



Title IX Coordinator Certification Higher Education

Session 3: Specific Topics for Title IX Coordinators

Presented by: Richard F. Verstegen





CareerLearning

Title IX Coordinator Certification Higher Education
Session 3: Specific Topics for Title IX Coordinators

Presented by: Rick Verstegen

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. s. 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 lack of sports based on student interests
 - Yes, dealing with financial issues
 - Yes, dealing with other issues
 - Other





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. s. 106.41(a)

Title IX Athletics

- **Regulations– separate teams**
 - Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.
 - However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.
 - For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact. 34 C.F.R. s. 106.41(b)

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. s. 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:
 - Student interests and abilities;
 - Athletic benefits and opportunities; **and**
 - 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 which 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 which 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 is:
 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 accommodating the interests and abilities of the underrepresented sex.

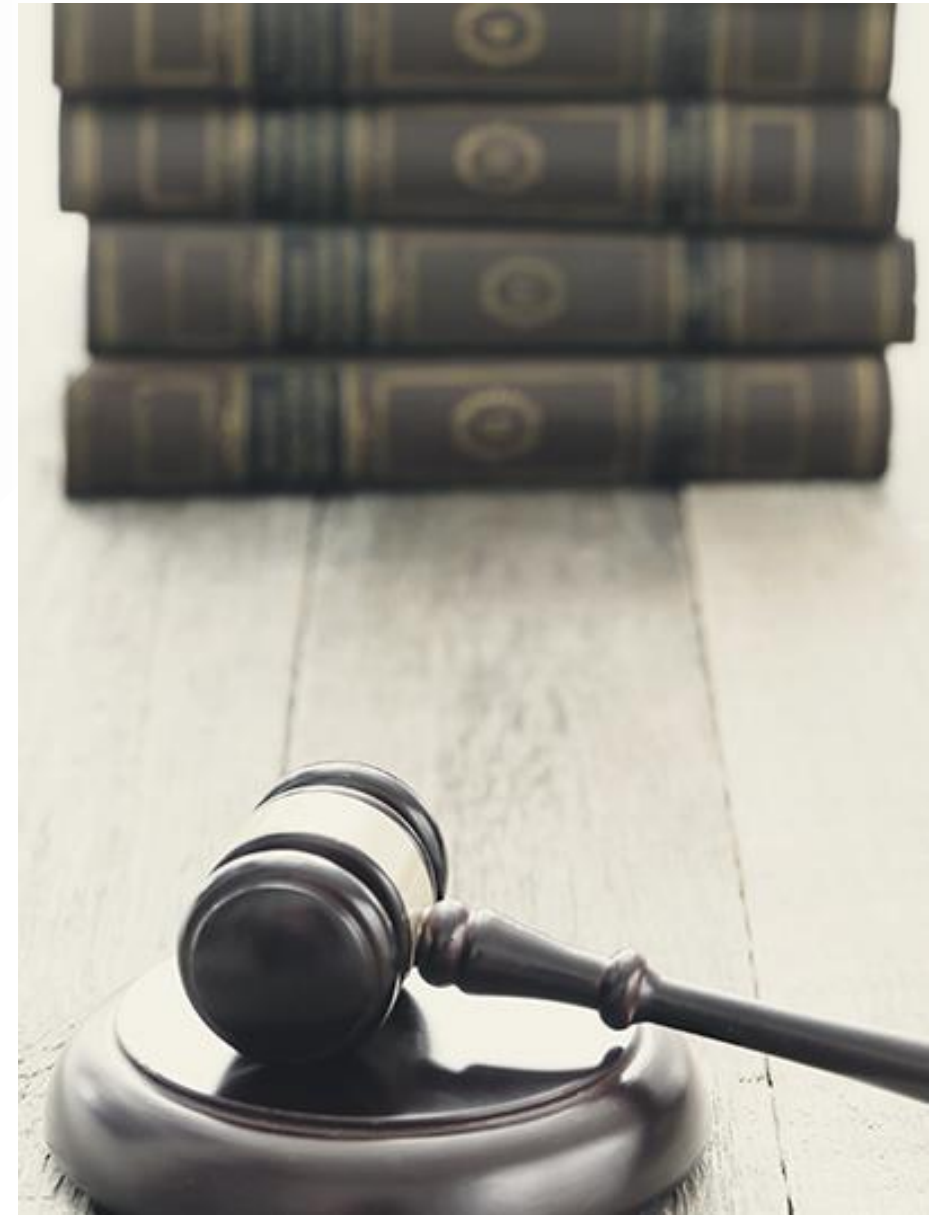
Title IX Athletics

- **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 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

- **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
 - Other



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 discriminating against any student based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions.
 - Title IX regulations also prohibits 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 prohibits discrimination on the basis of sex in many aspects within education.
 - Programs and services
 - Employment
- Title IX's focus has been on not making certain stereotypes of pregnant students or employees within education.

