

Independent Evaluator's First Interim Report

Phil Catanzano
January 26, 2024

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Introduction

In accord with the Settlement Agreement reached in A.B. et al v. Hawai'i State Department of Education, et al, CV 18-00477 LEK-RT, this is the first interim report of the Independent Evaluator (“IE”).¹ This interim report details the efforts taken by the IE from the date of the Settlement Agreement on or about October 9, 2023 until the date of this report. This was a relatively short window to put into place some of the more foundational elements of an institutional compliance program. Accordingly, many areas will continue to be updated.

The report is organized by deliverable, as defined by reference to the Settlement Agreement’s Exhibit A, applying primarily to James Campbell High School (“Campbell High School”), and Exhibit B, applying primarily to the State of Hawai’i, the Hawai’i Department of Education (“DOE”) and the Oahu Interscholastic Association (“OIA”). All efforts taken and coordinated by the IE are guided by the compliance standards and current federal guidance related to Title IX of the Education Amendments of 1972 (“Title IX”).

The IE submitted this report electronically to identified counsel for the parties for their initial review. This interim report will be provided to the following, in accord with Section H of the Settlement Agreement.²

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¹ Phil Catanzano serves as the IE and was not joined by any other staff from his firm, the Education and Sports Law Group, LLC, during the work described in this report. Thus, throughout the report updates will be described in the first or third person in a way that makes practical sense and without being overly formalistic.

² Attorney Wookie Kim from the ACLU was added to this list since he and another attorney in his office joined the IE at the facility review in December 2023.

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Additional information will be submitted to the parties in accord with the Settlement Agreement, however, the IE has requested additional detail regarding any protective orders or agreements prior to disclosing data that contains or may contain student identifying information, e.g., rosters. This is to ensure that Campbell High School and the DOE remain in compliance with the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 34 C.F.R. Part 99.

I. Data Collection Request and Procedure

The Settlement Agreement states that the "IE shall promptly set up and implement a data collection procedure, and collect all requested data related to each of the relevant categories listed in Section II of this Plan." See Settlement Agreement, Exhibit A, p. A1. In November and December of 2023, the IE began conversations with Campbell High School Principal Jon Henry Lee and Athletic Director Rory Pico around how Campbell High School collects and organizes such information. The Data Request included as Exhibit 1 to this report was shared with Principal Lee and Athletic Director Pico, and Athletic Director Pico has already begun providing responsive documents and will continue as the athletic equity review proceeds into the spring. More importantly, the IE intends to work with Principal Lee and Athletic Director Pico to refine this process so such information can be collected appropriately and efficiently for future years of this review.

The Data Request is not currently annotated with timing issues because there are none. Given the timing of the Settlement Agreement in October 2023, the DOE's subsequent retention of the IE in late-October/November, and the IE's return to Campbell High School in mid-December to provide training to coaches and staff, meet with students and parents, and review certain facilities (all described below), the Data Request was only provided recently. Future interim or annual reports will provide this annotation if data remains outstanding from Athletic Director Pico or any member of the Campbell High School community.

One final point alluded to in the introduction: before providing the specific data provided thus far, e.g., rosters with student identifying information, the IE asks the parties to confirm that there are appropriate protective orders in place to protect the privacy of such

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information consistent with FERPA. Once that information is shared, the IE will utilize www.Box.com or a similar file sharing service that is accessible to all parties. The IE asks that the parties confirm that Box is suitable and accessible in considering any government or private entity security protocols. The IE would like to revise/remove this paragraph once these details are established and will only refer to the protective measures in place so the public can be assured that, now and for the pendency of this review, any information regarding a student is treated appropriately and sensitively.

II. Fall and Winter Sports Rosters

The Settlement Agreement states that the Interim Reports shall include fall and winter sports team rosters, and other component-related data that will be sought in the IE's data request. See Settlement Agreement, Exhibit A, p. A1-2. This information has been collected and will be provided once a protective order or similar order is confirmed and a data sharing service is agreed upon.

