



Providing Equal Athletic Opportunities



A *Guide* to

COMPLIANCE



April 2005

OPPORTUNITY

Introduction

Providing equal opportunity is an achievable goal for all schools, and the Minnesota Department of Education (MDE) and the Minnesota State High School League (MSHSL) have collaborated on this document in order to provide timely, accurate and helpful information to secondary school administrators who are charged with developing and reporting athletic programs and participation numbers.



The MSHSL wishes to extend a special THANK YOU to Sara Winter, Division of Compliance and Assistance at MDE, for preparing this document. Her insightful responses to the Frequently Asked Questions clearly define the steps administrators can follow in support of all student-athletes in their school.

The MSHSL has produced and provided this Guide to each member school and is pleased to be able to partner with MDE in this project.

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TITLE IX

Title IX and Minn. Stat. § 121A.04

Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.) prohibits discrimination on the basis of sex in education programs and activities that receive Federal financial assistance from the U.S. Department of Education. The regulations implementing Title IX (34 C.F.R. Part 106) contain specific provisions for athletic programs and athletic scholarships. Similarly, Minnesota Statute § 121A.04 requires each school to provide equal opportunity for members of both sexes to participate in its athletic program.



While Title IX applies to interscholastic, intercollegiate, club and intramural athletic programs receiving Federal funding from the U.S. Department of Education, Minn. Stat. § 121A.04 applies to interscholastic and intramural athletic programs in public and private elementary and secondary schools. Minnesota Rules Chapter 3535 contain specific provisions for equal opportunity in schools.

Further, the overall determination of compliance under Title IX considers the school's "program as a whole." Under Minnesota law, schools are also responsible, when two teams in the same sport are separated by sex, to provide the two teams with substantially equal budgets per participant, exclusive of gate receipts and other revenues generated by that sport, and in all other respects shall be treated in a "substantially equal manner." The factors reviewed in determining compliance under Minnesota law, are comparable to those reviewed under Title IX.

Providing Equal Opportunity (Compliance)

34C.F.R. § 106 and Minn. Stat. § 121A.04

In determining equal athletic opportunities for male and female athletic programs, several factors are assessed by comparing:

- 1) Availability
- 2) Quality
- 3) Kind of Benefits
- 4) Kind of Opportunities
- 5) Kind of Treatment

The factors assessed are:

- 1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes;
- 2) The provision of equipment and supplies;
- 3) Scheduling of games and practice time;
- 4) Travel and per diem allowance;
- 5) Opportunity to receive coaching and academic tutoring;
- 6) Assignment and compensation of coaches and tutors;
- 7) Provision of locker rooms, practice and competitive facilities;
- 8) Provision of medical and training facilities;
- 9) Provision of housing and dining facilities;
- 10) Publicity; and
- 11) Expenditures.



Equal Opportunity

FACTORS

Factors Reviewed in Determining Compliance

OCR Clarification
OCR Policy Interpretation
Minn. Stat. § 121A.04
Minn. R. 3535.3400

- 1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes;**



- 2. The provision of equipment and supplies;**

Further Explanation of Each Factor

Three-part test:

1. Substantial proportionality; or

- Participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.
- Affords a “safe harbor” for establishing that the school provides nondiscriminatory participation opportunities.
- “Substantially proportionate” is not a statistical test; instead, it is determined on a case-by-case basis depending on specific circumstances and the size of the athletic program (exact proportionality is not required).

2. History of continuing practice; or

- Must show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex.
- Reviews the entire history of the athletic program focusing on the underrepresented participation opportunities and continuing remedial efforts to provide nondiscriminatory participation opportunities.
- Promises to expand the program some time in the future is not sufficient to meet this test.

3. Fully and effectively accommodating interests and abilities of the underrepresented sex.

- Focuses on whether there are concrete and viable interests among the underrepresented sex that should be accommodated.
- Factors taken into consideration include: unmet interest in a particular sport; sufficient ability to sustain a team in the sport; and, a reasonable expectation of competition for the team.
- Method for determining interest, biennial student interest survey, must reach a wide audience and be open ended.

OCR has repeatedly clarified that this three-part test provides schools three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in athletics. If a school has met any part of the three-part test, OCR will determine that the school has met this requirement.

