



Presents

Title IX in 2024: From Pregnancy to Transgender Student Athletes

March 7, 2024
12:00 pm – 1:00 pm

Presenter: Helen “Nellie” Drew, Esq.

Agenda

I. Overview

- A. The Law
- B. Original Goal
- C. Continuing Challenges

II. The Proposed Regulations

- A. A Swinging Pendulum
- B. Title IX Proceedings & The Balance of Protections

Agenda (continued)

III. Parenting & LGBTQ Issues

- A. Pregnancy, Lactation & Child Care
- B. Paternity & Adoption

IV. Transgender Issues

- A. Transgender Student Protections Generally
- B. Transgender Students & Athletes

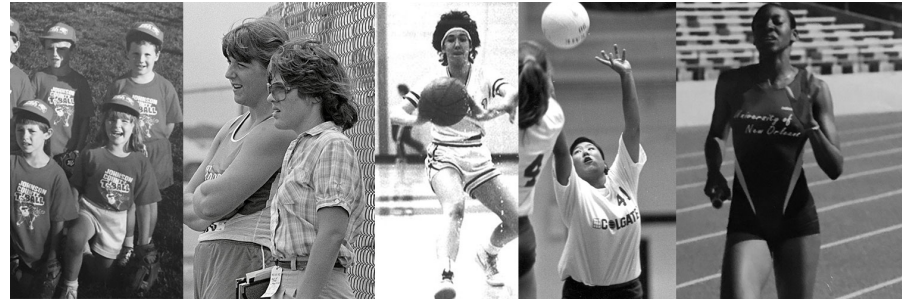
I. Overview : The Law 20 U.S.C.A. 1681

- An Amendment to the Civil Rights Act of 1964:

- "No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance."

B. Original Goal:

- To redress past discrimination in athletics & promote equality of opportunity



1. Separate but equal?

HOOVER V. MEIKLEJOHN

430 F.Supp. 164

(D. Colo. 1977)



Class action – assoc rule banning women's participation in soccer

Reason for rule:


“inordinate injury risk” –
group of MDs classify
soccer as contact sport due
to risk of collisions of
upper body when heading the
ball





Court :

- Agreed state action*
 - Agreed collision between male & female of = weights running at full speed more injurious to women because of physiology BUT
- "while males as a class tend to have an advantage in strength & speed over females as a class, **the range of differences** among individuals in both sexes **is greater than the average differences** between the sexes"



So - here- any male can
play . . .

BUT no female can, regardless of physical condition

BLACK LETTER LAW:

Traditional Equal Protection Framework:

- 1) If "fundamental right/interest denied/impaired" OR
- 2) If "suspect" classification (race)

Then STRICT SCRUTINY applies & need "Compelling" State interest

- 3) Otherwise, need only "rational relationship" to "legitimate" state objective

Dicta: would be struck down


- Even under rational relationship standard because gov't purpose in fielding soccer teams to enhance education & exclusion of girls to protect doesn't accomplish that goal;
- If purpose really to protect, arbitrary because no concern for males





2. What Does Title IX Apply TO?

- Educational programs or activities - NOT community, such as Little League
- Receiving federal \$ - led to “program-specific” vs. “institution-wide” issue



a. Program-specific approach:

- Majority of lower courts followed this, so since few collegiate athletic departments received federal \$ directly, little application of Title IX
- **Grove City College v. Bell** – 465 US 555 (1984)
Supreme Court ratifies this approach
- **Held:** financial assistance received by students of private college which then went to financial aid department NOT received by college as a whole SO

As of 1984, Title IX
only applies to
financial aid
department, not
athletic department!

b. Civil Rights Restoration Act of 1987

- Congress overrides Reagan's veto to adopt institution-wide approach
- **If ANY part of institution receives federal \$, all of the institution and its programs are subject to Title IX**

