



November 30, 2015

## SPORTS EQUITY ACT RELATED RECORD KEEPING AND TRANSPARENCY REQUIREMENTS (SB 1349)

Effective January 1, 2015, Section 221.9 was added to the Sex Equity in Education Act, Education Code sections 221.5 - 231.5. The legislation has created new sports equity record keeping and transparency related obligations which commence this school year. Advocacy organizations are ready to investigate schools for compliance.

*Is Your School Affected by the New Legislation?* The new legislation imposes record keeping and disclosure obligations on primary and secondary public schools, including charter schools, which offer sporting activities that involve: (i) coaches; (ii) a governing organization (such as CIF or SCMAF); (iii) practices; (iv) competition during a defined season; and (v) has competition as its primary goal.

*Why Does the Legislature Believe These New Rules Are Necessary?* Although, since Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964 was enacted, the opportunities for female students to participate in athletics at school have increased, studies show that female athletes still have fewer participation opportunities than their male counterparts. The gap is worse in urban schools and among students from low-income families.

*What Are the Obligations Imposed by Education Code Section 221.9?* The following information must be made available to the general public by the end of the school year:

- (1) The total enrollment of the school, dis-aggregated by gender;
- (2) The number of pupils enrolled at the school who participate in competitive athletics dis-aggregated by gender.
- (3) The number of boys and girls teams, classified by sport and by competition level.

In compiling this data, schools must use the total number of players on a team roster on the official first day of competition.

The school must post the information on the school's website or if the school does not maintain a website, by submitting it to the district office which shall, in turn, post the information on the district website. The records used by the school to compile the required data must be retained for at least three years after the information is posted on the school website.

*Course of Action if the Data Demonstrates a Disparity.* If the ratio of participation by girls in athletics in relation to the total enrollment of girls at the school is smaller than the corresponding ratio of boy athletes to the total enrollment of boys, then the school may be out of compliance with the substantial proportionality requirement of Title IX. The Ninth Circuit Court of Appeals has recently held that a 6.7 percent disparity, which at the subject school was the numerical equivalent of 47 girls, was discriminatory and non-compliant with Title IX. The California Department of Education (CDE) has said that a gap of 62 girls would likely preclude a finding of substantial proportionality, but that a gap of six girls would likely not. (*Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843 at 857 (9th Cir. Cal. 2014).) The Ninth Circuit includes California.

Also, the Ninth Circuit has explained that when making the substantial proportionality determination, the entire school's sports program for girls is compared to the school's sports program for boys. That means a school is not required to offer identical sports for each gender. Rather, boys and girls may participate in different sports according to their respective interests and abilities. In making the calculation though, unfilled slots on the roster of the girls and boys teams are disregarded and only the actual number of individual athletes is counted. (*Id.* at 855.)

The Court has emphasized that exact proportionality is not required. There is not an exact number of athletes at which substantial proportionality is achieved. Rather, substantial proportionality is determined on a case-by-case bases in light of each school's specific circumstances and the size of its athletic program. A general rule is that there is substantial proportionality if the number of additional participants required for exact proportionality would not be sufficient to sustain a viable team. (*Id.* at 856.)

Non-compliance with the substantial proportionality requirement of Title IX can expose a school district to: (i) a compliance complaint investigated by the CDE; (ii) a discrimination complaint investigated by the U.S. Department of Education, Office for Civil Rights (OCR); and/or (iii) a civil action seeking money damages or declaratory/injunctive relief plus reimbursement of attorney's fees.

Although liability carriers typically defend school districts against civil actions for money damages, legal representation in actions involving solely declaratory/injunctive relief or a CDE/OCR investigation is typically outside the scope of coverage. Such cases, however, may still be expensive.

CDE/OCR imposed remedies, as well as an award of declaratory/injunctive relief, may require a school district to spend substantial funds toward remedying the disparity. For example, a school district could be required to construct new facilities and hire additional personnel. In addition, the corresponding attorney's fee award in an injunction case may be substantial as well.

In cases where a disparity is apparent, a non-compliance finding can be avoided by demonstrating that the subject school has a history and continuing practice of expanding the participation opportunities for girls and that the expansion is responsive to the developing interests and abilities of the girls at the school. Alternatively, a non-compliance finding may be avoided by demonstrating that the interests and abilities of the girls at the school have been fully and effectively accommodated by their present existing athletic programs. (*Id.* at 854 - 859.)

When determining whether or not a school has a practice of expanding participation opportunities responsive to the interests and abilities of girls, an increase in the number of girls' sports teams over the years is disregarded. Rather, it is the increase in the number of actual individual female athletes over the past four years which is counted. Title IX requires an upward trend line. (*Id.* at 857.)

When determining whether the interests and abilities of the girls at the school have been fully and effectively accommodated, the school must administer periodic surveys designed to gauge the interests of female athletics. A circumstance in which a sport with a viable team is cut from the program may result in a conclusive ruling against the school unless there is strong evidence that interest in the sport has waned. (*Id.* at 858.)

Recommendation. Rather than wait to the end of the 2015-2016 school year to identify whether or not a disparity exists, review the data for the 2014-2015 school year and, if a disparity exists, initiate corrective action so that the 2015-2016 data shows improvement. If the corrective action does not eliminate the disparity to the extent that there is substantial proportionality between boys and girls athletic activities, then it may at least show a continuing practice of expanding the participation opportunities for girls.

If you have any questions concerning this or related issues, do not hesitate to contact our office.

– Alan B. Harris

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