

April 23, 2021

# COVID-19 Lessons Learned: Gender Equity in Athletics



## Our Speakers



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## Disclaimer

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- We are not giving you legal advice. Consult with competent legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- Remember that a variety of stakeholders are listening.
- If you registered using your email, you will get a copy of the slides! Watch for the “Thank You For Attending” email.

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## Today's Agenda

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- How does COVID-19 affect Title IX Athletics issues?
- The law
- The regulations – do the new ones matter?
- The three-part test
- Recent OCR investigations
- Transgender athletes

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## Title IX in the Headlines

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- “ECU reinstates women’s sports teams after threat of gender discrimination lawsuit” – News & Observer, January 7, 2021
- “Colleges cut sports to save money amid the pandemic. Then came the Title IX lawsuits.” – Washington Post, March 25, 2021. Notes recent controversies at William & Mary, Dartmouth, Clemson, Michigan State, Fresno State
- “NCAA women’s tournament 2021 – Inside an overdue reckoning over inequity in basketball” – ESPN, April 3, 2021
- “Women’s Rowing: UConn ‘is in direct violation of Title IX’” – Daily Campus, April 22, 2021

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## The Law

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- “No person in the United States shall, on the basis of sex, be **excluded** from participation in, be **denied the benefits** of, or be subjected to **discrimination** under any education program or activity receiving Federal financial assistance...” 20 U.S.C. 1681.

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## The Regulations

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- Institutions cannot:
  - Treat people differently on the basis of sex
  - Have different rules and consequences based on sex
  - Provide “significant assistance” to an organization which discriminates on the basis of sex

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## Discrimination

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- Tip: “Discriminate” does not mean “treat one group poorly.” It means “treat two groups differently.”
  - Locker rooms and facilities must be comparable.
  - Can segregate by sex in physical education classes for contact sports.

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## **Athletic Regulation – 34 CFR 106.41**

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- Applies to interscholastic, intercollegiate, club, and intramural athletics
- You may offer separate teams by sex, but you may have to allow women to try-out for men's teams if you don't offer the equivalent and it's not a contact sport.

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## **Equal Opportunity**

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- Selection of sports and levels of competition must accommodate the interests and abilities of members of both sexes

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## Three-Part Test

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- Know your numbers
- Know your history
- Know your students' interest

You only need to pass one part.

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## Part One

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- The number of male and female athletes is substantially proportionate to their respective enrollments.

Know your numbers:

- How many students are enrolled?
- How many students are athletes?

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## Part One – Good Example



This Year:

	Men	Women
Enrolled	52%	48%
Athletes	52%	48%



Next Year:

	Men	Women
Enrolled	51%	49%
Athletes	52%	48%



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## Part One – Bad Examples



Big School:

	Men	Women
Enrolled	48%	52%
Athletes	53%	47%



Little School:

	Men	Women
Enrolled	51%	49%
Athletes	52%	48%



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## Part Two

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- Is there a history and continuing practice of program expansion for the underrepresented sex?

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## Part Two – Things to Track

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- When did you add each team?
- When did you elevate each team?
- What did your numbers look like over the years?
- How have you responded when new teams were requested?
- Do you have a plan in place to monitor interest and expand opportunities?

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## Part Three



- Is your institution fully and effectively accommodating the interests and abilities of the underrepresented sex?

Know your student interest!

- Is there unmet interest in a particular sport?
- Is there sufficient ability to sustain a team?
- Is there a reasonable expectation of competition for the team?

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## Other Factors OCR Considers



- Equipment/supplies
- Scheduling games/practice time
- Travel and per diem allowance
- Coaching and academic tutoring
- Assignment/compensation of coaches/tutors
- Locker rooms
- Practice/competition facilities
- Medical/training facilities and services
- Housing/dining facilities and services
- Publicity

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## Equal Funding?

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- “Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams ... will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams of one sex in assessing equality of opportunity for members of each sex.” - 34 CFR 106.41(c).

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## Boosters

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OCR will look at what your boosters do  
**as if your institution has done it.**

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## Red Flags



- “We have new bleachers for the baseball team, so we’ll pass the old ones down to the softball team – they are better than what they have now!”
- “The women don’t like to play basketball on Saturday nights. They’d rather go see the men play.”
- “A donor paid for a special coach for the men’s soccer team! The women’s regular bus will still get them to their games.”
- “The baseball stadium has restrooms and a concession stand built in. Fortunately, it’s not too far from the softball stadium, so those spectators can use the same facilities.”

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## Case Study – Dakota CTC



- Dakota County Technical College – OCR # 05-15-2391
- Issued January 21, 2021
- College entered into a resolution agreement, but OCR’s background of the case identifies inequalities
- Investigation started in 2015(!)

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## Baseball vs. Softball Facilities



Baseball	Softball
Press box	Nope
Permanent restrooms	Nope
Permanent concession stand	Nope

“OCR determined that the 13 softball players affected by this adversity represent 31% of the College’s **female athletes** while none of the male athletes are affected by the lack of amenities.”