Pub. L. No. 100-259, 102 Stat. 28

C.
Athletics
– 10
Factors
Test 1975
45 CFR

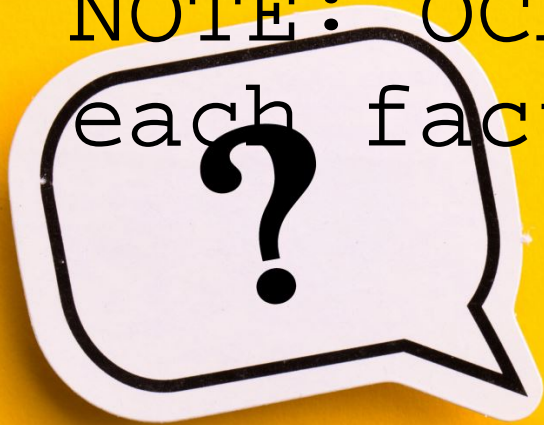
1. Accommodation of interests & abilities of both sexes
2. = equipment & supplies
3. Scheduling games & practices (midnight ice – or ANY ice time!)
4. Travel & per diem
5. Opportunity to receive coaches & tutors

10 factors (cont.)

- 7. Locker rooms, practices & facilities
- 8. Medical & training facilities & services
- 9. Housing & dining facilities & services
- 10. Publicity



NOTE: OCR need only consider
each factor



- WHAT'S MISSING??????????

d. Sexual Discrimination & Assault

NEVER part of original
purpose, but . . .

Franklin v. Gwinnett Co. Public Schools

503 U.S. 60

(1992)

SCOTUS finds a private right
of action for damages exists
for individual student
victim of sexual harassment
and abuse by teacher



C. Continuing Challenges:

1. Exemptions & Exceptions to Title IX:

- a. Statutory:
 - i. Religious institutions w/ tenets not consistent w/ co-educational programs
 - ii. Boy/Girl Scouts
 - iii. Not-for-profit fraternities/sororities
 - iv. Beauty pageants (!)

Exemptions & Exceptions to Title IX (cont.)

b. Regulatory -Title IX n/a where:

- i. selection based upon **competitive skill**
- ii. **contact sport** - defined as boxing, wrestling, rugby, ice hockey, football, basketball "& other sports the purpose or major activity of which involves bodily contact"

SO - ok in these sports to prohibit coed teams & field same sex teams



Must
females be
given an
opportunit
y to play?

- NO - although no specific exception, the regs don't require inclusion of females on all teams, regardless of the sport OR require a female contact sport team absent a significant number of interested females
- SO - it is possible for a woman to be totally excluded from a contact sport?
- YES! - but *Mercer v. Duke Univ.* 190 F.3d 643 (4th Cir. 1999)
- If a woman is allowed to try out for a contact sport, must²¹ be treated equitably.

So - is the NCAA subject to
Title IX?



