note 26.

³¹ *Id.*

³² *Id.*

³³ *Id.*

amount of aid given to athletes should go to female athletes.³⁴ Even though this piece of the framework typically applies more to intercollegiate athletics, it may still prove to be relevant for high school athletics in some instances.³⁵ For example, even though the Department of Education describes it in terms of intercollegiate athletics, it is still listed on the National Federation of State High School Associations' website as a component of complying with Title IX at the high school level.³⁶

3. *TREATMENT AND BENEFITS*

The third piece of the framework is treatment and benefits.³⁷ The 1979 Policy Interpretation provides that institutions must provide "equivalent treatment, services, and benefits" to each athletic program.³⁸ Under this standard, it is not necessary for the treatment, services, or benefits to be identical.³⁹ For example, locker rooms for girls' teams and boys' teams do not have to be exactly the same, as long as "the effect of any differences in the overall athletic program are negligible."⁴⁰ Due to this, compliance is determined by analyzing an athletic program as a whole, so if any substantial disparities in treatment, services, or benefits exist, they will not go unnoticed.⁴¹ It is important to note that, at the high school level, compliance with this framework is typically analyzed through a self-audit process.⁴² Athletic directors and school administrators are expected to regularly conduct these audits in an effort to "identify and review issues within the school's athletic program."⁴³ If the issues are not resolved and complaints are filed, the Office for Civil Rights will step in and analyze the matter by using this same framework.⁴⁴

³⁴ *Id.*

³⁵ *Id.* See also *Title IX Compliance*, *supra* note 37.

³⁶ *Id.*

³⁷ Brown, *supra* note 38.

³⁸ OFFICE FOR CIVIL RIGHTS, *supra* note 26.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ OFFICE FOR CIVIL RIGHTS, *supra* note 33 (stating that compliance is based off whether disparities of a "substantial and unjustified nature" exist in these areas).

⁴² Peg Pennepacker, *The Title IX Self-Audit: An Athletic Director's Best Practice*, NFHS (April 28, 2021) <https://www.nfhs.org> [<https://perma.cc/62CE-HZYD>].

⁴³ *Id.*

⁴⁴ *Id.*

B. PRESENT DAY ISSUES IN HIGH SCHOOL ATHLETICS

As of January 2023, there are 90 Title IX Athletics cases against school districts under investigation by the Department of Education's Office for Civil Rights.⁴⁵ In fact, "the number of complaints involving sex discrimination in athletics from kindergarten to 12th grade has outpaced those involving colleges by 40 to one since January 2021."⁴⁶ These issues include situations where boys' teams are using multimillion dollar stadiums and girls' teams are being injured because of a poorly maintained field.⁴⁷ The majority of complaints continue to be filed by individuals rather than groups and often these individuals are parents.⁴⁸ Even when these complaints are filed, a review by the Office for Civil Rights showed that it takes an average of 700 days to resolve cases, meaning the "girls who suffered unequal treatment often graduated before they saw results."⁴⁹ To avoid this long and often slow-moving process, students and their parents can also choose to file a lawsuit against the school district.⁵⁰ It is quite common for school districts that are accused of Title IX violations to settle cases out of court,⁵¹ likely because districts do not want to (1) be found of violating a federal law that was designed to prohibit gender-based discrimination in education, or (2) gain the reputation of not providing equal opportunities for its female students. However, some school districts prefer to have the matter go to court anyway.

One of those matters concerns the Hawaii Department of Education and the Oahu Interscholastic Association, which is one of the 51 members of the NFHS.⁵² This is a "potential landmark Title IX case" that involves systemic and widespread gender discrimination against the female athletes at James Campbell High

⁴⁵ U.S. DEP'T OF EDUC., *supra* note 4.

⁴⁶ Bill Pennington, *The Real Enforcers of Gender Equity in Sports: Angry Parents*, NEW YORK TIMES, (June 22, 2022) <https://www.nytimes.com> [https://perma.cc/7JHU-VBD5].

⁴⁷ Jacob Richman & Alexandra Gopin, *Title IX has not meant equality for high school girls sports*, ASSOCIATED PRESS NEWS, (April 12, 2022) <https://apnews.com> [https://perma.cc/2S9A-FC3U].

⁴⁸ Pennington, *supra* note 106; *See also id.*

⁴⁹ Richman & Gopin, *supra* note 107.

⁵⁰ *Id.*

⁵¹ David W. Chen, *Sex Discrimination Case in Hawaii Could Change High School Sports Across the U.S.*, NEW YORK TIMES, (October 22, 2022) <https://www.nytimes.com> [https://perma.cc/P4LA-TVY7].

⁵² *Id.*; *See also* Perry, *supra* note 100, suggesting "the largest and most comprehensive" association in the state is the one that is the member of the NFHS.

