

**Don't Shoot the Messenger (Again),
but Title IX is ~~Going to Change~~
Might Be Changing (Again)**



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Plan for Today

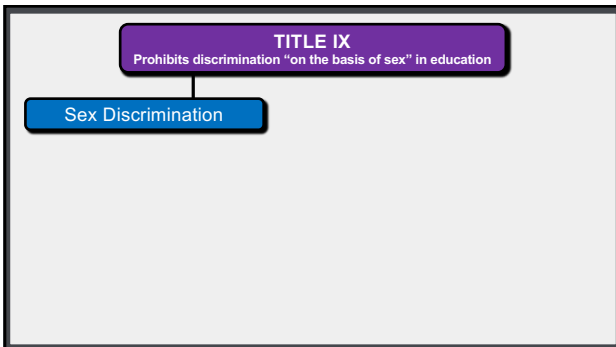
- Overview of Title IX
- Sports
- Transgender Access
- Sex Based Misconduct
- When do the "new" (2020) regulations apply?
- Top 9 Lessons Learned After 20 Months

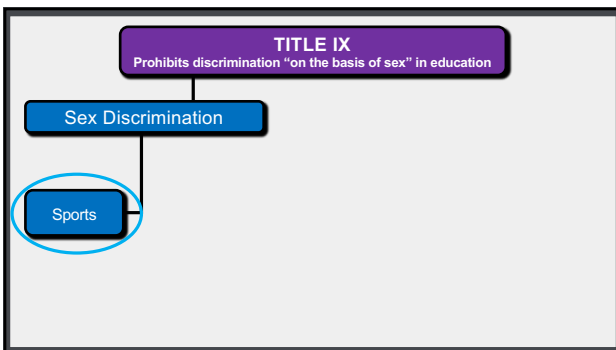


Title IX

- Prohibits discrimination "on the basis of sex" in education programs or activities that receive federal financial assistance.
 - 20 U.S.C. § 1681(a)
- Title IX applies to the entire school district.
 - 20 U.S.C. § 1687(2).

TITLE IX
Prohibits discrimination "on the basis of sex" in education







Equal Sports Opportunities

- Equal Accommodation
 - Providing boys and girls equal participation opportunities
- Equal Treatment
 - Providing boys and girls the same qualitative experiences

Whether equal opportunities are available?

<p>(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;</p> <p>(2) Equipment and supplies;</p> <p>(3) Scheduling of games and practice time;</p> <p>(4) Travel and per diem allowance;</p> <p>(5) Opportunity to receive coaching and academic tutoring;</p>	<p>(6) Assignment and compensation of coaches and tutors;</p> <p>(7) Locker rooms, practice and competitive facilities;</p> <p>(8) Medical and training facilities and services;</p> <p>(9) Housing and dining facilities and services;</p> <p>(10) Publicity.</p>
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34 C.F.R. § 106.41(c) 11

Effective Accommodation

- The "Three-Part Test"
 - First Prong
 - Substantially Proportionate Opportunities
 - Second Prong
 - History and Practice of Program Expansion
 - Third Prong
 - Full and Effective Accommodation

The "Three-Part Test"

- Each are *independent safe harbors!!!*
 - "If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement."
 - Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (OCR Jan. 16, 1996).
- Originally intended for *intercollegiate* athletics —now applies to high schools.
 - Ollier v. Sweetwater Union High Sch. Dist., 168 F.3d 843, 855 (9th Cir. 2014).

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**First Prong:
Substantially Proportionate Opportunities**

- Whether athletic participation "opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."
 - Examines the percentage of athletic "participation opportunities" for each sex compared to that sex's % of overall student enrollment.

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**First Prong:
Substantially Proportionate Opportunities**

- No bright-line rule.
- AND,
 - be wary when the number of opportunities to achieve proportionality would be sufficient to sustain a viable team.

