

# A Practical Guide to Title IX (and Equal Protection)

From the State Association Perspective: Self-Evaluation

NFHS Summer Meeting – Chicago, IL  
Sunday, July 1, 2018  
8:15 a.m.

Stacy Schroeder, Associate Executive Director  
Missouri State High School Activities Association

# Title IX of the Educational Amendments of 1972:

- No person in the United States shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any **education programs or activity receiving federal financial assistance**.
- Federal Financial Assistance?
- Some yes, some no.

# Equal Protection:

- The Equal Protection Clause is part of the Fourteenth Amendment to the United States Constitution. The clause, which took effect in 1868, provides that no **state** shall deny to any person within its jurisdiction "the equal protection of the laws".
- State Actor?
- US Supreme Court says Yes, we are.

# State Associations:

- Do we have a responsibility for Equity?
- Yes
- Legal (FFA and/or State Actors)
- Moral (Providing great opportunities to ALL our kids)

# Increase in Girls Participation since Title IX:

1971-72: 294,015 girls and 3,666,917 boys participated in high school sports;  
**girls = 7.4% of participants**

2016-17: 3,400,297 girls and 4,563,238 boys participated in high school sports;  
**girls = 42.7% of participants**  
Total Participation = 7,963,535

# State Associations: Our Responsibilities For Equity?

13 Program Components of Title IX - good start

- 1 accommodation of interests/abilities (3 part test)
- 2 scholarships
- 3 equipment/supplies
- 4 game times/practice times
- 5 travel/per diem
- 6 tutoring
- 7 coaching
- 8 facilities
- 9 medical
- 10 housing/dining
- 11 publicity
- 12 support services
- 13 recruitment

# State Associations: Our Responsibilities For Equity

13 Program Components of Title IX - good start

- 1 accommodation of interests/abilities (3 part test)
- 2 **scholarships (college level)**
- 3 equipment/supplies
- 4 game times/practice times
- 5 travel/per diem
- 6 **tutoring (schools themselves)**
- 7 **coaching (schools themselves)**
- 8 facilities
- 9 medical
- 10 housing/dining
- 11 publicity
- 12 support services
- 13 **recruitment (college level)**

# State Associations: Our Responsibilities For Equity

- Program Components:
  - Equitable Sport / Activity offerings
  - Equity in Facilities (State Series)
  - Equity in Game Times (State Series)
  - Services / Equipment / Publicity (State Series)
  - Medical / Training Services (State Series)
  - Equity in Reimbursement (State Series)
- Unique Responsibilities:
  - Equity in Sport Seasons for boys / girls

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Boone County Courthouse, Columbia, Missouri | Photo Courtesy of Bob Crow

## National Case Summaries 1934 – 2017

Mallory V. Mayse, Legal Counsel  
Missouri State High School Activities Association  
Compiler, Editor

National Federation of State High School Associations  
April 2017

- Each State Association has a copy
- Compiled by Missouri Legal Counsel Mallory Mayse
- Great resource for your staff and legal counsel
- The “gender” category of cases is second only to “transfers” in total number

# **PARTICIPATION OFFERINGS**

- CHAMPIONSHIP SPORTS**
- OTHER SPORTS**
- ACTIVITIES**

# Participation Offerings - Missouri

Championship Sports Boys - 10		Championship Sports Girls - 11	
Cross Country	Tennis	Cross Country	Tennis
Basketball	Track and Field	Basketball	Track and Field
Golf	Football <sup>(2)</sup>	Golf	Volleyball
Soccer	Baseball	Soccer	Fall Softball <sup>(3)</sup>
Swimming/Diving		Swimming/Diving	Spring Softball <sup>(3)</sup>
Wrestling		Wrestling <sup>(1)</sup>	

Emerging Sports Co-Ed - 4	Emerging Sports Boys - 2	Emerging Sports Girls - 2
Bass Fishing, Bowling, Chess, Target Shooting	Volleyball, Water Polo	Field Hockey, Lacrosse

**Activities (all co-ed): Music, Speech, Scholar Bowl, Spirit**

# Case Summary 1: Participation Offerings

- Horner v. Kentucky HSAA (1994/2000) (6<sup>th</sup> Cir)
- 12 female students alleged violations of Title IX and Equal Protection due to not adding fast-pitch softball (slow-pitch was available).
- Equal Protection claim dismissed
- Association was held to be recipient of FFA
- No Title IX violation, no intent
- No relief, damages or attorney fees



# **FACILITIES FOR STATE EVENTS**

# Facilities for State Events - Missouri

Championship Sports Boys - 10		Championship Sports Girls - 11	
Cross Country	Soccer	Cross Country	Soccer
Basketball	Golf	Basketball	Golf
Wrestling	Football	Wrestling	Volleyball
Track and Field	Baseball	Track and Field	Fall Softball
Swimming/Diving		Swimming/Diving	Spring Softball
Tennis		Tennis	

