

Risk Managers & Transgender Athletes: Title IX: Compliance and Enforcement

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Abstract

Risk management is the process of analysis, identification, assessment, control, and avoidance, of unacceptable risks. Risk managers for sport organizations, schools, and universities must be well-versed in the legal requirements found in current and past case law in understanding the impact Title IX will have on their risk assessment process. With society constantly evolving, risk managers rely more than ever on the legal analysis determined by specific cases. The issue of transgender identity is a novel one for risk managers as the issue has only been brought to their attention in the last few years. Currently, no formal and definitive guideline has been established as to whether transgender athletes will be afforded the same gender protections as women athletes. Transgender athletes have not been the subject of a court decision as society is still focused on the political side of the issue. The present analysis examines the history of Title IX as it pertains to sexual discrimination and the consequences for failing to remain in compliance with its guidelines and policies. Title IX was passed nearly half a century ago and the guidelines and policies regarding equality for women under the Act are constantly changing. The transgender issue and sexual discrimination could face the same scrutiny and analysis before a final interpretation and formal policy is established. Risk managers must be guided by past litigation while keeping an eye on the future to help them establish policies of protection from sexual discrimination for transgender athletes to ensure their assessments and plans are sufficient to avoid violations of Title IX.

Risk management on the issue of discrimination for colleges and universities changed dramatically in 1972 with the passage of Title IX of the Educational Amendments of 1972. This landmark legislation bans sex discrimination in academics and athletics at any educational institution that receives federal assistance. Title IX states:

"No person in the U.S. shall, on the basis of sex be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal aid." (Curtis)

Title IX regulates two major areas regarding sexual discrimination namely, sexual discrimination as to an individual and sexual discrimination as to equality in athletics. The personal discrimination portion of Title IX led to much confusion since its enactment because individuals already had other means by which to bring claims of sexual discrimination against their employers. The options before Title IX included claims under Title VII of the Civil Rights Act of 1964, section 1983 of Title 42 of the U.S. Code, part of the Civil Rights Act of 1871 and common law tort claims under state regulations. The multitude of options for litigants has caused risk managers to be unprepared when facing sexual discrimination claims. A brief look at these regulations reveals the protections available to sexual discrimination victims.

The Civil Rights Act of 1964 was the first federal statute which addressed sexual discrimination and sexual harassment and presented the following definition:

“Harassment on the basis of sex when such conduct has the purpose or effect of substantially interfering with a person’s work performance or creating an intimidating, hostile or offensive work environment.” (Civil Rights Act (1964). (n.d.)

The most important piece of legislation that came out of the CRA of 1964 was the creation of the Equal Employment Opportunity Commission (EEOC). The EEOC set forth a more detailed description of sexual harassment and sexual discrimination to include the following actions as being a violation of an employee’s rights: unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. More significantly, the EEOC further provided the employer with information about how sexual discrimination would be viewed in the workplace.

Meanwhile, section 1983 provides:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” (42 U.S.C. § 1983 - U.S. Code Title 42)

Finally, most states have adopted a law against discrimination which patterns itself after the federal laws and regulations. Due to the similarities and differences of these laws, risk managers understandably required direction on how to avoid sexual discrimination claims and equally as important be prepared to have the resources necessary in the event of a successful claim against their organization.

Both Title IX and Title VII of the Civil Rights Act of 1964 prohibit employment discrimination on the basis of sex. Under Title IX, an individual need not file a complaint with the Equal Employment Opportunity Commission as is required under Title VII. When individuals bring discrimination suits under Title IX, they may sue for punitive damages and demand jury trials. Risk managers need to be aware that generally, juries grant larger damage awards than judges. This means that settlements are preferable before trial although this will of course increase the amounts of settlements.

Title IX claims have many similarities to tort claims but risk managers must be aware of some important distinctions. First, a Title IX claim can be filed along with a state tort claim. Title IX claims have limits on the amount of monetary damages (except when punitive damages are alleged and awarded) whereas damages are not limited in tort actions. The choice of defendant is also an important distinction. In Title IX cases the school/employer is normally the sole defendant, while in tort claims the individual harasser is usually named as well. Employees may be more likely to file tort claims because of the limitations placed on monetary damages under the Civil Rights Act. Finally, Title IX does not protect visitors, invitees or outside vendors. Those victims would need the protection of state anti-discrimination laws to file tort claims. Only students and employees are protected under Title IX.