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## Lack of Locker Rooms



M Basketball W Volleyball	M Soccer W Soccer
Locker Room	Quasi-Locker room
Locks on lockers	Cubbies with no locks
No problems getting a locker	Cubbies hard to come by

“Twenty-nine (29) of the female athletes (69% of all female athletes) and 58 of the male athletes (79% of all male athletes) are disproportionately affected by the small cubbies in quasi-locker rooms. Accordingly, OCR found that **male athletes** are disproportionately affected by the college’s provision of poor-quality locker rooms.”

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## Case Study – Ball State



- OCR # 05-19-2303
- Issued May 18, 2020
- College entered into a resolution agreement, but OCR's background of the case identifies disparities

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## Coaching Access



Men's Teams	Women's Teams
Ratio: 1 coach to 7.9 athletes	<b>Ratio: 1 coach to 7.7 athletes</b>
# of coaches was a concern in 4 sports (36.8% of male athletes)	<b># of coaches was a concern in 5 sports (32.5% of female athletes)</b>
<b>Coaching quality was a concern in 1 sport (8.5% of male athletes)</b>	Coaching quality was a concern in 4 sports (24.6% of female athletes)
<b>58.8% total coach salary goes to men's sports</b>	41.2% total coach salary goes to women's sports

Conclusion: Insufficient evidence of a violation.

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## Medical/Training Access



Men's Teams	Women's Teams
Inconvenient weight rooms: <b>35% of men</b>	Inconvenient weight rooms: 40.9% of women
Training rooms too small: 15.4% of men	<b>Training rooms too small: 7.5% of women</b>
<b>Difficulties accessing athletic trainers: 3.4% of men</b>	Difficulties accessing athletic trainers: 53.2% of women
<b>Concerns about medical facilities: 38.5% of men</b>	Concerns about medical facilities: 100% of women

Conclusion: Disparities found and no legitimate, nondiscriminatory factor provided.

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## Bostock



- *Bostock*: Sex discrimination includes discrimination on the basis of sexual orientation, gender identity, and gender expression **under Title VII**
- Does this apply to Title IX also?

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## Executive Order

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- Executive Order (January 20, 2021) – *Bostock* applies to **Title IX**
- “Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.”

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## NCAA Statement (4/12/21)

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- “The NCAA has a long-standing policy that provides a more inclusive path for transgender participation in college sports.”
- Testosterone suppression treatment required for transgender women to compete in women’s sports.

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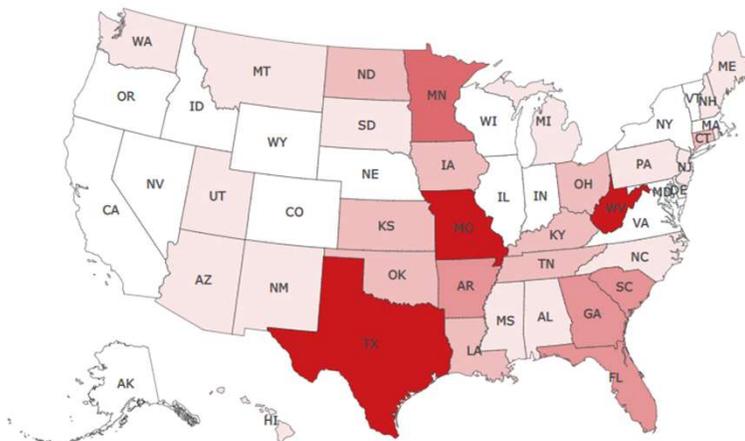
## Laws Limiting Transgender Participation



- Bills pending in 30+ states
- Typical features:
  - Applies to public schools
  - Single-sex team participants subject to challenge on the basis of sex
  - May require medical evaluation to determine sex of participant

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## Which states?



Source:  
freedomforallamericans.org

Density map of where bills  
are pending  
(darker = more bills)

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## ***Hecox v. Little***



- 479 F. Supp. 3d 930 (D. Idaho, August 17, 2020)
- Challenged Idaho's "Fairness in Women's Sports Act," which bans participation on women's teams by transgender women athletes
- Injunction granted: Likely to succeed with an equal protection claim

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## **Note: Religious Exemption Unclear**



- There is a Title IX exemption for religious institutions.
- There is a class-action lawsuit challenging the existence of that religious exemption.
- Unclear how religious exemption will apply to transgender athletes

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## Don't Miss Our Resource Page

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[www.bricker.com/titleix](http://www.bricker.com/titleix)

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## Upcoming Events

### Upcoming Free Webinars:

- May 11: Title IX Litigation Update
- June 2: COVID-19 Lessons Learned – Accommodations for Students and Employees



### Upcoming Workshops:

[www.bricker.com/events](http://www.bricker.com/events)

- Title IX team trainings start up again in June!