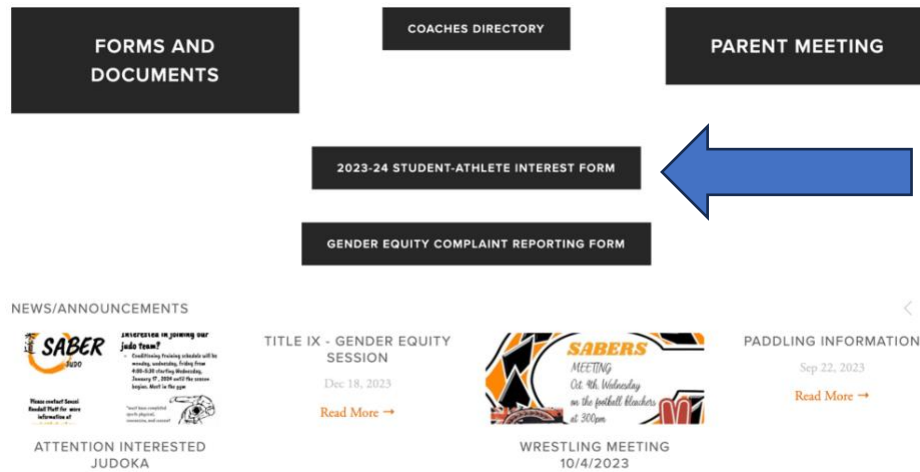
III. Survey for Campbell High School

The Settlement Agreement states that the IE will assist Campbell High School and the OIA to develop and execute an appropriate survey for Campbell High School and relevant middle school students, as well as beginning conversations with local staff and local league officials, as well as other individuals familiar with local sports (including club sports) to begin assessing and responding to Campbell High School's girls' interest in sports. See Settlement Agreement, Exhibit A, p. A2-3.

A survey was developed with Campbell High School staff prior to the IE's December 2023 visit to Campbell High School when it was further refined. That survey was administered to all Campbell High School students, as well as all students in Campbell High School's two feeder middle schools, Ewa Makai Middle School and the Ilima Intermediate School, when the students returned from winter break in early January. The survey was publicized several times by Athletic Director Pico (and assumedly others) to ensure students focused their attention on it. The [interest survey](#) is also still available on the Campbell High School [athletics page](#) along with the complaint reporting form and the notice of my visit, both referenced below.

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Currently there are approximately 800 responses provided from all three schools and that data is being reviewed by the IE. It is anticipated that those results will be shared with the parties on or about January 31, 2024, subject to a protective order as there is identifying information in that document.

IV. Head Coach Survey and Interviews

The IE provided training to Campbell High School's coaches on December 19, 2023 and provided additional training to other administrators in Campbell High School on January 8, 2024. That training is discussed in [Section VII](#). During those training sessions, the IE discussed with the coaches the athletic equity review that would be conducted and shared that the survey would be provided once the coaches returned from winter break. The IE is finalizing that survey and will send it to the coaches in early February 2024. The survey will include all areas to be assessed in the equity review this spring. Following the survey administration, the IE will begin conducting interviews with coaches via videoconference (e.g., Zoom) on a rolling basis. The IE will summarize information about these discussions in future interim and/or annual reports in a way that will be independent, transparent, and not sacrifice interviewee candor. See [Settlement Agreement, Exhibit A](#), p. A3.

The IE seeks to time these interviews appropriate to the sports in question, beginning with the fall sports whose seasons have already concluded, then moving to the winter sports that are currently active, before concluding with the spring sports. As described below, the IE anticipates a return to Campbell High School in early May of 2024.³ During that visit, not only will the IE inspect the physical facilities, but he will also collect any outstanding data and complete any remaining interviews of athletics staff.

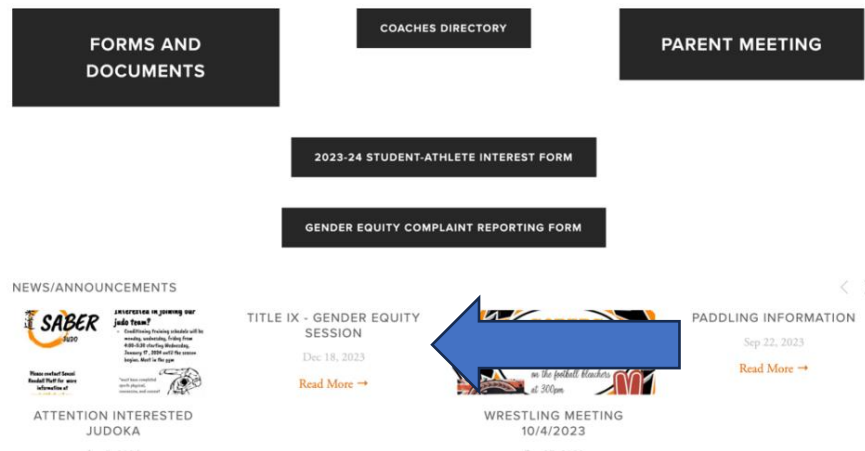
³ For the benefit of the parties that may attend, the IE is considering the week of May 5th or May 12th for a return visit, which is a timeline that also works for Campbell High School's administrators.