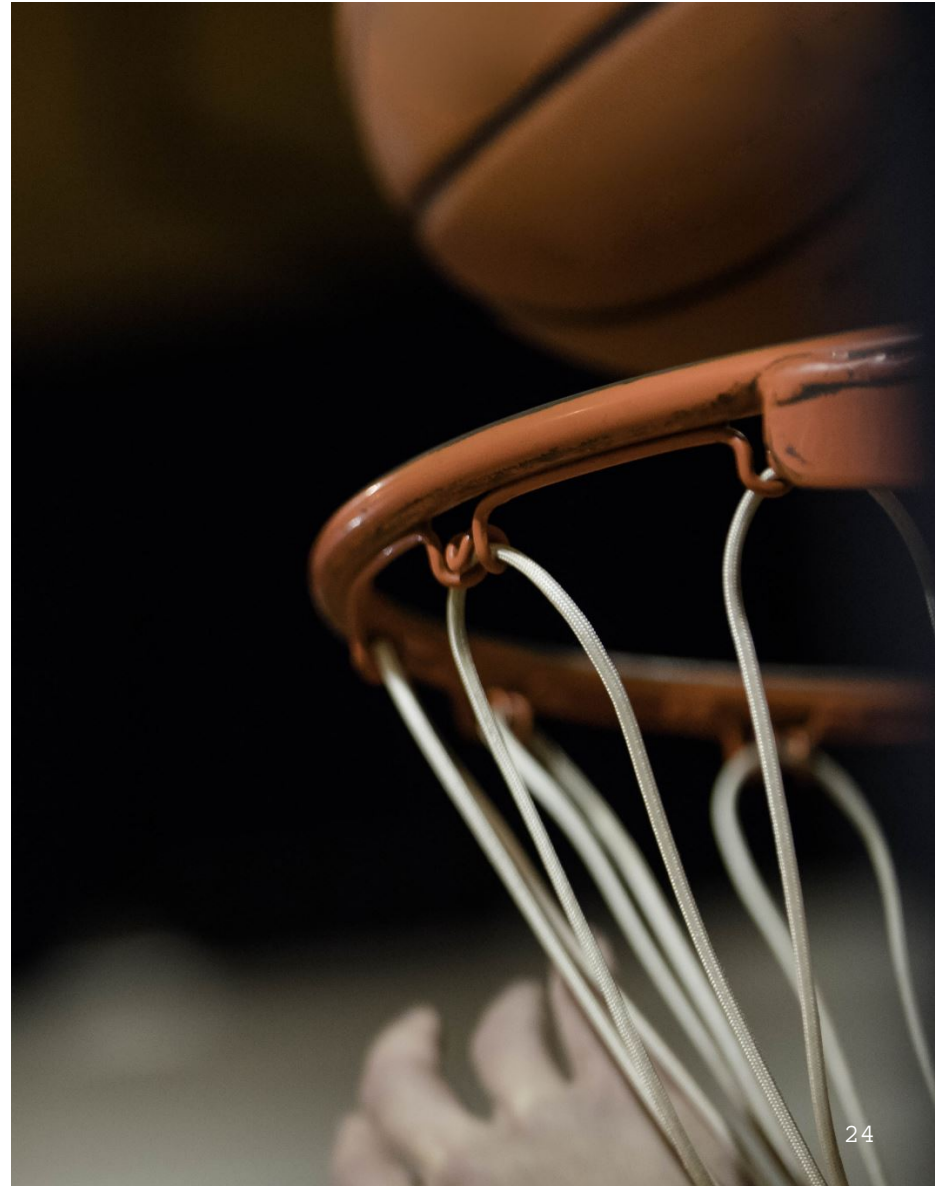
No . . . And Yes

- Because the NCAA , other athletic associations generally don't receive federal \$, they are NOT subject to Title IX
- BUT if they do get federal \$, even a bit, they are &
- The members are . . .



Moreover . . .

- The NCAA was a major **opponent** of Title IX &
- Eventually attempted to have the Department of Health, Education & Welfare regulations implementing Title IX exempt revenue-producing intercollegiate sports!



2. Continuing Sexual Discrimination, Harassment & Assault on Campuses

a. NOT ALONE report: 1/5 women experience attempted or actual physical sexual assault on campus - 2014

b. Jeanne Clery Act 20 U.S.C. 1092(1) (2018) - requires post-secondary institutions to keep records of crimes in and around campus and report them annually; also mandates timely warnings of crimes that threaten safety on campus



BUT – c. Toxic Culture
Cases continue



A. A Swinging Pendulum

- 1975 - Office of Civil Rights ("OCR") Regulations
- 1979 - Department of Health, Education & Welfare ("HEW") Regulations
- 1996 Clarification
- 1998 Clarification
- 2002 President George W. Bush appoints Commission on Opportunity in Athletics

And back
again .

. .

2003

- Report of Commission on Opportunity in Athletics &
- Minority Report of Commission
- Clarification Letter based upon (Majority) Report

2005

- Clarification Letter
- NCAA Resolution Objecting to 2005 Clarification Letter
- 2010 Policy Guidance Issued Rescinding Clarification Letter
- You get the idea . . .

1. A Policy Interpret ation: Title IX & Intercoll egiate Athletics - 1979

The [in]famous Three Part Test for athletic compliance is promulgated:

- 1) Whether intercollegiate participation opportunities are substantially proportionate to the enrollments of both sexes
- 2) Whether there has been a history & continuing practice of program expansion [for women]
- 3) Whether the interests & abilities [of women] have been fully & effectively accommodate



2. Clarification of Intercollegiate Athletics Policy Guidance: The Three- Part Test

- Attempts to discount “safe harbor” of first prong and claims of unconstitutional quotas
- Declares that “effective accommodation” can occur in the context of females’ “lack of interest” in sports
- See also, ***Cohen v. Brown***, 101 F.3d 155 (1st Cir. 1996), finding the Three-Part Test to be constitutional

3. Additional Clarification of Intercolle giate Athletics Policy: Three-Part Test Part Three

Compliance **will be found** under
Prong 3 **UNLESS**:

- 1) There is unmet interest
sufficient to sustain a
varsity team in the sport(s)
- 2) There is sufficient ability
to sustain an intercollegiate
team in the sport(s); and
- 3) There is a reasonable
expectation of
intercollegiate competition
for a team in the sport(s)
within the school's normal
competitive region

B. Title IX Proceedings & The Balance of Protections

1.