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Biediger v. Quinnipiac Univ. (2d Cir. 2012)

- Women’s volleyball players sued the university following the university’s decision to eliminate its varsity volleyball team.
- 3.62% disparity in the varsity athletic opportunities afforded women at the university compared to the percentage of women enrolled.
- Trial Court:
 - “in strictly numerical terms, a 3.62% disparity presents ‘a borderline case of disproportionate athletic opportunities.’”
- University still failed to show substantially proportionate opportunities.

Biediger v. Quinnipiac Univ. (2d Cir. 2012)

- The Court’s Justifications:
 - (1) The 3.62% figure (while a relatively small percentage) represented 38 additional female roster spots that were needed to achieve proportionality.
 - The 38 roster spots would have been sufficient to field an entire additional team.
 - The volleyball team that the university eliminated only required 14 players to compete.
 - (2) The cause of this discrepancy was directly attributable to the university’s own recent actions in eliminating varsity women’s volleyball.

First Prong: Substantially Proportionate Opportunities

EXAMPLE PUBLIC SCHOOLS - PROPORTIONALITY ANALYSIS

School Year	Enrollment				Sports		Athletes Participating						Proportionality		Ath. Opps. to Meet Exact Proportionality
	# Boys	% Boys	# Girls	% Girls	Boys	Girls	# Boys	% Boys	# Girls	% Girls	Total	Boys	Girls		
2017-18	90	48.6%	95	51.4%	185	5	78	52.7%	70	47.3%	148	4.1%	-4.1%	12.3 for Girls	
							Full		Full						
							• Cross Country	6	• Cross Country	4					
							• Football	30	• Softball	6					
							Winter		• Volleyball	22					
							• Basketball	12	• Basketball	13					
							• Wrestling	14	Winter						
							Spring		• Track	26					
							• Track	18	Spring						
2018-19	88	48.4%	94	51.6%	182	5	74	51.7%	69	48.3%	143	3.4%	-3.4%	10.0 for Girls	
							Full		Full						
							• Cross Country	5	• Cross Country	5					
							• Football	28	• Softball	8					
							Winter		• Volleyball	20					
							• Basketball	14	• Basketball	18					
							• Wrestling	12	Winter						
							Spring		• Track	18					
							• Track	15	• Track	18					

Second Prong:
History and Practice of Program Expansion

- [Briefly]
- “[W]hether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex.”

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Third Prong:
Full and Effective Accommodation

- “[W]hether it can be demonstrated that the interests and abilities of members of that sex have been fully and effectively accommodated by the present program.”

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Third Prong:
Full and Effective Accommodation

- OCR considers the following questions:
 - (1) Is there unmet interest in a particular sport?
 - Survey is ONE tool.
 - (2) Is there sufficient ability to sustain a team in the sport?
 - Not limited to current skill. Looks to potential.
 - (3) Is there a reasonable expectation of competition for the team?
 - Geographic area?
- If YES to all 3, → Not in compliance w/ 3d Prong

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Practical Advice

- (1) Analyze compliance periodically as best practice—not only when facing an OCR complaint, a lawsuit, or a request to add a sport.
- (2) Gather your data and look at proportionality.
- (3) If not proportional, see if interests and abilities are fully met.
- (4) Use the ongoing analysis to help you plan.

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Whether equal opportunities are available?

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) Equipment and supplies;
- (3) Scheduling of games and practice time;
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- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
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- (9) Housing and dining facilities and services;
- (10) Publicity.

34 C.F.R. § 106.41(c)

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Lowther v. Bennington Pub. Schs. (D. Neb. – Filed Feb. 2021)

- Allegations:
 - School allows boys to receive more outside funding than girls sports receive
- Equipment
 - baseball program is provided more balls of superior quality as compared to the softball program.
 - baseball program is provided more, newer and better uniforms than the softball program
 - Mobile batting practice cage, pitching machine, safety screens

Lowther v. Bennington Pub. Schs.
(D. Neb. – Filed Feb. 2021)

