

**THE PUPIL  
NONDISCRIMINATION  
GUIDELINES FOR**

# **ATHLETICS**

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IMPLEMENTING SECTION 118.13 OF THE WISCONSIN STATUTES  
AND PI 9 OF THE WISCONSIN ADMINISTRATIVE CODE

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A joint publication of the Wisconsin Department of Public Instruction  
and the Wisconsin Interscholastic Athletic Association



# Pupil Nondiscrimination Guidelines for Athletics



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Activity programs – athletics, music, speech, drama, debate – are a valuable part of the overall school experience for students. Students who participate in activity programs tend to have higher grade-point averages, better attendance records, lower dropout rates, and fewer discipline problems than students generally. Many activities stimulate student creativity and build higher cognition, making them important to academic success. Additionally, participation in high school activities is often a predictor of later success.

Wisconsin students have a rich array of activity choices and many, at one time or another, choose to participate in athletic programs. In addition to the educational benefits of sports, student athletes experience other measures of well-being at rates higher than their peers. Research shows that students who participate in interscholastic sports are less likely to be regular and heavy smokers, and that regular and heavy smoking decrease substantially with an increase in the number of sports played. Teenage female athletes are less than half as likely to get pregnant as female non-athletes and experience less depression than their non-athlete female peers.

As you know, sports have not always been open to all. In the past, people have been prohibited from sport participation or their opportunities to participate have been limited because of race and gender discrimination. Others have been denied sport opportunities because of their disabilities.

We have worked hard to eliminate discrimination, and our work has paid off. Sports are more open to males and females of all races, ethnicities, national origins, religions, abilities and sexual orientations. For example, participation in high school girls' sports has increased more than 800 percent since the inception of Title IX, the 1972 civil rights law that prohibited discrimination on the basis of sex.

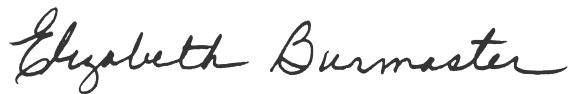
We still have work to do. Unfortunately, a student may be subjected to silence, innuendos, and rumors in locker rooms; the resulting climate limits access to sports and reinforces stereotypes that result in fear, discomfort, and even violence. We must welcome all students as full members of their sport teams.

## Forewords

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We believe this guide will help communities create welcoming and equitable athletic programs, and address both intentional and unintentional discrimination. This guide is aimed at helping student athletes, coaches, parents, administrators, and others to ensure that all students receive equal opportunities in sports. It focuses on explaining our state law and regulations, state and national athletics association policies, and relevant federal case law, statutes, regulations, and guidance that apply to educational institutions receiving federal funds.

Thank you for your commitment to the girls and boys in Wisconsin. We owe them our best efforts.



Elizabeth Burmaster  
State Superintendent of Public Instruction



This fifth revision of *The Pupil Nondiscrimination Guidelines for Athletics* follows a collaborative review by the Wisconsin Interscholastic Athletic Association (WIAA) and the Department of Public Instruction (DPI). It is not a document directed only at compliance; it is a series of guidelines and recommendations designed to provide school personnel with the resources needed to fulfill their obligations. To do anything less would not be consistent with our respective missions.

Information has been gathered from state and federal sources. The manual offers a Wisconsin blueprint for reaching equity through institutional review. It will be a success if it is accepted in spirit and enacted as a commitment to doing what is right for the students in our charge. The focus should be on eliminating myths and stereotypes.

Let's get started!



Doug Chickering, WIAA  
Executive Director

### **In general**

The intent of most civil rights laws is to ensure equitable treatment for minority groups and individuals who have been subject to discrimination. There is a comprehensive and relatively complex framework of federal and state case law, statutes, regulations, and guidance addressing the civil rights of students in our public schools.

*The Pupil Nondiscrimination Guidelines for Athletics* provides direction regarding equity in athletics based on a thorough review of federal and state law and guidance, including:

- Federal civil rights statutes
- Federal civil rights case law
- Federal civil rights regulations
- Federal civil rights administrative decisions
- Federal civil rights administrative guidance
- State civil rights statutes
- State civil rights case law
- State civil rights regulations
- State civil rights administrative decisions
- State civil rights administrative guidance

### **Federal law and guidance**

Federal laws that protect students from discrimination include the U.S. Constitution (the Equal Protection Clause of the Fourteenth Amendment), legislation, and federal court cases interpreting the constitution and the legislation. The legislation, passed by Congress in the last three decades, includes: Title VI of the Civil Rights Act of 1964 (prohibiting race, color, and national origin discrimination); Title IX of the Education Amendments of 1972 (prohibiting sex discrimination); Section 504 of the Rehabilitation Act of 1973 (prohibiting disability discrimination); and Titles II and III of the Americans with Disabilities Act of 1990 (prohibiting disability discrimination).

The U.S. Department of Education, Office for Civil Rights (OCR), has the authority to enforce the civil rights statutes. OCR-issued regulations guide the work of the OCR and ensure uniform application of the civil rights laws. Each civil rights statute has corresponding regulations. Regulations have the force of law and can have an important effect in determining the outcome of cases involving regulatory activity.

## Legal Overview

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OCR further interprets civil rights statutes through published guidance (*i.e.*, the 1990 *Title IX Athletics Investigator's Manual*) and in letters of finding for complaints. While not considered law, such interpretations provide insight since they reflect the best legal thinking of the federal government's civil rights experts.

### **State law and guidance**

In 1985, the Wisconsin Legislature enacted section 118.13, Wis. Stats., which prohibits discrimination in public schools on the basis of sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability. State courts have also created law regarding students' civil rights as courts reviewed cases under section 118.13, Wis. Stats., and the equal protection clause of the Wisconsin constitution.

DPI has the authority to enforce section 118.13, Wis. Stats. Similar to federal regulations, state regulations (in this case, PI 9, Wis. Admin. Code) have the force of law and can have an important effect in determining the outcome of cases involving Wisconsin's pupil nondiscrimination law.

Under section 118.13, Wis. Stats., the State Superintendent of Public Instruction decides appeals made to him or her under the pupil nondiscrimination law. The appeal decisions, which are reviewable in state court, carry the force of law.

### **In specific: sex, disability, and race discrimination law and guidance**

The majority of athletic discrimination cases involve allegations of discrimination on the basis of sex, disability, or race. Thus, this legal overview concludes with specific discussions regarding laws and guidance in the areas of sex discrimination, race discrimination, and disability discrimination.

### **Sex**

Title IX of the Education Amendments of 1972 is the federal law that prohibits sex discrimination in schools and other educational programs that receive federal funds. It applies to all aspects of educational opportunities, but is especially well known for its success in opening the door to athletics for women and girls. Because almost all public elementary and secondary schools receive some sort of federal funding, their athletics programs are covered by Title IX.

The power of Title IX was severely limited by the Supreme Court's ruling in *Grove City College v. Bell*, where the Court held that only the College's financial aid program was subject to the federal requirements of Title IX.<sup>1</sup> However, the passage of the Civil Rights Restoration Act in March 1988 re-established Title IX's institution-wide protection against discrimination.<sup>2</sup>

In February 1992, another Supreme Court ruling provided a new tool for enforcement of Title IX. In *Franklin v. Gwinnett County Public Schools*,<sup>3</sup> the Supreme Court ruled that monetary damages could be awarded in Title IX cases. Prior to this ruling, the only relief that courts provided was injunctive relief (requiring the schools to stop the discrimination). By allowing courts to award monetary damages, schools that are found guilty of sex discrimination face much harsher penalties.

Recent Supreme Court cases explore actions for which school districts can be held liable for sex discrimination. The Court found a school district liable for damages where the district itself intentionally violated Title IX when it remained deliberately indifferent to teacher harassment of students after it had actual notice (*Gebser v. Lago Vista Independent School District*<sup>4</sup>). The Court applied the same approach to peer student harassment (*Davis v. Monroe County Board of Education*<sup>5</sup>). In *Jackson v. Birmingham Board of Education*,<sup>6</sup> the Court held that Title IX allows suits alleging retaliation for reporting sex discrimination. Such retaliation constitutes intentional discrimination on the basis of sex even when the reporter was not the victim of the discrimination originally reported.

Court cases regarding gender equity in athletics at the elementary and secondary levels overwhelmingly address inadequate participation opportunities for and inferior treatment of female student athletes. Most cases are resolved at the district-court level. Decisions made in circuits outside of the Seventh Circuit (the federal judicial circuit that includes Wisconsin) may have different outcomes from a decision made within the Seventh Circuit.

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<sup>1</sup> *Grove City College v. Bell*, 465 U.S. 555 (1984).

<sup>2</sup> Civil Rights Restoration Act of 1987 (1988 Amendments), 20 U.S.C. § 1687, Pub.L. 100-259, 102 Stat.28 (1988).

<sup>3</sup> *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028, 1033 (1992).

<sup>4</sup> *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290-291 (1998).

<sup>5</sup> *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 642 (1999).

<sup>6</sup> *Jackson v. Birmingham Bd. Of Ed.*, 125 S.Ct. 1497 (2005).

## Legal Overview

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OCR investigates Title IX complaints regarding sex discrimination and has looked often at sex discrimination in athletics programs. In 1990, OCR issued the *Title IX Athletics Investigator's Manual*, which focuses on college athletics program compliance with Title IX. Guidance in the manual and updated policy documents remain relevant for investigations conducted at the elementary and secondary school levels.

### **Disability**

Three federal statutes offer entitlements to students with disabilities. The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) mandates and provides funding for certain special education services. Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990 (ADA) are civil rights statutes that offer protection from discrimination and require accommodations for individuals with disabilities.

The IDEA applies to students ages 3 to 21 who are identified as eligible under one or more of thirteen categories of disabilities. Generally, the IDEA requires public schools to identify and provide a free appropriate public education to eligible students. More specifically, the IDEA's regulations provide that school districts "shall take steps to provide nonacademic and extracurricular services in such manner as necessary to afford children with disabilities an equal opportunity for participation in those services and activities." Although the IDEA's language provides a potential basis to challenge exclusion of students with disabilities from participation in extracurricular activities, few litigants use IDEA for these claims.

Section 504 and the ADA are the two civil rights disability discrimination laws. Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal funds from the U.S. Department of Education. The ADA, which was modeled after Section 504, provides comprehensive civil rights protections to qualified individuals with disabilities. Under ADA, Title II is applicable to students with disabilities and their requests for accommodations in public entities. ADA's Title III prohibits places of public accommodation – private businesses serving the public (*i.e.*, private schools) – from discriminating on the basis of disability.

The main difference between Section 504 and the ADA is that one applies to the recipients of grants from the federal government (Section 504) and the other applies to public entities (ADA Title II). Both laws generally apply to public schools because they are recipients of federal funds from the U.S. Department of Education and also public entities. A private school may not need to comply with

Section 504 unless it receives federal funding; a private school will need to comply with ADA Title III as a place of public accommodation.

There is a relatively extensive body of case law regarding students with disabilities and athletic participation.<sup>7</sup> A significant portion of the cases review athletic associations' rules and regulations that unintentionally exclude students with disabilities from participation; the majority of courts uphold the rules of athletic associations. In contrast, the courts have tended to view more strictly school district policies and actions affecting students with disabilities.

Under Section 504 and the ADA, students challenging exclusion from interscholastic athletics under either statute typically find their cases hinge on the same key elements: (a) whether they are otherwise qualified to participate in the programs and (b) whether the waiver of the contested rule is a reasonable accommodation.<sup>8</sup>

OCR investigates Section 504 and ADA complaints regarding disability discrimination and has examined disability discrimination in athletics programs. OCR decisions do not stray far from the conclusions found in case law.

### **Race**

Discussions of race discrimination in athletics have, most recently, centered on the use of American Indian logos, nicknames, symbols, and images. Under federal law, most complaints allege that American Indian mascots and logos violate Title VI of the Civil Rights Act of 1963.

Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal financial assistance. Under Title VI, schools are prohibited from creating, encouraging, tolerating, or leaving uncorrected a racially-hostile environment in any academic, extracurricular, or athletic program, no matter where they are conducted.

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<sup>7</sup> See, e.g., Sullivan, Kathleen A., Lantz, Patricia J., and Zirkel, Perry A. "Leveling the Playing Field or Leveling the Players?: Section 504, the Americans with Disabilities Act, and Interscholastic Sports." Journal of Special Education 33.4(2000): 258-267.

<sup>8</sup> *Johnson v. Florida High School Activities Association*, 899 F.Supp. 579 (M.D.Fla. 1995), *Sandison v. Michigan High School Athletic Association, Inc.*, 863 F.Supp. 483 (E.D.Mich. 1994).