Quality
Amount
Suitability
Maintenance
Availability

Factors Reviewed in Determining Compliance

Further Explanation of Each Factor

3. Scheduling of games and practice time;	Number of competitive events per sport Number/length of practice opportunities Time of day and season events are scheduled Available opportunities for post-season competition
4. Travel and per diem allowance;	Modes of transportation Lodging furnished during travel Length of stay before/after competitive events Per diem allowances Dining arrangements
5. Opportunity to receive coaching and academic tutoring;	Availability of full/part-time coaches/assistants Availability of tutoring Procedures/criteria for obtaining tutorial assistance
6. Assignment and compensation of coaches and tutors;	Training/experience/professional qualifications
7. Provision of locker rooms, practice and competitive facilities;	Quality/availability of facilities provided for practice and competitive events Exclusivity of facilities provided for practice and competitive events Availability of locker rooms for practice and competitive events Maintenance of practice and competitive facilities Preparation of facilities for practice and competitive events
8. Provision of medical and training facilities and services;	Availability of medical/training facilities/services Availability/quality of conditioning facilities Availability/qualification of athletic trainers
9. Provision of housing and dining facilities;	Housing provided Special services as part of housing arrangement
10. Publicity; and	Availability/quality of sports information personnel Access to publicity resources Quantity/quality of publications/promotional devices
11. Expenditures.	<p>Under Title IX, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a school operates or sponsors separate teams will not constitute noncompliance; however, the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex may be considered.</p> <p>Under Minnesota law, when two teams in the same sport are in fact separated or substantially separated according to sex, the two teams shall be provided with substantially equal budgets per participant, exclusive of the salary of the coach, gate receipts and other revenues generated by that sport, and in all other respects shall be treated in a substantially equal manner. When an item(s) of expense is not separated, the expense shall be prorated to the teams according to the number of participants.</p>

Frequently Asked Questions of MDE and MSHSL Pertaining to Providing Equal Opportunity

QUESTIONS

Question

Short Answer

Explanation

Is dance team a sport?

OCR Letter to Anderson
OCR Letter to Stead

Historically, no.

Currently determined on a case-by-case basis.

Despite OCR's longstanding position that dance teams are in the same extracurricular category as cheerleaders, rather than athletic programs, OCR has recently provided guidance to schools to conduct their own assessments and make their own determinations of whether dance team, as conducted by the school, falls within its athletic program. OCR has provided several factors for the schools to review in order to make this determination.



Probably yes, if ...

The primary purpose of dance team is athletic competition; it is a stand-alone activity and administered by the school's athletic department; coaches are selected/compensated in the same manner as other current sports; coaches/judges are certified in a comparable manner as other current sports; a primary selection criteria for making the team is based on athletic ability; it has a defined season with a practice schedule and competitive opportunities that are comparable to other sports; it has post-season opportunities; participants are eligible for varsity letters and similar awards available to other athletes in the interscholastic athletic program; the activity falls within an organized conference under the auspices of the MSHSL and is governed by a specific set of published rules.



Probably no, if ...

The primary purpose of dance team is the support or promotion of other athletes; the selection criteria for making the team is not based on athletic ability; and it does not have a defined season, practice schedule or competitive opportunities that are comparable to other sports.

How do I make this assessment and determination?

Contact Sara Winter at MDE, 651-582-8237, and an Assessment and Determination Worksheet will be sent out to you.



Frequently Asked Questions of MDE and MSHSL (cont.) Pertaining to Providing Equal Opportunity

Question

Can my school have only a football or wrestling booster club?

OCR Letter to Gilyard

Short Answer

Maybe.

Probably yes, if ...

Probably no, if ...

Explanation

In the experience of OCR, sponsors, as a whole, are more interested and willing to assist male teams than female teams. Further, male-oriented “booster” activities generate more public interest than female-oriented activities. If all benefits are not considered in examining athletics, the purpose of Title IX requirements could be routinely undermined by the provision of unequal benefits through private financial assistance.

The school has a mechanism in place to ensure that equivalent benefits, treatment, services and opportunities are provided to males and females despite large portions of funding being raised specifically for one team.

The school has no mechanism in place to ensure equivalency, and the money is being given solely to the football or wrestling teams.

