

# Athletics and Extracurriculars: The Top Student Issues



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## General Rule

- Schools should assure that students are given equal opportunities to participate in athletics and extracurricular activities.
  - Must make sure that its policies and practices do not disproportionately exclude/disparately treat specific student groups based on:
    - Disability;
    - Race;
    - Gender



## General Rule

- This includes a Public School District's duty to:
  - Accommodate Students with Disabilities in Athletics, Clubs, and Extracurricular Activities;
  - Assure that Female and Male Students have equivalent facilities and programs;
  - Address Transgender Student rights to participate in Athletics, Clubs and Extracurricular Activities.



## Eligibility of Students

- A student typically has 4 years of eligibility
- However, under section 135.4 of the Commissioner of Education regulations, a student may ask for a one year extension if student “failed to enter competition” based on circumstances beyond the control of the student.
  - The student’s failure to enter into competition during one or more seasons of a sport was caused by illness, accident, documented social/emotional condition or documented social/emotional circumstances beyond the control of the pupil;
  - As a direct result of such circumstances, the student is required to attend school for one or more additional semesters in order to graduate; and
  - Such participation would not have a significant adverse effect upon the opportunity of other pupils to participate successfully in interschool competition in the sport.



## Medical/Safety Concerns

- School is not required to allow student to participate on team if there are medical/safety concerns.
  - Medical clearance from private/school physician.
    - Make sure your policy procedures **REQUIRES** satisfactory clearance before participation and allows a mechanism for school to question clearance and/or seek a second opinion.
    - Use your school physician as a resource.



## Medical/Safety Concerns

- N.Y. Educ. Law 3208-a- Special Proceeding to Determine the Physical Capacity of a Student to Participate in Athletic Programs
  - Allowed to participate if in best interests of student, as “reasonably safe.”
  - Requires two physician affidavits, and school cannot be liable for injuries.
- If Student cannot safely participate in full competition, can consider alternative roles.



## Tryouts/Auditions

- Students with disabilities have the right to try-out or audition to the same extent as other students, although they may be entitled to accommodations/modifications during tryouts and auditions.
- A student with disability may be cut/excluded as long as the reasons for the decision are neutral, nondiscriminatory.
  - Based on the student's skills and abilities compared to others.
  - Students with disabilities are not entitled to receive preferential treatment.



# Tryouts/Auditions

- Best Practices:
  - Identify factors of assessment
  - Create a rubric where students are scored in individual areas
  - Cut players with the lowest scores
  - Accommodations/modifications cannot be factored into decision







## Reasonable Accommodations/Modifications

- Schools must provide “reasonable” accommodations that allow a disabled student an opportunity to participate in a sport.
- An accommodation may be denied if it is not “reasonable”, is not “necessary”, or would “fundamentally alter the nature of the sport.”
- PGA Tour v. Martin- is allowing Casey Martin to ride a cart instead of walk a fundamental alteration to the golf competition?



# Reasonable Accommodations/Modifications

- PGA Tour vs. Martin
  - Riding a cart instead of walking a golf course is not a fundamental alteration to the competition.
  - Essence of game of golf is “shot making.” Walking is not an “essential attribute of the game itself.”
  - Court denied PGA’s argument that fatigue was an element to the competition.
  - What would be a fundamental alteration?  
Enlarging the holes on the course



# Reasonable Accommodations/Modifications

- Under the Martin case, the following factors should be looked at in determining whether an accommodation fundamentally alters the competition:
  - Whether the accommodation alters an essential aspect of the game;
  - Based on an individual assessment of the player's disability and the components of the game/competition.



## Examples of Reasonable Accommodations

- Allow student to check glucose every 30 minutes
- Visual cues for start of track meet
- One hand touch to end swimming meet
- What is NOT reasonable- adding an extra base to a baseball game





## Duty to Assure Equal Facilities and Programs

- Under Title IX of the Education Amendments of 1972 (Title IX), educational programs and activities receiving federal financial assistance cannot discriminate against employees and students based on sex or pregnancy.
  - No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.



# Duty to Assure Equal Facilities and Programs

- The prohibition applies to an educational institution even if it has only one program that receives federal funds.
- Title IX requires public agencies to provide “equal athletic opportunity for members of both sexes.”
- The penalty for violating Title IX is loss of federal funding. In addition, compensatory damages and attorney's fees may be awarded to individual victims of sex discrimination.



# Duty to Assure Equal Facilities and Programs

- The law of Title IX with respect to the equal provision of athletic opportunities is complex and fact intensive. Regulators apply 3 factors:
  - Whether the participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
  - Where the members of one sex have been and are underrepresented among athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
  - Where the members of one sex are underrepresented among athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully accommodated by the present program.