## Legal Overview

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OCR investigates complaints of racially hostile environments, which may include an Indian logo or mascot. Under guidelines adopted in 1994 (*Racial incidents and harassment against students at educational institutions; investigative guidance*), an institution is in violation of Title VI if it has created or is responsible for a racially hostile environment that is sufficiently severe, pervasive, or persistent that it interferes with or limits a student's ability to participate in or benefit from the services, activities, or privileges that it provides. A school cannot cause, encourage, accept, tolerate, or fail to remedy a racially hostile environment of which it has either actual or constructive notice.

In order to find a violation of Title VI under a hostile environment theory, OCR must find, based on the totality of circumstances, that a racially hostile environment existed, that the school had actual or constructive notice of this racially hostile environment, and that the school failed to adequately correct this racially hostile environment. In order to determine whether the racial harassment is sufficiently severe, pervasive, or persistent to create a racially hostile environment, OCR will examine the context, nature, scope, frequency, duration and location of the alleged incidents, as well as the identity, number, and relationships of the people involved. Typically, the harassment must be pervasive rather than consisting of isolated incidents. The severity of the harassment will be considered from the perspective of a reasonable person of the same race and age of the victim under similar circumstances. If the questioned conduct creates a racially hostile environment that affects the harassed student's enjoyment of the educational program under these criteria, OCR must then determine whether the school had notice of the harassment and took reasonable steps to rectify it. The requirement of actual or constructive notice is construed quite broadly by OCR; it is not likely to be an issue as long as the appropriate school personnel was contacted about the harassment or if the school should have known of the discrimination even absent a complaint. If the school has notice of the racially hostile environment, it must take reasonable steps to eliminate it in a timely and effective manner.

In two separate investigations, OCR has determined that a school's use of American Indian symbols and imagery in connection with its sports teams did not violate Title VI. In the first instance, OCR's investigation of the University of Illinois's use of the Chief Illiniwek mascot did not create a racially hostile environment because the incidents involving the mascot were isolated rather than pervasive. A second investigation of a high school in Quincy, Massachusetts, using the nickname "Indians" yielded a similar result.

Beginning in the early 1990s, Wisconsin analyzed the use of American Indian logos and mascots under its pupil nondiscrimination law, section 118.13, Wis. Stats. Some

districts received complaints and DPI received and resolved appeals alleging that American Indian logos and mascots created hostile environments.

In resolving appeals involving Indian logos and mascots, DPI continues to rely on a 1992 opinion from the Attorney General on the subject. The opinion states that the use of such logos, mascots, and nicknames is clearly within the purview of the law. Further, the Attorney General found that the administrative rules in PI 9, Wis. Admin. Code, which define the statutory language “discrimination,” “pupil harassment,” and “stereotyping” are a valid interpretation of the statute. The opinion states that evaluations of whether a particular use by a school district of an American Indian logo, mascot, or nickname is discriminatory must be made on an individual, case-by-case basis. Discrimination which meets the definitions of either stereotyping or pupil harassment must be shown to be detrimental to constitute a violation of the law. Finally, it is not a necessary element of a finding of discrimination to prove that the district intended to discriminate by adopting such logos or mascots.

Many Indian nations, federal and state departments (including DPI and the U.S. Commission on Civil Rights), and community-based organizations have issued position statements on Indian logos and mascots. Most of the position statements oppose, as a matter of educational leadership, Indian logos and mascots.

## Questions and Answers

### General questions

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#### Protected Categories

#### 1. Is sex the only category that is protected from discrimination in athletics?

No. As in all other aspects of K-12 public schooling in Wisconsin, students are protected from discrimination and harassment not only on the basis of sex but also on the basis of race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, and physical, mental, emotional, and learning disability. Some specific rules apply in specific categories, based on federal and state court interpretations, and are noted below.

#### Equity laws in public, private, and charter school athletics

#### 2. Does the law apply to all school athletic programs?

The law prohibits discrimination in admission<sup>9</sup> to public schools and in any curricular activity. The law also prohibits discrimination in any extracurricular activity, pupil services, recreational program, or other program or activity, approved or sponsored by the school board. The following factors are considered in determining whether a program or activity is approved or sponsored by a public school board: the provision of direct or indirect financial support; the provision of tangible resources; intangible benefits such as lending recognition or approval to a program or activity; the selectivity of the school board in providing privileges and resources to various programs and activities; and whether the relationship is occasional and temporary or permanent and long term.

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<sup>9</sup> A school district may operate one or more schools that enroll only one sex or provide one or more courses that enroll only one sex if the school board makes available to the opposite sex, under the same policies and criteria of admission, schools or courses that are comparable to each such school or course. Section 120.13(38), Wis. Stats.

In Wisconsin, the number of charter schools is increasing annually, and charter schools are offering intramural sport opportunities and are beginning to offer interscholastic sport opportunities for students. Charter schools must comply with section 118.40(4)(b)(2), Wis. Stats., which prohibits charter schools from denying participation in any program or activity on the basis of a person's sex, race, religion, national origin, ancestry, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.<sup>10</sup>

Wisconsin's private schools also offer both intramural and interscholastic sport opportunities. Private schools are not subject to Wisconsin's pupil nondiscrimination law. Private schools must comply with Title III of the ADA, which prohibits discrimination on the basis of disability. If recipients of federal funding, then private schools are required to comply with other federal laws, which may include other civil rights laws (Section 504, Title VI, and Title IX).

**Athletic scholarships**

**3. Is it legal for schools to administer athletic scholarships restricted by race, sex, ethnic group, or religion?**

Athletic scholarships are offered to graduating student athletes by post-secondary institutions. Post-secondary schools may offer the scholarships by sex to individual student athletes, which follows the separation of athletics by sex. High schools may cooperate fully, subject to WIAA rules, with providing appropriate information to

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<sup>10</sup> A charter school may enroll only one sex or provide one or more courses that enroll only one sex if the school board or other chartering agency makes available to the opposite sex, under the same policies and criteria of admission, schools or courses that are comparable to each such school or course. Section 118.40(4)(c), Wis. Stats.

## Questions and Answers

### General questions

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colleges and universities and announcing the scholarship awards. Public post-secondary institutions may not award athletic scholarships based on race, ethnicity, or religion.

#### Team selection and recognition

#### 4. **How does a coach decide who gets on the team and who plays?**

Coaches set the standards for their teams as well as the goals and objectives for each level within the team (varsity, junior varsity, freshman, etc.). These standards should be communicated to parents and student athletes before the season starts, thus providing everyone with knowledge of how the teams will be formed and what players and parents can expect from the coach and the program. Different goals and objectives should be expected at levels other than varsity. A best practice may be to make squad participation expectations a part of preseason discussions.

#### 5. **How does a coach decide who earns participation letters?**

The award system for each sport generally reflects an individual coach's personal philosophy and/or school policy. The award system should be communicated to parents and student athletes before the season starts. If coaches are allowed the sole discretion in determining award criteria, a best practice may be for schools to have appropriate supporting policies in place.

### Protected class: SEX<sup>11</sup>

Civil rights case law, statutes, regulations, and guidance focus on “equal opportunity” when reviewing club, intramural, interscholastic or intercollegiate athletic programs that are provided separately for males and females. The components of these athletic programs and activities are generally known as program areas or components (*i.e.*, coaching, access to locker rooms, practice, competitive facilities).

As interpreted by OCR<sup>12</sup> and DPI, nondiscrimination, on the basis of sex, applies to the overall athletic program and not just to specific teams, in most instances. For a school to be found to discriminate, on the basis of sex, student athletes of one sex generally must receive less than student athletes of the other sex. At the high school level, the OCR generally would limit its initial investigation of a complaint to the specific program component cited.

In case of an overall investigation, each program component is analyzed. The benefits and/or services provided to the boys program are compared to those provided to the girls program.

For all of the program components,<sup>13</sup> the basic test of compliance is equivalence. That is, the benefits, opportunities, and treatment of each sex must be equal or equal in effect. That does not mean they must be the same. Nondiscriminatory factors can account for differences, such as a girls coach's preference for a particular brand of equipment as compared to a boys coach's preference.

The OCR's 1990 *Title IX Athletics Investigator's Manual* instructs investigators to determine if there is a disparity in each area and to consider the significance of each disparity. The investigator compares the disparities favoring the entire boys

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<sup>11</sup> The overview and questions regarding nondiscrimination on the basis of sex rely on the leadership of the National Women's Law Center and the Women's Sports Foundation. Both organizations publish legal research and policy recommendations, which informed this section.

<sup>12</sup> The application of Title IX in this example, like many others in this guide, is the application spelled out by the OCR. A federal or state court of law does not have to use the OCR's interpretation of how to apply Title IX. If a lawsuit is filed, courts may have a different view. DPI looks to OCR for guidance and is likely to follow OCR's application.

<sup>13</sup> Except financial aid offered in the nature of athletic scholarships.

## Questions and Answers

Protected class: sex

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program with those favoring the entire girls program. The manual states, "If the disparities are greater for one sex than the other and the difference results in lack of equal opportunity for one sex, then an overall finding of noncompliance is made."<sup>14</sup>

In reviewing the OCR's letters of finding for Title IX athletics complaints, there was very little evidence of disparities that favored female athletes.

### Money

#### Equal Expenditures

#### **6. Are equal expenditures required for boys and girls sports offered in the same season, such as football and volleyball?**

No. Title IX of the Federal Education Amendments of 1972 does not require equal expenditures for girls and boys sports in the same season or even if the sports are comparable, such as girls basketball and boys basketball.

Budgets, however, can indicate possible discrimination, especially in areas where needs cost the same. Benefits provided must be equal. In other words, the athletic program for boys cannot provide top-of-the-line equipment while the athletic program for girls requires student athletes to practice and play with secondhand or cheap equipment.

Budget levels are especially important where the dollar limits set by the school affect the number of student athletes on a team.

If the boys athletic program receives greater benefits than the girls, the school has three choices: increase the benefits for the girls, decrease the benefits for the boys, or some of both. Simply telling the girls there

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<sup>14</sup> U.S. Department of Education, Office for Civil Rights, *Title IX Athletics Investigator's Manual* (1989) (hereafter *Investigator's Manual*) at 8.

is not enough money does not relieve the institution of its nondiscrimination responsibilities.

**7. If boys sports raise more money than girls sports, then can a school district spend more money on the boys program?**

No. Ability to generate revenue is not a legitimate reason for discrimination. In *Favia v. Indiana University of Pennsylvania*, Judge Maurice B. Cohill, Jr. wrote in his opinion, "We are also sympathetic with the fact that the football team represents a large portion of the dominance of men's teams over female teams at IUP. Football is a high-profile sport; it generates money through ticket sales and undoubtedly heightens the interest of students [and] alumni [...]. As a dangerous sport, it is also expensive... [H]owever, Title IX does not provide for any exception to its requirements simply because of a school's financial difficulties. In other words, a cash scrunch is no excuse."<sup>15</sup>

**Booster clubs**

**8. Do ticket sales, booster clubs, and other outside funding sources "count" under Title IX?**

Yes. All money and in-kind contributions that a team receives, regardless of the source, are subject to nondiscrimination requirements; as one court explained, "Once a [school] receives a [...] donation, the funds [or subsidies] become public money, subject to Title IX's legal obligations in their disbursement."<sup>16</sup>

Booster clubs and outside funding sources often contribute to or subsidize the budgets

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<sup>15</sup> *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3<sup>rd</sup> Cir. 1993).

<sup>16</sup> *Chalenor v. University of North Dakota*, 291 F.3d 1042, 1048 (8<sup>th</sup> Cir. 2002).

## Questions and Answers

Protected class: sex

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for athletic programs. Alumni may raise money for specific teams or for the overall athletic program. A corporate entity may sponsor invitational tournaments. As a result, the school may have greater resources for specific teams or programs. Boys sports typically receive more donor support because, in part, they have been around longer.

The OCR *Investigator's Manual* notes that a school still must make sure that equivalent benefits and services are provided to members of both sexes. If booster clubs or outside funding sources provide benefits to male teams, then the school must make sure that the female teams receive equal benefits. Further, if booster clubs or outside funding sources provide benefits and services to student athletes of one sex that the school cannot provide to student athletes of the other sex, then the school has to take action to ensure that benefits and services are equivalent for both sexes.<sup>17</sup> The district could ask the booster club or outside funding sources to provide those equivalent benefits, it could make up the difference from its own funds, or it could refuse the donation, subsidy, or invitation.