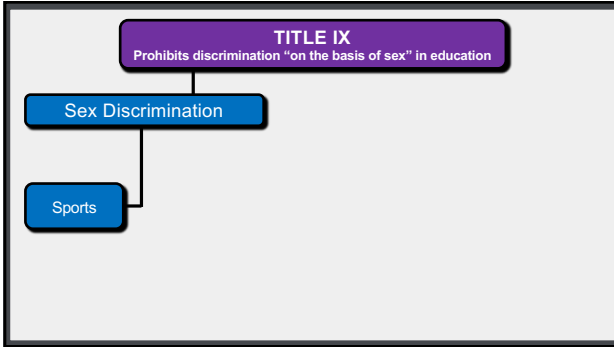
- Allegations (cont.):
 - Scheduling
 - Better off-season training for baseball
 - the scheduling of softball games makes it more difficult for the team to qualify for post-season play as compared to the scheduling of baseball games
 - Girls' basketball games routinely scheduled at earlier times than boys
 - Scheduling Travel – girls' varsity have to wait for JV
 - Coaches
 - Fewer
 - Less experienced

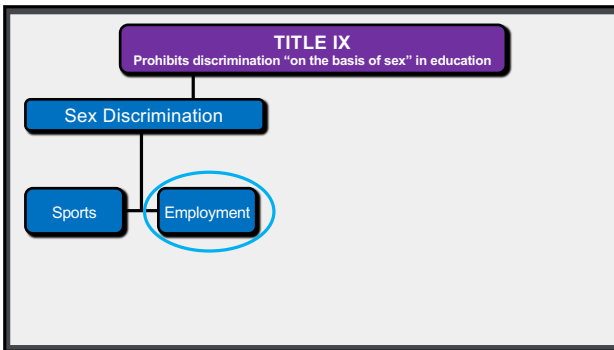
Lowther v. Bennington Pub. Schs.
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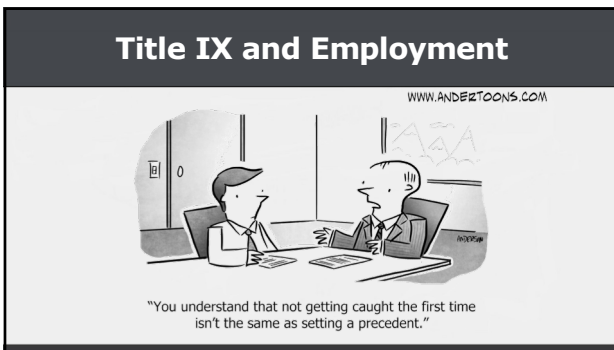
- Allegations (cont.):
 - Facilities
 - Two baseball fields; one softball
 - Press box / Table
 - Sound system
 - Dugouts
 - Bullpens
 - Hitting tunnels
 - Bathrooms vs porta potties
 - Batting Cages
 - Screens
 - Backstop
 - Scoreboard (10 inning, 9 times larger)

Lowther v. Bennington Pub. Schs.
(D. Neb. – Filed Feb. 2021)

- Consent Decree Entered July 19, 2021:
 - Affirmed District's obligation to Title IX
 - Agreed to construct specific softball facilities to the extent that baseball has the same
 - DLR Plans Dated March 2021
 - Provide equivalent off-season training programs
 - Access to existing facilities
 - Equivalent scheduling







Title IX and Employment

- Title IX (and Title VII) prohibit employment decisions based on sex

Bostock v. Clayton County
(U.S. 2020)

- Consolidation of three cases:
 - Donald Zarda was fired from his job as a skydiving instructor after revealing he was gay to a student.
 - Gerald Bostock was fired in Georgia for joining a gay softball league.
 - Aimee Stephens was fired from a position as a funeral director after transitioning from living as a biological male to female.
- All 3 sued their former employers under Title VII (of the Civil Rights Act of 1964), which prohibits employers from discriminating on the basis of race, color, national origin, **sex**, and religion.

Bostock v. Clayton County
(U.S. 2020)

- Issue Before the Court:
 - Whether Title VII allows an employer to take adverse employment action against an employee based on either:
 - Sexual Orientation
 - Gender Identity
- Court: **NO!**
 - An employer cannot "fire someone simply for being homosexual or transgender."

