

A group of five diverse students are sitting around a table in a library, looking at books and papers. The background is filled with bookshelves. The image is framed with a blue border.

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# **Title IX Certification (Higher Education) for Investigators and Decisionmakers**

## **Session 3: Specific Topics**

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# Overview



I

## Specific Topics

- Athletics
- Pregnancy
- Employment
- LGBTQ

II

## Policy Considerations

III

## Conclusion



# Title IX

- **Title IX regulations**
  - “The purpose of this part is to effectuate Title IX of the Education Amendments of 1972... which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance...” 34 C.F.R. § 106.1.
  - Other regulations found under 34 C.F.R. part 106.



# Athletics



# Poll Question

Have you had to address any issues with discrimination in athletics within the last 5 years?

- Yes, dealing with a lack of sports based on student interests
- Yes, dealing with financial issues
- Yes, dealing with other issues
- No





# Title IX Athletics

- **Regulations**

- The regulations implementing Title IX contain specific provisions relating to athletic opportunities.
- “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”

34 C.F.R. § 106.41(a)



# Title IX Athletics

- **Regulations – equal opportunity**

- A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.

34 C.F.R. § 106.41(c)

- In determining whether equal opportunities are available the Director will consider, among other factors:
  1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
  2. The provision of equipment and supplies;
  3. Scheduling of games and practice time;

# Title IX Athletics



- **Regulations – equal opportunity**
  - *Equal opportunity*
  - In determining whether equal opportunities are available the Director will consider, among other factors:
    4. Travel and per diem allowance;
    5. Opportunity to receive coaching and academic tutoring;
    6. Assignment and compensation of coaches and tutors;
    7. Provision of locker rooms, practice, and competitive facilities;
    8. Provision of medical and training facilities and services;
    9. Provision of housing and dining facilities and services;
    10. Publicity.



# Title IX Athletics

- The Department's Title IX regulations prohibit sex discrimination in interscholastic, intercollegiate, club, or intramural athletics offered by a recipient institution, including with respect to:
  - a) Student interests and abilities;
  - b) Athletic benefits and opportunities; and
  - c) Athletic financial assistance.



# Title IX Athletics

- **Three-part test**
  - Under the three-part test, an institution must meet at least one of three benchmarks:
    1. Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
    2. Where the members of one sex have been and are underrepresented among athletes, whether the institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of that sex; **or**



# Title IX Athletics

- **Three-part test**
  3. Where the members of one sex are underrepresented among athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.



# Title IX Athletics

- **Part one – substantial proportionality**
  - Where an institution provides athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time student enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.
  - This part of the test establishes a safe harbor for institutions that have distributed athletic opportunities in numbers substantially proportionate to the gender composition of their student bodies.

# Title IX Athletics

- **Part one – substantial proportionality**
  - Analysis:
    - First, determine the number of participation opportunities afforded to male and female athletes in the school's athletic program.
    - Second, determine whether athletic opportunities are substantially proportionate.
    - OCR recognizes that exact proportionality is not required in order to satisfy this test. Disparities are acceptable where they result from modest fluctuations in enrollment patterns.

# Title IX Athletics

- **Part two – history of program expansion**
  - OCR finds compliance where an institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of that sex.
  - This test is satisfied where an institution is continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender and persists in this approach as interest and ability levels in its student body rise.





# Title IX Athletics

- **Part two – history of program expansion**
  - OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex.
  - To meet the requirements, it is not necessary to show annual or constant efforts, but only continuing efforts of program expansion.



# Title IX Athletics

- **Part three – accommodating interests/abilities**
  - This part considers whether there are concrete and viable interests among the underrepresented sex that should be accommodated.
  - An institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination.

# Title IX Athletics

- **Part three – accommodating interests/abilities**
  - To ascertain whether the interests of students are being fully and effectively accommodated, OCR will consider whether there are:
    1. Is there unmet interest in a particular sport?
    2. Is there sufficient ability to sustain a team in the sport?
    3. Is there a reasonable expectation of competition for the team?
  - If all of these conditions are met, the Department of Education will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.



