



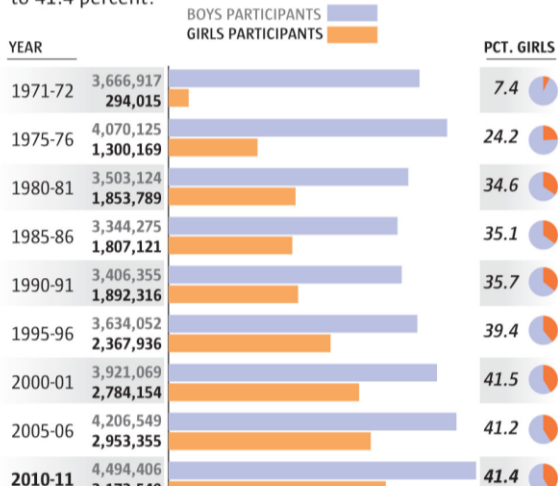
Athletic Audits and Booster Clubs

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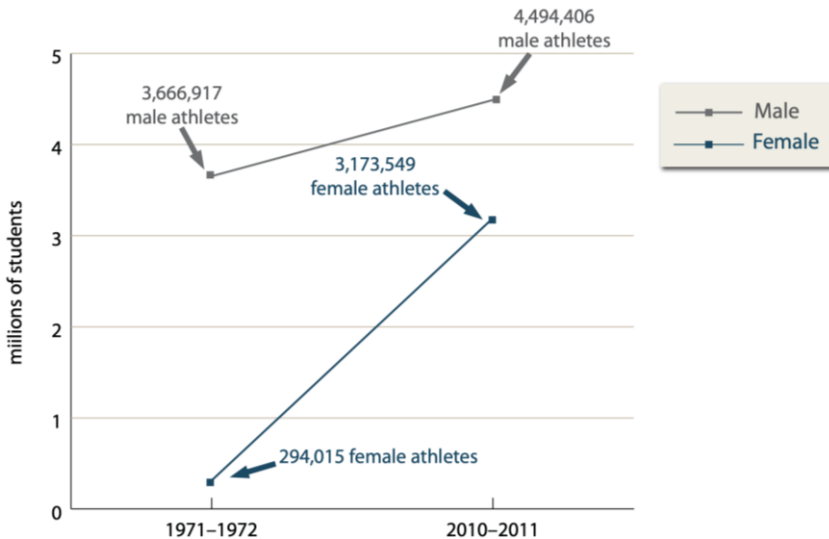
TITLE IX JUNE 23, 1972

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education programs or activity receiving federal financial assistance.”

sports in the United States. By 2010-11, the number had risen to 41.4 percent:



- “Sports” or “athletics” not referenced in original law, but significant impact in this area
- Female high school sports participation grew from less than 300,000 to 1.3 million in 1974 (within 2 years of passage)



SOURCE: National Federation of State High School Associations, 2011.

TITLE IX



Two Basic Requirements

- **Equal Access to the program**
- **Equal Treatment once in the program**



OCR INVESTIGATIONS

- As of 9/2/2022 there are 109 open investigations into athletic issues, including 12 in Texas.
- If OCR finds problems, they will encourage the district to enter into a Resolution Agreement.
- No known cases of federal funds being withheld because of athletic violations of Title IX, but the Resolution Agreements can be burdensome.
- Some districts decide to approach proactively and audit their program.
- Can be done by administration, consultant, or law firm.



BENEFITS OF A TITLE IX ATHLETICS AUDIT

- Uncover and remedy compliance issues before OCR does.
- Gain the confidence of the community.
- Students and coaches feel heard.
- Avoid negative publicity.



LEVEL ONE AUDIT

- Directed at the equal access prong
- We address this by looking at accommodation of interests and abilities, which includes what is known as the three-part test.



THREE-PART TEST

Institutions must meet ONE of the following:

1. Test One – Proportionality
2. Test Two – Program Expansion – underrepresented sex
3. Test Three – Full Accommodation – underrepresented sex



TEST ONE - PROPORTIONALITY

- Provide male and female students with interscholastic participation opportunities at rates substantially proportionate to their respective rates of enrollment.