### Accommodating student interests and abilities

Equity in athletics programs

**9. Is a district required to have the same number of teams for boys and girls?**

No. The important issue is not the number of teams but the number of students participating in sports. The district needs to equally accommodate the interests and abilities of both sexes. If the ratio of participants in the interscholastic athletics

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<sup>17</sup> *Investigator's Manual* at 5.

program to students enrolled is significantly different along sex lines, then the district may need to take action (*i.e.*, adding a team or another competitive level).

Whether the school needs to take action depends on the application of the three-part test (*infra*, question 11).

**10. A school sponsors a varsity, junior varsity, and freshman team in a boys sport but only a varsity and junior varsity team in the same girls sport. Is this acceptable?**

Maybe. The criteria for offering interscholastic competition within a sport must be the same for boys and girls. It should be locally developed and include, among other factors, interest, abilities, and available competition.

When athletic opportunities are not identical, girls have the legal right to participate on a boys team. If, for example, there is no girls freshman team, then freshman girls must be allowed to participate on the boys freshman team.

**11. What is the “test of proportionality” that we hear so much about?**

To determine compliance with a district's legal requirement to effectively accommodate the interests and abilities of their students, there are three tests. Answering "yes" to **any** of the following questions results in compliance.

*(1) Are interscholastic level athletic participation opportunities for male and female students provided in numbers substantially proportionate to their respective enrollments in the overall student population?*

## Questions and Answers

Protected class: sex

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For example, if the student body is 52 percent male and 48 percent female, and about 52 percent of the student athletes are male and 48 percent female, then the school is in compliance. To date, there has been no court decision indicating an acceptable minimum differential of students of one sex compared to the percentage of student athletes of that same sex.

It should be stressed that equal numbers of teams do not always equal fair opportunities. Different teams may have greatly varying numbers of student athletes. For example, a football team may have 95 players on its roster, while a girls gymnastics team may have seven. This illustrates the importance of looking at the total number of athletic participation opportunities and not the total number of teams.

**OR**

*(2) If the members of one sex have been and are underrepresented among interscholastic student athletes, can the school district 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?*

The courts have been firm in noting that the word "continuing" is important when using this test. Many schools added substantial numbers of girls teams after the passage of Title IX, but have either kept the status quo or since decreased opportunities. In *Roberts v. Colorado State University*, Judge Zita L. Weinshienk wrote, "the program expansion prong of the effective accommodation test was not intended to stop the compliance inquiry as to any institution that can demonstrate that it has added a women's

sports team sometime in the last three decades."<sup>18</sup>

**OR**

*(3) If neither of the first two prongs can be satisfied, can an institution otherwise demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present athletic program?*

For this test, the key words are "fully and effectively." In *Cohen v. Brown University*, the court noted that this "sets a very high standard: it demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically underrepresented sex, not slaked by existing programs, an institution necessarily fails this prong of the test."<sup>19</sup>

OCR investigators ask a series of questions to determine whether a school meets tests two or three:

- \* When did each girls and boys team begin interscholastic competition? How did the sports get started? Was there a club team first? Intramurals?
- \* Has the athletic department dropped any boys or girls sports? If so, why were they dropped?
- \* How many participants were on each team that was dropped and how did it affect the percentage of student athletes who are male or female?
- \* If sports have been added, what was the effect on the percentage of gain to each program?

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<sup>18</sup> *Roberts v. Colorado State Bd. Of Agriculture*, 998 F.2d 824 (10<sup>th</sup> Cir. 1993).

<sup>19</sup> *Cohen v. Brown University*, 991 F.2d 888, 898 (1<sup>st</sup> Cir. 1993).

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- \* If there have been unsuccessful attempts to add new teams, why were the attempts unsuccessful?
- \* What plans are there for adding new sports?
- \* Are the written policies, procedures and/or criteria for adding new sports discriminatory in language or effect?
- \* Is there interest in any sport not currently being offered?<sup>20</sup>

### Adding sports teams

#### **12. If a district offers a boys sports team and there is “sufficient interest” expressed by girls, then a girls team must be added. What constitutes “sufficient interest?”**

In addition to the questions identified above (*supra* question 11) and the criteria used to establish boys sports teams, other information may be useful in determining “sufficient interest”: school surveys to determine interest, prior student requests for competition, existing programs – clubs, intramurals, community and regional sports programs – and participation in and response to physical education classes.

A school is not required to provide a varsity team every time some female students are interested in a sport. Courts do require, however, that opportunities must be provided when there is sufficient interest and ability among the underrepresented sex to sustain a viable team and a reasonable expectation of competition for that team.

#### **13. Does adding a girls team require the district to drop a boys team?**

No. Nondiscrimination laws, regulations, and guidance do not require districts to drop sports or to reach compliance by cutting boys teams. If funding is an issue and no new

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<sup>20</sup> *Investigator's Manual* at 23-25.

funds are available to add a girls sport, necessary funding may be derived from small percentage cuts from the budgets of all boys and girls teams. These savings can be used for the new girls team.

**14. What should a district do if girls are underrepresented in the sports program, and there is interest in a new sport, but the other districts with which the district normally competes do not offer the sport or the sport is not state sanctioned?**

The district should take reasonable steps to foster the development of competitive opportunities in the sport in other districts the district normally competes with and explore possible competitive opportunities with other districts or club sports programs. If the sport is not sanctioned, then the district should work with WIAA to take reasonable steps to address the interest.

Alternatively, the district should consider how to meet the interest within the district by including the sport in its recreational athletics program.

### Cutting sports teams

**15. Given a district's economic difficulties, sports teams must be cut. How does a district eliminate teams and remain in compliance with nondiscrimination laws?**

A school planning to cut teams must keep federal and state civil rights laws and regulations in mind to be sure that it does not place the school's compliance in jeopardy. Specifically, cutting equal numbers of boys teams and girls teams does not ensure compliance.

If a district program is in compliance at the time of the reductions, then the district should make reductions in a way that equally affect boys and girls. A district must review all potential cuts to determine how the cut

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would affect the overall opportunities for students.

If one sex is underrepresented before reductions begin, then the reductions should address the imbalance in the participation rate before reducing the participation opportunities for the underrepresented sex. When the overall ratio of student athletes is disproportionate to that of the student body, it would be difficult to justify cutting opportunities for the underrepresented sex. This is especially true when coupled with the fact that the underrepresented sex has shown an interest and ability by actually playing the sport.

### Specific sports

#### **16. Why are softball and baseball not considered comparable sports for girls and boys, respectively?**

The Supreme Court of Appeals of West Virginia ruled in favor of the plaintiff (the female student seeking opportunity) on this issue. The court noted from the record in this case that the "games of baseball and softball are not substantially equivalent" and distinguished the "superficial similarity" between the games by citing differences, including equipment, skill levels, and dimensions of the playing surface. Whether particular sports are comparable depends upon the characteristics of the sports being compared.

#### **17. Are cheerleading or drill team considered interscholastic sports?**

Not typically. Danceline, cheerleading, drill team, baton twirling, and marching band are normally considered to be extracurricular activity programs that are conducted in conjunction with sports contests and involve elements of physical activity. They usually exist to entertain or educate a spectating audience or, in the case of cheerleading, to encourage audience enthusiasm for an

athletic team that is engaged in competition.

The teams organized in conjunction with the sports contests may periodically act like sports teams when they engage in state, regional, or national championship competitions. The existence of a competitive opportunity does not qualify the extracurricular activity as an athletic team or sport.

This does not mean that drill teams or similar programs could not under any circumstances be considered a sport. If the primary purpose of drill team or cheerleaders is to compete against other drill teams or in cheer competition on a regular season and post-season qualification basis (in much the same structure as basketball) and if the team conducted regular practices in preparation for such competition while under the supervision of a coach, then these activities could be considered sports. On occasion, these groups could also put on exhibitions at boys or girls sports events, but these exhibitions could not be their primary purpose.

As part of its responsibility for enforcing Title IX, OCR must determine whether an activity is a sport for purposes of evaluating whether an equal opportunity is being provided. OCR issued guidance on April 11, 2000, on the factors it considers in making this determination, with particular reference to Cheerleading and Dance and Drill (*see* Appendix H).

### Girls on boys teams

#### **18. When are girls permitted to participate on boys teams?**

Girls are allowed to participate on any boys team when there is not a comparable athletic opportunity for girls. Participation includes trying out and competing in the

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regular season and boys series tournaments under the same rules and conditions as male athletes.

A lack of comparable athletic opportunity exists when there is no girls team. Even when there are both girls and boys teams, a girl may have the legal right to participate in the boys team if the girls team does not offer "identical opportunities" to the boys team (*infra*, question 19).

**19. A school sponsors both a boys and a girls sports team. One very talented girl wants to compete on the boys team because she feels the boys team is more competitive and she wants that experience to assist her in obtaining a major college scholarship. Is she allowed to participate on the boys team?**

Probably not. If the girls team has the identical opportunities (length of season, number of contests, scheduling similarities, tournament opportunities), she must be denied membership on the boys team under WIAA rules – a determination likely to be upheld by courts. Courts have determined that the possibility of a scholarship is speculative and not to be considered as an "opportunity."

In a sport with different rules by gender, the female athlete could argue that the two sports are different and that denying her the opportunity to play on the boys team is a violation of her equal protection rights as defined by the U.S. Constitution, 14<sup>th</sup> Amendment, or the Wisconsin Constitution's Equal Protection Clause.

**20. If a girl participates in a boys sport, are any rules altered?**

Maybe. The national and state association playing rules for individual sports identify any rule alteration, based on sex.

In addition, the weigh-in provisions for female wrestlers are different from those of male athletes (*infra*, question 22).

**21. Can a school district require girls to pass a different or additional physical examination or parental waiver requirements if she desires to participate on a boys team?**

No. The requirements for participation are the same for all eligible students. An additional medical documentation form or parental waiver cannot be required for a girl prior to her participation. In a 1977 case, a U.S. District Court judge struck down additional testing as discriminatory. The judge wrote, "The evidence shows that range of differences among individuals in both sexes is greater than the average differences between sexes. The failure to establish any physical criteria to protect small or weak males from the injurious effects of competition with larger or stronger males destroys the credibility of the reasoning urged in sport of the sex classification... Any notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality."<sup>21</sup>

**22. Wrestling rules require a stripped shoulder-to-shoulder weigh-in. If girls participate, what provisions must be made?**

The proper procedure to use for weighing-in female wrestlers is to have a female weigh the wrestler in private. The female need not be a registered official but should be someone on the faculty of one of the participating schools.

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<sup>21</sup> *Hoover v. Meiklejohn*, 430 F.Supp. 164 (D.Colo. 1977).

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The ultimate responsibility rests with the school for which the student is wrestling. If the school with the female wrestler is traveling, then the host school may provide a female for weighing-in. If the host school cannot or does not wish to provide someone to monitor the weigh-in, then it is the responsibility of the girl's school to bring a female with them to handle this responsibility.

**23. What happens if an opposing school refuses to provide a wrestling opponent or if a scheduled opponent refuses to wrestle a girl?**

If a school refuses to provide a wrestler or if a wrestler refuses to compete against a girl, then the school forfeits that match and the girl is declared the winner.

**24. A girl tries out for wrestling. The school doesn't want to have any of the boys wrestle her in practice or the boys on the team refuse to wrestle her in practice. Is it appropriate to have the coach work out against the girl?**

No. The coach must provide the same practice opportunities for the girl as for other team members. All student athletes must participate in practice activities as directed.

### Boys on girls teams

**25. When there is no team offered for boys in the sport, do boys have the right to participate on the girls teams?**

No. Because sport participation opportunities for girls have been historically limited, girls have a right to participate on boys teams if there is no girls team in the same sport. Since the opportunities for boys have not been historically limited, boys do not have these same rights. While some state courts have found and there are those that argue that such a position violates the individual rights of boys, federal courts have found that

protecting the participation rights of girls as a previously discriminated-against “class” outweigh the rights of the “individual” boy.

This is an area where judicial interpretation differs from the interpretation of the federal agency overseeing Title IX. The OCR has interpreted the law to be permissive in this regard; that is, state athletic organizations may permit boys to play on girls teams.

The WIAA does not permit boys to play on girls teams.

### Team recognition

**26. At the end of the girls seasons, participants receive a letter certificate. At the end of many of the boys seasons, participants receive letter jackets as a gift from the booster club. Is this a violation of nondiscrimination law?**

Yes. The jackets, which are identified by OCR under “equipment and supplies” (*infra* questions 27 through 30), unequally benefit the boys program over the girls program. The school district must (a) request the booster club to raise money for jackets to equally benefit the girls program, (b) find additional sports program funds to purchase the jackets and equally benefit the girls program, or (c) decline the booster club gift.