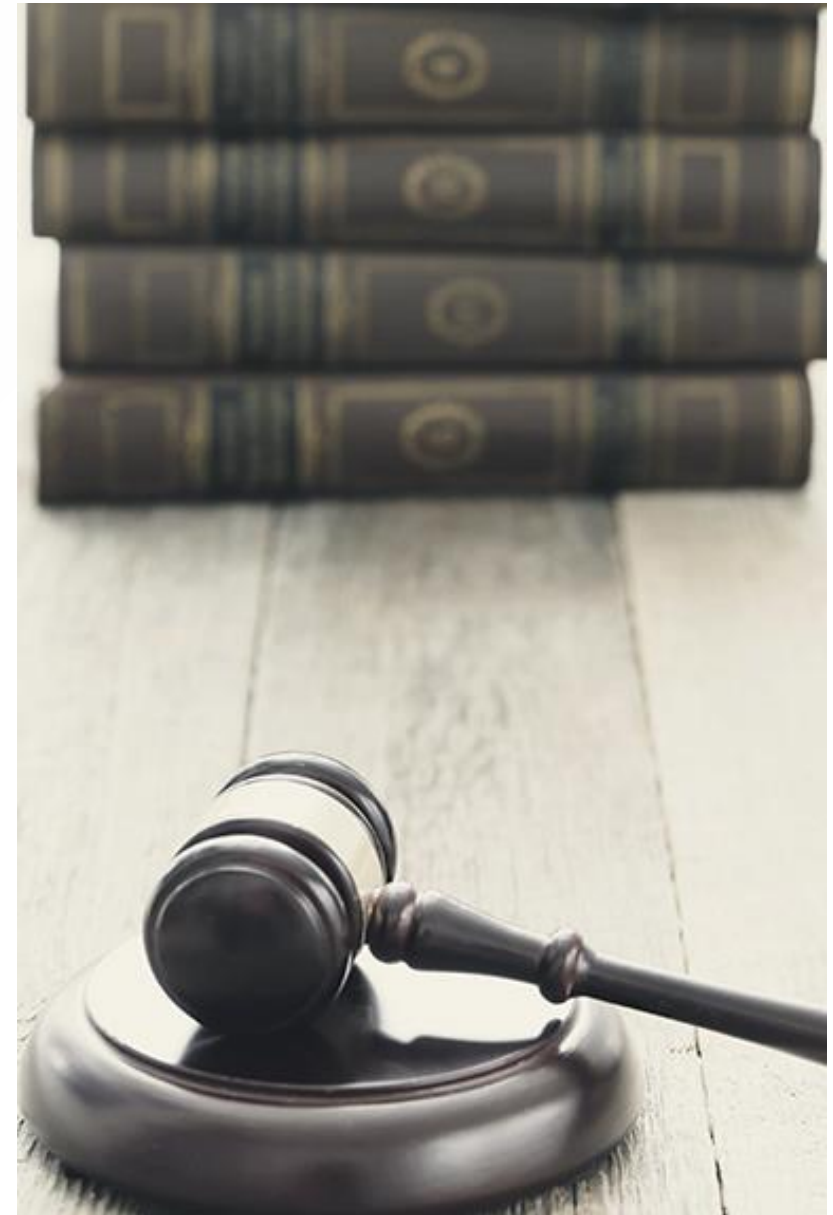
# Title IX Athletics



- **Benefits and opportunities**
  - In determining whether an institution is providing equal opportunity in athletics, the regulations require the Department to consider, among others, the following factors (*a.k.a. the “laundry list”*):
    1. The provision of equipment and supplies;
    2. Scheduling of games and practice time;
    3. Travel and per diem allowances;
    4. Opportunity for coaching and academic tutoring;
    5. Assignment and compensation of coaches and tutors;
    6. Provision of locker rooms, and practice and competitive facilities;

# Title IX Athletics

- **Benefits and opportunities**
  - In determining whether an institution is providing equal opportunity in athletics, the regulations require the Department to consider, among others, the following factors (*a.k.a. the “laundry list”*):
    7. Provision of medical and training facilities and services;
    8. Housing and dining services;
    9. Publicity;
    10. Recruitment; **and**
    11. Support services.