Bostock v. Clayton County
(U.S. 2020)

- An employer violates Title VII even when an employee’s sex is only a part of the reasons for firing:
 - “It doesn’t matter if other factors besides the [employee’s] sex contributed to the decision.”
- It is impossible to **discriminate** against individuals for being homosexual or for being transgender without necessarily discriminating **because** of sex.
- Wait, aren’t we here for Title IX?

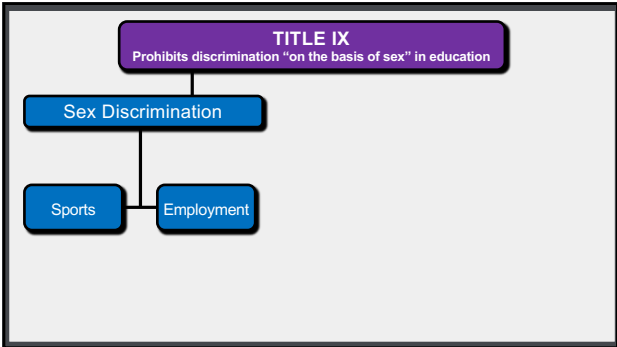
U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity

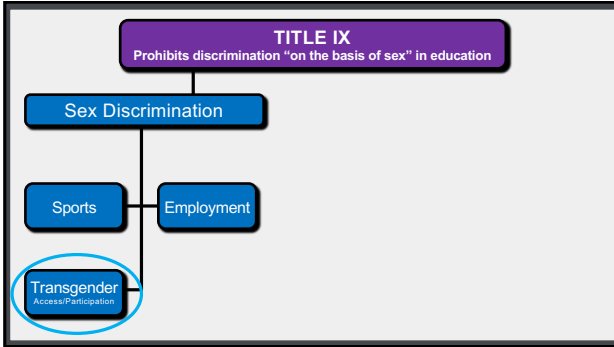
JUNE 16, 2021

Contact: Press Office, (202) 401-1576, press@ed.gov

The U.S. Department of Education’s Office for Civil Rights today issued a [Notice of Interpretation](#) explaining that it will enforce Title IX’s prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation, and (2) discrimination based on gender identity. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of federal financial assistance.

The Department’s interpretation stems from the landmark U.S. Supreme Court decision in [Bostock v. Clayton County](#), issued one year ago this week, in which the Supreme Court recognized that it is impossible to discriminate against a person based on their sexual orientation or gender identity without discriminating against that person based on sex.







Transgender Facility Access

- Doesn't *Bostock* answer this?
- Despite ED's press releases, *not really*.
 - In Title VII, you cannot consider sex when making employment decision.
 - But, . . . Title IX specially allows schools to consider sex concerning sex segregated facilities (e.g., bathrooms, locker rooms, etc.)

Transgender Facility Access

§106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

- In other words, unlike in Title VII, the mere question of considering a person’s sex for purposes of bathroom or locker room access **should not** (at least theoretically) violate Title IX.
- The issue is *what is the person’s sex?*
 - Gender on birth certificate?
 - Gender identified at time of access?

Transgender Facility Access

- Nationwide Trends: Courts are recognizing access in favor of transgender students
 - Not (yet) in the 8th Circuit or D. Neb.

Grimm v. Gloucester Cty. Sch. Bd. 2020 U.S. App. LEXIS 27234 (4th Cir. 2020)

- Grimm was transgender student who requested access to boys’ bathroom
 - School initially permitted without issue, but discontinued accommodation in light of intense community backlash
- Grimm brought suit alleging violations of Title IX and EPC
 - Followed by related claims that school district refused to amend his educational records to reflect updated birth certificate and gender
- Grimm won in District Court, won in front of the Fourth Circuit, almost got to the Supreme Court before guidance underlying decision is rescinded
 - Remanded to be heard again by Fourth Circuit

Grimm v. Gloucester Cty. Sch. Bd.
2020 U.S. App. LEXIS 27234 (4th Cir. 2020)