School, which happens to be the biggest public high school in Hawaii.⁵³ Here, the girls' water polo team was not provided with a pool, leaving the girls to practice in the ocean and use a nearby Burger King restroom.⁵⁴ The girls did not have a locker room and would need to get ready for practice either under the bleachers before leaving the school or on the bus on the way to practice.⁵⁵ In 2018, it was previously reported by a newspaper in Honolulu that a locker room for the female athletes did not even exist, despite the school being built in the 1960s.⁵⁶ The water polo team is not the only girls' team that has faced treatment like this. The girls' soccer team was also forced to practice after the boys' football and soccer teams, often leaving the first time slot to be 9:30pm.⁵⁷ It is typically rare for Title IX cases against school districts to go to trial, but it has been decided the case may move forward as a class action and its trial date set for October 2023.⁵⁸

III. PROPOSED SOLUTIONS

A. COMPLIANCE MANDATES AT THE STATE LEVEL

One solution that may work at the high school level is the implementation of Title IX compliance mandates. A 2017 poll from the National Women's Law Center found that 78% of U.S. voters support Title IX.⁵⁹ However, to many people, Title IX is not something they are familiar with. A 2022 University of Maryland poll found that 58% of polled parents have never seen, heard, or read about Title IX, but generally believed boys' and girls' teams should be treated equally.⁶⁰ The first step should be to implement a required Title IX course for all high school athletes, coaches, athletic directors, and principals. "The root cause of most of Title IX violations in high school programs can be traced back to a single issue – administrators' lack of training about gender equity

⁵³ Chen, *supra* note 111.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Polling Results: Voters Nationwide Overwhelmingly Support Title IX*, NATIONAL WOMEN'S LAW CENTER, <https://nwlc.org> [https://perma.cc/5AJL-BN5R].

⁶⁰ Kara Newhouse, *Title IX a mystery to most parents and students*, *poll says*, CAPITAL NEWS SERVICE (April 11, 2022) <https://cnsmaryland.org> [https://perma.cc/HJ7V-8DSR].

responsibilities.”⁶¹ Even though NFHS offers online courses for this exact demographic, its Title IX course is only labeled as “elective.”⁶² It is unlikely that one will be able to comply with something if they are not fully educated on what they are complying with. To take it a step further, since the state athletic associations act as the state governing body, they should “monitor Title IX compliance as a condition of membership.”⁶³ This would essentially balance out the fact that there is not one NCAA-like national governing body for high school athletics and would instead focus on an initiative that can be taken by the appropriate governing body.

B. GENERAL BOOSTER CLUBS

Booster clubs are organizations that help raise funds and support specific student programs.⁶⁴ One of the specific student programs booster clubs assist with is athletics.⁶⁵ One way that support for girls’ sports could be increased is by high school athletic departments implementing a general athletic booster club. A “unified booster club supports all sports at the school” and would be able to disperse funds across all of the school’s sports, not just the ones generating the most donations.⁶⁶ This has the potential to be a fairly practical solution because funds do not need to be donated specifically to a girls’ sport for it to be used for Title IX purposes.⁶⁷ Additionally, booster clubs are volunteer-based and, at the high school level, are typically composed of parents.⁶⁸ However, anyone can join a booster club. In fact, at the collegiate level, booster clubs are often supported by members of the community.⁶⁹ Another potential way to increase support for girls’ sports may be to reach out to the community and see if there are any alumni, business owners, or residents who would be interested in joining the booster club. Not only can this help the financial support of the

⁶¹ Franklin, *supra* note 132, at 156.

⁶² NFHS, *supra* note 97.

⁶³ Ellen J. Staurowsky, Courtney L. Flowers, Erin Buzuvis, Lindsay Darwin, & Natalie Welch, *The Women’s Sports Foundation 50 Years of Title IX: We’re Not Done Yet Executive Summary and Policy Recommendations*, 30 *Women in Sport and Physical Activity Journal* 71, 80 (2022).

⁶⁴ Franklin, *supra* note 132, at 154.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

programs, but it may also lead to emotional support for the girls as well.⁷⁰

IV. CONCLUSION

Title IX of the Education Amendments of 1972 was passed to ensure that no person in the United States was excluded from participation in, denied the benefits of, or subjected to discrimination under any educational program because of their sex.⁷¹ Athletics have long been considered an educational program because of their effect on grades, graduation rates, and social and intellectual skills.⁷² Title IX is applied to athletics by looking at the participation opportunities, scholarships and financial assistance, and treatment and benefits of both the girls' and boys' teams at their respective school.⁷³ Despite the passing of Title IX happening over fifty years ago, progress at the high school level has been lacking.⁷⁴ However, progress can be made by implementing compliance mandates at the state level and creating general booster clubs in schools.

⁷⁰ Monique Paris, *Fighting Culture Norms to Include Everyone in Activities*, NFHS (April 12, 2022) <https://www.nfhs.org> [<https://perma.cc/7MWQ-DHR7>] (suggesting that true inclusion for female high school athletes will occur when they feel a sense of community and belonging).

⁷¹ U.S. DEP'T OF EDUC., *supra* note 1.

⁷² Merkel, *supra* note 27, at 401.

⁷³ OFFICE FOR CIVIL RIGHTS. *supra* note 33.

⁷⁴ See NATIONAL WOMEN'S LAW CENTER, *supra* note 94.