

# Top 10 Legal Issues Impacting School Athletics

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## 10. Name, Image, Likeness (NIL) Law

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## Name, Image, Likeness (NIL) Law

- ❑ April 7, 2021: Governor Lujan Grisham signed SB 94, the Student Athlete Endorsement Act
- ❑ Effective July 1, 2021
- ❑ Allows intercollegiate student-athletes to earn compensation for the use of their name, image, likeness, or athletic reputation and to obtain professional representation (i.e., an agent) for matters relating to the student-athlete's NIL
- ❑ How does this affect K-12 public schools?
  - Potential early graduation for high school student-athletes
  - High school student-athletes are still amateurs



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## 9. Disability Laws Applicable to Athletics



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## The Law

- ❑ Section 504 of the Rehabilitation Act of 1973
  - Must provide “reasonable accommodation” to students with disabilities who are otherwise qualified to participate in sports
- ❑ Title II of the Americans with Disabilities Act of 1991
  - Must provide “reasonable accommodation” to students with disabilities who is excluded solely because of disability
- ❑ Title III of the Americans with Disabilities Act of 1991
  - Same as Title II but for private schools
- ❑ Individuals with Disabilities Education Act of 1990 (IDEA)
  - IEP accommodations for sports



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## The Practice

- ❑ Disabled and Otherwise qualified
  - Disabled: Suffers a physical or mental impairment that substantially limits one or more major life activities.
    - ❑ Motor skills impairments, learning disabilities, recovering drug or alcohol addicts
    - ❑ Can be temporary
  - Otherwise qualified: Student can satisfy all essential skills, ability, physical and eligibility requirements for participation either in spite of the disability or with reasonable accommodation.



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## Reasonable Accommodations in Sports

- ❑ Changes to method of play should be implemented unless
  - Changes that fundamentally alter the nature of the athletic activity
  - Undue financial or administrative burden
  - Pose significant risk to health or safety of the disabled persons or to other athletic participants



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## NMAA Rules

- ❑ NMAA: Students eligible for SpEd services for less than 50% of the school day, are subject to the same scholastic requirements. Rule 6.2.3
- ❑ NMAA: Students eligible for SpEd services for more than 50% of the school day, determined by IEP. Rule 6.2.3
- ❑ NMAA: Withdrawal from school due to disability will not count for purposes of eligibility.



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## 8. Liability for Sports Related Injuries

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### Liability for Sports Related Injuries

- NMSA 1978, §41-4-6, provides in pertinent part:
  - General standard: The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings.
  - Every person has a duty to exercise care for the safety of others.



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## Reckless or Intentional and Willful Misconduct

- ❑ Standard of care in sports:
  - Participants cannot expect opponents to exercise “reasonable care” to the same degree as actions in daily life
  - Liability for reckless and intentional acts
    - ❑ Acts outside the normal safety rules of the game
- ❑ Players are responsible when they do not play the game “normally”



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## 7. Concussion Management



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## Concussion Management

- ❑ Common Pitfalls:
  - Failure to remove from play
  - cursory evaluations
  - Premature return-to-play



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## Concussion Management

- ❑ Section 22-13-31 of the Public School Code and NMAA Return to Play Guidelines
  - Procedures for coaches in allowing athletes to return to play after displaying signs of a brain injury
    - ❑ 10-day non-participation period;
    - ❑ No longer exhibits signs of brain injury; AND
    - ❑ Medical release
  - Requires coaches/athletes be educated on signs/symptoms of a concussion
  - Requires school districts to develop head injury protocols
  - Requires school districts to inform parents/athletes of potential risks of head injuries in sports



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## 6. Hazing / Sexual Harassment



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### Definition of Hazing

- ❑ Not defined in New Mexico Law
  - Addressed under bullying in the "Safe Schools for All Students Act"
    - ❑ Severe, pervasive or persistent conduct that targets a student
- ❑ NMSBA Policy Service : J-4615 JK-RE
  - Hazing: engaging in any offensive or dangerous physical contact, restraint, abduction, or isolation of a student, or
  - Requiring or encouraging a student to perform any dangerous, painful, offensive physical or verbal act, including ingestion of any substance, exposure to elements, deprivation of sleep or rest, or extensive isolation, or
  - Subjecting a student to dangerous, painful, offensive or demeaning conduct reasonably likely to create extreme mental distress, as a condition of membership in, or initiation into, any class, team, group or organization sponsored by, or permitted to operate under, the auspices of a school of the School District, or for similar or related purposes, provided, that such conduct shall be considered hazing when it is recognized and integral part of the particular sport or activity.