How are we to measure the students’ interests in sport activities?

Minn. R. 3535.3300

The biennial determination of student interest survey.

All public and private elementary and secondary schools are required to make a biennial determination of student demonstrated interest. The method used to make the determination must be reported to MDE, via the athletic program report. Student demonstrated interest must be considered in the selection of athletic activities provided in the athletic program for the purpose of providing separate teams or sports for members of the previously excluded sex.

The method used to determine student interest must reach a wide audience and be open ended.

The MSHSL has a sample student interest survey on its website at www.mshsl.org.

Do I include interscholastic and intramural athletic activities together in order to determine if we are in compliance?

Minn. R. 3535.3300

Minn. R. 3535.3000, subp. 3

Minn. R. 3535.3000, subp. 4

No.

The school must be in compliance for providing interscholastic athletic activities and also for intramural activities.

The number of opportunities for females to participate on teams is to be comparable to the number of opportunities for males to participate on teams in each school year in the interscholastic athletic program and comparable, as well as in the intramural athletic program. The equipment, supplies, and uniforms for each sport are to be comparable for both sexes. The locker rooms, practice, and competitive facilities are to be comparable for both sexes. The medical services are to be comparable for both sexes. The participation rates for members of both sexes are to be comparable while recognizing the voluntary nature of student involvement in interscholastic and intramural activities.

Question

Short Answer

Explanation



How do I calculate whether we satisfy the first prong of the three-part test – substantial proportionality?

OCR Clarification
 Minn. R. 3535.3000, subp. 5
 Minn. R. 3535.3000, subp. 6
 Minn. R. 3535.3000, subp. 7

By comparing the percentage of each sex participating in sports to their respective enrollment percentages.



Interscholastic athletic program: means all athletic activities offered within a school the purpose of which is to provide opportunities for students to compete with other students on like teams in other schools within an organized conference under the auspices of the MSHSL or with other teams in other schools operating under separate jurisdictions. A complete list of MSHSL sponsored activities may be found at <http://www.mshsl.org>.

Intramural athletic activities: means all non-interscholastic activities offered within a school, which are not a part of the regular physical education curriculum, designed to provide students athletic opportunities, experiences, and the development of competencies in a variety of sports.

In determining the number of participation opportunities, an athlete who participates in more than one sport is counted as a participant in each sport in which he or she participates (duplicate number). The number of participation opportunities is the sum of the duplicate male participants number and duplicate female participants number.

To determine the percentage of females participating in athletic opportunities, divide the duplicate female participants number by the number of participation opportunities.

To determine the percentage of males participating in athletic opportunities, divide the duplicate male participants number by the number of participation opportunities.

Participate: means for interscholastic sports, a student has been selected by the coach to be a member of a particular athletic team, inclusive of varsity, junior varsity, and sophomore teams, after the tryout period has ended.

Participation rate for a particular sex in the interscholastic athletic program: means the ratio of the number of participants of that sex in the athletic program to the number of students of that sex in the student body.

Participation rate for a particular sex in the intramural athletic program: means the ratio of the number of participants of that sex in the athletic program to the number of students of that sex in the student body.

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Frequently Asked Questions of MDE and MSHSL (cont.) Pertaining to Providing Equal Opportunity

Question	Short Answer	Explanation
		<p>For example, if your school's enrollment is 52% boys and 48% girls and 52% of the participants in the athletic program are boys and 48% are girls, then your school would clearly satisfy the first prong of the three-part test.</p>
<p><i>If the percentage of female representation in athletic opportunities is within 5% of the percentage of females in the student enrollment, are we in compliance?</i></p>	<p>Maybe.</p>	<p>“Substantial proportionately” is not a statistical test. Rather, the determination of compliance is made on a case-by-case basis. OCR has clarified that opportunities may be considered substantially proportional when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a team. However, keep in mind the option of cooperating with another nearby school.</p>
<p>OCR Clarification</p>	<p>Probably yes, if ...</p>	<p>For example, at your school girls make up 52% of the school's enrollment, 47% of the athletes, and the athletic program consists of only 60 participants. If the school provided girls with 52% of athletic opportunities, approximately 6 additional girls would be able to participate. Since 6 participants are unlikely to support a viable team, the school would meet part one.</p>
	<p>Probably no, if ...</p>	<p>For example, at your school girls make up 52% of the school's enrollment, 47% of the athletes, and the athletic program consists of 600 participants. If the school provided girls with 52% of athletic opportunities, approximately 62 additional girls would be able to participate. Because this is a significant number of unaccommodated girls, it is likely that a viable sport could be added. If so, your school would not meet part one.</p>
<p><i>If my school provides an equal number of male and female sports, does that mean we are automatically in compliance?</i></p> <p>OCR Policy Statement</p>	<p>Not necessarily.</p> <p>Probably yes, if ...</p> <p>Probably no, if ...</p>	<p>Providing the same number of male and female sport teams does not, in and of itself, guarantee compliance.</p> <p>The sports offered are representative of the students' interests and abilities.</p> <p>The sports offered are not representative of the students' interests and abilities and, therefore, there are few participants on the teams.</p>