- Fourth Circuit: "At the heart of this appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender. **We join a growing consensus of courts in holding that the answer is resoundingly yes.**"
 - Grimm wins on bathroom access issues and record amendment issues under both Title IX and EPC
 - Court cites *Bostock* extensively
- Supreme Court declines to review the decision**

Transgender Facility Access

- What do we think the Biden/Cardona OCR would say?
 - Transgender students have right to use facilities that conform to the gender with which the student identifies at the time the access is sought.
 - Would point to *Bostock* and *Grimm*.
 - See COSA Presentation by Catherine Lhamon (Mar. 31, 2022)
- Possible revisions in (soon-to-be?) proposed regulations

Transgender Participation in Sports

WWW.ANDER2TOONS.COM

"So I went to the optometrist and everything's fine.
But he just won't let it go!"

Transgender Participation in Sports

The New York Times

Lia Thomas Wins an N.C.A.A. Swimming Title

With her victory in Atlanta, Thomas, who competes for the University of Pennsylvania, became the first openly transgender woman to win an N.C.A.A. swimming championship.

Transgender Participation in Sports

Hartford Courant

HIGH SCHOOL

Federal judge dismisses lawsuit that sought to block transgender female athletes from competing in girls high school sports in Connecticut

U.S. News

Oklahoma, Arizona Governors Sign Transgender Sports Bans

Republican governors in Arizona and Oklahoma have both signed bills into law that prevent transgender girls and women from competing on female sports teams.

By Associated Press | March 31, 2022

NEW YORK POST

Kansas Gov. Laura Kelly vetoes GOP bill banning transgender athletes

By Mary Kay Lingo | April 16, 2022 | 4:55pm | Updated

PBS NEWS HOUR

Iowa governor signs restrictive transgender sports bill

DES MOINES, Iowa (AP) — Iowa Gov. Kim Reynolds signed into law Thursday a bill that prohibits transgender females from participating in girls high school sports.

**Transgender Participation
in Sports**




NEBRASKA SCHOOL ACTIVITIES ASSOCIATION

Nebraska School Activities Association – Gender Participation Policy

The Nebraska School Activities Association (NSAA) has developed this policy to address the eligibility and participation of students in NSAA-sponsored athletics based upon gender.

<https://nsaa-static.s3.amazonaws.com/about/gppolicy.pdf>




NEBRASKA SCHOOL ACTIVITIES ASSOCIATION

C. Gender Based Participation:


1. **Gender Eligibility:** A student's gender for purposes of eligibility for NSAA-sponsored athletic activities shall be determined by the sex noted on the student's birth certificate.⁶
2. **Cross-Gender Participation:** Girls may participate on boys' teams when there is no girls sport or comparable sport (e.g., softball and baseball) or team offered in that sport by the member school. Boys are not allowed to play girls sports or on girls teams even when there is no corresponding boys sport.⁷

D. Transgender Student Participation: The NSAA Gender Participation Policy only addresses bona fide transgender students and does not alter the foregoing cross-gender participation rule.




NEBRASKA SCHOOL ACTIVITIES ASSOCIATION

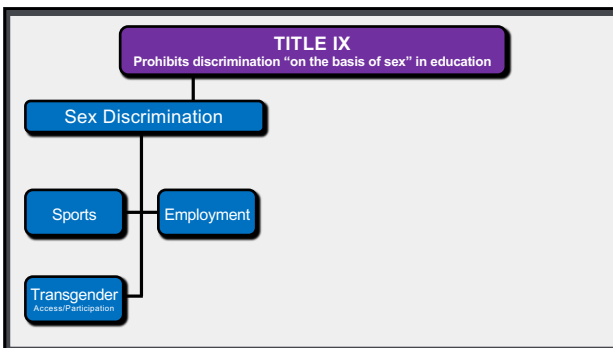
- Specific Procedures for Transgender Student Participation:
 - Notice to Student's School
 - Student's School Determination of Eligibility
 - Application for Participation to the NSAA
 - Review and Required Approval by NSAA Gender Identity Eligibility Committee