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## Hazing and Other Laws

- ❑ Criminal statutes:
  - **Assault:** an attempt to commit a battery or the use of insulting language NMSA 1978 Sec. 30-3-1
  - **Battery:** unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.
- ❑ Title IX concerns
  - Any allegation of sexual contact?



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## 5. Title IX in Sports



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## What is Title IX

- ❑ Title IX of the Education Amendment of 1972 prohibits discrimination based on sex in educational institutions that receive federal financial assistance.
  - Title IX has just 37 words:
  - “No person in the United States, shall, on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity received Federal Financial Assistance.”



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## Application to Sports Programs

- ❑ Must comply with one of three tests
  - Substantial Proportionality: Are opportunities for sports substantially proportionate to enrollment?
    - ❑ *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10<sup>th</sup> Cir. 1993) (10.5% disparity is not substantially proportional)
  - History: Do we have a history and continuing expansion of programs for underrepresented sex?
  - Accommodations: Has our school fully and effectively accommodated the interests and abilities of the underrepresented sex?
    - ❑ Recommend student surveys



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## 4. Social Media Use



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### Social Media Use

- ❑ Students “do not shed their constitutional right[s] to free speech at the schoolhouse gate,” but the “special characteristics of the school environment” may limit those rights in some circumstances. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969).
  - Material and substantial interferences/disruptions
- ❑ *Mahanoy Area School District v. B.L.*, 594 U.S. \_\_\_ (2021)
  - Student’s free speech rights were violated when school officials dismissed her from cheerleading squad for off-campus social media post
    - ❑ No material and substantial disruption



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## Social Media Use

- ❑ What does this mean for participation in extracurricular activities, which are a “privilege, not a right”?
  - Students have free speech rights when engaging in a “privilege”
  - School officials still have the power to discipline for student speech that occurs “on-campus or while engaged in student activities constituting the equivalent of being on-campus”
  - School officials still have the power to discipline for student speech that occurs online or off-campus if it genuinely disrupts classroom activity
  - Conduct vs. speech



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## 3. Constitutional Rights



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## Privilege of Sports

- ❑ NMAA: Participation is a privilege not a right
- ❑ No recognized U.S. Constitutional right to participate in school athletics
- ❑ NM Constitution:
  - Free public schools sufficient for the education of, and open to, all children of school age



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## Student Rights

- ❑ Free Speech (1<sup>st</sup> Amendment)
  - "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1965)
- ❑ Freedom of Religion (1<sup>st</sup> Amendment)
  - Religious headwear or jewelry can be restricted only for player safety
- ❑ Due Process (14<sup>th</sup> Amendment)
  - Participation in sports falls outside the scope of due process because it amounts to "mere expectation" rather than a constitutionally protected right
- ❑ Unreasonable search and seizure (4<sup>th</sup> Amendment)
  - Drug testing for athletes - "Students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Veronica Sch. Dist. 47J v. Acton*, 545 U.S. 646, 648 (1995).



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## 2. Transgender Athlete Participation



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### Transgender Athlete Participation

- Title IX
  - US DOE has “enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX. . . This interpretation will guide the Department in processing complaints and conducting investigations, but *it does not itself determine the outcome in any particular case or set of facts.*” (June 16, 2021)
- Around the country:
  - *B.P.J. v. West Virginia State Board of Education, et al.*
    - US DOE and DOJ filed Statement of Interest, advising court that Title IX and Equal Protection Clause prohibit discrimination because of sex, including because a student is transgender.



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## Transgender Athlete Participation

- ❑ New Mexico HB 304 (2021): Would have prohibited transgender girls from participating in girls' sports
  - Did not pass
- ❑ NMAA Bylaw 6.1 requires students to compete in **the gender listed on their original or amended birth certificate**



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## 1. COVID-19 Protocols

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## COVID-19 Protocols

- NMAA 2021-2022 Guidelines for Participation and Department of Health and PED guidance:
  - Masks must always be worn indoors
  - Masks are recommended when outdoors
  - Personal athletic equipment must not be shared
  - Medical clearance required to return-to-play for students who contract COVID-19



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## COVID-19 Protocols

- NMPED Test-to-Stay Protocols for unvaccinated, asymptomatic individuals in close contact with confirmed case in school setting:
  - Requires negative result on rapid COVID-19 test on Days 1, 3, 5
  - Failure to test on required days → Return to quarantine at home
  - Testing sequence restarts if individual has another close contact exposure
  - If individual exhibits COVID-19 symptoms requiring self-isolation, the modified quarantine is terminated. Individual must self-isolate at home until confirmation of negative test.



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