Question

How do I determine whether we satisfy the third prong of the three-part test — fully and effectively accommodating the interests and abilities of the underrepresented sex?

OCR Additional Clarification

Short Answer

By determining whether there are concrete and viable interests among the underrepresented sex that should be accommodated by the school's athletic program.



Explanation

OCR has recently clarified that a school will be found in compliance with part three unless there exists a sport(s) for the underrepresented sex for which all three of the following conditions are met: (1) unmet interest sufficient to sustain a team in the sport(s); (2) sufficient ability to sustain a team in the sport(s); and (3) reasonable expectation of competition for a team in a sport(s) within the school's normal competitive region.

Schools are not required to accommodate the interests and abilities of all their students or fulfill every request for the addition or evaluation of particular sports unless all three conditions are present. Additionally, a school may provide proportionately fewer athletic participation opportunities to one sex, as compared to its enrollment rate, if the interests and abilities of the enrolled students of the underrepresented sex are being fully and effectively accommodated by the school's current athletic programs.

In this analysis, the burden of proof is on OCR (in the case of an OCR investigation or compliance review), or on the students (in the case of a complaint filed with the institution under its Title IX grievance procedures), to show by a preponderance of the evidence that the school is not in compliance with part three.

Do I have to report athletic numbers to both MDE and MSHSL?

Minn. R. 3535.3600

Minn. R. 3535.3700

Minn. Stat. § 127A.42

Yes.

You are required to submit an athletic program report to MDE on or before October 15 of each year.



MDE is to assure schools/school districts provide an equal opportunity for members of both sexes to participate in athletic programs. MSHSL gathers participation numbers by sport and by gender and forwards them to the National Federation of State High School Associations to compile nation-wide participation numbers.

Annually, on or before October 15, all public and private elementary and secondary schools that offer interscholastic and intramural sports must submit, to MDE, an elementary and secondary athletic program report containing information about both interscholastic and intramural athletics provided.

The report shall contain by building:

1. Number of sports offered for each sex;
2. The season each sport is offered for each sex;
3. Number of weeks each sport is offered;
4. Number of teams in each sport;
5. Number of coaches assigned each sport;
6. Number of students by sex participating in each sport;
7. Dollar expenditure per sport;
8. Total unduplicated count of student participation in the interscholastic program by sex; and
9. Total unduplicated count of student participation in the intramural program by sex.

Frequently Asked Questions of MDE and MSHSL (cont.) Pertaining to Providing Equal Opportunity

