

Title IX Athletics

Q & A

Q *Is cheer considered a sport where “the major activity of which involves bodily contact?” Historically, our institution has sponsored an all-female cheer squad, which conducts normal cheers (yell routines) and jumps/stunts (e.g., mini-pyramids). There is a male student who would like to try out for the cheer squad. Our cheer coach has never coached a co-ed squad before. Are there Title IX implications? (Director of Athletics, NCAA Division III Institution)*

A There are indeed Title IX implications, as Title IX prohibits sex discrimination against men, not just women. However, due to various provisions of the Title IX regulation, and the unique activity that is cheerleading, you have a choice about how to label the cheer squad; that label may then allow you to deny a try-out for the male student, if you so choose.

The language you are quoting is from the section of the Title IX regulation that addresses athletics programs, namely, intercollegiate, interscholastic, club, and intramural programs. Under the Title IX regulation, institutions may separate athletics teams on the basis of sex for contact sports. The Title IX regulation

actually lists six sports – basketball, boxing, football, ice hockey, rugby, and wrestling – as contact sports. The regulation specifies that contact sports may also be those sports where “the purpose or major activity . . . involves bodily contact.” When a team is offered in a contact sport, an institution does not have to allow a member of the excluded sex to try out for the team. However, our interpretation is that this language refers to the contact that may occur during contests with members of the opposing team, not with one’s own teammates. Thus, in our opinion, cheer would not be viewed as a contact sport under Title IX.

However, the main question is whether the cheer squad may be viewed as a team under the athletics provisions of the Title IX regulation. In September 1975, shortly after the Title IX regulation became law, the Office for Civil Rights stated in a Memorandum issued nationwide to education administrators that “drill teams, cheerleaders and the like . . . are covered . . . as extracurricular activities under section [106.31] . . . and are not a part of the institution’s ‘athletic program’ within the meaning of the regulation.” Under section 106.31 of the Title IX regulation, which addresses “education programs or activities,” institutions may not exclude students from participation or deny benefits on the basis of sex. In other words, membership on cheerleading teams must be open to both

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women and men. If the cheer squad is an extracurricular activity under Title IX, then the institution cannot deny membership, or try-outs that may be required to attain membership, to any student on the basis of gender.

The nature of cheerleading has changed since 1975, and some cheerleading teams have evolved into acrobatics and tumbling teams, some of which claim status as intercollegiate teams. You have not suggested that you consider the cheer squad to be an intercollegiate team, and it is doubtful that it would be viewed as such under Title IX since the vast majority of cheerleading teams would not. The reason is that most cheerleading teams provide entertainment at other teams' events, such as the football or basketball games, which compromises the cheer squad's consideration as an intercollegiate team. This is true even if the cheer squad competed in its own competitions in addition to providing entertainment for other team's events. For those institutions offering acrobatics and tumbling as an intercollegiate team, the Title IX challenge is whether the team is treated as an intercollegiate team and competes in a number of events that constitute a reasonable competitive schedule against appropriate level competition. In the Quinnipiac University case, the 2013 decision of the federal district court cited the differing rules employed for the very few contests against teams from an array of competitive levels in finding that the cheerleading/acro team was not an intercollegiate team.

If your institution's cheer squad qualified as an intercollegiate team, and you offered the team for women only, then you could deny men the opportunity to try out for, and participate on, the women's intercollegiate cheer team under the following condition: athletic opportunities for the excluded sex (men) have not been limited previously. OCR has interpreted this language concerning previous limitations to refer to athletic opportunities overall at the institution, and not the specific sport. In other words, if men's opportunities in your overall athletics program have not been previously limited, then you would not be required to allow a man to try out for the women's intercollegiate cheer squad (for nearly every athletics program in the country, it is women, not men for whom opportunities have previously been limited).

This policy concerning separate teams on the basis of sex for intercollegiate athletics also applies to club teams. So, the cheer squad would not have to qualify as an intercollegiate team in order to limit participation to one gender. As a club team, the cheer squad could be offered exclusively to women. The Title IX regulatory provisions that allow institutions to separate teams on the basis of sex specify that the two bases for such separation are when the sport involved is a contact sport, or when selection for teams is based on competitive skill. Many club teams and intramural teams do not require specific levels of

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competitive skill in order to participate. Consequently, the regulation would appear to require, in general, that intramural and club teams and programs be co-ed unless the sport involved is a contact sport. However, OCR adopted informal policy in the 1980s allowing institutions to offer intramural and club teams and programs separately on the basis of sex when claiming that this separation is to encourage participation by the underrepresented sex, which is nearly always women. Even so, the fact that you have try-outs for the cheer squad would suggest that, even as a club sport, selection for the cheer club team is indeed based on competitive skill.

To summarize, the cheer squad, assuming it would not be considered an intercollegiate team, might be viewed under the Title IX regulation as an extracurricular activity; and as such, participation must be open to both women and men. However, if your institution chooses to offer the cheer squad as a club team, which would then place it under the Title IX regulatory provisions for athletics programs, you may then offer the cheer squad only to women, and deny the male student a try-out for the squad. Although you have that choice, please allow us to proffer the suggestion that your cheer coach might consider expanding her coaching talents and the overall number of participants to accommodate a co-ed cheer squad as many colleges and universities already do.

34 C.F.R. § 106.31; § 106.41(b); 1979 Intercollegiate Athletics Policy Interpretation pages 71413-71423; Memorandum to Chief State School Officers, Superintendents of Local Education Agencies and College and University Presidents – “Subject: Elimination of Sex Discrimination in Athletic Programs,” September 1975; *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277 (D. Conn. 2009); 728 F. Supp. 2d 62 (D. Conn. 2010); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012); 2013 WL 789612 (D. Conn. March 4, 2013)