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V. Meetings with Students and Parents, Meetings with DOE and OIA Staff, and Review of New Facility in December 2023

The IE traveled to Campbell High School in December 2023 to conduct meetings and/or focus groups with interested students and/or their parents. These meetings occurred between December 20-21. The opportunity to meet with the IE was publicized on Campbell High School's [athletic page](#), shared by the athletic coaches, administrators and some teachers, and signs were posted near the gymnasium where the IE held these interviews. Below is the notification that remains on the Campbell High School website:



In addition to meeting with any individuals who signed up, the IE also provided open office hours for the entirety of both school days and remained at Campbell High School to meet with parents and students in the evening. The IE asked individuals who did respond how they learned about the IEs' visit, and the majority stated that they learned of the visit from the website, from Athletic Director Pico, from announcements or a "student bulletin," from their teachers, or from their athletic coaches. No one indicated that they had been prompted to ask any questions, refrain from asking any questions, or make any specific statements. Once an individual shared whatever information that they wanted to share, the IE also asked about other compliance areas, like their perspectives on their equipment, their playing field, and similar athletics-related benefits. Several individuals were interested in what Title IX was and how the law worked.

The IE met with 18 students and two parents while on campus. All were students at Campbell High School and it is believed most had gone to one of the public middle schools that feed into Campbell High School: Ewa Makai Middle School or the Ilima Intermediate School. Five of the 18 students were girls, the remainder were boys; both parents were

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mothers of male student-athletes at Campbell High School. A summary of their comments is as follows:

- The majority of the boys raised what they believed to be unfairness targeted at them by Athletic Director Pico or the Campbell High School staff as a result of the litigation, e.g., highlighting that a girls' team had newer or more uniforms. The parents, who were also parents of male athletes, also shared this concern and sought for "everyone to be treated the same." The IE sought to discuss with these students and parents the way that Title IX works in consideration of the over-represented or under-represented sexes.
- Several of the students highlighted that the boys' soccer team does not have a locker room while the girls' soccer team does. One student stated that "[n]one of the boys' teams have locker rooms so we have to use the general [physical education] locker or take our stuff out with us...The girls soccer teams do have locker rooms because they take over the football locker rooms as soon as their seasons start. As soon as football ended, we were moved out very quickly. Like a day or two so the girls could come in. We tried to leave it really clean for them."
- Several students raised concerns with facilities shared by boys and girls. For example, several boys discussed the challenges of a dead spot on the shared basketball court, others highlighted the need for wrestlers to be provided locker rooms to shower for hygiene-related reasons.
- Several boys shared the challenges that arose around late practices or games, particularly in considering how they could safely get home. Currently, the boys who raised this concern are carpooled, but they stated that they wished they could bike but practice ended too late.
- Several boys stated that they wished they could take more trips, but that travel for boys' teams was limited by Athletic Director Pico.
- Two of the girls highlighted what they perceived to be an assistant coach that did not like them, but they did not believe it was based on gender, as the coach was also a female. The IE asked for additional detail and the student-athletes said that it involved their being asked to give more effort in practice.
- One detail shared by female athletes during the December meetings was that the girls' soccer team utilized the locker room previously utilized by the football team in the fall. One of the interviewees stated that she had heard that male athletes

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continued to use the facility to shower in the morning before school. She had not seen these athletes and she affirmed that she had never felt unsafe in the showers or feared that a male athlete would enter. Still, the IE raised this with Athletic Director Pico who promptly reminded the football team that they were not allowed to use the locker room after their season ended in late-November. The IE invited the female student athlete to follow up if the issue had not resolved and, as of the date of this report, I have heard nothing further about this issue.

The IE is willing to continue to meet with students and parents as this review progresses.

The IE also utilized the December visit to begin conversations with Campbell High School, representatives from the DOE, and representatives from the OIA to discuss potential sports to be added and supported by the OIA. The initial sports discussed included flag football, pickleball, and rugby. However, as noted below, these efforts have not been completed because the OIA is in the midst of hiring a new Executive Director and the DOE has recently hired a Title IX specialist who has not yet started. It is anticipated that both positions will be filled shortly, at which point I will discuss these issues and how the OIA can support Campbell High School. To be clear, the OIA's former Executive Director, Ray Fujino, expressed his strong support in December 2023 but acknowledged he was soon to be retiring from the role. His staff joined him at that meeting, but a formal Executive Director has not been appointed.