Question	Short Answer	Explanation
	<p>You are asked to submit participation numbers, by sport and by gender, to MSHSL on or before June 1 of each year.</p>	<p>The report is submitted to MDE electronically, via the internet, at http://education.state.mn.us/Athletics/login.do. Upon receipt of a school's athletic program report, MDE must evaluate the data contained in the report and forward reports requiring additional attention to the commissioner of human rights. MDE may reduce or withhold the school's/school district's state aid for any school year for noncompliance with state laws prohibiting discrimination because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance or disability.</p> <p>Athletic administrators are asked to access the administrative side of the MSHSL's website at the conclusion of the fall and winter activities and on May 1 each spring. The form used to collect participation data is entitled Activity Participation Survey, and each school is required to provide the data not later than June 1 of each school year.</p>
<p><i>If a male team and a female team share a coach, such as golf, does this mean I report the program as co-ed?</i></p>	<p>Usually no.</p>	<p>Co-ed: means a team that is open to both sexes. Co-ed teams are generally limited to adapted athletic programs or intramural athletic programs.</p>
<p><i>If we are not in compliance, can we eliminate a sport in order to bring us into compliance?</i></p> <p>OCR Policy Guidance</p>	<p>Not the recommended solution.</p>	<p>OCR has repeatedly stated that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage a school to eliminate athletic teams.</p>
<p><i>Our district is facing substantial budget cuts, and we cannot afford to provide equal athletic opportunities for both male and female students. What do we do?</i></p> <p>OCR Letter to Gilyard</p>	<p>Lack of funds does not excuse discrimination.</p> 	<p>Schools should, in advance of proposed budget cuts, develop a mechanism to ensure that equivalent benefits, treatment, services and opportunities are provided for males and females as programs face elimination or as resources are reallocated.</p>

Resources

RESOURCES

The United States Department of Education, Office for Civil Rights (OCR) enforces the Federal Title IX law. The OCR office for Minnesota is located at:

Chicago Office

Office for Civil Rights
U.S. Department of Education
111 N. Canal Street, Suite 1053
Chicago, IL 60606-7204

Telephone: 312-886-8434

FAX: 312-353-4888

TDD: 312-353-2540

Email: OCR_Chicago@ed.gov

Website: www.ed.gov/ocr

The Minnesota Department of Education (MDE) reviews school compliance with state and federal anti-discrimination laws. MDE is located at:

Minnesota Department of Education

Division of Compliance and Assistance
Attention: Sara Winter
1500 Highway 36 West
Roseville, MN 55113

Telephone: 651-582-8237

FAX: 651-582-8725

TTY: 651-582-8201

Email: sara.winter@state.mn.us

Website: www.education.state.mn.us

The Minnesota Department of Human Rights (MDHR) enforces state anti-discrimination laws and investigates all charges alleging sex discrimination in athletic programs in schools. MDHR is located at:

Minnesota Department of Human Rights

190 E. 5th Street, Suite 700
St. Paul, MN 55101

Telephone: 1-800-657-3704

651-296-5663

TTY: 651-296-1283

Website: www.humanrights.state.mn.us

The Minnesota State High School League (MSHSL) is a 501-c(3) nonprofit corporation that is a voluntary association of high schools. The MSHSL controls contests by and between Minnesota High Schools, and the eligibility rules for such competitions are developed by the member schools themselves. The MSHSL Board of Directors administers post-season tournaments and develops policies which direct MSHSL initiatives. MSHSL is located at:

Minnesota State High School League

Attention: Dave Stead
2100 Freeway Blvd.
Brooklyn Center, MN 55430-1735

Telephone: 763-560-2262

FAX: 763-569-0499

Email: dstead@mshsl.org

Website: www.mshsl.org



Resources

RESOURCES

Minn. Stat. § 121A.04. Athletic Programs: Sex Discrimination.

Minn. Stat. § 127A.42. Reduction of Aid For Violation of Law.

Minn. Stat. § 363A.23. Exemption Based on Education.

Minn. R. 3535.3000. Definitions.

Minn. R. 3535.3200. Separation By Teams.

Minn. R. 3535.3300. Biennial Determination of Student Interest.

Minn. R. 3535.3400. Creating Equal Opportunity For Two Teams.

Minn. R. 3535.3600. Compliance Reports and Submission of Data.

Minn. R. 3535.3700. Duties of the Commissioner of Education.

34 C.F.R. § 106.41. Athletics.

Clarification of Intercollegiate Athletics Policy Guidance: Three-Part Test (Jan. 16, 1996) (OCR Clarification).

OCR Letter to Anderson (March 18, 2004) (regarding whether dance team is a “sport” for purposes of Title IX) (OCR Letter to Anderson).

Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71413 (Dec. 11, 1979) (OCR Policy Interpretation).