- Red** = Championships run concurrently at same facility = **equitable facility**
- Green** = Same facility but in different season = **equitable facility**
- Purple** = Using different facilities even in common sports = must be very careful to provide equitable facilities in common sports AND overall

# Case Summary 2: Facilities

- Mason v. Minnesota SHSL (2004)(US District Ct)
- Alleged that administration of the girls' state ice hockey tournament is not substantially equal to its administration of the boys' state hockey tournament
- Title IX, Equal Protection Clause and Minnesota statutes
- Plaintiff's motion for preliminary injunction to force the League to hold the 2004 event at the boys venue (Xcel Energy Center) denied
- Defendant's motion for summary judgment was denied; case was to be placed on the next trial calendar.
- Conclusion: Case dismissed 9/28/04
- 2005 event at same venues; moved to Xcel in 2006



# **SPORT SEASONS**

# Placement of Sports in Seasons

TWO areas of review:

- Equitable **opportunities** each season
- Equitable season placement for sports
  - Traditional season
  - Non-traditional season
  - What is the traditional season?
  - Court: B/G should be equally advantaged/disadvantaged

# Sport Seasons - Missouri - Numerical

Season	Boys	Girls
Fall (4/5)	Cross Country	Cross Country
	Football	Volleyball
	Swimming/Diving	Fall Softball
	Soccer	Golf
		Tennis
Winter (2/3)	Basketball	Basketball
	Wrestling	Wrestling
		Swimming/Diving
Spring (4/3)	Baseball	Spring Softball
	Track and Field	Track and Field
	Golf	Soccer
	Tennis	

# Case Summary 3: Sport Seasons

- Communities for Equity v. Michigan HSAA (6<sup>th</sup> Cir.)
- Began in June of 1998 (ended 2007)
- Plaintiffs sought injunctive relief under Title IX and EP, requiring male and female sports to be played in the same season or to schedule equal numbers of boys and girls sports in advantageous seasons. Court equated advantageous with college level seasons.
- Title IX and EP violations were found after multiple appeals and review by US Supreme Court
- Compliance plan required
- 2007-08 Michigan rearranged sports seasons

# Case Summary 4: Sport Seasons

- Vawter vs. Missouri SHSAA (2016) (US Dist Ct)
- Plaintiffs alleged discriminatory treatment of female softball players under Title IX and EP, due to restrictions on attending recruiting camps during the fall softball season (nontraditional).
- TRO was granted but was moot when team lost game allowing attendance outside of season.
- MSHSAA proposed new by-law allowances for attendance at events sponsored specifically by colleges/universities during HS season
- By-Law Changes passed

# Sport Seasons - Missouri

Traditional/Advantageous vs. Non-Traditional/Disadvantageous

Season	Boys	Girls
Fall	Cross Country	Cross Country
	Football	Volleyball
	Swimming/Diving	Fall Softball
	Soccer	Golf*
		Tennis
Winter	Basketball	Basketball
	Wrestling	Wrestling
		Swimming/Diving
Spring	Baseball	Spring Softball
	Track and Field	Track and Field
	Golf*	Soccer
	Tennis	

Green = traditional/advantageous season

Red = non-traditional/disadvantageous

Golf\* - traditional season (spring) was deemed disadvantageous

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# Closing Thoughts - Areas of Review

- Check your length of seasons for B/G sports held in *different* seasons -same weeks, or defensible.
- Review your state series reimbursement schedule (travel/lodging/meals) to make sure compensation is equitable & is not connected to revenue generation
- Look at your by-laws on boys and girls participation and cross-check with your transgender policy. Can boys play on girls teams? Can girls play on boys teams? Exceptions?
- Re-check as your programs expand
- Re-check as you send new RFP's for facilities

Thank you for your attention.

Questions?

# Equity in Game Times

- Prime Time Play - equitable scheduling
- OCR Key Factor:
  - The day and time of day competitive events are scheduled for boys and girls should be equitable
- Think GLOBALLY, but can compare common sports
- Game Times for boys and girls should be:
  - Equivalently convenient to students and coaches
    - Missing school / missing classes / Leaving early
  - Conducive to audience attendance
    - Equivalently convenient to parents, friends, community
    - School day vs. non-school day
    - During work hours vs. outside of work hours
    - Taking travel into consideration

# Equity in Game Times

- Missouri
- Basketball Example - annual rotation of times
- Sectional, quarterfinal, state game times
  - Girls and Boys play at common site
  - Rotated every year
  - 2016-17 Boys preceded Girls
  - 2017-18 Girls preceded Boys
- Tough one - differing opinions
- Only way to treat both equitably is to rotate
- XC and Track handled similarly

# Case Summary 5: Game Times

- Parker v. Indiana HSAA (2010)(US District Ct)
- School districts sued with state office
- Alleged violation of Title IX and EPC
- Boys varsity basketball games were scheduled more often on the “preferred Friday and Saturday nights than were girls games.”
- Regular season schedules of their schools not state events.
- IHSAA - Title IX claim dismissed -not recipient of FFA; Ultimately the EP claim was dismissed.