Finally, in December 2023, the IE, counsel from the ACLU of Hawai'i, counsel for the DOE, representatives from the OIA and counsel for the OIA, and representatives from Campbell High School conducted a review of the new Campbell High School athletic field and track that had recently been upgraded. See Settlement Agreement, Exhibit A, p. A3. There were no associated restrooms, concession stands, and/or locker rooms as part of this upgrade. Parties were welcome to take photographs or ask questions of the Campbell High School staff and all questions were answered. For example, Campbell High School staff affirmed that the field did not suffer from drainage issues, was maintained by Campbell High School staff before games, was not available to the public, and had not been subjected to any significant damage. Similarly, an existing press-box was asked about and it was stated that it may be replaced in the future but currently is not used. Photographs of the field will be taken by the photographer detailed in Exhibit A to be used for the formal athletic equity review and provided to the parties in the Annual Report.

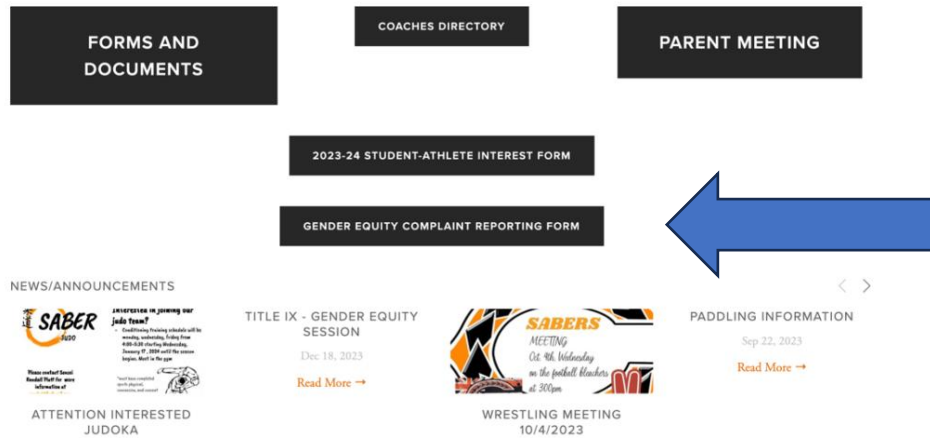
VI. Reporting Mechanism for Student-Athletes to Report Gender Equity Concerns

Campbell High School also created a reporting mechanism for student-athletes to report any gender equity concerns via a hotline and/or online portal maintained by Campbell High

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School. This complaint reporting mechanism also will be publicized to students, coaches, and parents in various Campbell High School publications such as schedules, handbooks, and training materials. See Settlement Agreement, Exhibit A, p. A10. The form is found at this [link](#) and the form is also found on the Campbell High School athletics page as follows:



The form was designed to be concise and collects the following information:

I am a James Campbell High School... *

Choose

Please share the nature of your concern with as much specificity as possible. *

Your answer

Date or approximate date you last experienced or observed the issue you described? *

Your answer

OPTIONAL: Please provide any details you can that indicate why you believe your concern is a gender equity issue?

Your answer

OPTIONAL: Would it be ok for someone from the school to contact you to discuss this issue or to share updates as we look into it, please provide your full name and the way that you would like to be contacted. Please note that if the issue you raised created a health or safety risk to you or another member of the Campbell High School community we may need to refer it to another adult including a parent or guardian.

Your answer

Submit Clear form

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Campbell High School staff receive all responses and will convey them to the IE, but as of this date no reports have been made.

VII. Training for Campbell High School Coaches and Athletics Staff

The IE provided the first of several annual Title IX athletics training to Campbell High School's administration and athletics leadership, including its athletic director, assistant athletic directors, trainers, athletic department staff, and coaches. See Settlement Agreement, Exhibit A, p. A11. These trainings occurred over two dates – December 19 (in person) and January 8 (via Zoom) with a third likely scheduled in the short term for anyone that could not attend. The training materials are included as Exhibit 2 to this document.

This training will also be extended to include representatives from the DOE and the OIA, as appropriate, during the IE's return visit in May 2024.

The IE will also work with the DOE to develop and incorporate a Title IX athletic training video into its required athletic training videos once the DOE's Title IX Specialist is onboarded, which is anticipated to occur within approximately a month.