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### Athletics program support<sup>22</sup>

#### Equipment and supplies

#### **27. How does a district provide equal benefits to their female athletes and their male athletes through equipment and supplies?**

A district must provide, *overall*, equal benefits to female students as compared to male students in the area of equipment and supplies. It does not have to provide the exact same benefits and opportunities to each girls and boys team.

Equipment and supplies include, but are not limited to, uniforms and apparel, sport-specific equipment and supplies, instructional devices and conditioning and weight training equipment. Further, they include practice and game uniforms, shoes, rain gear and warm-up suits, but not undergarments (athletic supporters, sports bras, etc.). Equipment includes bats, sticks, rackets and equipment set up and taken down for practice. Conditioning and weight-training equipment includes weights, water bottles, sweatbands, braces, etc.

The factors to consider when determining whether a district complies with nondiscrimination laws:

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<sup>22</sup> When examining athletics program support, it is important to remember that federal and state nondiscrimination case law, statutes, regulations, and guidance require equal treatment of male and female athletes *overall*. The case law, statutes, regulations, and guidance do not require that each team get exactly the same services and supplies. Instead, the girls and boys programs must receive the same level of services, facilities, and supplies. Variations within the girls program and boys program are allowed.

An additional consideration, however, is that both federal and state constitutions guarantee equal protection to males and females; case law has interpreted the Equal Protection clauses to mean, in relevant part, that individual girls must be allowed to participate on boys teams when they do not have “identical opportunities” through participation on the girls team.

- \* Suitability: compare the extent to which equipment and supplies provided male and female teams are regulation, official, sanctioned, and meet athletic association specifications (*i.e.*, balls, rackets, uniforms, nets, gymnastic equipment, etc.).
- \* Quality: compare the condition, age, durability, general quality of equipment and supplies provided to male and female teams.
- \* Amount: compare the number of various items provided to male teams and female teams (*i.e.*, balls, bats, shoes, uniforms, pads, wrist weights, as well as shared equipment).
- \* Maintenance and replacement: compare maintenance services provided male and female teams (*i.e.*, laundry, equipment storage, upkeep and repair); compare schedules for replacement of uniforms, shoes, bats, balls and which teams receive old uniforms and under what conditions.
- \* Availability: compare the amount of time that equipment and supplies are accessible to student athletes in each sport (*i.e.*, always, not on the weekends, restricted to hours not used by particular team).

The source of funding for equipment and supplies is not relevant for determining comparability.

**28. What is the district's responsibility to address inequities in equipment and supplies that result from contributions by booster clubs, individual coaches, or student athletes?**

The district must ensure that the equipment and supplies afforded to interscholastic athletic teams are equitable. If one team receives a contribution from an outside source, which includes student athlete purchase of equipment or supplies, then the district must ensure that the contribution does

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not result in an overall disparity in the amount, quality and availability of equipment and supplies for boys and girls teams.

For additional discussion regarding booster clubs, see question 8.

**29. If new equipment is provided for one team, must it be provided for the other “like” team?**

Not necessarily. State and federal law, regulations, and guidance do not require that similar sports be on the same schedule for receiving new equipment. The test is whether, overall, the amount, quality, maintenance and replacement and availability of equipment is comparable throughout the girls and boys programs.

**30. Can districts spend unequal amounts on equipment for boys and girls teams?**

Yes. State and federal civil rights laws permit schools to take into account real differences between the costs of girls and boys sports that may justify a difference in the amount spent on their equipment and supplies. If the overall equipment and supply budget for boys sports is higher than for girls sports, it may be justified if a boys sport (*i.e.*, football) requires greater expenditures so that the needs of the girls and boys athletics programs are equally met.

The test is whether, overall, the amount, quality, maintenance, and replacement, and availability of equipment is comparable throughout the girls and boys programs.

Schedules

**31. How does a district provide equal benefits to its female and male student athletes through the scheduling of games and practice times?**

The district needs to guarantee that boys and girls receive equal benefits from the scheduling of games and practice times. Because the number of games vary greatly by sport, it may be useful to compare female and male teams in the same or similar sports. However, the test compares *overall* the girls athletics program to the boys athletics program.

The five factors to address:

- \* Number of competitive events offered per sport: compare the number of competitive events per sport for male and female teams.
- \* Number and length of practices: compare the length of practices, the number of practices per week and determine which teams have priority over others when schedules conflict.
- \* Time of day competitive events are scheduled: compare schedules to determine extent to which schedules support parent and student attendance, allow spirit groups to support teams and discourage time missed from class.
- \* Time of day practices are scheduled: compare the time of day, days of week practice is scheduled.
- \* Number of pre-season and post-season competitive opportunities: compare, in particular, teams for which tournament opportunities were available but in which they did not compete.<sup>23</sup>

<sup>23</sup> *Investigator's Manual* at 36.

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### **32. Is a district required to schedule the same number of games or practices for girls and boys teams in the same or similar sport?**

No. There may be nondiscriminatory differences in scheduling due to the unique aspects of certain sports. Scheduling of competitive events, for example, may be limited by a lack of competition for a particular sport in the normal competitive region. Fewer competitive contests may, in turn, affect practice schedules and pre-season and post-season competitive opportunities.

Differences favoring boys teams should be offset by differences favoring girls teams in other sports.

### **33. How should districts schedule practice times?**

The scheduling of practice times must be nondiscriminatory. This issue often arises when two or more teams share the same practice facilities. One team cannot receive preferential treatment over another team on the basis of sex. A team that is in its competitive season, however, should receive preference over a team that is not in competition at the time.

For example, districts can create a schedule that equally conveniences and inconveniences both boys and girls teams. Teams can alternate practicing right after school, before school, and in the evenings.

### **34. How should districts schedule games?**

Districts should schedule games so that the more favorable nights of the week are equally available to girls and boys. If both teams play on the same day, the boys and girls teams should alternate which plays at the preferred time. Otherwise, teams should

alternate which day they play.

The times that are considered most desirable may vary from district to district. Preferred days and times are determined by asking the student athletes, coaches, and fans within the district.

### Travel

#### **35. How does a district provide equal benefits to female and male student athletes through traveling to special events or tournaments?**

A district must ensure that the travel arrangements and travel allowances, *overall*, are comparable for girls athletic opportunities and boys athletic opportunities. It does not have to provide the exact same benefits and opportunities to each boys and girls team.

A district should (a) review written policies, procedures, and criteria for providing travel arrangements and (b) compare housing during travel and meal allowances. There are five factors to consider when determining compliance:

- \* Method of transportation: compare the type of transportation used by female and male teams traveling similar distances.
- \* Housing furnished during travel: compare the housing furnished during travel of male teams versus female teams, examine the quality of the motel used and the number of student athletes assigned per room.
- \* Length of stay before and after competitive events: compare the time female and male teams are away from school before and after competitive events.
- \* Daily allowance provided to the teams: compare the per diem allowances for male and female teams; use the amount actually given or spent per student

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athlete since this may be different from the “standard” per diem rate that the school may set or may have been provided by the boosters.

- \* Dining allowance provided to the teams: compare dining arrangements during travel for female and male teams; note any differences in quality (*i.e.*, teams eating at restaurants, school cafeteria, or packed meals).<sup>24</sup>

Some nondiscriminatory differences may exist. For example, the form of transportation may vary between teams because of team size, number of coaches, support staff and/or amount of equipment.<sup>25</sup> Distance to specific competitions also affects the mode of transportation as well.

### **36. Are districts required to provide travel services as part of its athletic program?**

No. If districts choose to provide such services, then the services must be equitably provided to both male and female student athletes.

## Coaching

### **37. How does a district provide equal benefits to their female athletes and their male athletes through coaching?**

Districts must examine the overall athletic programs rather than specific individual coaches. To assess whether coaching for boys and girls teams is comparable, three main factors are evaluated:

- \* Availability: compare the relative availability of full-time coaches, part-time coaches, and volunteer assistance for female and male teams (divide the total number of student athletes by the total

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<sup>24</sup> *Investigator's Manual* at 43.

<sup>25</sup> *Investigator's Manual* at 46.

number of coaches to get the coach-to-athlete ratio and compare the ratios for the girls program versus the boys program).

- \* Assignment: compare the training, experience, and other professional qualifications of coaches of male teams to that of female teams; if coaching is not a full-time job, then note teaching and other assignments (number of classes taught, class load, and number of hours the coach is on the school grounds of the team); compare the extent to which coaches assist in locating scholarships or other benefits for student athletes; determine if there is a pattern of assigning less qualified coaches to male or female teams.
- \* Compensation: compare the rate of compensation for coaches of male teams to coaches of female teams (per sport, per season, duration of contracts, conditions related to contract renewal, experiences as related to compensation, nature of coaching duties performed and other duties expected of coaches); compare the full compensation of each coach, no matter the source (*i.e.*, perks, club memberships, radio or television shows, cars, insurance benefits).<sup>26</sup>

Under certain circumstances, some coaching positions – coaching for combined and co-ed teams – can and should be excluded from analysis.

**38. Does a district have to pay the coach of a boys team the same as the coach of the same or similar girls team?**

No. Nondiscrimination laws, regulations, and guidance related to educational equity do not require districts to pay the same salary to coaches of “like” sports. Differences in salary may be based on nondiscriminatory factors

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<sup>26</sup> *Investigator's Manual* at 55.

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such as years of experience or different job duties or responsibilities.

Federal and state civil rights in employment laws protect the rights of employees, including coaches. Under these laws, a district must ensure that it pays equal pay for equal work without regard to the sex of the employees involved. District officials responsible for setting salaries need to carefully review these laws before setting salaries.

**Locker rooms, practice, and competitive facilities**

### **39. How does a district provide equal benefits to their female athletes and their male athletes through locker rooms, practice, and competitive facilities?**

A district must provide, *overall*, equal benefits to male students as compared to female students in the area of locker rooms, practice, and competitive facilities. It does not have to provide the exact same benefits and opportunities to each girls and boys team.

Factors to consider:

- \* Quality and availability of the practice and competitive facilities: compare the quality and availability of practice and competitive facilities for female and male teams; list other groups (athletic teams, intramural teams, band, community groups) that use the facilities and the order of priority for regular use and for use when the weather is bad; compare the extent to which facilities meet regulations; compare special features available at the facilities (laundry, weight training, availability of trainers, spectator capacity, public address system, electronic score boards, accommodations for visiting teams, concession facilities, general lighting, special lighting for television coverage or filming, multimedia equipment for training and coaching).

- \* Exclusive use of facilities provided for practice and competitive events: compare the number of female teams that have exclusive use of locker room facilities with the number of male teams that have exclusive use of locker room facilities; compare the duration of exclusivity (entire year, seasonal, during competition or practice).
- \* Availability of locker rooms: compare athletic locker assignments for female and male athletes (for the entire year, seasonal, during competition, during practice).
- \* Quality of locker rooms: compare the size and quality of the locker room facility for male and female teams; note any special features (laundry, weight training, availability of trainers, accommodations for visiting teams, multimedia equipment for training and coaching).
- \* Maintenance of practice and competitive facilities: compare the quality of facility maintenance; determine who has responsibility for maintenance and maintenance schedule.
- \* Preparation of facilities for practice and competitive events: compare the quality of facility preparation for competition and practice; compare who has responsibility for facility preparation (crews, students, coaches).<sup>27</sup>

**40. Some sports teams play on fields owned by the city. Does that change a district's obligation under nondiscrimination laws?**

No. Federal and state nondiscrimination laws apply to any field or facility used by a school athletic program, regardless of who owns the field or facility in question. Even if a field is supervised and maintained by the city or county, the school remains legally responsible if the field conditions,

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<sup>27</sup> *Investigator's Manual* at 64-65.

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maintenance, or amenities reflect unequal treatment of its male and female athletes. When city- or county-owned fields are maintained to very different levels of care and the disparity may reflect unequal treatment, based on sex, of student athletes, a school could (a) work with the city to ensure that the fields receive equal maintenance, (b) allocate school funds to better care for the lesser-maintained field, or (c) relocate the underrepresented sex to another field that receives better care.

### **41. Is a school district required to have identical practice and competitive facilities for boys and girls teams?**

No. The district needs to ensure that the facilities used by girls teams and boys teams, taken as a whole, are comparable in terms of quality and availability, exclusivity of use, maintenance, and preparation.

### **Medical and training facilities and services**

### **42. How does a district provide equal benefits to their female athletes and their male athletes through medical and training facilities and services?**

In many districts, these services will be minimal. For districts that do offer medical and training facilities and services, they must provide, *overall*, equal benefits to male students as compared to female students in the area of medical and training facilities and services. They do not have to provide the exact same benefits and opportunities to each girls and boys team.