Title IX– Pregnancy

- **General requirements**
 - 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

A stack of three books is positioned on a light-colored surface, likely a desk or table. The top book has a dark red cover, the middle one is white, and the bottom one is also white. The background is a blurred bookshelf filled with various books, creating a library or study environment.

- **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 Pregnancy

- **Regulations**

- An educational institution in providing any aid, benefit, or service to a student, may not, on the basis of sex:
 - Treat one student differently from another in determining whether the student satisfies any requirement or condition for the provision of any aid, benefit, or service;
 - Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
 - Deny any student such aid, benefit, or service;
 - Subject students to separate or different rules of behavior, sanctions, or other treatment; or
 - Otherwise limit any student in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. s. 106.31.

Title IX– Pregnancy

- **Regulations**
 - Title IX regulations expressly prohibit using parental status as a means of discriminating on the basis of sex in programs and activities. 34 C.F.R. s. 106.40.
 - General rule: An educational institution shall not apply any rule concerning a student actual or potential parental, family, or marital status which treats students differently on the basis of sex.





Title IX Pregnancy

- **Regulations**
 - A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient. 34 C.F.R. s. 106.40(b)(1)

Title IX Pregnancy

- **Regulations**

- A recipient may require such a student to obtain certification of a physician that the student is physically and emotionally able to continue participation, so long as such certification is required of all students for other physical or emotional conditions requiring the attention of the physician. 34 C.F.R. s. 106.40(b)(2).
- A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students. 34 C.F.R. s. 106.40(b)(3).

Title IX Pregnancy

- **OCR guidance**
 - Under Title IX, it is illegal for schools to exclude a pregnant student from participating from any part of an educational program or activity.
 - This applies to specific classes, extracurricular activities, honor societies, and other activities.
 - Educational institutions must allow students to continue to participate in classes even though they are pregnant.

Title IX Pregnancy

- **OCR guidance**
 - Educational institutions can allow students to choose whether to participate in special instructional programs or classes for pregnant students. Students can participate if they want to, but schools cannot pressure them to do so.
 - Any alternative program must provide the same types of academic opportunities as the institution's regular program.
 - Educational institutions must allow students to participate even though they are pregnant and not require them to submit a doctor's note.

Title IX Pregnancy

- **OCR guidance**
 - To ensure a pregnant student's access to its educational program, when necessary, an educational institution must make adjustments to the regular program that are reasonable and responsive to the student's temporary pregnancy status.
 - Educational institutions must provide pregnant students with the same special services it provides to students with temporary medical conditions.
 - This includes at-home tutoring or independent study.

Title IX Pregnancy

- **OCR guidance**
 - Educational institutions may require a pregnant student or student who has given birth to submit medical certification for school participation but only if the school also requires such certification from all student with physical or emotional conditions requiring the attention of a physician.
 - Schools should not presume that a pregnant student is unable to attend school or participate in school.

Title IX– Pregnancy

- **Excused absences and medical leave**
 - In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began. 34 C.F.R. 106.40(b)(5).



