

**BEFORE THE COLORADO BALLOT TITLE SETTING BOARD**

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Lori Hvizda Ward and Lynn Kutner,  
Objectors,

v.

Linda White and Rich Guggenheim,  
Designated Representatives of Initiative 2023-2024 #104.

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**MOTION FOR REHEARING ON  
INITIATIVE 2023-2024 #104**

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Through their legal counsel, Lori Hvizda Ward and Lynn Kutner, registered electors of Larimer and Denver Counties, respectively, hereby file this motion for rehearing on Initiative 2023-2024 #104.

On January 3, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #104:

*Shall there be a change to the Colorado Revised Statutes concerning restricting participation in athletic programs based on biological sex at birth, and, in connection therewith, defining a public athletics provider for minors as a public school, a public school district, an activities association or organization involving a public school, and a private school when competing with a public school; requiring public athletics providers for minors to designate each athletics program for students of elementary, middle, and high school as female, male, or coeducational and only allowing students who are female based on biological sex at birth to participate in athletic programs designated as female; prohibiting any governmental entity from investigating, reviewing or taking adverse action against a public athletics provider for minors for compliance with this provision; establishing a cause of action for a public athletics provider for minors or a student who suffers harm as a result of noncompliance of this provision; requiring the department of education to assume financial responsibility for any expense related to a lawsuit or complaint for compliance with this provision; and allowing governmental liability for a civil action brought for noncompliance with this provision?*

In setting this title, the Board erred in the ways set forth below.

## I. The Board lacked jurisdiction due to #104's single subject violations.

There are two types of single subject violations at issue here that are coupled with the limit on participation in athletic activities in schools.

### A. *Changes to an array of existing governmental powers*

The measure prohibits every government entity at all levels from taking or doing anything about a complaint pertaining to public athletics providers. No court, no agency, no district, and no legislative committee could inquire about the propriety of the official action taken with regard to participation in sports-related activities. This limitation on an historic, appropriate field of government powers is inconsistent with the single subject requirement and not likely to be a known or intended result of voters. C.R.S. § 1-40-106.5(1)(e)(II) (single subject requirement guards against voter surprise).

### B. *Confusing drafting*

The provision restricting government powers is so confusingly written as to be internally contradictory. What it does say is this: “A governmental entity shall not entertain a complaint [or take related actions] against [potential defendants] **for compliance** with this subsection (2).” (Emphasis added.)

In other words, this provision prohibits actions filed in order to obtain compliance with the stated limits on participation. While proponents will undoubtedly state they intended to prohibit complaints against defendants who have complied with subsection (2), they wrote it to have the opposite effect. “The preposition ‘for’ means ‘in order to bring about or further,’ or ‘in order to obtain.’” *Norton v. Rocky Mt. Planned Parenthood, Inc.*, 2018 CO 3, ¶12 (citing For, Webster’s Third New Int’l Dictionary (unabr. ed. 2002) (interpreting limit on State use of public funds to pay “for” the performance of any abortion); see Merriam-Webster Online Dictionary (“for” is “a function word to indicate purpose” or “an intended goal”), <https://www.merriam-webster.com/dictionary/for> (last viewed Jan. 9, 2024). Using these definitions, the above cited provision of Initiative #104 effectively reads, “A governmental entity shall not entertain a complaint [or take related actions] against [potential defendants] **in order to bring about (or to obtain) compliance** with this subsection (2).” (Emphasis added.)

If Proponents intended to prohibit such complaints that are initiated “as a result of compliance” with the provisions, they would have said so. That language would make it clear that the complaints which could never be brought were those that dealt with decisions to disqualify athletes. Notably, they used exactly that terminology in Proposed Section 22-32-116.6(4). There, they referred to the Department of Education’s responsibility for costs whenever legal actions were brought “as a result of compliance with subsection (2) of this section.” Given the “rule of consistent usage,” wherein the same term used in the same statute is deemed to have the same meaning, “for compliance” and “as a result of compliance” are not equivalent phrases. See *Colorado Common Cause v. Meyer*, 758 P.2d 153, 161 (Colo. 1988).

Thus, Proponents drafted a provision that prohibits complaints being brought “in order to” bring about “compliance” with its key provision. Colo. Const., art. V, sec. 1(5.5) (the single subject of a measure “shall be clearly expressed in its title”). A clear single subject statement cannot be written when the measure’s express terms conflict with what proponents now say they intended to achieve. After all, the Board’s titles cannot just reflect the proponents’ intent; titles must also reflect a proposed law’s “true” meaning. C.R.S. § 1-40-105(3)(b).