Factors to consider:

- \* Medical personnel and assistance:  
compare the quality and availability of medical personnel for girls and boys teams, compare which male and female teams have physicians working with them on a regular basis, compare which female and male teams receive free annual physicals,

which female and male teams have physicians present and for which games.

- \* Insurance coverage: compare insurance policies covering male and female athletes and any student costs.
- \* Weight and training facilities and conditioning facilities: compare all weight training and conditioning facilities used by male and female teams; determine which teams have exclusive use of certain facilities, which teams have priority use, which teams share use of facilities, and which teams have use of any special facilities; compare equipment available in the training/conditioning facilities.
- \* Athletic trainers: compare the quality and availability of trainers for the girls and boys teams, determine which teams are assigned professional as opposed to student trainers and which trainers are full-time and which are part-time; compare the experience and certification of trainers serving male and female teams; compare the number of female athletes and teams compared to male athletes and teams served by certified trainers and student trainers.

**43. One sport has a much higher injury rate than other sports. Can a district allocate a disproportionate share of medical services to that sport and, thus, to one sex?**

Yes. Certain nondiscriminatory factors might allow one team to have more qualified medical personnel. For example, the injury rate in a particular sport may justify the assignment of more qualified medical personnel. Districts can use past rates to determine which sports may have greater needs.

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### Publicity and promotion

#### 44. How does a district provide equal benefits to their female athletes and their male athletes through publicity and promotion?

A district must provide, *overall*, equal benefits to female students as compared to male students in the area of publicity and promotion. It does not have to provide the exact same benefits and opportunities to each girls and boys team.

Factors to consider:

- \* Availability and quality of sports information personnel: compare the experience, training, time spent of persons assigned publicity duties for female teams and those assigned for male teams; compare the estimated time allocated to female teams and to male teams (some schools assign publicity duties to the athletic director, assistant athletic director or to coaches as part of their overall duties; if so, then compare the percentage of time given to publicity for male teams as compared to female teams).
- \* Access to other publicity resources for boys and girls programs: compare the policies, procedures, and criteria for providing publicity services to the boys and girls athletic programs; determine which teams have access to the school's publicity resources (school marquee, video/projection equipment, public address system, free advertising on local media).
- \* Quantity and quality of publications and other promotional devices featuring girls and boys programs: compare the quality and quantity of sports information publications and promotional services provided girls teams and boys teams; compare the promotional information (print and multi-media) supporting local male and female athletes; how and with what frequency male and female teams are supported by cheerleaders, dance/drill

teams, bands or other spirit groups; compare location of trophy display cases for male and female athletics; compare male and female coverage in school newspaper, catalog, yearbook, website.<sup>28</sup>

- 45. We have a student athlete or team garnering significant publicity and, thus, district resources to respond. Therefore, our publicity is unequally benefiting one sex over the other. Are we in violation of nondiscrimination laws?**

Not necessarily. The unique circumstances of a particular team, competitive event or student athlete may create unique demands or imbalances. For example, a team that is in contention for a state championship may be of great interest to the press, generating many requests for information. The sports information staff may spend much more time on that team and neglect other teams as a result. Such disparities would not violate nondiscrimination laws unless there is a pattern of such imbalances that benefits unequally student athletes of one sex over the other.

- 46. How should spirit groups be assigned to games to be equitable between girls and boys contests?**

Athletic schedules should be reviewed and schedules established with an equal number of contests represented for both boys and girls events by all spirit groups. If there are too many games for the varsity spirit groups to cover, districts should look into bringing up junior varsity squad members to fill in for an evening, or lower level band members to sit in for an evening to fill out the needed numbers. However, JV

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<sup>28</sup> *Investigator's Manual* at 85.

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cheerleaders or lower level band members should not be assigned to fill in only at boys games or only at girls games; they should participate in an equal number of boys and girls games.

**47. We are attempting to meet equity requirements by providing cheerleader support at both girls and boys athletic contests; however, girls coaches and/or players do not want cheerleaders at their games. What can we do?**

Positive communication helps all parties involved to accept this as law and as a positive experience for student athletes. Concentrate on the positive aspects of spirit groups. Some schools have constituted a committee with coaches, players, and cheerleaders involved in planning.

**48. Female and male athletic competitions are not equally covered in the local media. Is the district responsible?**

No. Newspapers, TV and other media are not required to be equally responsive to a district's efforts to provide equivalent publicity services to male and female athletic programs. However, the district's own publicity and promotion must be provided without discrimination.

Unequal publicity may result from the initiative of fans and booster clubs for a particular team. In this case, districts have a responsibility to offset inequities caused by these outside sources of publicity.

### Support services

**49. How does a district provide equal benefits to their female athletes and their male athletes through support services?**

The administrative and clerical support provided to an athletic program is extremely important because they give coaches more

time to perform their coaching. A district must provide, *overall*, equal benefits to female students as compared to male students in the area of support services. It does not have to provide the exact same benefits and opportunities to each girls and boys team.

Factors to consider:

\* Administrative assistance: examine the policies, procedures, and criteria for providing support services to athletic programs and note any difference between services for the male and female programs; compare the number of administrators assigned to, and the percentage of time spent working for girls programs with those assigned to and time spend working for the boys programs; compare the types of administrative services available to the boys program with the types available to the girls program (athletic directors and assistants, business managers, facilities managers, fund-raisers, team managers); compare the overall quantity and quality of the administrative assistance available to the male and female programs.

Clerical assistance: compare the number of secretarial and clerical staff assigned to, and the percentage of time spent working for, the girls athletics programs with the number and time spent working for the boys athletic programs; compare the number of female teams that share administrative, secretarial and clerical assistance with the number of male teams sharing assistance; compare the number of coaches for the female program who get clerical help with the number of coaches for the male program getting such help; compare the size of the offices and the equipment provided to coaches of female teams and coaches of male teams (photocopying machines, telephones, cell

## Questions and Answers

Protected class: sex

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phones, access to television, video players, tape recorders, computer equipment, projection equipment); compare the overall quantity and quality of the clerical assistance available to the male and female programs.<sup>29</sup>

**50. The need for administrative, secretarial, and clerical support services varies from team to team. Does this mean that a district is providing unequal benefits to students of one sex over the other?**

Not necessarily. The relevant determination is whether the need for such services is met to the same extent for the total male and female programs.

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<sup>29</sup> *Investigator's Manual* at 91.

**Protected class: PREGNANCY**

**Denied participation**

**51. Can a school exclude, on the basis of pregnancy, a student from sport participation?**

No. Schools are prohibited from excluding students from programs or activities on the basis of such students' pregnancy or pregnancy-related conditions.

**52. Must a sport team accommodate a pregnant student athlete?**

Yes. Athletic programs must treat pregnancy or pregnancy-related conditions in the same manner and under the same policies as any other temporary disability.

Athletic programs may require pregnant students to submit a doctor's certificate as a condition of continued participation in a program or activity, as long as they would require a similar certification for all students with comparable disabilities or limitations.

**Leave of absence**

**53. Is a sport team required to provide a leave of absence for female athletes during pregnancy, childbirth, and related medical conditions?**

Yes. Athletic programs must permit a pregnant student to take a leave of absence for pregnancy or pregnancy-related conditions as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician – whether or not they allow leave for other reasons. When the student returns, she must be reinstated.

## Questions and Answers

Protected class: race, color, and national origin

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### Protected class: RACE, COLOR, AND NATIONAL ORIGIN

#### Mascots and logos

#### 54. Are American Indian mascots and logos discriminatory?

It depends. In 1992, the Wisconsin Attorney General stated in an opinion requested by the state superintendent that "the use of American Indian mascots, logos, and nicknames could cause an American Indian harm by reinforcing a stereotype and/or creating an intimidating or offensive environment, thus perpetuating past discrimination." The use of an American Indian logo, nickname, or mascot could therefore be a violation of state law. However, the law does not presume that all American Indian logos, nicknames, or mascots are unlawful. In each case, the logo, nickname, or mascot in question (or its use) is examined to determine whether it is discriminatory.

State law is consistent with federal law in this regard. When reviewing Indian mascot and logo complaints, DPI or OCR will determine whether the mascot or logo creates a hostile environment. Both agencies will find discrimination if (a) a racially hostile environment exists (racially harassing conduct of a physical, verbal, or graphic nature that is sufficiently severe, pervasive or persistent as to interfere with or limit the ability of an individual to participate or benefit from the school district's services, benefits, activities, or privileges), (b) the school district has actual or constructive notice of the racially-hostile environment, and (c) the school district failed to take action reasonably calculated to redress the hostile environment.

**Students without legal immigration status**

**55. A student resides illegally in the United States. May the school district prohibit the student from participating in sport programs?**

No. The Supreme Court has held that non-U.S. citizen students who reside in the U.S., regardless of their legal immigration status, have the right to attend public schools, including participation in activities, in their school district of residence.<sup>30</sup>

**English-language learners**

**56. Can a school prohibit English language learners from participating in sports?**

No. Federal and state civil rights laws require English language learners to have equal access to the same nonacademic programs and extracurricular activities available to all other students.

**57. What supports is a district required to provide English language learners who participate in sports?**

Based on the general prohibitions of different treatment under Title VI and §118.13, Wis. Stats., notices provided to all students must be provided to English language learners in a language and mode of communication that they understand.

Districts must provide supports necessary for English language learners to have an equal opportunity to participate in extracurricular and nonacademic activities.

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<sup>30</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

## Questions and Answers

Protected class: race, color, and national origin

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Translation for parents

### **58. What athletic program materials are required to be translated for parents who are not proficient in English?**

School districts have the responsibility to adequately notify national origin-minority group parents of school activities which are called to the attention of other parents. Notification must be sufficient so that parents can make well-informed decisions about the participation of their children in a district's programs and services. Such notice in order to be adequate may have to be provided in a language other than English.<sup>31</sup> Such notice may not need to be provided in writing.

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<sup>31</sup> *May 25, 1970, memorandum regarding identification of discrimination and denial of services on the basis of national origin* (U.S. Department of Health, Education, and Welfare); *The provision of an equal education opportunity to limited-English proficient students* (U.S. Department of Education, Office for Civil Rights, 2000).

### Protected class: RELIGION

#### Uniform accommodations for religious beliefs

#### 59. Can a student athlete participate in a sport competition with uniform modifications in conformity with her/his religious beliefs?

Maybe. Students generally have no right to be exempted from religiously neutral and generally applicable school dress rules, which includes uniform rules, based on their religious beliefs or practices.<sup>32</sup>

The playing rules of the National Federation of State High School Associations (NFHS), which govern Wisconsin interscholastic athletic competitions, include uniform specifications. NFHS rules do not allow for modifications based on a student's genuinely-held religious beliefs. However, the WIAA may allow uniform modifications in conformity with a student's religious beliefs.

#### Prayer

#### 60. Can a school invite clergy to deliver publicly a prayer before, during, or after a game?

No. The Supreme Court has repeatedly held that the First Amendment of the U.S. Constitution forbids religious activity that is sponsored by the government (*i.e.*, school districts).<sup>33</sup>

#### 61. Can teams pray together in the locker room?

The First Amendment of the U.S. Constitution both forbids religious activity that is sponsored by the government and protects

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<sup>32</sup> *Student religious expression in public schools: United States Department of Education guidelines* (1998).

<sup>33</sup> *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

## Questions and Answers

Protected class: religion

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religious activity that is initiated by private individuals.<sup>34</sup> As the Supreme Court has explained in several cases, “there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”<sup>35</sup> The Supreme Court’s decisions over the past forty years set forth principles that distinguish impermissible governmental religious speech from the constitutionally-protected private religious speech of students.

Thus, students may pray individually or with other team mates or read scriptures in the locker room if: (a) they are subject to the same rules designed to prevent disruptions that are applied to other privately initiated expressive activities and (b) they are not engaged in activities or instruction.

The student right to religious expression does not include the right to have a “captive audience” listen or to compel other students to participate. Repeated invitations to participate in religious activity may become illegal harassment.

When acting in their official capacities as representatives of the state, coaches are prohibited by the Establishment Clause from encouraging or discouraging prayer and cannot actively participate in such activity with students.

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<sup>34</sup> See, e.g., *Everson v. Board of Education*, 330 U.S. 1 at 18 (1947) (the First Amendment “requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them”); *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001).

<sup>35</sup> *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)); *Rosenberger v. Rector of University of Virginia*, 515 U.S. 819, 841 (1995).