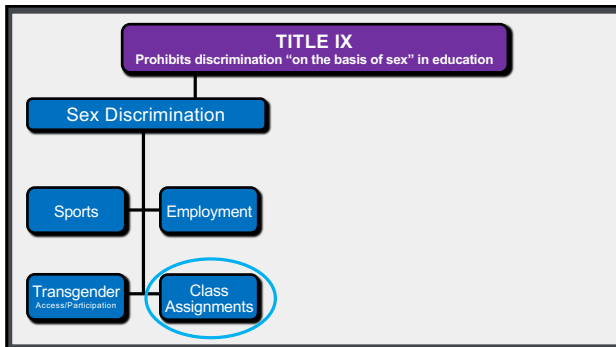
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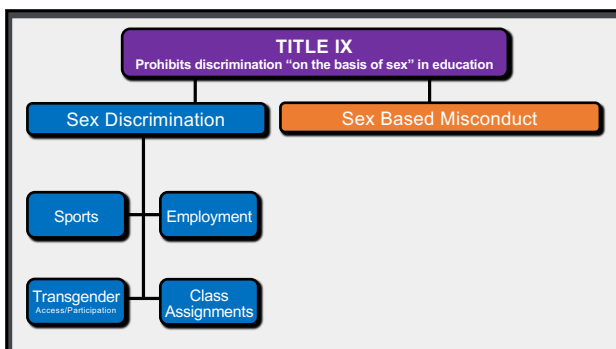
- Review criteria:
 - Transgender student affirms and exhibits consistent gender identity and expression to which student self-relates
 - Creditable documentation affirming the actions, attitudes, dress and manner and demonstrate the student's consistent gender identification and expression;
 - Creditable written verification from an appropriate health-care professional of the student's consistent gender identification and expression;

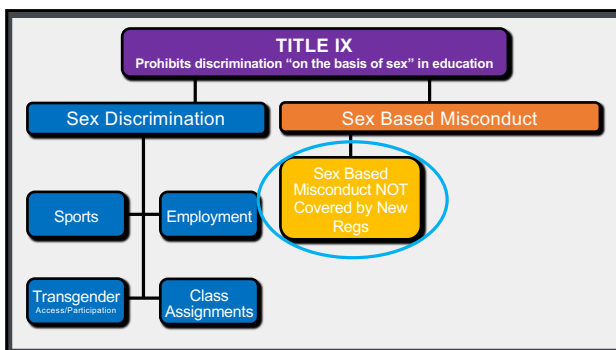
 **NEBRASKA SCHOOL ACTIVITIES ASSOCIATION**

- Review criteria:
 - For a transgender female (or Male-to-Female) (MTF) student only, creditable medical documentation of hormonal therapy, sexual re-assignment surgery and physiological testing, with more detailed requirements.