VIII. Review OIA Governance Documents

The Settlement Agreement also stated that, “[w]ithin sixty (60) days” the IE “shall review the [OIA's] governance documents.” See Settlement Agreement, Exhibit B, p. B1. To that end, the IE reviewed the OIA's current Constitution, Bylaws, and Handbook, among other documents to assess issues or changes that may be helpful to reach compliance with Title IX. In this initial review, I highlighted issues such as the following:

- In the Preamble, it states that “the Association's purpose is to promote athletics in a healthy, safe environment.” I suggested the OIA should add the term “equitable” to this listing in the Preamble. See OIA003207. Not only will that help enhance the approach of the OIA, but it will also allow it to be more responsive and supportive regarding equity issues. For the current settlement, this would be interpreted around gender equity, but in the larger sense it could also branch to other forms of diversity.
- In another part of the Preamble it states that the OIA “maintains that athletics should be supported by public funds. It supports the principle of centralized funding and purchasing and encourages a continuance of certain initiatives at individual schools, simultaneously developing a foundation of equal opportunities among all member schools.” *Id.* I highlighted that this was unclear to me, but to the extent it

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referred to individual schools raising funding for athletics, it should be made clear in policy and training that outside funding to purchase athletic-related benefits "counts" for Title IX purposes. By extension, I suggested local school staff must monitor such fundraising/spending to ensure equity.

- In Section 6(b)(2) of the OIA Bylaws, it states that "[r]ecruitment activities shall not be tolerated" by the OIA. See OIA003220. Given that this section is built into the "Geographic Exceptions" section, this may be limited to schools seeking to recruit students so as to use a geographic exception to compete for another school district. However, I suggested the OIA may clarify that "recruitment" may be used by high schools to identify underrepresented athletes from their feeder middle school, i.e., allowing the high school to provide training and marketing to its feeder schools so that pre-high school students know what sport offerings are at that particular high school.
- I also made similar suggestions regarding scheduling and "prime time" activities, the contemplation of televised activities equitably, the use of outside gifts, and even a rule for tennis apparel. For this last point, see OIA003315, the Handbook designated that girls should not show their midriff with no corresponding requirement for the boys. I have seen this last example as a challenge when female athletes are subject to additional rules around apparel that are not critical to their sport.

With all of this said, however, I have not provided this formal advice or requests to the OIA until a permanent Executive Director is appointed. While I provided some of it informally with the OIA in December, I will provide it again to the permanent Executive Director, when appointed. I do not anticipate any challenge in this regard.

IX. Outstanding Items with the OIA and/or DOE

There are several additional requirements that remain outstanding while the OIA and DOE fill certain roles within their organizations.

For example, the Settlement Agreement states that the IE "shall develop a Title IX assessment form that OIA-member schools shall be required to complete annually to maintain 'Good Standing' as a condition of their continued membership in the OIA" as well as related policies and training materials to effectively complete the forms and/or training. See Settlement Agreement, Exhibit B, p. B1. As described in Section VIII, these efforts will not be completed until the OIA appoints an Executive Director, which is the DOE and OIA's current priority.

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As another example, the Settlement Agreement states that “[w]ith the assistance of the IE, the OIA shall create and implement policies and procedures regarding complaints of unequal treatment in athletics and/or retaliation,” that “shall be consistent with any complaint procedure developed by the DOE” and “shall include a process by which a complainant can make an anonymous complaint via a phone hotline and/or online portal.” See Settlement Agreement, Exhibit B, p. B4. Again, until the DOE’s Title IX Specialist is hired, it seems premature to complete these tasks. The DOE has stated that this individual has been hired and should be onboarded within approximately a month.

The Settlement Agreement also states that the “IE shall develop a student interest survey that will be administered and distributed by the OIA to its member schools, periodically as determined by the IE” and that the “OIA and the IE shall determine sports and additional levels of competition for which there is or may be unmet interest among girls.” See Settlement Agreement, Exhibit B, p. B2. These tasks also remain outstanding, though I will share that every proposed sport discussed generally with the OIA or DOE has been generally welcomed. There has been no dismissal or criticism of any idea. This decision will also be informed, first, by the interest and ability survey that is currently being completed, and second, by the practical resources of the member institutions. For example, if there are not sufficient hockey rinks in Honolulu, it makes little sense to prioritize a sport like ice hockey at cost to more practical sports like flag football, beach volleyball, water polo, rugby, or pickleball.

I am satisfied with the current support and efforts made by Campbell High School, the DOE, and the OIA. Each group understands and respects that this is the beginning of an extended process, and each appears motivated to bring Campbell High School into compliance with Title IX and set a solid foundation for future Title IX compliance efforts.