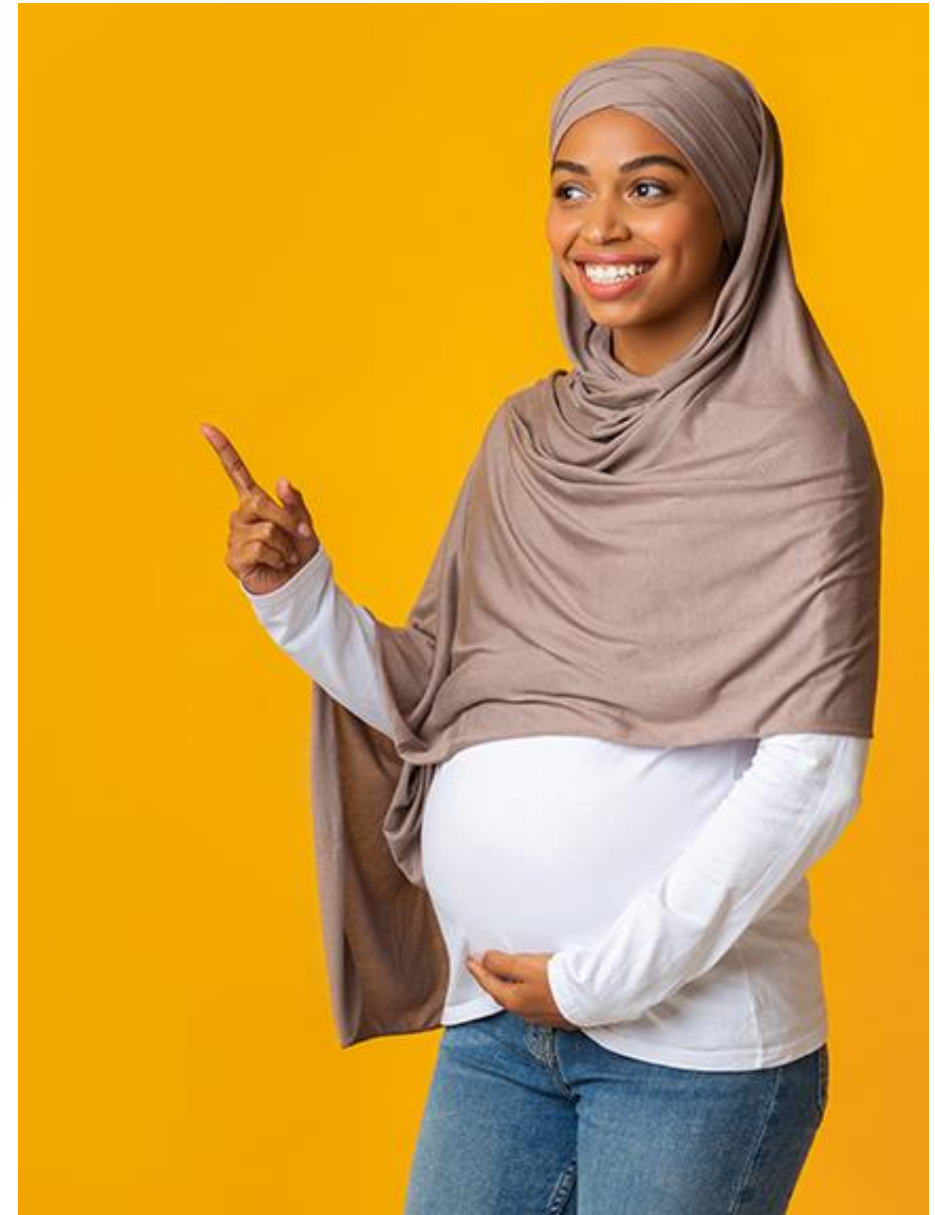


Title IX Pregnancy

- **Excused absences and medical leave**
 - Educational institutions must excuse absences due to pregnancy and childbirth for as long as the doctor deems the absences medically necessary.
 - Educational institutions must allow the student to return to the same academic status as before the student's medical leave began, which should include giving students the opportunity to make up any work missed while the student was out.
 - Other options may also be offered, such as retaking a semester.

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).

Title IX Pregnancy

- **Additional resources**
 - *Guidance: Strategies to Assist Educators in Supporting Pregnant and Parenting Students*
 - Administrators, Teachers, Counselors.
- *Guidance: Programs Designed to Support Pregnant and Parenting Students*
 - Prenatal, Parenting, and Life Skills Programs
 - Child Care and Early Learning Programs
 - Dropout Prevention Programs