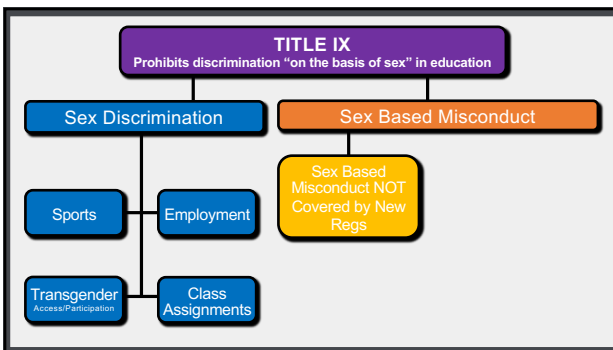


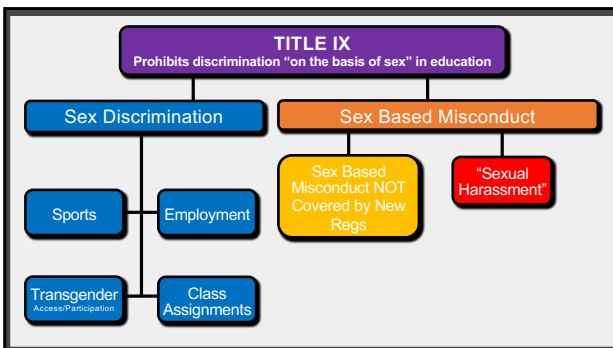


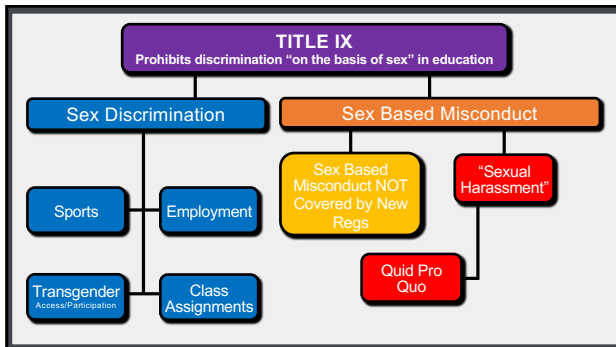


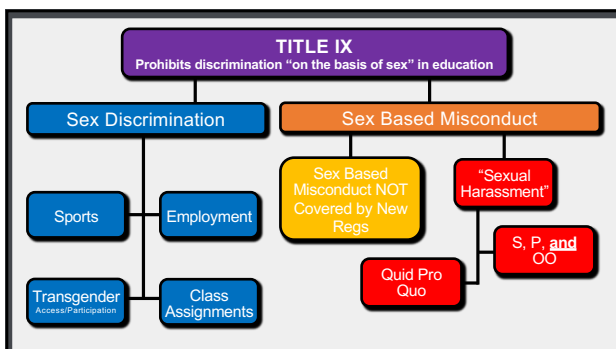
Sex Based Misconduct NOT Covered by "New" (2020) Regulations

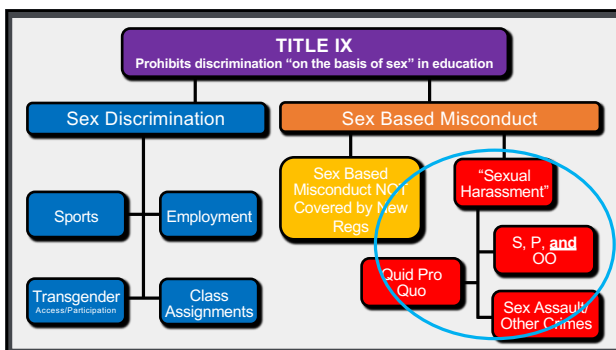
- Lots of sex based misconduct that schools can (and SHOULD) respond to:
 - Sexting
 - One-off comments/names/harassment
 - But NOT bullying/harassment based on sex/sexual orientation/gender identity that is S, P, and OO
 - Hostile sexual environment
 - Environment at school following off-campus sexual assault
 - Employee-on-employee "Title VII" sexual harassment
- Not necessarily "sexual harassment" (as defined).











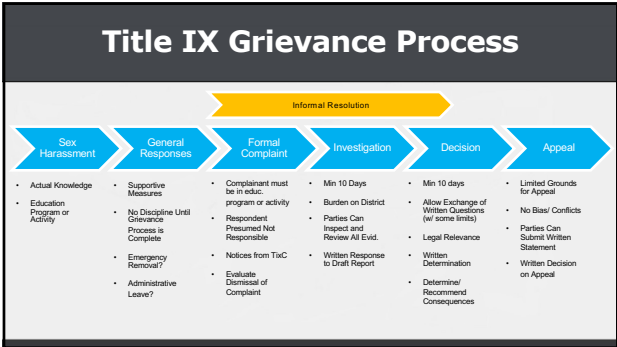
Title IX "Sexual Harassment"

- New Title IX regulations (eff. August 2020)
- Formal definition of "sexual harassment":
 - Quid Pro Quo
 - Severe, Pervasive, and Objectively Offensive
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking

**A note on the Violence Against Women Act.*

Title IX "Sexual Harassment"