# Title IX Athletics

- **Nondiscriminatory justifications**
  - Sports that require more resources because of the nature of the game. (i.e., football = \$\$\$\$)
  - Special circumstances, like a surge in demand.
  - Special operational expenses, such as tournaments.



# Title IX Athletics

- **Scheduling**
  - OCR will evaluate the scheduling of the athletic program as a whole.
  - Five factors for consideration:
    1. The number of competitive events offered per sport.
    2. The number and length of practices.
    3. Time of day competitive events are scheduled.
    4. Time of day practices are scheduled.
    5. Number of pre-season and post-season competitive opportunities.





# Title IX Athletics

- **Coaching**
  - Three factors to compare:
    - Availability of coaches and volunteer assistants.
    - Assignment of coaches
    - Compensation
- Coaching equivalency is evaluated as a whole and not by comparing the boys' and girls' coaches in each sport.

# Title IX Athletics

## Locker rooms and facilities

- Compliance factors for the locker room, practice, and competition facilities:
  - The quality and availability of the facilities provided for practice and competitive events;
  - Exclusivity of use of facilities for practice and competitive events;
  - Availability of locker rooms;
  - Quality of locker rooms;
  - Maintenance of practice and competitive facilities; and
  - Preparation of facilities for practice and competitive events.

# Title IX Athletics

## Comparison

- OCR assesses compliance by **comparing** the availability, quality, and kinds of benefits afforded members of both sexes.

## Disparities

- OCR examines each factor and identifies any differences that had a negative effect on one sex that resulted in a disparity.

## Offsets

- If there is a disparity, OCR considers whether a benefit for a team was offset by a benefit to a team of the opposite sex.



# Title IX Athletics

## Negligible Disparities

- If no offset, OCR considers whether the differences between the benefits provided to the boys' and girls' programs are negligible.

## Legitimate, Nondiscriminatory Factors

- Where the disparities are not negligible, OCR examines whether the disparities are the result of legitimate, nondiscriminatory factors.

## Denial of Equal Opportunity

- If there are no nondiscriminatory reasons, OCR determines whether the disparities are substantial enough to deny equal opportunity.

# Title IX Athletics

- “OCR has concerns about the District’s provision of equipment and supplies favoring the male participants.”
- “A disproportionate number of boys’ teams appear to have been allocated budgets for uniforms beyond those identified in the District’s uniform rotation schedule as compared to the girls’ teams.”

*Morton Community Unit School District 709 (Illinois), OCR Case No. 05-21-1346 (March 9, 2022).*

# Title IX Athletics

- **Fundraisers and donations**
  - Once a school accepts a donation, the money becomes public money that is subject to Title IX.
  - Schools are not obligated to accept donations, but by accepting the donation, the school must ensure that it remains in compliance with Title IX.



# Title IX Athletics

- OCR examines whether the quality of benefits were equivalent, regardless of the funding sources.
- OCR considers benefits provided through the use of private funds (booster clubs and fundraising), in combination with all other benefits.
- Where private funds provide benefits that assist teams of one sex, the district must ensure that teams of the other sex receive equivalent benefits.



# Title IX Athletics

- “OCR has a compliance concern that the School is not providing its male and female student-athletes equal opportunities with regards to . . . equipment and supplies.”
- “The football and boys’ lacrosse teams have the financial resources to purchase high-quality and custom-designed uniforms and equipment, whereas the field hockey and girls’ lacrosse teams wear standard-issue uniforms.” “[T]he disparity in access to quality uniforms, equipment, and supplies is due to challenges and disparities that arise from fundraising.”
- “OCR does not view some School athletic programs having access to better equipment as a result of successful fundraising to be a legitimate, nondiscriminatory reason that excuses the District from providing equivalent equipment and supplies to girls’ and boys’ athletic programs.”