Assistance from the Supreme Court helped to clarify distinctions between Title IX and section 1983. The first such case, Fitzgerald v. Barnstable School Committee, was decided in 2009. In his opinion, Justice Samuel Alito gave attorneys, institutions and claimants a precise breakdown of the differences between Title IX and section 1983. Fitzgerald v. Barnstable School Comm. 555 U.S. 246 (2009). (n.d.) The Court found that lawsuits filed under Title IX could also include claims of civil-rights violations under Section 1983, which enforces the equal-protection clause of the 14th Amendment to the Constitution. Fitzgerald v. Barnstable School Comm. 555 U.S. 246 (2009). (n.d.) Justice Alito opined that the two statutes were not mutually exclusive because each offers different protections and penalties. Fitzgerald v. Barnstable School Comm. 555 U.S. 246 (2009). (n.d.). Claims under Section 1983 can be filed against individuals, for example, while Title IX lawsuits can be filed only against institutions. “Because Title IX’s protections are narrower in some respects and broader in others than those guaranteed under the equal-protection clause, the court cannot agree with the First Circuit that Congress saw Title IX as the sole means of correcting unconstitutional gender discrimination in schools”. (Fitzgerald v. Barnstable School Comm. 555 U.S. 246 (2009). (n.d.)

The protections offered claimants under these four avenues of litigation all have important differences which can allow for multiple claims for the same incident. The damages are also distinctive, meaning that one claim if brought under all four counts could lead to some very expensive and embarrassing judgments against the institution involved. The laws surrounding sexual discrimination at schools and universities have developed into legal complexities that the alert risk manager will need to study and comprehend in order to protect his employer from significant damages and loss of reputation.

Effective risk management must take into account steps to prevent Title IX claims in the workplace. An efficient administrator and athletic director will develop risk management strategies to prevent harassment claims under Title IX. Some examples of these strategies include:

1. Develop a complete understanding of Title IX and state anti-discrimination laws and regulations;
2. Keep abreast of current court decisions related to Title IX and gender equity;
3. Develop and implement Title IX policy and procedures;
4. Develop sexual harassment Title IX complaint procedures for students, teachers, and staff;
5. Monitor Title IX compliance efforts and make recommendations for any appropriate changes; and
6. Provide in-service training to help teachers, staff, and students understand the policies and procedures. (www.womenssportsfoundation.org)

A properly prepared risk manager will develop a strategy using the suggested risk management plan referenced above to handle compliance under Title IX to protect against sexual discrimination claims.

As indicated earlier, Title IX does not just regulate individual sexual discrimination but also, discrimination in athletics. These areas range from participation numbers to the quality of available coaching. The three basic parts of Title IX as it applies to athletics include:

1. Participation: requires that women be provided an equitable opportunity to participate in sports as men (not necessarily the identical sports but an equal opportunity to play).
2. Scholarships: requires that female athletes receive athletic scholarship dollars proportional to their participation (e.g., if there are 100 male athletes/100 female athletes and a \$200,000 scholarship budget, then the budget must be split \$100,000 to men/\$100,000 to women).
3. Other Benefits: requires equal treatment in the provision of (1) equipment and supplies, (2) scheduling of games and practice times, (3) travel and daily allowance, (4) access to tutoring, (5) coaching, (6) locker rooms, (7) practice and competitive facilities, (8) medical and training facilities and services, (9) publicity and promotions, (10) recruitment of student athletes, and (11) support services. (<http://www.womenssportsfoundation.org>)