### Protected class: DISABILITY

#### Maximum age rule

**62. Can a student with a disability participate in sports after turning 19, which is the WIAA maximum age for participation?**

Maybe. WIAA may, per association policy and upon consideration of individual request, waive the maximum-age rule for students with disabilities. Under no circumstances, however, may a student begin a sport season after the student has reached age 20.

#### Maximum participation rule

**63. Can a student with a disability participate in sports for more than four consecutive years, which is the WIAA maximum participation rule?**

Maybe. WIAA may, per association policy and upon consideration of individual request, waive the maximum-participation rule for students with disabilities.

#### Academic performance and attendance policies

**64. Can a student with a disability be denied participation from sport for failure to meet academic, behavior, or attendance requirements?**

Probably. Both WIAA and school districts have established academic requirements for participation in interscholastic athletics and require compliance with district codes of conduct. School districts may have attendance policies for participation. As long as the association and districts apply the rules uniformly to students with and without disabilities, they are providing an equal opportunity for students with disabilities to participate in sport.

A student who is enrolled in a state-approved special education program and does not receive usual grades may be eligible for sport participation if he/she is making satisfactory progress in his/her total

## Questions and Answers

Protected class: disability

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school program as indicated in her/his IEP.<sup>36</sup>

If a student's IEP or Section 504 plan requires a district to accommodate her/his disability through a waiver of attendance policies and procedures, then a school must not apply the uniform attendance policy to the student.

### Safety concerns

#### **65. Can a district prohibit, based on safety concerns, students with disabilities from participating in interscholastic sports?**

Probably not. Section 504 provides that the exclusion of students with disabilities from a school activity is not improper if there exists "substantial justification" for the school's policy.<sup>37</sup> The foundational Supreme Court decision notes the "mere possession of a [disability] is not a permissible ground for assuming an inability to function in a particular context."<sup>38</sup>

A district should make case-by-case determinations based on medical and other expert opinions.

### IEPs and Section 504 Plans

#### **66. Should a district include interscholastic sport participation in IEPs or Section 504 Plans?**

Only when necessary for the student to benefit from his or her individual education program.

The student may not be denied the opportunity to try out for a team, or be excluded from a team, because of her or his disability.

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<sup>36</sup> WIAA Rules of Eligibility, Academic Eligibility Article V, Section 2(6).

<sup>37</sup> *Grube v. Bethlehem Area School District*, 550 F.Supp. 418 (E.D. Pa. 1982).

<sup>38</sup> *Southeastern Community College v. Davis*, 442 US 397 at 406 (1979).

### Reasonable accommodations

#### 67. What must a school do to reasonably accommodate a student with a disability participating on a sports team?

First, the student must be “otherwise qualified to participate” in the sport. The Supreme Court interprets this to mean the student “is able to meet all of a program’s requirements in spite of his [or her] [disability].”<sup>39</sup>

Second, a district is required to reasonably accommodate the student’s disability. The Supreme Court has interpreted reasonable accommodations as those that do not require organizations “to lower or to effect substantial modifications of standards to accommodate”<sup>40</sup> students with disabilities and that do not “impose undue financial and administrative burdens or require a fundamental alteration in the nature of the program.”<sup>41</sup>

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<sup>39</sup> *Southeastern Community College v. Davis*, 442 U.S. 397 at 406 (1979).

<sup>40</sup> *Ibid.* at 413.

<sup>41</sup> *School Board of Nassau County v. Arline*, 480 US 273 (1987).

## Questions and Answers

Protected class: sexual orientation

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### Protected class: SEXUAL ORIENTATION

**Discomfort in the locker room or on the playing field**

**68. What should coaches do if players are uncomfortable with other student athletes in the locker room or on the playing field because of different sexual orientations?**

Coaches should work with their student athletes to address these issues.

Coaches need to ensure that student athlete conduct does not create a hostile environment on the basis of sexual orientation. A hostile environment, which is a form of illegal discrimination, occurs when harassing conduct of a physical, verbal, or graphic nature is sufficiently severe, pervasive or persistent as to interfere with or limit the ability of an individual to participate or benefit from the school district's services, benefits, activities, or privileges.

Everyone's privacy must be respected in the locker room. No student athlete should engage in any activity that invades the privacy of another regardless of sexual orientation. If anyone in the locker room engages in this kind of activity, the behavior should be addressed without regard to sexual orientation.

**Student athlete refusal to practice or play**

**69. Can a school accommodate a student athlete's refusal, on the basis of religion, to practice with or compete against another student because of her/his sexual orientation?**

No. A coach must enforce any applicable codes of conduct or team procedures in response to a student who refuses to practice with or compete against other students.

A coach must ensure that student conduct does not create a hostile environment based on sexual orientation. A hostile environment, which is a form of illegal discrimination, occurs when harassing conduct of a physical, verbal, or graphic nature is sufficiently severe, pervasive or persistent as to interfere with or limit the ability of an individual to participate or benefit from the school district's services, benefits, activities, or privileges.

## Resources

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### General resources

U.S. Department of Education, Office for Civil Rights  
<http://www.ed.gov/about/offices/list/ocr/index.html>

Wisconsin Department of Public Instruction, Pupil Nondiscrimination Program  
<http://dpi.wi.gov/sped/puplnondis.html>

Wisconsin State Law Library resources regarding civil rights  
<http://wsll.state.wi.us/topic/civilrights.html>

Center for the Study of Sport in Society (a Northeastern University program that offers educational programs to eliminate violence, sexism, racism, and homophobia in sport)  
<http://www.sportinsociety.org>

### Resources organized by protected class

#### Sex

Women's Sports Foundation  
<http://womenssportsfoundation.org>

*Know your rights*

<http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/index.html>

*Discrimination*

<http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/disc/index.html>

*Playing Fair: A Women's Sports Foundation Guide to Title IX in High School & College Sports, Fourth Edition*

<http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/geena/article.html?record=829>

National Women's Law Center  
<http://www.nwlc.org/>

*Title IX*

<http://www.titleix.info/>

*Check it out: Is the playing field level for women and girls at your school? An athletics equity checklist for students, athletes, coaches, parents, administrators, and advocates*

<http://nwlc.org/pdf/Checkitout.pdf>

National Association for Girls and Women in Sport  
<http://www.aahperd.org/nagws/>

*Title IX*

<http://www.aahperd.org/nagws/template.cfm?template=titleix/main.html>

### **Race**

Wisconsin Department of Public Instruction, Bilingual/ESL Program  
<http://dpi.wi.gov/ell/index.html>

Wisconsin Department of Public Instruction, Migrant Education Program  
<http://dpi.wi.gov/title1/mig1.html>

Wisconsin Indian Education Association  
<http://www.wiea.org/>

*"Indian" Mascot & Logo Taskforce*

<http://www.indianmascots.com/>

American Indian Sports Team Mascots  
<http://www.aistm.org/>

American Indian Cultural Support  
<http://www.aics.org/>

Great Lakes Inter-tribal Council  
<http://www.glitc.org/>

### **Religion**

Anti-Defamation League  
<http://www.adl.org>

*Religion in the public schools*

[http://www.adl.org/religion\\_ps\\_2004/](http://www.adl.org/religion_ps_2004/)

American Civil Liberties Union  
<http://www.aclu.org/index.html>

*Religion in schools*

<http://www.aclu.org/religion/schools/index.html>

First Amendment Center  
<http://www.firstamendmentcenter.org/>

## Resources

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*First Amendment Schools*

<http://www.firstamendmentschools.org/>

U.S. Department of Education

<http://www.ed.gov>

*Religion and public schools*

<http://www.ed.gov/policy/gen/guid/religionandschools/index.html>

### **Disability**

Wisconsin Department of Public Instruction, Special Education Team

<http://dpi.wi.gov/sped/index.html>

Wisconsin Yellow Pages for Kids

<http://www.yellowpagesforkids.com/help/wi.htm>

Great Lakes ADA Technical Assistance Center

<http://www.adagreatlakes.org/>

Children and Youth with Special Health Care Needs Program

[http://www.dhfs.state.wi.us/dph\\_bfch/cshcn/index.HTM](http://www.dhfs.state.wi.us/dph_bfch/cshcn/index.HTM)

Disability Rights Wisconsin

<http://www.w-c-a.org/>

Special Olympics of Wisconsin

<http://www.specialolympicswisconsin.org>

Wisconsin Statewide Parent-Educator Initiative

<http://dpi.wi.gov/sped/parent.html>

### **Sexual Orientation**

It Takes a Team! Education Campaign for LGBT Issues in Sport

<http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/itat/index.html>

Gay, Lesbian, & Straight Education Network (GLSEN)

<http://www.glsen.org/cgi-bin/iowa/all/home.html>

Gay and Lesbian Athletics Foundation

<http://www.gayconference.org>

Federation of Gay Games  
<http://www.gaygames.org>

!OutProud!  
<http://www.outproud.org>

Parents, Families, and Friends of Lesbians and Gays (PFLAG)  
<http://www.pflag.org>

The Safe Schools Coalition  
<http://www.safeschoolscoalition.org/>

Gay & Lesbian National Hotline  
<http://www.glnh.org>

*The Department of Public Instruction and WIAA will regularly update these resources.  
Please visit our websites:*

<http://dpi.wi.gov/sped/puplnondis.html>

<http://www.wiaawi.org/>

## Appendixes

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- A. Wisconsin's pupil nondiscrimination law and administrative code
- B. Federal civil rights laws
- C. Complaint resolution
- D. Sample discrimination complaint procedure
- E. Sample discrimination complaint form
- F. Student interest surveys
- G. Sample student athletic interest form
- H. OCR letter regarding cheer as sport

## Section 118.13, Wis. Statutes

**118.13 Pupil discrimination prohibited.** (1) Except as provided in s. 120.13 (38), no person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational, or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability.

(2) (a) Each school board shall develop written policies and procedures to implement this section and submit them to the state superintendent as a part of its 1986 annual report under s. 120.18. The policies and procedures shall provide for receiving and investigating complaints by residents of the school district regarding possible violations of this section, for making determinations as to whether this section has been violated and for ensuring compliance with this section.

(b) Any person who receives a negative determination under par. (a) may appeal the determination to the state superintendent.

(3) (a) The state superintendent shall:

1. Decide appeals made to him or her under sub. (2)(b). Decisions of the state superintendent under this subdivision are subject to judicial review under ch. 227.
2. Promulgate rules necessary to implement and administer this section.
3. Include in the department's biennial report under s. 15.04(1)(d) information on the status of school district compliance with this section and school district progress toward providing reasonable equality of educational opportunity for all pupils in this state.

(b) The state superintendent may:

1. Periodically review school district programs, activities, and services to determine whether the school boards are complying with this section.
2. Assist school boards to comply with this section by providing information and technical assistance upon request.

(4) Any public school official, employee, or teacher who intentionally engages in conduct which discriminates against a person or causes a person to be denied rights, benefits, or privileges, in violation of sub. (1), may be required to forfeit not more than \$1,000.

Section note: Ch. 418 s. 929 (55)(a), Laws of 1977; 1983 Acts 374, 412; 1985 Act 29; 1987 Act 332; 1987 Act 332 s. 66a provides that sub. (4) takes effect July 1, 1989; 1985 Act 29 s. 3043(1) provides that the state superintendent shall submit the rules required under s. 118.13(3) (a) 2 in final form no later than July 1, 1986; 1991 Act 31 amends 118.13(1) by the addition of religion to the protected groups.

## Appendix A

### Wisconsin's pupil nondiscrimination law and administrative code

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## PI 9, Wisconsin Administrative Code

**PI 9.01 Discrimination Prohibited.** This chapter establishes procedures for compliance with s. 118.13, Stats., which provides that no person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational, or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional, or learning disability. This chapter does not intend to prohibit the provision of special programs or services based on objective standards of individual need or performance to meet the needs of pupils, including gifted and talented, special education, school age parents, bilingual bicultural, at risk and other special programs; or programs designed to overcome the effects of past discrimination.

History: Cr. Register, October, 1986, No. 370, eff. 11-1-86.

**PI 9.02 Definitions.** In this chapter:

(1) "Bias" means an inclination for or against a person or group of persons based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability, that inhibits impartial or objective judgment affecting pupils.

(2) "Board" means the school board in charge of the public schools of a district.

(3) "Curricular program or activity" means a particular course or courses of study within the scope of the curriculum.

(4) "Department" means the Wisconsin Department of Public Instruction.

(5) "Discrimination" means any action, policy, or practice, including bias, stereotyping, and pupil harassment, which is detrimental to a person or group of persons and differentiates or distinguishes among persons, or which limits or denies a person or group of persons opportunities, privileges, roles, or rewards based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional, or learning disability, or which perpetuates the effects of past discrimination.