*Morgan Hill Unified School District (California), OCR Case No. 09-22-1295 (October 19, 2023).*

# Title IX Athletics

- **Additional resources**
  - For more information about the obligation to provide equal athletic opportunities and to effectively accommodate students' athletic interests and abilities, please review:
    - Dear Colleague Letter: Part Three of the Three-Part Test (April 20, 2010), available at <http://www.ed.gov/ocr/letters/colleague-20100420.html>;
    - Dear Colleague Letter: Athletic Activities Counted for Title IX Purposes (September 17, 2008), available at <http://www.ed.gov/ocr/letters/colleague-20080917.pdf>

# Title IX Athletics

- **Additional resources**

- For more information about the obligation to provide equal athletic opportunities and to effectively accommodate students' athletic interests and abilities, please review:
  - Dear Colleague Letter: Further Clarification of Intercollegiate Athletics Policy Guidance (July 11, 2003), available at <http://www.ed.gov/ocr/title9guidanceFinal.html>;
  - Dear Colleague Letter: Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (January 16, 1996), available at <http://www.ed.gov/ocr/docs/clarific.html>; **and**
  - Title IX Policy Interpretation: Intercollegiate Athletics (December 11, 1979), available at <http://www.ed.gov/ocr/docs/t9interp.html>.



# Pregnancy



# Poll Question

Have you had to address any issues with discrimination in pregnancy within the last 5 years?

- Yes, dealing with harassment
- Yes, dealing with discrimination
- Yes, dealing with both harassment and discrimination
- No



# Title IX – Pregnancy

- **General requirements**
  - Title IX prohibits generally discrimination on the basis of sex in education programs and activities.
  - Title IX regulations specifically prohibit discrimination against any student based on pregnancy or related conditions.
  - Title IX regulations also prohibit a school from applying any rule related to a student's parental, family, or marital status that treats students differently based on their sex.





# Title IX – Pregnancy

- **General requirements**
  - Title IX's focus has been on not making certain stereotypes of pregnant students or employees within education.
  - Title IX regulations also emphasize the need to treat certain pregnant students similar to students with temporary disabilities.
  - In this respect, certain accommodations may need to be provided to students who are pregnant.



# Title IX Pregnancy

- **OCR guidance**
  - On June 25, 2013, the Office for Civil Rights (OCR) issued a Dear Colleague Letter on pregnancy and parenting discrimination.
  - The Department of Education also issued Supporting the Academic Success of Pregnant and Parenting Students in June 2013.



# Title IX Pregnancy

- **OCR guidance**
  - Focus on concerns with 16 through 24-year-olds who were not enrolled in high school and had not earned a high school diploma or alternative credential.
  - Students give a range of reasons for dropping out of high school, both school-and family-related.
  - Pregnancy is consistently the most common family-related reason given by female students.





# Title IX – Pregnancy

- **OCR guidance**
  - Title IX guidance details how the law applies to a range of specific educational activities and policies that affect pregnant and parenting students, including:
    - Class and school activities;
    - Excused absences and medical leave;
    - Accommodations;
    - Harassment; and
    - Policies and procedures.

# Title IX Regulations

- **Title IX Regulations: Pregnancy and Students**
  - A recipient must not adopt or implement any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.
  - A recipient must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions.

34 C.F.R. § 106.40(a) and (b)

# Title IX Regulations

- **Title IX Regulations: Pregnancy**
  - Pregnancy or related conditions means:
    - (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
    - (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
    - (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

34 C.F.R. § 106.2

# Title IX Regulations

- **Actions to Prevent Discrimination and Ensure Equal Access**
  - A recipient must take specific actions under paragraphs (b)(3)(i) through (vi) of this section to promptly and effectively prevent sex discrimination and ensure equal access to the recipient's education program or activity once the student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions.
  - The Title IX Coordinator must coordinate these actions.

34 C.F.R. § 106.40(b)(3)

# Title IX Regulations

- **Title IX Regulations: Pregnancy and Students**
  - A recipient must ensure that when a student, or a person who has a legal right to act on behalf of the student, informs any employee of the student's pregnancy or related conditions unless the employee reasonably believes that the Title IX Coordinator has been notified, the employee promptly provides that person with the Title IX Coordinator's contact information and informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity.