People v. Turner

2018 WL 3751731

(2018)



Black woman let her child play in the park
next to where she worked. This is the image



White man raped an unconscious woman in an alley
behind a dumpster. This is the image the media is

2. *Neal v. Colorado State Univ.*

2017 WL 633045

(2017)

Student-athlete sues school
for gender bias in Title IX
sexual assault proceedings;



3. Recission of 2011 Dear Colleague Letter

- 2017, AG Jeff Sessions rescinds letter
- Argument policy guidance measures have been used to avoid formal rule-making procedures
- Claimed “preponderance of the evidence” standard too low, resulting in adverse decisions against innocent respondents in Title IX proceedings

4. DeVos Era Regulations 2020



- Redefines sexual harassment to conduct "so severe, pervasive & objectively offensive" that it "effectively denies" access to the program or activity
- Requires schools only to respond to formal complaints or if "actual knowledge"
- Provides option of using "clear & convincing" evidentiary standard instead of preponderance of the evidence
- Requires live hearings & cross-examination of witnesses
- Restricts application to school program-related locations IN US

Biden Era Proposed Regulations 2022 - 2024



- Expands definition of protections to sex stereotypes, pregnancy & related conditions, sexual orientation or sexual identity
- Adds hostile environment, lowering the bar from objectively severe, sustained & pervasive
- Expands application to school-related locations abroad
- Requires "prompt & effective action" to address any indication of sexual harassment
- Requires preponderance of the evidence unless clear & convincing standard used for other proceedings
- Eliminates live hearings & cross-examination of witnesses

III. PARENTING & LGBTQ+ ISSUES

A. Pregnancy, Lactation & Child Care



- Schools must allow pregnant students to participate in all programs & activities, including sports, if they choose, WITHOUT AN MD'S NOTE
- Allow accommodations such as restroom breaks & elevator access
- Excused medical absences & support, such as at-home tutoring, as needed
- Provide lactation space
- Protect against harassment

NOTE: RELIGIOUS SCHOOLS EXEMPT
TO EXTENT TITLE IX CONFLICTS
W/ RELIGIOUS TENETS

B. PATERNITY & ADOPTION

"all parents, regardless of sex, should be provided with the same leave or accommodations for caretaking"

Any leave beyond pregnancy-related disability (typically 4 weeks before delivery and 6-8 weeks afterward) MUST BE OFFERED ON GENDER-NEUTRAL BASIS

Student-athletes must be offered reinstatement to pre-pregnancy position

IV.
TRANSGENDER
ISSUES
A.
Transgender
Student
Protections
Generally

2021 OCR Notice of Interpretation
– Title IX to be interpreted
consistently with ***Bostock v.***
Clayton Co. 140 S.Ct. 1731
(2020)

Title IX prohibits discrimination
or harassment based upon gender
identity & sexual orientation,
including specifically:

"[those] who identify as male,
female or nonbinary; transgender
or cisgender; intersex; lesbian,
gay, bisexual, queer,
heterosexual, or in other ways"
86 Fed. Reg. 117 (6/22/21)

BIG CAVEAT:

State of Tenn., et al. v. U.S. Dep't of Educ., No. 3:21- cv-308 (E.D. Tenn.) (July 15, 2022)

TRO filed preventing Dept. of Education from enforcing Title IX pursuant to the OCR Notice in Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, South Dakota, and West Virginia

B. Transgende r Students & Athletics

Notice of Proposed Rule-Making
2023:

1. Would prohibit categorical prohibitions upon transgender athletic participation
2. Would allow gender eligibility rules if they:
 - a. Serve an "important educational objective" AND
 - b. Be "substantially related" to achieving that objective

Important Considerations for Gender-Based Eligibility Rules: CONTEXT

- Grade or Education Level
- Level of Competition
- Sport
- Harm Minimization



3.
Conflict
with
state
laws . .
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