Other Areas

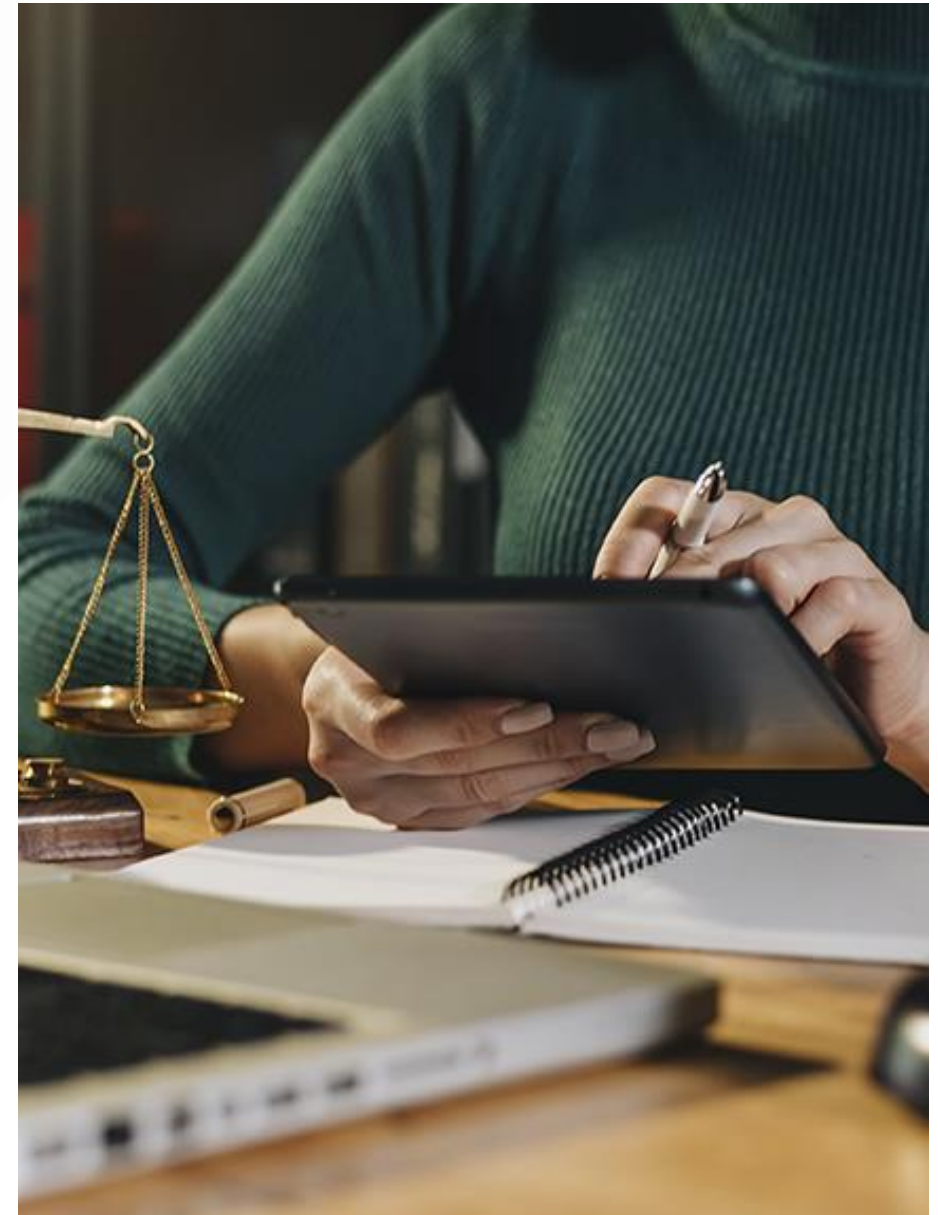
Title IX Employment

- **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. s. 106.51.
 - Recruitment. 34 C.F.R. s. 106.53.
 - Compensation. 34 C.F.R. s. 106.54.
 - Job classification and structure. 34 C.F.R. s. 106.55.



Title IX Employment

- **Employment**
 - Fringe Benefits. 34 C.F.R. s. 106.56.
 - Advertising. 34 C.F.R. s. 106.59.
 - Pre-employment Inquiries. 34 C.F.R. s. 106.60.
 - Sex as bona-fide occupational qualification. 34 C.F.R. s. 106.61.



Title IX Employment

- **Employment and status**

- Under 34 C.F.R. s. 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 which 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 Employment

- **Employment and status**
 - **Pregnancy as a Temporary Disability.** An educational institution shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability 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. s. 106.57(c).

Poll Question

- **Have you had to address issues with discrimination within LGBTQ students within the last 5 years?**
 - Yes, dealing with harassment
 - Yes, dealing with discrimination
 - Yes, dealing with both harassment and discrimination
 - Other



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](#)