34 C.F.R. § 106.40(b)(2)



# Title IX Regulations

- **Responsibility to provide information**
  - The recipient must inform the student, and if applicable, the person who notified the Title IX Coordinator of the student's pregnancy or related conditions and has a legal right to act on behalf of the student, of the recipient's obligations under paragraphs (b)(1) through (5) of this section and § 106.44(j) and provide the recipient's notice of nondiscrimination under § 106.8(c)(1).

34 C.F.R. § 106.40(b)(3)(i)

# Title IX Regulations

- **Pregnancy – Separate and Comparable Portion**
  - A recipient does not engage in prohibited discrimination when it allows a student, based on pregnancy or related conditions, to voluntarily participate in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions.
  - The recipient must allow the student to voluntarily access any separate and comparable portion of the recipient's education program or activity under paragraph (b)(1) of this section.

34 C.F.R. § 106.40(b)(1) and (b)(3)(iii)

# Title IX Regulations

- **Reasonable modifications**
  - The recipient must make reasonable modifications to the recipient's policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity.
  - Each reasonable modification must be based on the student's individualized needs. In determining what modifications are required under this paragraph, the recipient must consult with the student. A modification that a recipient can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification.

34 C.F.R. § 106.40(b)(3)(ii)(A)

# Title IX Regulations

- **Reasonable modifications**

- The student has the discretion to accept or decline each reasonable modification offered by the recipient. If a student accepts a recipient's offered reasonable modification, the recipient must implement it.
- Reasonable modifications may include but are not limited to, breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom; intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time for coursework and rescheduling of tests and examinations; allowing a student to sit or stand, or carry or keep water nearby; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other changes to policies, practices, or procedures.

34 C.F.R. § 106.40(b)(3)(ii)(B) and (C)

# Title IX Regulations

- **Voluntary leaves of absence**

- The recipient must allow the student to voluntarily take a leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's licensed healthcare provider.
- To the extent that a student qualifies for leave under a leave policy maintained by a recipient that allows a greater period of time than the medically necessary period, the recipient must permit the student to take voluntary leave under that policy instead if the student so chooses.
- When the student returns to the recipient's education program or activity, the student must be reinstated to the academic status and as practicable, to the extracurricular status that the student held when the voluntary leave began.

34 C.F.R. § 106.40(b)(3)(iv)



# Title IX Regulations

- **Lactation space**
  - The recipient must ensure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

34 C.F.R. § 106.40(b)(3)(v)

# Title IX Regulations

- **Supporting documentation**
  - A recipient must not require supporting documentation under paragraphs (b)(3)(ii) through (v) unless the documentation is necessary and reasonable for the recipient to determine the reasonable modifications to make or whether to take additional specific actions under paragraphs (b)(3)(ii) through (v).

34 C.F.R. § 106.40(b)(3)(vi)

# Title IX Regulations

- **Supporting documentation**
  - Examples of situations when requiring supporting documentation is not necessary and reasonable include, but are not limited to, when the student's need for a specific action under paragraphs (b)(3)(ii) through (v) is obvious, such as when a student who is pregnant needs a bigger uniform; when the student has previously provided the recipient with sufficient supporting documentation; when the reasonable modification because of pregnancy or related conditions at issue is allowing a student to carry or keep water nearby and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom; when the student has lactation needs; or when the specific action under paragraphs (b)(3)(ii) through (v) is available to students for reasons other than pregnancy or related conditions without submitting supporting documentation.

34 C.F.R. § 106.40(b)(3)(vi)

# Title IX Regulations

- **Comparable treatment**
  - To the extent consistent with paragraph (b)(3) of this section, a recipient must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions with respect to any medical or hospital benefit, service, plan, or policy the recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's education program or activity.