## Other Athletic Benefits & Opportunities

- In addition to equal sports participation opportunities, Title IX protects students by requiring that schools also provide to the historically under-represented gender in athletics equivalence in the “other athletic benefits and opportunities” that accompany sports participation.
- The OCR evaluates compliance with this requirement using what it refers to internally as its “laundry list” – categories of benefits reflecting the quality of the sports offerings at a school:
  - Protective athletic equipment, uniforms and athletic supplies;
  - Locker rooms and practice/competition facilities;
  - Allocation of travel/transportation/per diem benefits;
  - Years of experience, compensation and quality of coaches;
  - Institutional housing and dining facilities and services;
  - Nature of publicity, marketing and media services;
  - Game and practice times and scheduling;
  - Facilities for and access to athletic training and medical services;
  - Academic tutoring services for student-athletes;
  - Institutional support services for athletic programs; and
  - Recruiting resources provided to athletic programs.





# Transgender Student Rights

- “NYSED is committed to providing all public school students, including transgender and nonconforming (“GNC”) students, with an environment free from discrimination and harassment, to fostering civility in public schools, and to ensure that every student has equal access to educational programs and activities.”



# Transgender Student Rights

- In *Bostock v. Clayton Co.* (2020), the U.S. Supreme Court concluded that Title IX protects transgender student from discrimination and harassment. See *eg. B. P. J. v W. Virginia State Bd. of Educ.*, 550 F Supp 3d 347 (SDW Va 2021).



# Transgender Students and Sports

- The New York State Public High School Athletic Association (“NYSPHSAA”) issued guidelines for schools on transgender students.
- The NYSPHSAA states that it recognizes the value of participation in interscholastic sports for all student athletes and is committed to providing all students with the opportunity to participate in NYSPHSAA activities in a manner consistent with their gender identity and the New York State Commissioner of Education’s Regulations.



# Transgender students and sports

- The NYSPHAA guidelines provide procedures for transgender students who would like to participate in sports:
  - The student and the parent(s)/guardian shall notify the Superintendent (or designee) that the student would like the opportunity to participate in interscholastic athletics consistent with the gender he/she identifies as.
  - The student's home school will determine the eligibility of a student seeking to participate in interscholastic athletics in a manner consistent with his/her gender identity where the student's gender identity does not correspond to his/her sex assigned at birth.
  - The Superintendent (or designee) will confirm the gender identity asserted for purposes of trying out for an interscholastic sports team through documentation from the parent, guardian, guidance counselor, or from a doctor, psychologist or other medical professional.
  - Once a member school has rendered a determination of eligibility to try out for an interscholastic sports team or teams which corresponds to the student's gender identity the eligibility is granted for the duration of the student's participation in interscholastic athletics. The student must meet all NYSPHSAA standards for eligibility for practice and competition.
  - The Athletic Director should notify the NYSPHSAA if any accommodations are needed.



# Transgender Student Rights

- Since 2020, 23 states have passed laws restricting transgender athletes' ability to participate in school sports in accordance with their gender identity.
  - The laws vary from state-to-state.
- In April, the U.S. House of Representatives passed HR 734, a federal bill that declares it is a "violation of Title IX" to "allow individuals of the male sex to participate in programs or activities that are designated for women or girls." It further stated that "sex shall be recognized based solely on a person's reproductive biology and genetics at birth."
  - HR 734 passed the House on a party-line vote but has not been taken up by the Senate and is unlikely to become law.
  - President Joe Biden has said that he would veto the bill.



# Transgender Student Rights

- Biden administration proposing new Title IX regulations that prohibit schools from enacting policies that “***categorically ban***” transgender student rights from participating in sports. However, the proposed rule would allow limits on the participation of transgender athletes when such limitation enables the school to achieve an “***important educational objective***, such as ***fairness in competition.***”



# Transgender Student Rights

- In *B.P.J. v. West Virginia State Board of Ed.*, a transgendered student sued the school's board of education, activities commission, and school superintendent for enforcing a state statute that required athletic teams be designated based on biological sex. The District Court held that the statute – and enforcement of it - violated the Equal Protection Clause and Title IX as applied to that student.
- In *Hecox v. Little*, with facts similar to BPJ, the court held that the Fairness in Women's Sports Act, discriminated against transgendered girls by barring their participation in women's sports teams.



# Transgender Student Rights

- *Soule v. Conn. Ass'n of Schools* (2d Cir. December 2023).
  - 4 cisgender female athletes in track filed a lawsuit seeking declaratory and injunctive relief against the athletic conference and its member school districts, alleging that the conference's policy of allowing athletic participation based on an individual's gender identity (not assigned at birth) constituted sex discrimination in violation of Title IX.
  - The Court ruled that the athletes have "**standing to sue**" under Title IX, and can potentially present a claim where they are entitled to monetary damages.
  - The female athletes competed in Track and were able to cite instances where they competed against and finished behind one or both of the transgender athletes who participated. The students allege that but for the transgender athlete's participation, they would have placed higher. This established that the plaintiffs were harmed by the policy.



# Questions?



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