TEST ONE - PROPORTIONALITY

- Step one: Calculate the rate of enrollment.
- Example: A district has 74 students, 45 girls and 29 boys, so the girl's enrollment rate is .61.



TEST ONE - PROPORTIONALITY

- Step two: Calculate the rate of participation
- Who to count?
 - Anyone on the squad list as of the first countable contest, those who join after
 - Count the same individual more than once – once for each team
 - Count all levels of participation, not just varsity
 - If someone quits or is cut after first contest, they still count
 - Don't count academically ineligible
 - Don't count student managers
- Ex: there are 116 participants, 54 girls and 62 boys, so the girls' rate of participation is .47



TEST ONE - PROPORTIONALITY

- Step three: Compare the rate of participation to the rate of enrollment.
- Ex.: the girls' rate of enrollment compared to participation (.61 - .47) is a difference of .14



TEST ONE - PROPORTIONALITY

- Step four: Is the rate of participation substantially proportionate to the rate of enrollment?
- OCR will generally tolerate differences between two and five percentage points with the smaller differential tolerated for programs with the largest participation numbers.
- Ex.: 14 percentage points is not close enough – the rates are not substantially proportionate – girls are underrepresented so test one is not met.



TEST TWO – PROGRAM EXPANSION

- Must demonstrate a history of and continuing practice of program expansion for the underrepresented sex
- **Expansion is:**
 - adding teams that increases opportunities for participation
 - adding opportunities on existing teams
- **Expansion is not:**
 - increasing the rate of participation
 - improving benefits for existing team (equipment, scheduling, travel)



TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- Must show that you are fully and effectively accommodating the interests and abilities of the underrepresented sex.
- That means offering every sport and team for girls for which there is sufficient **interest** and **ability** for a viable team and sufficient interscholastic **competition** for that team in the school's normal competitive region.
- All three factors must exist before a school is obligated to offer a team under test three.



TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- For interest – look at on-campus programs and off-campus programs.
- On campus
 - Participation in intramural sports, recreation programs, or elective PE courses can be evidence of interest on campus.
 - Surveys can be used to identify interest levels for a team not currently offered to the underrepresented sex.
- Off campus
 - Participation at other schools in the local community can be evidence of potential interest in that sport.
 - Participation in community and regional recreation programs can also be evidence of interest.



TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- For ability OCR looks at students’ athletic experience and accomplishments in on-campus and off-campus programs.
- However, at interscholastic level, lack of ability is unlikely to justify failure to offer a team.



TEST THREE – FULL AND EFFECTIVE ACCOMMODATION

- For competition there must be sufficient interscholastic competition in the school's normal competitive region.
- Normal competitive region can be identified by looking at miles from campus or geographic area.
- Once the region is identified, all schools within that region offering interscholastic sports for girls that are currently not offered at the school should be identified.
- At that point you can analyze whether there is sufficient competition at an appropriate competitive level for that sport
- It can make sense to start with this analysis rather than interest and abilities because if there is not sufficient competition, then the school complies with test three regardless of interest or ability levels.



RELATED CONSIDERATIONS

- Financial constraints are not a justification for noncompliance with Title IX.
- In some situations, girls must be allowed to tryout for boys' teams:
 - no girls' team for the sport
 - noncontact sport
 - girls' athletic opportunities have been limited previously
- UIL sponsorship not required to add sports.



RELATED CONSIDERATIONS

- “Roster management” may be used to achieve compliance with Test One.
 - Can avoid the expense of adding a girls’ team and the difficulties of eliminating a boys’ team.
 - It involves boys’ teams cutting participants while girls’ teams retain more participants.



RELATED CONSIDERATIONS

- Cheerleading and dance teams generally don’t count.
 - OCR considers them extracurricular activities, not athletic teams.
 - OCR will recognize a competitive cheer team if they schedule enough contests to form a reasonable competitive schedule and don’t perform at events for other sports.
- No word on esports



LEVEL TWO AUDIT

- This is addressed to the equal treatment prong.
- Involves looking at program components to determine whether the benefits enjoyed by the girls are equivalent to the benefits enjoyed by the boys.
- First we look at the levels of competition.