# KHSAA TITLE IX UPDATE

Kentucky High School  
Athletic Association



Presenter

Darren Bilberry, Assistant Commissioner  
Kentucky High School Athletic Association

# Online Roster Requirements

- KHSAA online system only, no other form will substitute
- No one can play in a game
- Reminder that per Bylaw 14, not eligible to play in games, not eligible to practice if coming into the school under Bylaws 6, 7 or 8 (transfer, foreign exchange or foreign student)
- School decides who edits rosters. Must work cooperatively with AD or Principal in getting assigned rights, or having them do the editing
- New format of roster has fourth level (postseason) so that roster manipulation at end of season doesn't cause inconsistencies in yearly reporting



# Title IX: What is it?

Title IX is the portion of the Education Amendments of 1972 that prohibits sex discrimination in educational institutions that receive federal funds, either directly or indirectly. In brief, Title IX states that:

*“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”*



# KHSAA Membership Criteria

- *Duties of the KHSAA in managing high school athletics are set forth in 702 KAR 7:065. The regulation includes the following: “As a condition present to membership, require each member school and superintendent to annually submit a written certification of compliance with 20 USD Section 1681-83 (Title IX)”*
- *The Annual Membership Application includes this wording and is verified by the principal of each KHSAA member school on this form.*



# KHSAA Role-Title IX Enforcement

*Title IX is the portion of the Education Amendments of 1972 that prohibits sex discrimination in educational institutions that receive federal funds, either directly or indirectly. Is not an enforcement agency in regards to Title IX*

- KHSAA Does not determine whether or not a school is in violation
- KHSAA Reserves the right to report to local district or the Office of Civil Rights
- KHSAA Title IX complaints should be directed to the local school district or the Office of Civil Rights
- KHSAA Title IX Complaints received by the KHSAA will be forwarded to the school principal, Title IX Coordinator and District Title IX Coordinator



# Title IX Historical Information

KHSAA Staff maintains a repository of information on the KHSAA website including:

- All past Annual Title IX Repots
- All past Field Audit Visit Reports
- Annual Title IX Workshops and other consultation as requested or required
- Annual audit re-visit schedule for selected schools
- Pertinent information from the office of civil rights



# Annual Reporting to KBE

*KHSAA Staff reports to the Kentucky Board of Education on the Status of the prior year revisit summary for KHSAA Member Schools*

- Observations of disparities and areas of concern to be addressed
- Observed deficiencies and timeline for improvements by the school
- Penalties assessed for non-submission of reports



# Steps for Monitoring Title IX Compliance - GERC

- Each KHSAA Member school shall form a Gender Equity Review Committee *that shall meet a minimum of three times per year*
  - Follow suggested guidelines for committee makeup
  - Minutes shall be kept and on file for each meeting.



# STEPS FOR MONITORING TITLE IX COMPLIANCE-GERC

- Each KHSAA Member school shall form a Gender Equity Review Committee *that shall meet a minimum of three times per year*
  - Committee Shall Monitor Title IX Action Plans
    - Include Timetable for improvements
    - Develop a current year improvement plan and review previous action plans to ensure implementation deadlines are being met
  - Using prior Annual Reports, conduct an Internal Self-Audit. KHSAA Resources are available to assist



# STEPS FOR MONITORING TITLE IX COMPLIANCE-GERC

- Committee Make-up
  - Include District Title IX Coordinator
  - Include High School Title IX Coordinator
  - Include school personnel, student athletes and bookkeeper
  - Emphasize diversity – especially with student athletes
  - Include booster club members
  - Verified via GE19 form (first page of Title IX report)



# Booster Clubs - FAQ

- Athletic Administrators should have copy of, and must adhere to the KDE Red Book, available on KDE website at <http://goo.gl/ZpvEKT>
- A sample booster club agreement is on the KHSAA Title IX website <http://goo.gl/SQeHQb>
- It is strongly recommended that schools have only one booster club under direct control of the school



# Title IX Framework

Title IX has two basic provisions:

- Opportunities to become participants
- Benefits or treatment of participants



# Title IX Framework - Opportunities

## Participation Offerings – The Three Prong Test

- Substantial Proportionality or
- History & Continuing Practice of Program Expansion or
- Full & Effective Accommodation Of Athletic Interests



# T1 ONLINE FORM

## Substantial Proportionality



# Internal Analysis Summary

Percentage of participation is within a certain percentage of the underrepresented sex.



