



July 3, 2024

Ms. Angelique Johnson-Dingle
Deputy Commissioner for P-12 Instructional Support
Office of P-12 Education
New York State Education Department
89 Washington Avenue, Room 318-M-EB
Albany, New York 12234

Re: EDU-21-24-00017-P – Proposed Regulations for Mixed Competition and Extra Class Athletics

Dear Deputy Commissioner Johnson-Dingle:

We write to provide comments on behalf of the New York State Council of School Superintendents and the New York State School Boards Association related to the State Education Department's proposed regulation on Mixed Competition and Extra Class Athletics.

Both of our organizations believe that good intentions serve as the predicate for the introduction of these proposed regulations. We support the proposed elimination of the Tanner scale. We see it as discriminatory and having a most negative effect upon our female students. But, as set forth more fully below, our organizations believe that the proposed regulations will yield negative unintended consequences and, as such, urge that they not be adopted.

Authorizing Boys who Identify as Boys to Play on Girls Teams

The proposed regulation would repeal a provision that authorizes schools to “decline to permit a male or males to participate on a team organized for females upon a finding that such participation would have a significant adverse effect upon the opportunity of females to participate successfully in interschool competition or interschool athletic activities.” Instead, the proposed regulation would provide that schools must “ensure that students of a different gender are able to participate fully in the team selection process ... regardless of gender.”

This regulation would effectively require that districts permit boys who identify as boys to play on girls sports teams when they request to do so. Such a result would have a significant disparate impact on girls sports teams such as volleyball, field hockey, flag football, and softball. On average, since boys of high school age are stronger, faster, and taller than girls, in many instances they will have an advantage against the majority of girls if this regulation is adopted. We are opposed to moving away from the existing regulatory framework for determining whether a boy may play on a girls sports team.

Consistency with Title IX

Moreover, as proposed, this regulation would present a health and safety concern for girls who may be overpowered by larger and faster male teammates and opponents. In addition, we assert this proposal is inconsistent with Title IX as interpreted in resources issued by the U.S. Department of Education's Office of Civil Rights last year.ⁱ

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The OCR guidance allows schools three ways to demonstrate that they are fulfilling their legal duty to meet the athletic interests and abilities of boys and girls among their student populations:

1. One option, referred to as “substantial proportionality,” calls for examining whether, in the aggregate, the percentage of girl and boy participants on athletic teams are “...about the same as—or ‘substantially proportionate’ to—the percentage of girls and boys enrolled at your school.”
2. A second option looks to whether a school can show it has a history and continuing practice of expanding its athletic program to respond to the interests and abilities of a sex under-represented in school athletic programs.
3. The third option asks whether a school can show that, despite disproportionality, it is nonetheless meeting the interests and abilities of the under-represented sex. For example, this option asks if there is enough demand, skill, and talent at your school among girls to sustain a viable team or sport, if girls are under-represented in the school’s overall athletic program.

Accordingly, under this framework, if a school cannot show substantial proportionality in athletic participation by boys and girls, it must use the second or third option to demonstrate that it is fulfilling its obligations to students in both sexes. But in requiring schools to allow boys to join teams in girls’ sports, those teams could become “girls teams” in name only, if, for example, boys become a majority of starters on such a team. This would mean that a school could not cite the creation of a girls’ flag football or softball team as an effort toward satisfying option 2. Nor could it claim to be meeting the interests and abilities of girls under option 3, if girls are blocked from membership or starter status on a girls’ team so comprised.

In any event, to the extent the federal government has not yet finalized its new Title IX regulations, we believe that it would be most appropriate to hold off on adopting state regulations in this area, beyond eliminating use of the Tanner scale.

Conclusion

Thank you for your consideration of our comments and recommendations and for your time in our past discussions on this subject. Please contact us with any questions you may have regarding the issues we have raised.

Sincerely,

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Executive Director

**New York State Council of
School Superintendents**

Robert S. Schneider, CPA, CAE
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ⁱ United States Department of Education, Office of Civil Rights. “Title IX and Athletic Opportunities in K-12 Schools: A Resource for Students, Parents, Coaches, Athletic Directors, and School Communities.”

<https://www2.ed.gov/about/offices/list/ocr/docs/ocr-k12-athletic-resource-202302.pdf>