TWO-PART TEST – LEVELS OF COMPETITION

- Schools must meet ONE part:
 - Equivalently Advanced Competitive Opportunities
 - Continuous Upgrades of Competitive Opportunities



TEST ONE – EQUIVALENTLY ADVANCED COMPETITIVE OPPORTUNITIES

- This test involves calculating the percentage of female and male participants competing at each level such as varsity, junior varsity, and freshman levels and comparing those percentages.
- As a general rule, differences within five percentage points are not significant.



TEST TWO – CONTINUOUS UPGRADES OF COMPETITIVE OPPORTUNITIES

- Must demonstrate a history and continuing practice of upgrading of opportunities.
- This means that opponents from higher competitive levels have been scheduled more over time.



OTHER ATHLETIC BENEFITS AND OPPORTUNITIES

1. EQUIPMENT AND SUPPLIES
2. SCHEDULING OF GAMES AND PRACTICE TIMES
3. TRAVEL AND PER DIEM ALLOWANCES
4. TUTORING
5. COACHING
6. LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES
7. MEDICAL AND TRAINING FACILITIES AND SERVICES
8. HOUSING AND DINING FACILITIES AND SERVICES
9. PUBLICITY
10. SUPPORT SERVICES
11. RECRUITMENT OF STUDENT-ATHLETES



REVIEW OF COMPONENTS

- Analyze compliance in the overall program, not by comparing individual sports.
- Offsetting benefits are recognized.
 - Where students of one sex are provided an advantage in some aspect of the program, while students of the other sex are provided an advantage in a different aspect of the program.
 - If the benefits are of equivalent weight or importance, they may offset each other or provide a balance of benefits.
- Much information is gleaned from surveys given to coaches and students.



EQUIPMENT AND SUPPLIES

- **QUALITY**
suitability, replacement schedules
- **AMOUNT**
number of items
- **MAINTENANCE**
storage
professional and student managers
laundry
- **AVAILABILITY**



EQUIPMENT AND SUPPLIES

- Information to review:
 - Questionnaires – information from coaches and athletes about quality and amount of equipment and supplies and the convenience and adequacy of storage space
 - Interviews – follow up with coaches and athletes about their responses
 - Facilities tour – visually inspect equipment storage facilities



SCHEDULING OF GAMES AND PRACTICE TIMES

- Number of competitive events
- Time of day of competitive events
- Number and length of practices
- Time of day of practices
- Opportunities for pre-season and post-season events
- Length of season
- Season of sport
- Number of sports per season



SCHEDULING OF GAMES AND PRACTICE TIMES

- Information to review:
 - Printed competitive schedules for current and previous years
 - Printed schedules for pre-season events, including scrimmages with other teams and exhibition games
 - Questionnaires about the desirability of practice and game schedules for regular, pre, and post season
 - Interviews to clarify questionnaire responses



TRAVEL AND PER DIEM ALLOWANCES

- Modes of transportation
- Housing and dining furnished during travel
- Length of stay before and after competitive events
- Per diem allowances



TRAVEL AND PER DIEM ALLOWANCES

- Information to review:
 - Questionnaires about modes of transportation, quality of housing, the number of athletes per room, length of stay before and after, dining arrangements and per diem amounts
 - Interviews to clarify
 - Budget information related to team travel
 - Schedules showing location of away contests



COACHING

Opportunity to receive coaching:

- Availability of coaches
- **Number of coaches per team**
- Length of contract
- Association with school - **on-campus versus off-campus**

Assignment of Coaches:

- Qualifications
- Years of experience
- Success as coach

Compensation of Coaches:

- Total dollars proportionate to participation



COACHING

Items to review:

- Names of coaches for each team and length of contract, nature of duties, time assigned to other duties, compensation for coaching and non-coaching
- Questionnaires regarding the availability and qualification of coaches
- Interviews



LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES

Practice and Competitive Facilities

- Quality
- Availability
- Exclusivity
- **Focus on facilities used by just one gender**
- **Calculate proportions using each facility**