34 C.F.R. § 106.40(b)(4)

# Title IX Regulations

- **Certificate to participate**

- A recipient must not require a student who is pregnant or has related conditions to provide certification from a healthcare provider or any other person that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless:
  - (i) The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
  - (ii) The recipient requires such certification of all students participating in the class, program, or extracurricular activity; and
  - (iii) The information obtained is not used as a basis for discrimination prohibited by this part.

34 C.F.R. § 106.40(b)(5)



# Title IX Regulations

- **Title IX Regulations: Pregnancy and Employees**
  - A recipient must not discriminate against any employee or applicant for employment on the basis of current, potential, or past pregnancy or related conditions.

34 C.F.R. § 106.57(b)

# Title IX Regulations

- **Pregnancy and Employees – Lactation time and space**
  - A recipient must provide reasonable break time for an employee to express breast milk or breastfeed as needed.
  - A recipient must ensure that an employee can access a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed.

34 C.F.R. § 106.57(e)

# Title IX Regulations

- **Pregnancy and Employees – Comparable treatment**
  - A recipient must treat pregnancy or related conditions as any other temporary medical conditions for all job-related purposes, including commencement, duration, and extensions of leave; payment of disability income; accrual of seniority and any other benefit or service; and reinstatement; and under any fringe benefit offered to employees by virtue of employment.

34 C.F.R. § 106.57(c)

# Title IX Regulations

- **Pregnancy and Employees – Voluntary leaves of absence**
  - In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient must treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

34 C.F.R. § 106.57(d)

# Title IX Pregnancy

- **Pregnancy and athletics**
  - NCAA has provided significant guidance on this issue.
  - See NCAA Pregnant and Parenting Student-Athletes, Resources, and Model Policies.

<http://www.ncaa.org/about/resources/inclusion/pregnant-parenting-student-athletes>





# Title IX Pregnancy

- **Relevant cases**
  - *Ivan v. Kent State University*, 863 F.Supp. 581 (concluding that the university articulated legitimate reasons to overcome any claim of discrimination).
  - *Varlesi v. Wayne State University*, Case No. 14-1862 (affirming a jury award of nearly \$850,000 after finding discrimination against a pregnant student).
  - *Stewart v. City University of New York* (2013) (settlement after an administrative complaint after allegations that the university refused to allow her to make up assignments).
  - *Kostal v. Logan University* (2013) (settlement after an administrative complaint allegations that the university refused to allow her to make up work).



# Other Areas

# Poll Question

Have you had to address issues with discrimination against LGBTQ students within the last 5 years?

- Yes, dealing with harassment
- Yes, dealing with discrimination
- Yes, dealing with both harassment and discrimination
- No





# Title IX Employment

- **Employment**
  - In recruitment, hiring, rates of pay, job assignments, benefits, and other terms or conditions of employment, an educational institution may not discriminate against persons on the basis of sex.  
34 C.F.R. § 106.51
- Recruitment  
34 C.F.R. § 106.53
- Compensation  
34 C.F.R. § 106.54
- Job classification and structure  
34 C.F.R. § 106.55



# Title IX Employment

- **Employment**

- Fringe Benefits

34 C.F.R. § 106.56

- Advertising

34 C.F.R. § 106.59

- Pre-employment Inquiries

34 C.F.R. § 106.60

- Sex as a bonafide occupational qualification

34 C.F.R. § 106.61





# Title IX Employment

- **Employment and status**
  - Under 34 C.F.R. § 106.57, an educational institution shall not apply any policy or take any employment action:
    - Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or
    - Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.



# Title IX LGBTQ

- **Students and LGBTQ**
  - On February 22, 2017, the Department of Justice and the Department of Education rescinded their respective prior guidance on gender identity issues. The Department of Justice and the Department of Education withdrew the statements of policy and guidance.
  - [DOJ Dear Colleague Letter February 22, 2017](#)

# Title IX LGBTQ

- **Students and LGBTQ**
  - In 2017, the Seventh Circuit decided an appeal from the U.S. District Court for the Eastern District of Wisconsin. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.D.A. 1034, 1039-42 (7th Cir. 2017).
  - The Whitaker case involved the following topics:
    - Restroom use,
    - Title IX, **and**
    - The Equal Protection Clause.