Due to the gender equal requirements under the Act, schools and universities faced many claims upon the enactment of Title IX because too many variables and uncertainties existed about compliance with Title IX and its enforcement. Typical of most legislation, the courts were charged with interpreting the law and providing guidelines as to enforcement and compliance. Since its passage, the Supreme Court has decided many landmark cases to help shape and interpret Title IX into its current form. Ironically, the Act was almost deemed ineffective before it even got off the ground. In Grove City vs. Bell (1978), the Supreme Court removed the applicability of Title IX in athletics programs by stating that only those programs or activities which receive direct Federal financial assistance be held under the umbrella of Title IX. (Grove City Coll. v. Bell 465 U.S. 555 (1984). (n.d.) The effect of this decision was to curtail the multitude of claims filed against schools alleging Title IX violations in athletics. (Grove City Coll. v. Bell 465 U.S. 555 (1984). (n.d.) Not until the passage of the 1988 Civil Rights Restoration Act was the effectiveness and potency of Title IX restored. In the 1988 Act, the legislature overrode Grove City by mandating that all educational institutions which receive any type of Federal financial assistance, whether it is direct or indirect, be bound by Title IX legislation. (Tungate) This Act forced risk managers and their schools to be more aware of the violations and consequences posed by the law.

Many seminal cases were decided following the 1988 Act. The first case of significant impact was Cohen v. Brown University. In this case, Brown University, in an effort to reduce expenses, downgraded two men's and two women's varsity programs to club status. The move affected 37 men and 23 women. Nine women from the women's gymnastics and volleyball teams sued the University citing Title IX violations.

In its defense, Brown argued that its athletic program "fully and effectively accommodated the interests and abilities" of its students and provided gender-equal opportunities and therefore, was in compliance with Title IX. The Court, however, focused on the disparities between gender ratios in the student population and in the athlete population and between funding for men's and women's programs. The Court ruled against Brown and required the University to comply with a court-approved Title IX corrective action plan and pay out a half of a million dollars in legal fees. (Tungate). The Brown decision impressed upon other schools the real risks and exposures non-compliance with Title IX could bring. The fear of losing Title IX claims and being forced into corrective action plans while paying out large sums of monies to attorneys and litigants required risk managers at schools and universities to begin to take these claims seriously.

In Franklin v. Gwinnett County Public Schools, (1992), the Supreme Court found that plaintiff's filing Title IX lawsuits are entitled to receive punitive damages when intentional action to avoid Title IX compliance is established. Franklin established the damages portion of Title IX and changed forever the landscape of Title IX lawsuits. Now the schools and universities needed to be concerned about the amount of damages that could be awarded if found to be non-compliant with Title IX. (Tungate)

Meanwhile in a case that seemed to support critics of Title IX that gender equality was focused solely on women's rights, the Appellate Division in Neil v. Board of Trustees (1999) held that reducing the number of positions available on men's athletic teams in order to save money and promote participation by women is not a violation of any Title IX provisions against gender discrimination in sport. (Neal v. Board of Trustees of California State Universities 189 F.3d 763, (Cal. 1999) (n.d.).

A decision that seemed to fly in the face of Title IX protection was made in O'Connor v. Board of Education. Here, the Supreme Court determined that denying a female athlete the right to try-out for an all-boys sport is reasonable and not unconstitutional simply because it might appear arbitrary. The Court reasoned that "without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events". (O'Connor v. Board of Education 449 U.S. 1301 (1980). (n.d.)

The Smith v. NCAA case expanded the scope of protection under Title IX when the Court held that an NCAA rule prohibiting student-athletes from competing in intercollegiate sports while enrolled at a graduate institution other than their undergraduate school was an anti-trust violation, Title IX discrimination, and breach of contract. (R. M. Smith Appellant, v. National Collegiate Athletic Association, 266 F.3d 152 (3d Cir. 1997). (n.d.)

With these cases and decisions by the Supreme Court, risk management in athletic departments must remain diligent in receiving and implementing the most recent and relevant court decisions in the area of Title IX. Otherwise, policies implemented will fall short of the what is required to protect the employees and athletes and what is required to remain in compliance under Title IX.

