

## Legal Note: Massachusetts Equal Rights Amendment (1979)

Public schools that provide athletic opportunities for its students are required to follow both state and federal laws to ensure equitable opportunities for students of different sexes or genders. The purpose of this legal note is to provide a brief overview of the laws that impact gender equity, particularly as it relates to fielding mixed gender teams and the inclusion of transgender or non-binary students in athletic programs. Schools with specific questions about gender equity and their own athletic program should work with their district's legal representatives to ensure compliance with all laws.

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in school programs, including athletics. With respect to athletics, Title IX seeks to ensure that underrepresented sexes are given an equal opportunity to participate in athletic programs. Title IX does not require schools to offer identical sports for boys and girls, but an equal opportunity to play. Thus, schools are well-advised to offer sufficient program options to boys and girls with a sufficient numbers or roster spots across the various athletic seasons.<sup>1</sup>

Massachusetts schools must also comply with the Equal Rights Amendment (ERA), which is part of the Massachusetts Declaration of Rights and Constitution. The ERA states that "equality under the law shall not be abridged because of sex, race, color, creed or national origin." The ERA was applied to school athletics in 1979 in the matter of Attorney General v. MIAA, 378 Mass. 342 (1979), a case which schools continue to follow today. Similar to Title IX, the ERA and interpretive case law ensures equitable opportunities for boys and girls to participate in school athletics. ERA, however, has been applied in such a way as to allow for mixed gender teams. In Attorney General v. MIAA, the court determined that a blanket rule prohibiting boys from playing on girls teams, where there was no equivalent boys team, violated the ERA.<sup>2 3</sup>

As a result of this 1979 ruling, the MIAA amended its rules to state, "A girl may play on a boys' team if that sport is not offered in the school for the girl, and a boy may play on a girls' team if that sport is not offered in the school for the boy." This has led schools across Massachusetts to afford opportunities for both boys and girls to compete in sports designated for the other sex where the school did not offer a boys and girls team in the

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<sup>1</sup> Title IX compliance does not stop at analyzing the number of program options and roster spots. Other factors, such as equity of resources, equipment, facilities and other factors are also important elements in assessing Title IX compliance.

<sup>2</sup> The case involved male students who were interested in participating in girls' field hockey. The MIAA advanced several arguments in support of its rule to prohibit boys from girls teams - all of which were rejected. The court rejected the arguments that biologically males would have an advantage over females, that it would be unsafe for boys and girls to compete against one another, or that boys would inevitably overtake girls sports.

<sup>3</sup> In D.M. et al. v. Minnesota State High School League et al., Case No. 18-3077, the 8<sup>th</sup> Circuit struck down an athletic association rule that prohibited boys from participating in the schools' competitive dance teams. Citing the Equal Protection clause of the 14<sup>th</sup> Amendment of the U.S. Constitution, the 8<sup>th</sup> Circuit decision compelled schools to offer the boys the opportunity to participate in competitive dance. While not precedent setting in Massachusetts, the 8<sup>th</sup> Circuit decision suggests that schools should also consider the 14<sup>th</sup> Amendment Equal Protection Clause in disputes over gender based athletic opportunities in a similar manner as the ERA.

same or relatively equivalent sport. In 2019, the MIAA revised the rule to say: “If a school offers a single team in a particular sport, it may not restrict eligibility based on gender unless such restriction is necessary to ensure that the school’s gendered designation of athletic opportunities complies with Title IX (either by demonstrating proportionality or the absence of unmet interest among members of the underrepresented sex).” This change better clarified the interplay between the ERA and Title IX obligations.

Additionally, Massachusetts schools must also be familiar with M.G.L. c. 76, sec. 5. This statute, which also protects students from discrimination based on sex, was expanded to protect students based on gender identification. As a result of this law, and consistent with the interpretive guidance offered by the Department of Elementary and Secondary Education, students are entitled to be accepted by their schools as the gender with which they identify across all school programs. This means that athletic opportunities must be afforded to students in accordance with their identified gender, not necessarily their birth-assigned gender.<sup>4</sup>

Schools at the local level are responsible for determining eligibility of students who want to participate in its athletic program. MIAA acknowledges that for school administrators understanding how each of these statutes inform local decision making is challenging. Drawing upon Title IX, ERA and M.G.L. c. 76, sec. 5 and the relevant case law, MIAA offers several guidelines to assist school districts on gender-based issues and fielding mixed gender teams:

1. Blanket prohibitions based on gender should be avoided. The MIAA case in 1979 and D.M. case decided by the 8<sup>th</sup> Circuit Court show that when an athletic association has a blanket prohibition of boys playing on girls teams such rules were overly broad and not sufficiently tailored to the interest in advancing gender equity in school based athletic programs.
2. Collect and understand the data about boys and girls participation in athletics. Currently, schools report to the Department of Elementary and Secondary Education on the number of single gender sports and teams and number of participants by gender as part of Title IX compliance monitoring.
  - a. If schools are providing relatively equal athletic opportunities to boys and girls, then permitting boys to play on girls teams and vice versa meets the requirements of the ERA and likely would not violate Title IX.
  - b. If the data show that opportunities for boys and girls are not equal, then allowing students of the over-represented gender onto teams of the under-represented gender may violate Title IX and should be carefully considered.
3. Student safety has not been a successful defense to excluding students of one gender from participating on teams of the opposite gender. The arguments generally fail due to the lack of correlation between injuries and mixed-gender teams.
4. As the laws and interpretive case law continue to evolve, MIAA will also endeavor to respond with information and guidance to its members, and revisit its rules as necessary in response to changes in the law. School districts are encouraged to work with their local legal counsel on individual cases.

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<sup>4</sup> Students who identify as transgender or nonbinary may not always reveal their gender identification to their parents. Concerns regarding transgender and nonbinary student-athletes should be approached on an individual basis with flexibility and sensitivity. Schools may also want to seek counsel from their school district’s attorney for guidance when such situations arise.