*C. Intramural contests are a non-competitive, unrelated class of endeavors when grouped with competitions between schools*

The measure applies to “any interscholastic, intramural, or club athletic team, sport, or athletic event.” Proposed Section 22-32-116.6(1)(c).

Intramurals are contests within, not between, schools. “Intramural sports are recreational sports organized within a particular institution, usually an educational institution.” [https://en.wikipedia.org/wiki/Intramural\\_sports](https://en.wikipedia.org/wiki/Intramural_sports) (last viewed Jan. 8, 2024); *see also* Merriam-Webster Online Dictionary (defining “intramural” as “competed only within the student body”), <https://www.merriam-webster.com/dictionary/intramural> (last viewed Jan. 10, 2024). Intramural sports have an entirely different purpose from club and interscholastic athletics. “The implementation of high school intramurals is meant to be an additional extracurricular option for non-varsity players and/or ‘non-athletes’ (those that are not out for a school sport).” <https://www.pheamerica.org/2022/the-value-of-an-intramural-program-for-high-school-students/> (last viewed Jan. 8, 2024).

In Colorado, for instance, one school offers “an intramural sports program for students who prefer a shorter time commitment and less competitive sports environment,” while another “offers several intramural opportunities for students in grades 9-12 with the purpose of providing a safe, enjoyable environment for students of any skill level to participate in a variety of recreational activities.” *See* <https://mcauliffe.dpsk12.org/athletics/club-sports-intramurals/> and <https://www.edenpr.org/eden-prairie-high-school/activitiesathletics/activities-office/intramurals> (last viewed Jan. 8, 2024).

Thus, regulating participation in highly competitive athletic events (varsity and junior varsity levels or club sports) is entirely different in policy and politics than setting standards for in-school, non-competitive contests. Combining tangentially related subjects presents the challenge often acknowledged by the Supreme Court: “the risk of surprising voters with a ‘surreptitious’ change... because voters may focus on one change and overlook the other.” *In re Title, Ballot Title & Submission Clause for 2021-2022 #1*, 2021 CO 55, ¶41 (citations omitted).

**II. The titles set are incomplete and misleading.**

*A. The titles further confuse #104’s restrictions on filing complaints “for compliance” with the new limitations on participation in athletics.*

For the reasons set forth in Section I.B above, a title is inherently confusing if it leaves voters with the impression that complaints and governmental action cannot be taken “for

compliance with” these restrictions. Therefore, the measure itself makes accurate title setting impossible. *In re Title, Ballot Title & Submission Clause for Initiative 2015-2016 #156*, 2016 CO 56, ¶¶13, 15 (title was “illogical and inherently confusing” because language from the measure, incorporated into the title, was “muddled” and did “not help voters understand the effect of a ‘yes’ or ‘no’ vote”). A title is legally insufficient where the title language used, even if taken directly from the measure itself, “makes no sense.” *Id.* at ¶14. That is the case here.

*B. The titles incorrectly state the Colorado Department of Education will be responsible for any expense related to a lawsuit or complaint “for compliance” with this provision.*

The titles state the Department of Education must pay the expense of lawsuits or complaints undertaken “for compliance” with the measure’s restrictions. Consistent with the above discussion of the meaning of “for”, the titles will communicate to voters that this responsibility applies to actions to “obtain” compliance. But that’s not what the text seeks to achieve. #104 imposes a financial burden on the Department where expenses are incurred “**as a result of** compliance with subsection (2) of this section.” Proposed Section 22-32-116.6(4) (emphasis added). In other words, the measure requires the Department to pay the costs where a party has already complied, not where a party is sued in order to make it comply. This title is misleading for this reason as well.

*C. The titles fail to state that the measure allows any plaintiff – whether it is a student or public athletics provider – to sue for “psychological, emotional, or physical” harms.*

“Harm,” under the measure, comprises “psychological, emotional, or physical” harm suffered. Proposed Section 22-32-116.6(3)(d). A voter would not ordinarily think that a group sponsoring athletic activities could suffer, much less sue for, harms that are this broadly categorized. Proposed Section 22-32-116.6(3)(c). But they should know, by means of the title, that this measure generates exceedingly broad, potential liability.