# T2 Online Form

History and Continuing  
Practice of Program Expansion



# Internal Analysis Summary

Gauge how many participation opportunities you have created over the past five years.

Demonstrate that you have increased participation opportunities by 25% by adding new teams.



# T3 Online Forms

Full and Effective Accommodation  
of Student Interest



# T61 SURVEY

- Required every other year 2017-2018 *is* a survey year for all schools
- 80% response rate required, including 8<sup>th</sup> graders from direct feeder school(s); enrollment number taken from the 2<sup>nd</sup> Month Report
- Grades 9-11
- If using the KHSAA T61 paper survey, or if you are creating your own electronic survey based on the T61 paper survey, make certain to use the latest version (<http://www.khsaa.org/forms/t61.pdf>);



# Internal Analysis Summary

Analyze survey results to determine feasibility of adding new sports offerings based upon student responses.



# Title IX Framework: Benefits

- Equipment and Supplies
- Scheduling of Games and Practice Times
- Travel and Per Diem
- Coaching
- Locker Rooms, Practice and Competitive Facilities
- Medical and Training Facilities and Services
- Publicity
- Support Services



# T35 Online Forms

All Expenditures From the Previous School Year

Money Spent *Versus* Money Raised

The Cost of All Benefits



# PREPARING FOR A TITLE IX RE-VISIT

- Each summer, near the start of school, a list of that year's schools will be posted
- You will be contacted by KHSAA field staff several weeks in advance to confirm schedule
- Visits are scheduled by rotation, however adjustments might be made following review of annual reports
- Schools will almost automatically be revisited if failing to meet one of three prong tests

# PRIOR TO YOUR VISIT

- Review the following Items and have them available:
  - Annual Reports from the last five (5) years
  - Meeting minutes from your Gender Equity Committee of the past three (3) years
  - All previous Title IX school visit and re-visit reports
  - Any written letters, communications regarding Title IX complaints



## 11:00 – 11:45, ITEMS TO HAVE AVAILABLE FOR REVIEW AND DISCUSSION

- Sample uniforms for each varsity team including warm-ups, travel uniforms, practice gear
- A copy of your athletic facility emergency action plans per KRS 160.445
- A uniform review, rotation, and/or replacement plan that shows a full cycle for each sponsored team
- Most recent game schedules for all school sponsored teams --- also to include any media guides, game programs, seasonal schedule cards and/or posters



## 11:00 – 11:45, ITEMS TO HAVE AVAILABLE FOR REVIEW AND DISCUSSION

- Extra service pay schedule for all coaches
- Facility usage guideline / schedules for any and all shared practice and competitive facilities. \*(gymnasium, weight room, outdoor fields, hitting facilities), \*post at site
- Written guideline/regulations regarding the provision of athletic travel and per diem. (bus, van, charter / food, hotel for overnight stay, etc.)



## **11:00 – 11:45, ITEMS TO HAVE AVAILABLE FOR REVIEW AND DISCUSSION**

- Written guidelines / regulations regarding awards and recognition. (banner display, banquets, school awards, team awards, etc.)
- Written designation of locker room space assignment for all teams (include off-campus sites ie. golf, swimming, etc.)
- Written designation of athletic equipment storage space assignment for all teams.
- Current list of your Gender Equity Review Committee Members



## 11:00 – 11:45, ITEMS TO HAVE AVAILABLE FOR REVIEW AND DISCUSSION

- If applicable, include your school athletic handbook and any written / signed booster club agreements.



# 11:45 AM – 1:00 PM

## GUIDED TOUR OF ATHLETIC FACILITIES

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- Locker room spaces
- Practice and competitive areas
- Storage areas
- Coaches offices
- Any other area as utilized by student athletes





## 1:00 PM – 2:00 PM SELECTED INTERVIEWS

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- One male and one female student athlete (preferably from your Committee)
- Two (2) head coaches of female teams
- Principal, School Title IX Coordinator, District Title IX Coordinator (must be 2 of 3 in attendance)



**2:00 PM - 3:00 PM**  
**GENDER EQUITY REVIEW**  
**COMMITTEE MEETING**

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- Individuals already interviewed are invited but not required to attend
- Presentation of information from the Audit Team to the Committee





## **3:00 PM – 4:00 PM PUBLIC COMMENT SESSION**

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- School obligation to publicize this locally including proper location on school property

# ?? REVISIT POSSIBLE QUESTIONS ??

- What is the process for selection in a school being re-visited? How does a school get on the 'list'?
- What should I pay attention to when I receive the report back from the KHSAA
- What is the follow-up that I should do after I receive my written report?