- If allegations constitute "sexual harassment," then you **MUST** follow the new regulations.
- Alleged wrongdoers are presumed to be **NOT RESPONSIBLE** for alleged misconduct
- Cannot discipline students or employees unless and until **grievance process** has been completed (≥30 days)
 - Also requires formal complaint



KSB Lessons Learned After 20 Months

- #1: No, the Biden Administration has NOT rescinded all of these regulations
 - Formal Regulation-Making Process (not just "guidance")
 - Issued New (Return to Obama?) Interpretations Only
 - ACTUAL Proposed Revisions to Regulations Forthcoming
 - Like any day now

KSB Lessons Learned After 20 Months

- #2: Determining whether the allegations constitute "sexual harassment" under Title IX as a threshold matter is critically important to your entire process.
 - Also, education program or activity?
 - HUGE impact to timeline and process
 - Strategic Approach

KSB Lessons Learned After 20 Months

- #3: Although not explicitly required, **ALL K-12 employees** should received some basic training on Title IX.
 - Notice of allegations of sexual harassment to ANY EMPLOYEE puts the DISTRICT on notice
 - "Sexual Harassment" is broader than many colloquial understandings
 - Title IX exposure that would keep me up at night.

KSB Lessons Learned After 20 Months

- #4: Remember that some complaints **MUST** be dismissed prior to investigation:
 - Would not constitute sexual harassment even if proved
 - Did not occur in the district's education program or activity
 - Did not occur against a person in the United States
- Avoid, "Well, we'll just investigate to make the complainants happy."
 - Rarely satisfying. Difficult to investigate/decide.
- If the allegations are not proper (or unclear), the Investigator/D-M are often in an incredibly tough (or impossible) situation

KSB Lessons Learned After 20 Months

- #5: Having an updated and compliant Title IX policy in place is a **MUST** in order to comply and actually address complaints
 - Without an updated policy, there is no details on the process for the team to follow
 - Really tough when handling in actual claim and waiting on policy to be adopted
 - As detailed/long as these policies can be, they offer a roadmap for handling complaints of sexual harassment (which most administrators have never done before).

KSB Lessons Learned After 20 Months

- #6: You need your Title IX Team in place and trained
 - You never know when you will learn of these allegations or when you will receive a complaint
 - Schools that have had to scramble to get their team in place or trained **WHILE RESPONDING TO** an actual complaint face an uphill battle
 - Think about who should serve in which role (student discipline process, too)
 - Consider outsourcing Inv./D-M/App. D-M for complex or difficult cases

KSB Lessons Learned After 20 Months

- #7: The formal grievance process is often (always?) more slow and drawn out than the complaining party would often (always?) prefer
 - Policy/Handbooks should notify students/parents of process
 - Formal grievance process **precludes** prompt discipline
 - When communications are not clear as to whether formal complaint has been intended/filed, follow up communication can help clarify

KSB Lessons Learned After 20 Months

- #8: Informal Resolution is a useful tool in some cases
 - At any time between filing of **formal complaint** and decision
 - Requires parties voluntary, **written consent**
 - CANNOT be used to resolve allegations that an employee sexually harassed a student
 - Doesn't require formal process (e.g., arbitration, mediation, etc.)
 - Parties can withdraw at any time

KSB Lessons Learned After 20 Months

- #9: Title IX, student discipline, and special education issues often converge
 - Prevalence of special education students involved in Title IX cases (both as complainants and respondents)

KSB Lessons Learned After 20 Months

- Data cited in the comments to the proposed regulations:
 - 22 percent of students with disabilities reported some form of abuse over the last year
 - Nearly 62 percent had experienced some form of physical or sexual abuse before the age of 17
 - Only 27 percent reported the incident
 - Individuals with intellectual disabilities are sexually assaulted and raped at more than seven times the rate of individuals without disabilities

KSB Lessons Learned After 20 Months

- #9: Title IX, student discipline, and special education issues often converge
 - Prevalence of special education students involved in Title IX cases (both as complainants and respondents)
 - Remember accommodations/FAPE when providing supportive measures
 - Manifestation Determinations
 - In absence of formal complaint, is change of placement better than student discipline

What's next?

Questions?



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