*D. The titles fail to state that the measure allows students and public athletics providers to be sued for any “indirect” harms.*

Given the breadth of harms to be used as the basis for legal actions, voters should know that the scope of such actions are actually more expansive. Lawsuits may be filed to seek remedies for “indirect” harms. Proposed Section 22-32-116.6(3)(a), (c). It’s hard to know what this entails because the measure does not limit what “indirect” harms are compensable in the event of a violation. But it is clear that “indirect” harms do not have to arise in any clearly prescribed form or manner. *See Keim v. Douglas Cnty. Sch. Dist.*, 2015 COA 61, ¶34 (“‘Indirect’ is defined as ‘not proceeding straight from one point to another’”). At a minimum, voters should know that an undefined expanse of liability is part of what they are being asked to approve, especially where, as here, a measure is waiving sovereign immunity.

*E. The titles fail to state that this initiative allows parties suing under its provisions to obtain “injunctive relief, monetary damages, and any other relief available under law” as well as attorney fees and costs.*

Typically, the form of relief may not be as essential to be stated in a title as it is here. As outlined above, the sheer breadth of what is actionable under this measure makes the unlimited relief available a key feature to be brought to the attention of voters. *See, e.g., In re Title, Ballot Title and Submission Clause, and Summary for Proposed Amendment Concerning Unsafe Workplace Environment*, 830 P.2d 1031, 1033-34 (Colo. 1992) (title accurate where it used “any and all damages” consistent with initiative text).

*F. The titles do not make it clear that the measure creates an exception to existing government immunity provisions.*

The titles reference that the measure “allow[s] governmental liability for a civil action brought for noncompliance with this provision.” They do not make clear that government is currently immune under the Colorado Governmental Immunity Act. The Board’s practice is to be this explicit, even without needing to cite current law. For example, a legally sufficient title has stated that, under an initiative, a covered person “shall not be immune from suit.” *Id.* at 1033. Language to this effect should be added to clarify this aspect of the titles.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #104 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution, or correction of the misleading ballot title set.

Respectfully submitted this 10<sup>th</sup> day of January, 2024.

RECHT KORNFELD, P.C.

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**CERTIFICATE OF SERVICE**

I hereby affirm that a true and accurate copy of the MOTION FOR REHEARING ON INITIATIVE 2023-2024 #104 was sent this day, January 10, 2024, via first-class mail, postage paid and via fax to:

Nicole Thomas (Counsel to Proponents)  
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*s/ Nathan Bruggeman*

## Action for Healthy Kids

- [What We Do](#)
- [Who We Are](#)
- [Take Action](#)
- [Healthy Kids Blog](#)

### Overview



Outside of physical education, do your students have opportunities to practice physical activity skills? **Intramural programs** and activity clubs allow students to experience a variety of physical activity and games that will **contribute to an active and healthy lifestyle without the competitiveness that comes with traditional team sports.**

### Take Action

Developing a **before/after school intramural program** or activity club for students is a great way to provide resources and exposure to new sports, activities and games. It also **creates a sense of belonging to the school environment, and connection with teachers and peers outside the classroom.** Activities may include friendly competitions in various sports like kickball, open

gym, jump rope, frisbee, capture the flag, yoga, and dance lessons, and can be based on student choice, development of specific skills or to prepare for [fitness testing](#).

When offering intramurals and activity clubs, remember:

- Discuss with school administration how to incorporate intramural programs and activity clubs at your school. Review current programs and identify gaps of activities. Questions to consider:
  - How many and what type of activities to offer?
  - What space is available to use?
- What barriers exist that may prevent students from participating?
- How will students be recruited and registered to participate?
- Who will supervise?
- When will the club be scheduled (how often, how long will each activity last)?
- Engage students to find what activities they're interested in! Be sure to include ideas that are not just sport focused, such as [open gym](#) or [fitness circuit course](#) and [fitness classes](#). Participation in activities and clubs should provide choice for students and should be voluntary.
- Create an [inclusive physical activity environment](#) that is both welcoming and respecting of all abilities and fitness levels.
- Once activities have been identified, establish a budget for the program and club to be successful. Consider volunteer time and donated goods and spaces. Consider [applying for a grant](#) to cover costs.
- Review the district's policy for supervision of the activities and facility maintenance. [Determine if facilities can be open to the community](#).
- Use school and community communication channels (websites, school newsletter, morning announcements, etc.) to promote the intramurals and clubs to students and families.