(6) "Extracurricular program or activity" means an activity not falling within the scope of the curriculum and includes all organized pupils' activities which are approved or sponsored by the school board whether on or off school property.

(7) "National origin" includes pupils whose dominant language is other than English.

(8) "Pregnancy" includes any pregnancy-related condition.

(9) "Pupil harassment" means behavior toward pupils based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability which substantially interferes with a pupil's school performance or creates an intimidating, hostile, or offensive school environment.

(10) "Pupil services" means a program of pupil support services and activities including counseling, health and nursing, psychological, and social work services.

(11) "Recreational program or activity" means any leisure time activity for school age children approved or sponsored by the school board and includes city recreational programs which are administered by a school board.

(12) "Sexual orientation" has the meaning defined in s. 111.32(13m), Stats.

(13) "State superintendent" means the superintendent of public instruction for the state of Wisconsin.

(14) "Stereotyping" means attributing behaviors, abilities, interests, values, and roles to a person or group of persons on the basis, in whole or in part, of their sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional, or learning disability.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

**PI 9.03 Policies.** (1) Each board shall develop policies prohibiting discrimination against pupils. The policies shall include the following areas:

(a) Admission to any school, class, program, or activity. This does not prohibit placing a pupil in a school, class, program, or activity based on objective standards of individual performance or need.

(b) Standards and rules of behavior, including pupil harassment.

(c) Disciplinary actions, including suspensions and expulsions.

(d) Acceptance and administration of gifts, bequests, scholarships and other aids, benefits, or services to pupils from private agencies, organizations, or persons.

(e) An instructional and library media materials selection policy consistent with s.121.02(1)(h), Stats., and s. PI 8.01(2)(h).

(f) Methods, practices, and materials used for testing, evaluating, and counseling pupils. This does not prohibit the use of special testing or counseling materials or techniques to meet the individual needs of pupils.

(g) Facilities. This does not prohibit separate locker rooms, showers, and toilets for males and females, but the separate facilities must be comparable.

(h) Opportunity for participation in athletic programs or activities. This does not prohibit separate programs in interscholastic athletics for males and females, but the programs shall be comparable in type, scope, and support from the school district.

(i) School sponsored food service programs under 42 USC ss. 1751 et. seq.

(2) Existing board policies which meet the requirements of this chapter, including those adopted by the board in compliance with federal statutes such as Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973, may be incorporated into the policies required under this chapter. These policies shall be included in those presented for public hearing and commentary under sub.(3).

(3) The policies shall be adopted by the board following a public hearing or an opportunity for public commentary at a board meeting.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

**PI 9.04 Complaint Procedure.** Each board shall:

(1) Designate an employee of the school district to receive complaints regarding discrimination under s. 118.13, Stats., and this chapter.

(2) Establish a procedure for receiving and resolving complaints from residents of the school district or aggrieved persons under s. 118.13, Stats., and this chapter, including a

## Appendix A

### Wisconsin's pupil nondiscrimination law and administrative code

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provision for written acknowledgment within 45 days of receipt of a written complaint and a determination of the complaint within 90 days of receipt of the written complaint unless the parties agree to an extension of time; except that:

(a) Appeals under 20 USC s. 1415 and ch. 115, Stats., relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education of a child with an exceptional educational need shall be resolved through the procedures authorized by ch. 115, subch. V, Stats.

(b) Complaints under 20 USC s. 1231e-3 and 34 CFR ss. 76.780-76.782, commonly referred to as EDGAR complaints, that the state or a subgrantee is violating a federal statute or regulation that applies to a program shall be referred directly to the state superintendent.

(3) Notify a complainant of the right to appeal a negative determination by the school board to the state superintendent and of the procedures for making the appeal.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

Note: Included with the department's order promulgating ch. PI 9 was the following applicability statement:

The policies required under ss. PI 9.03 and 9.04 shall be developed before August 1, 1987. Complaints of discrimination received by the board prior to August 1, 1987, may be handled by any existing complaint procedures provided that the time requirements of s. PI 9.04 are met. In the absence of any board complaint procedure or if the time requirements are not met, the complainant may appeal directly to the state superintendent. Negative decisions of the board may be appealed to the state superintendent under s.PI 9.08(1)(a).

Note: Because of changes in federal law, EDGAR complaints are now IDEA complaints.

**PI 9.05 Public Notice.** Each board shall:

(1) Annually provide public notice of board policies on pupil nondiscrimination including the name and address of the designated employee under s. PI 9.04(1) and the complaint procedure under s. PI 9.04(2). The notice shall be a class 1 legal notice under ch. 985, Stats.

(2) Include a pupil nondiscrimination statement on pupil and staff handbooks, course selection handbooks, and other published materials distributed to the public describing school activities and opportunities.

(3) Include the complaint procedure in pupil and staff handbooks.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

**PI 9.06 Evaluation.** (1) In order to provide the information necessary for the state superintendent to report on the compliance with s.118.13, Stats., as required under s.118.13(3)(a)3, Stats., each board shall evaluate the status of nondiscrimination and equality of educational opportunity in the school district at least once every five years on a schedule established by the state superintendent. The evaluation shall include the following:

(a) School board policies and administrative procedures.

(b) Enrollment trends in classes and programs.

(c) Methods, practices, curriculum, and materials used in instruction, counseling, and pupil assessment and testing.

(d) Trends and patterns of disciplinary actions, including suspensions, expulsions, and handling of pupil harassment.

(e) Participation trends and patterns and school district support of athletic, extracurricular, and recreational activities.

(f) Trends and patterns in awarding scholarships and other forms of recognition and achievement provided or administered by the school district.

(g) School district efforts to achieve equality of educational opportunity and nondiscrimination.

(2) The board shall provide an opportunity for participation in the evaluation by pupils, teachers, administrators, parents, and residents of the school district.

(3) The board shall prepare a written report of the evaluation which shall be available for examination by residents of the school district.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

**PI 9.07 Reporting.** Each board shall submit the following to the department:

(1) Copies of policies and procedures under s. 118.13(2)(a), Stats., and ss. PI 9.03 and 9.04, and notices under s. PI 9.05, upon request of the state superintendent.

(2) An annual compliance report, including the name of the designated employee under s. PI 9.04(1); and the number of complaints received during the year, a description of each complaint and its status.

Note: Included with the department's order promulgating ch. PI 9 was the following applicability statement: By August 1, 1987, boards shall submit the first annual report to the department as required under sub. (2) and provide public notice as required under s.PI 9.05.

(3) A copy of the written report of the evaluation conducted under s. PI 9.06.

Note: Form PI 1197, *Compliance Report—Pupil Nondiscrimination*, may be obtained from Department of Public Instruction, Division for Handicapped Children and Pupil Services, P.O. Box 7841, Madison, WI 53707.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

Note: The Division for Handicapped Children and Pupil Services is now called the Equity Mission Team.

**PI 9.08 State Superintendent.** (1) The state superintendent shall:

(a) Decide appeals of board decisions made under s.118.13(2)(a), Stats., and this chapter as follows:

1. The complainant may appeal a negative determination of the board to the state superintendent within 30 days of the board's decision.

2. The complainant may appeal directly to the state superintendent if the board has not complied with the provisions of s.PI 9.04(2).

3. The state superintendent shall utilize the procedures under ch. PI1 to resolve appeals under this subsection.

4. If the state superintendent finds that the board violated s.118.13, Stats., or this chapter, the state superintendent shall issue an order to comply which includes a requirement that the board submit a corrective action plan, including a schedule, within 30 days of the board's receipt of the order.

5. The state superintendent shall refer a complaint to the board for resolution if it has not been filed with the board or if the complaint is currently under consideration by the board under the complaint procedure required by s.PI 9.04.

(b) Include in the department's biennial report under s. 15.04(1)(d), Stats., information on the status of school district compliance with s. 118.13, Stats., and school district progress toward providing reasonable equality of educational opportunity and nondiscrimination for all pupils in Wisconsin.

## Appendix A

### Wisconsin's pupil nondiscrimination law and administrative code

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- (2) The state superintendent may:
- (a) Provide technical assistance to school districts.
  - (b) Review the policies established by the board under ss. PI9.03 and 9.04.
  - (c) Review school district programs, activities, and services to determine whether boards are complying with this chapter and with s. 118.13, Stats. The department may review school districts on a schedule which corresponds with the audit of compliance with school district standards under s. 121.02(2), Stats. The scheduling of reviews does not prohibit the state superintendent from conducting an inquiry into compliance with this chapter upon receipt of a complaint.

History: Cr. Register, October, 1986, No. 370. eff. 11-1-86.

**Title VI of the Civil Rights Act of 1964<sup>42</sup>**

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

**Title IX of the Education Amendments of 1972<sup>43</sup>**

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 program or activity receiving Federal financial assistance.

**Section 504 of the Rehabilitation Act of 1973<sup>44</sup>**

No otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

**Title II of the Americans with Disabilities Act of 1990 (ADA)<sup>45</sup>**

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

**Title III of the Americans with Disabilities Act of 1990 (ADA)<sup>46</sup>**

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

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<sup>42</sup> 42 U.S.C. § 2000d et seq.

<sup>43</sup> 20 U.S.C. § 1681 et seq.

<sup>44</sup> 29 U. S. C. § 794

<sup>45</sup> 42 U.S.C. § 12131 et seq.

<sup>46</sup> 42 U.S.C. § 12181 et seq.

## Appendix C

### Complaint resolution

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#### How to file a complaint

State law prohibits discrimination against a pupil because of the pupil's:

- sex
- race
- religion
- national origin (including a student whose primary language is not English)
- ancestry
- creed
- pregnancy
- marital or parental status
- sexual orientation
- physical, mental, emotional or learning disability

A pupil may not be excluded from a public school (pre-kindergarten through grade 12), or from any school activities or programs, or be denied any of the benefits of school activities or programs, or be treated in a different manner for any of these reasons.

Each public school district is required by law to have written policies that prohibit discrimination against pupils for any of the reasons listed above. Each district must also have some way for pupils, their parents or guardians, or residents of the school district to file complaints of discrimination. The school board must approve a procedure for filing complaints of discrimination. The complaint procedure must be in writing. And each school district must name an employee of the school district who will be responsible for receiving complaints of discrimination against pupils. Schools must include information about these policies and procedures in any handbooks they have for teachers, students and parents.

If you believe the school district has discriminated against your child, you may file a complaint with the school district. You may contact the school or district office and ask for copies of the pupil nondiscrimination policies and complaint procedure. To file a complaint, follow the directions in the school district's written complaint procedure. If you have questions about the procedure, you should ask who in the school district handles pupil discrimination complaints. Contact that person and ask that person to explain the complaint process to you.

In some cases, the complaint procedure will involve several steps. If you are not satisfied with the outcome of your complaint at the end of any step, you should go ahead to the next step, always following the instructions in the district's written complaint procedure. You should always file your complaint in writing. The school district must acknowledge your complaint within 45 days, in writing, and the final decision on your complaint must be made within 90 days.

If you have gone through all the steps of the school district's complaint procedure and you are not satisfied with the outcome, you may file an appeal with the Department of Public Instruction. Any appeal must be filed within 30 days of the date of the school district's final action on your complaint. The Department of Public Instruction may not consider your appeal unless you have gone through all the steps of the school district's complaint procedure and a final decision has been issued by the school district.

An appeal to the Department of Public Instruction should be in writing and signed, and should include the following information: the reason for the appeal; the facts that make you believe discrimination occurred; and the relief or outcome you are requesting if you are successful in your appeal. It is a good idea to include a copy of the school district's final decision or letter to you.

If the school district does not have a pupil discrimination complaint procedure, you may file a complaint directly with the Department of Public Instruction. The complaint should be in writing, signed, and should contain the same information that is required in an appeal: the reason for the complaint; the facts of the complaint; and the relief you are requesting. You may also file a complaint with the Department of Public Instruction if the school district does not make a decision on your complaint within 90 days. In most cases, if the school district has not made a final decision on your complaint within 90 days, the department will return the complaint to the school district to make a final decision. In an appeal, if the department determines the school district has acted in violation of the Wisconsin pupil nondiscrimination law, the superintendent can issue an order requiring the school district to comply with the law, and require that the school district develop and submit a corrective action plan to prevent further discrimination. The superintendent does not have the authority to award monetary relief, or impose or order discipline on teachers or school district staff.

For more information about Wisconsin's pupil nondiscrimination law, you may call the Department of Public Instruction, Pupil Nondiscrimination Program. The telephone number is (608) 267-9157.