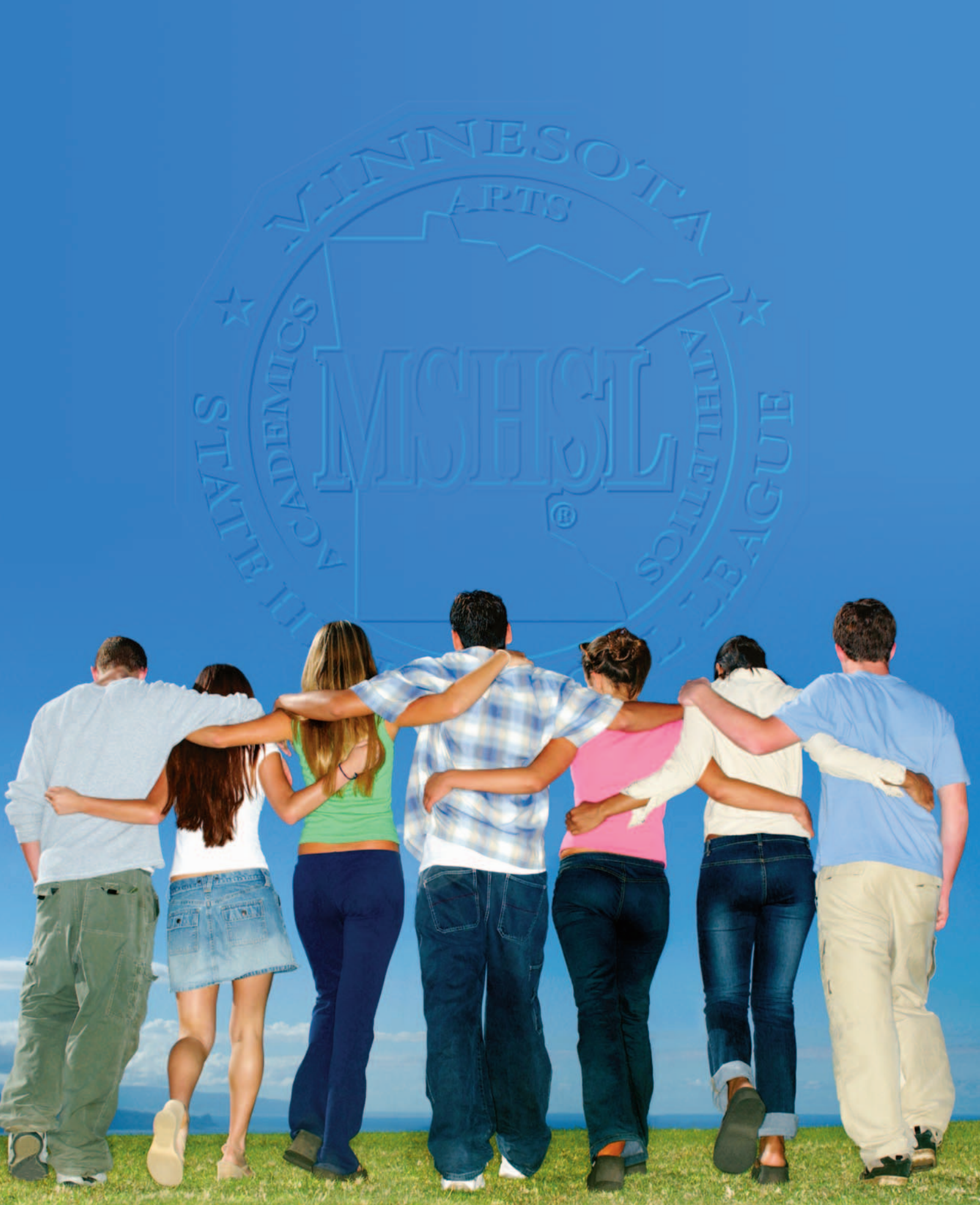
Equal Opportunity in Intercollegiate Athletics: Requirements Under Title IX of the Education Amendments of 1972 (OCR Policy Statement 1991) (OCR Policy Statement).

Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three (March 17, 2005) (OCR Additional Clarification).

OCR Letter to Stead (April 11, 2000) (regarding definition of sport) (OCR Letter to Stead).

Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003) (OCR Policy Guideline).

OCR Letter to Gilyard (Feb. 7, 1995) (regarding private financial assistance and Title IX) (OCR Letter to Gilyard).



Minnesota State High School League