## Social Emotional Health Highlights

Activities such as these help students explore...

**Self-Awareness**: Getting involved in extra-curriculars allows children to gain self-confidence and self-efficacy through activities that are special to them. Through this, they can explore their strengths in more depth and identify areas of growth that align with their interests.



**Relationship Building:** Incorporating opportunities for physical activity through team sports helps children build skills in communication, teamwork, and social engagement. [Intramural programs](#) and activity clubs [teach lessons about communicating clearly and listening to others as well as working together to achieve a common goal!](#)

## Tips

Starting small is okay! If your school currently does not have any intramurals or activity clubs, consider one or two activities to start. [Walking programs](#) are often the easiest and low cost.

Consider transportation issues for students to come early or stay after school. If it's going to be an issue, consider operating your club during recess or during regular school hours.

Engage parents and the community! Think outside the box and four walls of your school. Here are a few examples. A parent with an interest or talent may volunteer to give lessons one day after school each week. A community member skilled in the martial arts may offer beginning martial arts training to students and staff. Community bicycle club members could meet after school and talk to kids about bicycle safety and hold a bike rally one time each month. Local sports businesses may sponsor the club with donations of water bottles, t-shirts, and equipment.

For more activities and ideas like this one, be sure to [sign up for our news and updates](#). And if you like what you see, please [donate to support our work](#) creating more ways to help build a healthier future for kids.

<https://titleixspecialists.com>

## Why Good Sports, Inc., Title IX and Gender Equity Specialists?

Good Sports, Inc., brings 40+ years of experience analyzing athletics programs and identifying solutions to Title IX compliance problems. Good Sports, Inc., Owner and Founder Valerie McMurtrie Bonnette co-authored the Title IX Athletics Investigator's Manual issued by the Office for Civil Rights (OCR), U.S. Department of Education. OCR has nationwide enforcement authority for Title IX.

Good Sports, Inc., helps institutions of all sizes achieve Title IX athletics compliance. With clients in 37 states, we have consulted privately with institutions of all division levels of the NCAA, NAIA and NJCAA, as well as high schools in several states. We assist schools and programs across the nation achieve and maintain compliance.

With unparalleled insight into OCR's perspective, we analyze your program from every angle. University presidents and administrators have called our reports "excellent," "superb," and "very user-friendly," appreciating our clinical approach in addressing how Title IX applies to your athletics program. Our private consultations include education on the Title IX athletics requirements.

For administrators who want to do it themselves, we have step-by-step instructions in our self-evaluation manuals / desk references: "Title IX and Intercollegiate Athletics: How It All Works – In Plain English" and "Title IX and Interscholastic Athletics: How It All Works – In Plain English." These resources deliver a clear explanation of the Title IX athletics requirements, allowing you to evaluate and achieve Title IX compliance.



<https://titleixspecialists.com/wp-content/uploads/2018/01/Club-and-Intramural-Sports.pdf>

# Title IX Athletics

## Q & A

**Q** We are trying to increase men's enrollment, and have been looking to expand our club and intramural programs for that purpose. We are meeting test one – proportionality of the three-part test for our intercollegiate program. Do the club sports affect Title IX compliance in any way? For example, if we provide financial support to these club sport participants, does that create any concerns? What if the clubs have a coach, budget, and use athletics facilities? What Title IX issues should we be concerned about? (NCAA Division II Director of Athletics)

**A** The very same Title IX requirements for intercollegiate athletics programs also apply to club programs and intramural programs. However, each program is evaluated separately from each other for compliance. Title IX views intercollegiate, club, and intramural sports as three separate programs, and compliance findings are for the specific facts within each separate program; compliance in one program does not determine compliance in another program. The participation for club sports and benefits for participants are analyzed to determine Title IX compliance for the club sports

program. The participation for intramural sports and benefits for participants are analyzed to determine Title IX compliance for the intramural sports program. The participation for intercollegiate sports and benefits for participants are analyzed to determine Title IX compliance for the intercollegiate sports program.