When an individual sues and receives a jury trial under Title IX, the school faces risks similar to those in discrimination cases under Title VII of the Civil Rights Act of 1964. As a result, sports programs are frequently the targets of complaints filed with the Office of Civil Rights (OCR). The OCR has instituted an investigatory process for determining if schools are in compliance with Title IX. First, the OCR investigates whether there is gender balance in the entire athletic program as opposed to looking at the individual sports. The reason for this is that naturally certain sports (football) are dominated by one gender; however, the Act is in place to observe that the athletic program as a whole offers opportunities to both men and women in proportion to their numbers in the school. (Yuracko)

The problem for most administrators today is that society continues to change and evolve requiring a continued interpretation of the definition of sexual discrimination. The cases cited above do not and could not address the issue of gender identity as that concern was not prevalent at the time of those court decisions. In 1972, sexual discrimination issues focused primarily on male and female athletes. Today, administrators must also be aware of issues surrounding the LGBT community. LGBT is shorthand for lesbian, gay, bisexual and transgender. (www.apa.org/topics/lgbt) (n.d.) Whereas, the LGB refers to sexual orientation, the "T" in LGBT stands for transgender or gender non-conforming, and is an umbrella term for people whose gender identity or gender expression does not conform to that typically associated with the sex to which they were assigned at birth. (www.apa.org/topics/lgbt) (n.d.)

The issue of transgender athletes and their ability to participate in high school and college athletics has only recently begun to come to the attention of society and the sports community. Issues surrounding fairness, equality, identity, and competition must now be considered in relationship to the Title IX rules, regulations, and court cases set forth previously herein. Answers to the questions regarding the intent of the crafters of the Title IX legislation need to be analyzed further in respect to transgender identity and the athletes. These answers are critical because athletic programs and facilities will be required to adapt to the transgender community, similarly to the adaptations made in the early years following the passage of Title IX. Programs will need to make adjustments on rosters to find a proper balance between compliance and competition, while facilities will need to be transformed to include new restroom accommodations amongst other potential costly changes. The transgender community deserves answers as do the risk managers and administrators that are charged with compliance under Title IX. Usually answers to such questions are found in the legal system as noted above. However, the transgender identity issue has become politicized causing sides to be taken even before a court decision is made. This uncertainty in wondering which way the political winds will blow is not conducive for risk managers to create effective and legal policy for transgender identity athletes and employees.

Politically, the transgender community has been bounced around between the two major parties in the United States. Under President Barack Obama, the issue of transgender identity and their inclusion in society was addressed in his “Dear Colleague” letter of May 13, 2016. (See appendix A for full copy of letter) The Department of Justice under President Obama stated with certainty in the letter that, “The Departments treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.” This interpretation seems to indicate that transgender athletes are protected under Title IX and thus, the athletes are to be treated as a protected class under the law.

On the other side of the political spectrum, President Donald Trump recently overturned the Obama “Dear Colleague” policies when he withdrew protection for transgender students in public schools that let them use bathrooms and facilities corresponding with their gender identity. (Vogue) An issue as important as this to risk managers cannot simply be left to the whims of whichever political party is in power. Risk managers cannot operate their respective departments and protect their organizations without a clear and concise policy. Therefore, politics cannot be the only option in interpreting the guidelines of Title IX, as it pertains to transgender identity. Risk managers need additional guidance and direction. Once again, they must look to the legal system for answers.

As detailed previously, Title IX continues to evolve through court decisions as new fact patterns arise. Unfortunately for risk managers, the transgender issue regarding equality under Title IX has yet to fully decided by the United States Supreme Court. A recent case involving a Virginia high school student’s request to use a bathroom that corresponds with his gender identity would have been the first of its kind to reach the United States Supreme Court. (Barnes) Gavin Grimm, a transgender male, sought to use the boy’s bathroom but was instead required to use a private bathroom in the nurse’s office. (Barnes) The Court elected to send the case back to the lower courts to determine the issue. (Barnes) For the petitioner in this case, for the entire transgender population, and for risk managers, the Supreme Court did not answer the important question as to whether transgender rights are protected under Title IX. (Barnes) The lack of direction by the Supreme Court once again leaves risk managers with no clear answer. Without an answer, policies and rules enacted by risk managers will be subject to costly and damaging litigation until a definitive solution to the transgender protection under Title IX question is offered.

The answer to the transgender question as it pertains to Title IX needs to happen sooner than later for athletic departments and their schools as the federal aid they receive by remaining in compliance with Title IX significantly affects their budgeting and ability to provide resources for their students and athletes.