# Title IX LGBTQ

- **Students and LGBTQ**
  - Fourth Circuit Court of Appeals decided that restroom policies segregating transgender students and denying transgender students accurate transcripts are unconstitutional and violate Title IX. *Grimm v. Gloucester*, 972 F.3d 586 (4th Cir. 2020).
  - The District argued that it had the ability to create sex-segregated restrooms and that the act in and of itself isn't discriminatory. The court stated that while the act of creating the sex-segregated restrooms may not have been discriminatory – the school board's notion of what "sex" means was discriminatory.

# Title IX LGBTQ

- **Students and LGBTQ**
- On June 15, 2020, the U.S. Supreme Court held that discrimination on the basis of an individual's status as homosexual or transgender constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. [See Bostock v. Clayton Cty., Ga., 140 S. Ct. 1731, 1741 \(2020\).](#)
- The Supreme Court held: “[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”



# Title IX LGBTQ

- **Students and LGBTQ**
  - Biden Executive Order
    - The Executive Order makes the policy statement that all persons should receive equal treatment under the law without regard to their gender identity or sexual orientation.
    - The Order bases these policy statements on Title VII of the Civil Rights Act of 1964 and the Supreme Court's recent ruling on that law, *Bostock v. Clayton County*.





# Title IX

- **DOE notice of interpretation**
  - On June 16, 2021, the U.S. Department of Education (DOE) issued a Notice of Interpretation (Notice) 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.
  - This notice can be found at:  
<https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>

# Title IX

- **DOE notice of interpretation**
  - This notice also informs schools that the Office for Civil Rights (OCR) will investigate complaints of discrimination based on sexual orientation and gender identity and will address compliance concerns or violations when necessary.
  - In fact, OCR has stated that it will investigate “allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied benefits of such programs or activities or otherwise treated differently because of their sexual orientation or gender identity.”
  - Earlier this year, the U.S. Department of Justice came to the same conclusion as DOE: Title IX protects against discrimination based on sexual orientation and gender identity.



# Title IX

- **Policy implications**
  - School districts should take careful note of DOE's recent Notice and review nondiscrimination policies and procedures with respect to sexual orientation and gender identity.
  - If a district's nondiscrimination policy prohibits discrimination on the basis of sex, there is no need to include sexual orientation or gender identity as a subset of "sex" to avoid OCR scrutiny, provided the district interprets "sex" to include sexual orientation and gender identity and its practices reflect such interpretation.

# Title IX LGBTQ

- **Students and LGBTQ**
  - Safest route is to assume that students who are transgender are protected under Title IX and to work with these students on an individual basis to accommodate them with respect to the use of restrooms and locker rooms, preferred names and pronouns, school-sponsored activities, and athletics.
  - In responding to requests from students who are transitioning or transgender, a district should consider:
    1. District policies and procedures;
    2. The age of the student;
    3. The parents' involvement and support;
    4. How to maintain student confidentiality;
    5. How to make the district's facilities accessible for the student; **and**
    6. Possible harassment/retaliation.



# Title IX LGBTQ

- **Tehachapi USD (CA)**
  - Tehachapi Unified School District (District) agreed to resolve a Title IX complaint alleging sexual and gender-based harassment of a gender non-conforming male student (Student), who attended Jacobsen Middle School.
  - The investigation found that the Student was targeted for harassment over two school years because of his nonconformity with gender stereotypes.
  - The District signed a Resolution Agreement in which it agreed to take all reasonable steps to ensure that all students enrolled in the District are not subject to sex-based harassment, and to respond promptly and appropriately to all reports of harassment.



# Conclusion



# Conclusion

- Need to consider various areas.
- Need to identify policies.
- Need to ensure staff is trained in various areas.



# What was your key takeaway?

## Please let us know in the Q&A.

We will use your response with your first name and last initial on our website so others can benefit!





**Richard Verstegen**  
**Attorney**

# Questions?



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