Locker Rooms

- Number of Locker Rooms
- Quality of Locker Rooms
- Exclusivity



LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES

- Information to review:
 - Facilities tour to visually inspect all locker rooms, practice, and competitive facilities
 - Questionnaires regarding the quality and availability of locker rooms, practice, and competitive facilities
 - Interviews to follow up



MEDICAL AND TRAINING FACILITIES AND SERVICES

- **Medical Personnel and Assistance**
- **Qualifications/Availability of Trainers**
- **Training Rooms**
- **Weight Rooms**
- **Insurance**



MEDICAL AND TRAINING FACILITIES AND SERVICES

- Information to review:
 - Questionnaire to coaches, athletes, and head athletic trainer regarding the assignment of medical and athletic training personnel to home games, away games, and practices and the availability and quality of training room and weight room
 - Interviews to follow up
 - Facilities tour to visually inspect all training and weight rooms
 - Review insurance policy for student-athletes



PUBLICITY

- Attendance by support groups (cheerleaders, band, drill team, etc.)
- Equivalent publicity and promotions
- Equivalent types and quality of publications
- Availability of sports information personnel



PUBLICITY

- Information to review:
 - Questionnaires regarding participation of support groups, publications, and other publicity and promotion
 - Interviews to follow up
 - Obtain copies of publications for each team, including media guides, programs, schedule cards, press releases, posters, website



SUPPORT SERVICES

- Equivalent clerical and administrative support so that boys' and girls' coaches spend the same hours per week performing clerical and administrative tasks
- Boys' and girls' coaches should have equivalently adequate and convenient office space and equipment



SUPPORT SERVICES

- Information to review:
 - Questionnaires regarding the number of hours coaches say they spend per week on clerical and administrative tasks and the support staff available for their teams
 - Interviews to follow up
 - Facilities tour to inspect the office space for coaches and clerical staff.



Title IX does **NOT** require an institution to provide:

- An athletics program
- A good athletics program – programs need to be equally good or equally pathetic for male and female students
- The same funding:
 - to the overall women’s and men’s programs
 - to men’s and women’s teams in the same sports (funding source cannot justify disparities)
- Specific benefits such as coaching, facilities, equipment
- Same number of teams or same sports for men and women
- Same benefits to men’s and women’s teams in the same sport
- Compete at a specific level or join a specific conference

Courtesy of: Valerie McMurtrie Bonnette, *Title IX and Interscholastic Athletics: How it all Works – In Plain English*



FUNDING SOURCE CAN'T JUSTIFY DISPARITY

- Booster Clubs
 - Any benefits provided by booster clubs are subject to Title IX.
 - If booster club provides benefits that create a disparity under Title IX, then the school is responsible for offsetting that disparity.
 - Example: If a booster club’s contributions provide football athletes with benefits superior to those provided to all female athletes, the school may reallocate the funds it would have spent on football to girls’ teams as necessary to provide equivalent benefits and achieve compliance.



FUNDING SOURCE CAN'T JUSTIFY DISPARITY

■ Booster Clubs

- OCR has always taken that position.
- In 1992 a district court in Rhode Island adopted OCR's position.
- Then in 1997, a district court in Florida rejected a school district's argument that it cannot be held responsible if the fund-raising activities of one booster club is more successful than another.
- Then in 2002, the 8th Circuit Court of Appeals stated: "Once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement."



FUNDING SOURCE CAN'T JUSTIFY DISPARITY

■ Donations

- The same rule applies for other private donations.
- It is not the money itself that Title IX is concerned with; it's the benefits that money buys.
- If the benefits are disparate, look at ways to offset the disparities.



FUNDING SOURCE CAN'T JUSTIFY DISPARITY

■ Fundraising

- No specific Title IX requirements
- Opportunities cannot be limited or imposed discriminatorily.
- Priority for more lucrative fundraisers cannot be based on sex.
- Giving benefits to boys' teams that girls' teams must pay for through fundraisers creates compliance problems.
- Athletes may not receive lesser benefits on the basis of sex because of their coach's inability to fundraise.
- Disparate benefits on the basis of sex cannot be the result of coaches' differing abilities to fundraise.



The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.



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