Interpreting Title IX as it relates to transgender identity is of major significance to schools because the penalties for violating the Act are so severe. A school that violates Title IX runs the risk of losing its federal funding, being forced to adopt a court-ordered compliance program, and having to pay compensatory and punitive damages. For many small school athletic programs, the punitive damages aspect of a Title IX litigation could cause the school to eliminate its athletics, in essence bankrupting the program. The consequence of Title IX damages can dramatically impact the academic mission of a school while also harming its reputation athletically and within the academic community.

Thus, the risk manager must understand how the school and university must remain in compliance with Title IX, regarding transgender athletes and employees. Compliance is critical for a school's survival. Risk managers have been trained to follow specific legislative guidelines for Title IX compliance. For transgender identity issues, risk managers are still waiting for that guidance.

In order to police the schools and to guarantee compliance, a Title IX Coordinator is required under the law to be hired at each institution. Failure to have a Title IX Coordinator violates the Act and subjects the school to reporting to the Office for Civil Rights (OCR) at the U.S. Department of Education.

Even the ability to investigate schools' compliance with Title IX has been made easier by the legislature. The Equity in Athletics Disclosure Act (EADA) passed in 1994 requires all institutions of higher education to report each year on athletic participation numbers, scholarships, program budgets and expenditures, and coaching salaries by gender. Individuals may seek this information and schools must supply this information within two weeks upon request. (Equity in Athletics Disclosure Act (EADA) - ed.gov. (n.d.)

Nearly all high schools, colleges, and universities are vulnerable to Title IX lawsuits for failure to comply with the gender-based equality aspects of the Act as to athletics. Again, the risk manager is charged with developing a risk strategy to protect the institution. The best way to accomplish this strategy is to ensure that the school or university is in fact in compliance with the regulations and requirements of Title IX.

A risk manager must know what compliance means under the Act before implementing ways to avoid claims of non-compliance. According to the U.S. Department of Education, a school's athletic program complies with the law if it can demonstrate that: (1) the percent of male and female athletes is substantially proportionate to the percent of male and female students enrolled at the school; (2) the school has a history and continuing practice of expanding participation opportunities for the underrepresented sex; (3) the school is fully and effectively accommodating the interests and abilities of the underrepresented sex. www.aclu.procon.org (n.d.)

A Title IX compliance self-audit is the first step in both complying with Title IX and avoiding potential Title IX lawsuits. The audit should take a close and honest examination at a school's entire athletic program to see whether it complies with Title IX. After the audit, a program and timetable to expand athletic opportunities to give equality in program, participation and funding for women will usually convince the OCR that the school's intentions are forthright in complying with Title IX. By imposing upon itself an in-depth evaluation, schools and universities are hoping that their actions will convince a court or jury that the school is doing everything in its power to comply with the law. Hopefully, this will lead to lower jury awards and the denial of punitive damages in cases brought by individuals.

In summary, the purpose of Title IX in 1972 was to ensure equality of treatment and opportunity in athletics. Today, with new issues regarding gender identity, risk managers will have to tread cautiously until the transgender identity issue is defined within the framework of student body interest, budget restraints, and gender ratio. The original purpose of Title IX was to allow women to have equal opportunities as men on a whole, not on an individual basis. Following its enactment, the Courts have continued to expand the scope and authority of Title IX which for risk managers simply means being able to stay on top of the changes even when they come at a rapid pace. The transgender issue will also require the same diligence. Transgender athletes present a multitude of new issues for athletic departments including fair competition, equity, identity, facility modifications, and budget constraints. The transgender issue must now be addressed similarly to the manner in which early Title IX cases were handled. This may likely result in years of ongoing litigation until a formal policy is established. Risk managers cannot wait for that to occur and must act within reason using past principles and guidelines to assist them in setting their organization's policies. While risk managers would prefer to have the guidelines set forth for them by the courts, they will need to act prudently to protect the interests of their school and university.

For all of the controversy, litigation and compliance issues surrounding the Act, its achievements in women equality and participation are quite noteworthy. The question with which we are now faced is whether Title IX will have the same impact on the transgender population. Until an unambiguous directive is set forth, risk managers are left with a difficult burden to remain in compliance and to avoid litigation under Title IX. The unanswered issue of whether the transgender athlete is protected under Title IX leaves the student-athlete, the school and university, and the risk managers in a cloud of uncertainty.

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