If your complaint is about discrimination because of sex, disability, race, color, or national origin, you may also file a complaint with the Office for Civil Rights of the United States Department of Education. A complaint must be filed with the Office for Civil Rights within 180 days (about six months) of the date the discrimination occurred. You do not have to file a complaint with the school district before filing a complaint with the Office for Civil Rights, and you may file complaints with both the school district and the Office for Civil Rights if you wish to do so. The address and telephone number for the Office for Civil Rights for this region are:

Office for Civil Rights, Region V  
111 North Canal Street  
Chicago, IL 60606  
(312) 886-8434

If your complaint is about the special educational needs of a child, there is a different complaint and appeal process. For information about the IDEA complaint process, contact the Special Education Team at (608) 266-1068.

## Appendix D

### Sample discrimination complaint procedure

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(The following complaint procedure is offered as an example. The law does not prescribe any particular complaint procedure, the number of stages in a complaint procedure, or the progression through the stages. The complaint procedure is set by each local school board, and may involve one or several steps. The only requirements of the law are the following: the school district must designate an employee to receive complaints; the complaint procedure must be in writing and adopted by the school board; the school board must acknowledge the complaint in writing within 45 days; the final decision on the complaint must be made within 90 days and must be in writing; and the final decision must inform the complainant of the right to appeal to the state superintendent and explain the procedure for appealing.)

XXX School District

S. 118.13, Wis. Stats.

#### Pupil Discrimination Complaint Procedure

If any person believes that XXX School District or any part of the school organization has failed to follow the law and rules of s. 118.13, Wis. Stats., Title IX, Title VI, or in some way discriminates against pupils on the basis of sex, race, religion, color, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation, or physical, mental, emotional, or learning disability, he/she may bring or send a complaint to the Administration Office at the following address: XXX Drive, XXX, Wisconsin XXX. Prior to the submission of a formal written complaint, however, the district encourages resolution of complaints or concerns in an informal manner. The XXX School District will take complaints, concerns, or questions about discrimination or harassment seriously and address them as quickly as possible.

**Step 1** A written statement of the complaint shall be prepared by the complainant and signed. (Note: the district may have a complaint form that can be requested and which is treated as a formal written complaint when completed and submitted.) This complaint shall be presented to the district employee designated to receive complaints. That employee shall send written acknowledgment of receipt of the complaint within 45 days as required by Wis. Admin. Code PI 9.04.

**Step 2** A written determination resolving the complaint shall be made by the board or its designee within 90 days of receipt of the complaint unless the parties agree to an extension of time; appeals under 20 USC s. 1415 and ch. 115, Wis. Stats., relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education of a child with an exceptional educational need shall be resolved through the procedures authorized by ch. 115, subch. V, Wis. Stats.

**Step 3** If a complainant wishes to appeal a negative determination by the board, he/she has the right to appeal the decision to the state superintendent within 30 days of the board's decision. In addition, the complainant may appeal directly to the state

## Appendix D

### Sample discrimination complaint procedure

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superintendent if the board has not provided written acknowledgment within 45 days of receipt of the complaint or made a determination within 90 days of receipt of the written complaint. Appeals should be addressed to: Complaint Officer, Wisconsin Department of Public Instruction, P.O. Box 7841, Madison, Wisconsin 53707. This notification is made as required by Wis. Admin. Code PI 9.04(3).

**Step 4** Complaints of discrimination on the basis of sex, race, color, national origin, or disability may also be made to the U.S. Department of Education, Office for Civil Rights, 111 North Canal Street, Chicago, IL 60606.

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***Note:** The 118.13 complaint procedure does not apply to district employees or job applicants. Also, it does not replace the federal regulations that require a school district to have Title IX and Section 504 complaint procedures. A school district may adopt a single, combined complaint procedure as long as it satisfies each of the laws that requires a procedure.*

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## Student Interest Surveys

One of the basic implications of the Title IX law, regulations, and guidance and state law, regulations, and guidance regarding sex equity in athletics is that sports and athletic programs must effectively accommodate the interests and abilities of all students. This standard necessitates the development and application of data collection procedures. One of the primary methods for determining the interests of students is to conduct a survey of student interests at regular intervals.

Please take a minute to think about how a student interest survey should be designed and answer the following questions:

1. What types of information should be included in a student survey?
2. What do you believe would be the outcome of a student survey conducted in your schools?
3. What procedures should be used for its distribution?
4. How frequently should student interest surveys be conducted?

Physical activity personnel need to consider what should be included in a student survey, the procedures to be used for its distribution, the frequency of student interest surveys, and the ways that the information obtained may be integrated into existing programs.

A student survey form should include the following types of information:

- Identifying information: grade level and sex of student. This identifying information serves a number of important purposes, including assuring the accuracy and integrity of the survey. It is equally important that students be assured their responses will be confidential. Surveys should be designed so that the responses may not be traced back to individual respondents.
- Explanatory information: the purpose of the survey and how the information will be used.
- A system of ranking or rating specific sports activities: a listing of sports that students may rank or rate.
- Opportunity for suggesting other sports alternatives: space for listing possible interests that are not included in the listing should be provided.

## Appendix F

### Student interest surveys

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- Opportunity for comments: general questions regarding attitudes or other suggestions for sports programs would be desirable.

The procedures that are followed in the distribution of a student survey may influence the outcomes. It usually is wise to ensure distribution to every student at a time when students can provide their individual responses without undue peer pressure.

Student surveys should be conducted periodically as a means of identifying current needs and the changing patterns of student interest. Determination of the frequency of student surveys should be based on the frequency of significant change in the composition of the student body, the number of times that athletic programs are designed, and the feasibility of survey efforts. Completion of surveys on a regular basis will ensure the use of current data in program planning.

## Sample Student Athletic Interest Form

The purpose of this survey is to ensure that the total athletic program provides both males and females with an equal opportunity to benefit from athletic competition.

The degree of student interest or the lack of interest in athletic activities will be used to help determine what sports the district will offer. Every effort will be made to satisfy students' requests based on the interests recorded in this survey. Please note that cheerleading and spirit activities are not likely to be considered athletic activities.

Please answer each section carefully. Be sure that you rank the different sports that either you prefer to play or that you feel would satisfy your interests and abilities. One = 1, the highest rank

School \_\_\_\_\_

Grade	Date
Gender <input type="checkbox"/> Male <input type="checkbox"/> Female	Race/Ethnicity <i>Optional</i>

I. Athletic offerings that I have played and will continue to play: (Rank Order 1-6; 1 is the most preferred; 6 is the least preferred).

- |  |  |
|--|--|
| _____ Baseball<br>_____ Basketball<br>_____ Bowling<br>_____ Cross Country<br>_____ Football<br>_____ Golf<br>_____ Gymnastics<br>_____ Hockey<br>_____ Soccer | _____ Softball<br>_____ Swimming<br>_____ Tennis<br>_____ Track and Field<br>_____ Volleyball<br>_____ Wrestling<br>_____ Others: _____<br>_____ |
|--|--|

## Appendix G

### Sample student athletic interest form

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Comments:

- II. Athletics offerings that I have not played but would like to play: (Rank Order 1-6; 1 is the most preferred; 6 is the least preferred.)

_____	Archery	_____	Hockey
_____	Baseball	_____	Soccer
_____	Basketball	_____	Softball
_____	Bowling	_____	Swimming
_____	Boxing	_____	Tennis
_____	Cross Country	_____	Track and Field
_____	Fencing	_____	Volleyball
_____	Football	_____	Wrestling
_____	Golf	_____	Others: _____
_____	Gymnastics	_____	_____

Comments:

- III. The six top offerings that I am most interested in playing (sports may or may not be identified above)

1. _____	2. _____
3. _____	4. _____
5. _____	6. _____

IV. What do you like most about the sports program in your school?

V. How do you think the sports program could be improved?

## Appendix H

### OCR letter regarding cheer as sport

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UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS  
BANK ONE CENTER, SUITE 750  
600 SUPERIOR AVENUE, EAST  
CLEVELAND, OHIO 44114-2611

OCT 18 2001

Ms. Suzanne M. Martin  
Assistant Director  
Michigan High School Athletic Association  
1661 Ramblewood Drive  
East Lansing, Michigan 48823-7392

Dear Ms. Martin:

This letter is in response to your correspondence requesting our assistance in determining whether competitive cheer as operated in the state of Michigan may be considered a sport under Title IX. The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106. OCR is happy to provide technical assistance regarding compliance with Title IX so that organizations may conduct their own assessment of their programs. The Title IX implementing regulation states in relevant part: "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient . . . ." 34 C.F.R. § 106.41 (a).

Historically, OCR has followed the policy first announced in the September 1975 letter to Chief State School Officers, Superintendents of Local Educational Agencies, and College and University Presidents, which stated, in part, that ". . . drill teams, cheerleaders and the like, which are covered more generally as extracurricular activities . . . are not part of the institution's 'athletic program' within the meaning of the [Title IX] regulation. "Notwithstanding this general presumption, OCR's compliance approach is to assess each activity on a case-by-case basis. We take into account, just as you did in your assessment, the five factors and other relevant information identified in OCR's letter of April 11, 2000, to David Stead, Executive Director of the Minnesota State High School League (copy enclosed for your immediate reference).

In your letter, you assert that competitive cheerleading in Michigan "meets all reasonable criteria for a sport." In support of this conclusion, you submitted twelve exhibits along with your narrative description of competitive cheerleading in Michigan, including information about specific circumstances in certain schools. This material tends to support in several ways the characterization of MHSAA-sanctioned competitive cheerleading as a Title IX sport in that it specifies the season of sport, identifies the eligibility requirements and standardized judging criteria used by registered officials, notes the availability of some state and conference championships and scholarship monies, and certifies that this activity is recognized as a sport by MHSAA and interscholastic athletics conferences within Michigan.

In addition to the material you submitted, we recommend that, before you conclude that competitive cheerleading in the state of Michigan generally satisfies the Title IX standard for a sport, you look more closely at the actual operation of competitive cheerleading programs at your member schools and consider information from a broader selection of high school athletic programs. The following areas would be relevant for your consideration:

- **Relationship of competitive cheerleading to high school athletics departments and other sports:** If you intend that MHSAA-sponsored competitive cheer should be considered as a sport throughout the state, what information does your organization collect or maintain indicating that competitive cheer is generally administered by high school athletic offices in schools throughout the state,

other than the information you provided about the Michigan Center High School. Alternatively, if you contend that MHSAA-sponsored competitive cheer should be considered as a sport within and among certain school districts and not necessarily statewide, what information, other than that relating to the Michigan Center High School, supports that position? What information does your organization collect or maintain that demonstrates that competitive cheer is included within districts' athletics department budgets for uniforms, equipment, supplies, coaches' pay, and other support given by the districts to their interscholastic athletic teams?

- **Team selection, preparation, and competition:** You submitted information indicating that Michigan Center High School conducts try-outs for prospective competitive cheer team members. Included in your information is a statement that students must submit three teacher recommendations and a typed statement of purpose. What is the rationale for requiring teacher recommendations and a statement of purpose and are such items commonly required by all Michigan high schools with respect to selection for competitive cheer and other sports? Do these requirements at Michigan Center High School reflect a practice statewide of holding a single try-out/selection process for both competitive cheer and sideline cheer? What information do you collect or maintain regarding the selection process in other school districts? How do the prescribed minimum number and average number of opportunities for competition during the competitive cheer season compare with those prescribed in other sports? Do participants in competitive cheer have their own practice schedule, separate from participants in sideline cheer? Your letter identified that certain school districts in the state of Michigan participate in conference championships held by the Wolverine Conference of Southwest Lower Michigan and the Big 8 Southwestern Michigan Athletic Conference. Are there other conferences in which other school districts in the state participate?
- **Relationship between competitive and sideline cheerleading:** Does the MHSAA regulate sideline cheerleading? What are the similarities and differences between competitive cheer and sideline cheer competitive events? Are separate try-outs and practice sessions held for competitive and sideline cheer? To what extent has the National Federation of High School Associations Spirit Rules Book been adopted by the MHSAA and what is the purpose for its use?
- **Scholarships and recognition:** In your supporting documents you identified the eligibility requirements of competitive cheer participants for varsity letters and similar awards. Are these eligibility requirements applicable for districts other than those identified in the supporting documents?

The specific comments provided above are intended to assist you in identifying the information that we believe is pertinent in making your assessment of whether competitive cheer constitutes a sport for Title IX purposes. Once you have collected this information, we would be happy to provide further technical assistance. Please do not hesitate to contact me at (216) 522-4970 if you have any questions about this letter or if I may otherwise be of assistance.

Sincerely,

/s/

Harry A. Orris  
Director, Cleveland Office  
Midwestern Division