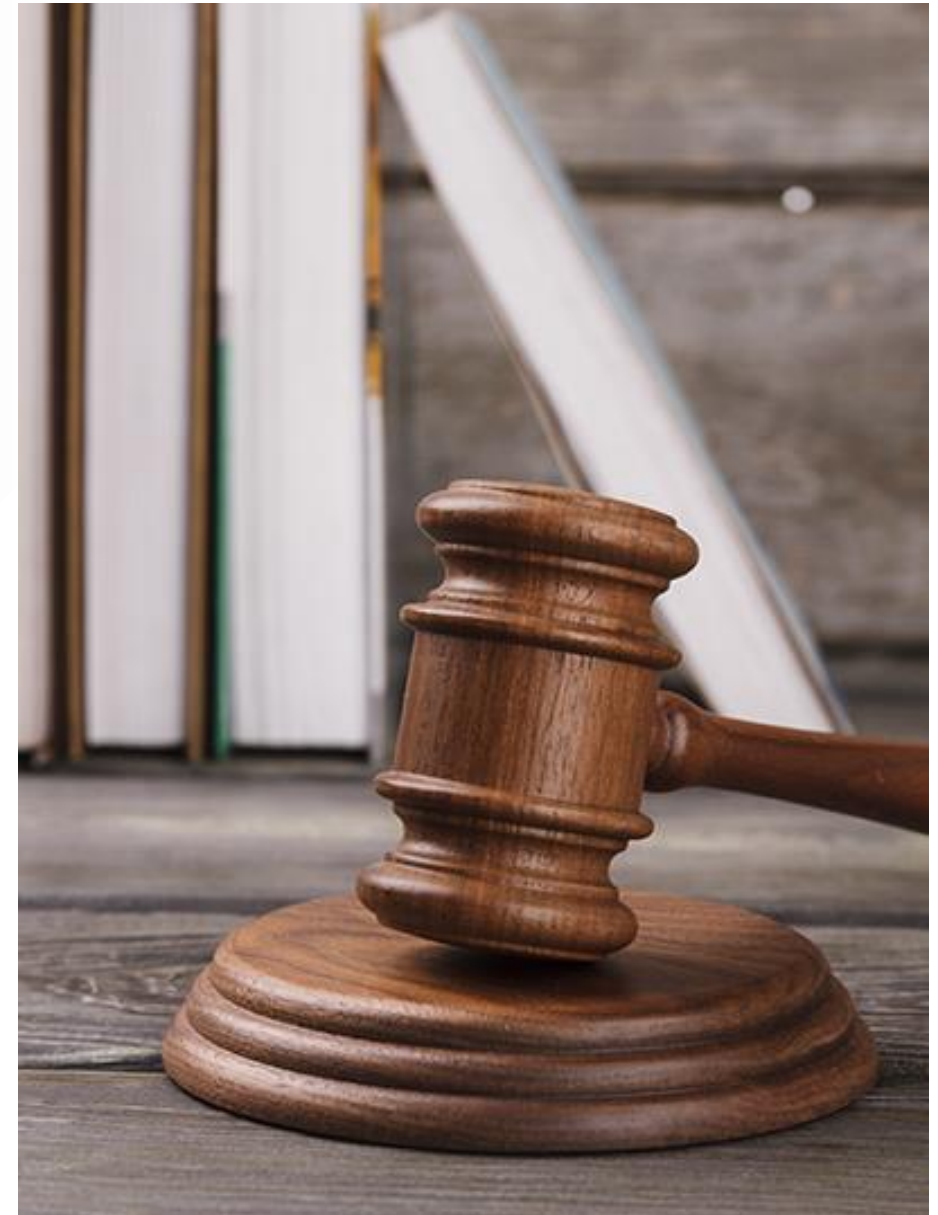
Title IX LGBTQ

- **Students and LGBTQ**

- 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**
 - 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**
 - 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 in 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 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, an institution should consider: (1) institution policies and procedures; (2) how to maintain student confidentiality; (3) how to make the institution's facilities accessible for the student; and (4) possible harassment/retaliation.



Conclusion

Conclusion

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



Questions?



Richard Verstegen
Attorney



Boardman & Clark, LLP



<https://www.boardmanclark.com>



(608) 286-7233



rverstegen@boardmanclark.com

Disclaimer

Our webinars are designed to be accurate and authoritative, but we do not provide legal, accounting, medical or similar professional services. Client remains solely responsible for compliance with all applicable laws, regulations, accounting standards and official health guidance. If legal, accounting, medical or other expert advice is desired, Client should retain the services of an appropriate professional.

Photocopying, distributing or using these copyrighted materials electronically without the copyright owner's express written consent is strictly prohibited. Consent is granted for the use of purchasers of webinars and then solely for the use of registered attendees of the webinars. No right or license is given to reproduce the materials in any form or format or to place the materials in any format on any website or blog or to otherwise republish it in any manner without the express written permission of the copyright holder.