The same 13 Title IX athletics program components that are evaluated to determine compliance for the intercollegiate athletics program are also applied to club sports and intramural sports. In effect, to determine if your club sports program is operating in compliance with Title IX, the following would be evaluated: the three-part test (the access issue evaluating if female and male students have an equal opportunity to become a participant), and the twelve treatment issues (treatment of those who have become participants) for athletics scholarships, equipment, scheduling, travel, tutoring, coaching, facilities, medical services, housing and dining, publicity, support services, and recruitment. The major differences between intercollegiate programs and club sports programs are that club teams are most often self-initiated. This means that participation in club sports programs usually meets test three (full accommodation) of the three-part test, whereby every sport of interest, ability, and available competition is offered for the underrepresented sex. In effect, the

## ***Title IX Athletics Q & A***

institution meets one of the tests of the three-part test, and complies for the accommodation of interests and abilities. As for the twelve treatment issues, institutions typically provide facilities for club sports, but typically do not provide athletics scholarships, scheduling, tutoring, coaching, medical services, housing and dining, publicity, support services, and recruitment benefits for club teams. Otherwise, when institutions do provide support, it may involve funding to purchase uniforms and pay for van transportation, and possibly a small stipend for a coach. Some institutions just provide facilities and no other benefits. Yet other institutions provide extensive benefits, including athletic scholarships. The same analysis that applies for intercollegiate athletics would also apply for any scholarships for club sports. In effect, women's and men's rates of participation in the club sports program would be identified. This would be followed by determining whether the rates of scholarship awards to male and female club sports athletes are proportionate to their rates of participation within one percentage point. If not, a violation of Title IX is likely. Some institutions have donors who fund athletic scholarships for participants in specific sport clubs (athletic scholarships based on athletic skill, rather than academic scholarships or need-based scholarships). Donated dollars are viewed under Title IX as dollars provided by the institution. Bottom line - if athletic grant dollars for female and male club sport athletes are not proportionate to women's and men's rates of club sports participation within one percentage point, then a violation is likely.

The challenge in determining the appropriate non-scholarship financial support for clubs is that different sports may have different needs, just as for intercollegiate athletics. Unlike intercollegiate athletics, however, the institution is unlikely to fully fund the equipment and uniform needs for clubs, pay for transportation by bus or aircraft instead of a van, or pay a salary to one or more coaches. In other words, the funding is limited and may only cover parts of the club's costs for equipment, travel, coaching, etc. Thus, it may be appropriate to establish the same policy and dollar amounts for all clubs or by participant. For example, the institution might provide \$40 per participant for "uniforms," which might consist of a t-shirt and shorts; the institution might pay for gasoline expenses for each van that it allows the club to reserve; and the institution may fund \$1500 as a stipend for a coach. Should club participants desire more elaborate uniforms, better modes of transportation, or additional coaches or more experienced coaching, then the individual participants may pay the additional costs. One red flag is providing different amounts of financial support for women's and men's club teams in the same sport; possible justifications might be significantly different participation numbers, or an unusual event, such as providing support for a club team that qualifies for a national tournament.

## **Title IX Athletics Q & A**

Intramural programs tend to be more recreational and less competitive than club sports programs, and institutions often do not provide benefits other than facilities, scheduling of games and practices, and officials for game operations. Title IX compliance problems for intramural programs are rare; however, the concerns that are more likely to arise are for the assignment of higher quality facilities or priority in the scheduling of games and practices on the basis of sex.

The main interrelationship among intercollegiate, club, and intramural programs is that participation in club sports and intramural sports will be reviewed as evidence of potential interest for intercollegiate sports. In effect, if an institution does not offer a women's intercollegiate lacrosse team, and there is a women's lacrosse club at the institution, that would be viewed as strong evidence of interest in lacrosse; however, the question remains whether club lacrosse participants might also be interested in intercollegiate participation. Additionally, a review of intramural participation, community participation, and the participation at high schools in the areas where coaches routinely recruit may confirm sufficient interest for a women's intercollegiate lacrosse team. Another interrelationship may be that club and/or intramural teams use the same facilities as the intercollegiate teams. The compliance question is whether overuse or scheduling of any facilities affects athletes of one gender more than athletes of the other gender. If so, then a compliance concern is likely.

In short, the same Title IX requirements that apply to intercollegiate athletics also apply to club and intramural sports. However, compliance is reviewed separately for these three separate education programs. (34 C.F.R. § 106.41(a), (b), and (c); 1979 Intercollegiate Athletics Policy Interpretation pages 71413 - 71423)

