

GRAND RIVER | SOLUTIONS

Title IX | Athletics

North Dakota University System
NAIA - NCAA Div. I & II - NJCAA

February 2022

Meet Your Facilitators



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About Us

Vision

We exist to help create safe and equitable work and educational environments.

Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

Agenda

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What is Title IX?

Measure What Matters

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Review & Apply

Title IX & EADA



What is Title IX?

Measure What Matters

01



We are aware of the current state of North Dakota law and the potential changes (legislation passed and vetoed 2021).

Sex vs Gender

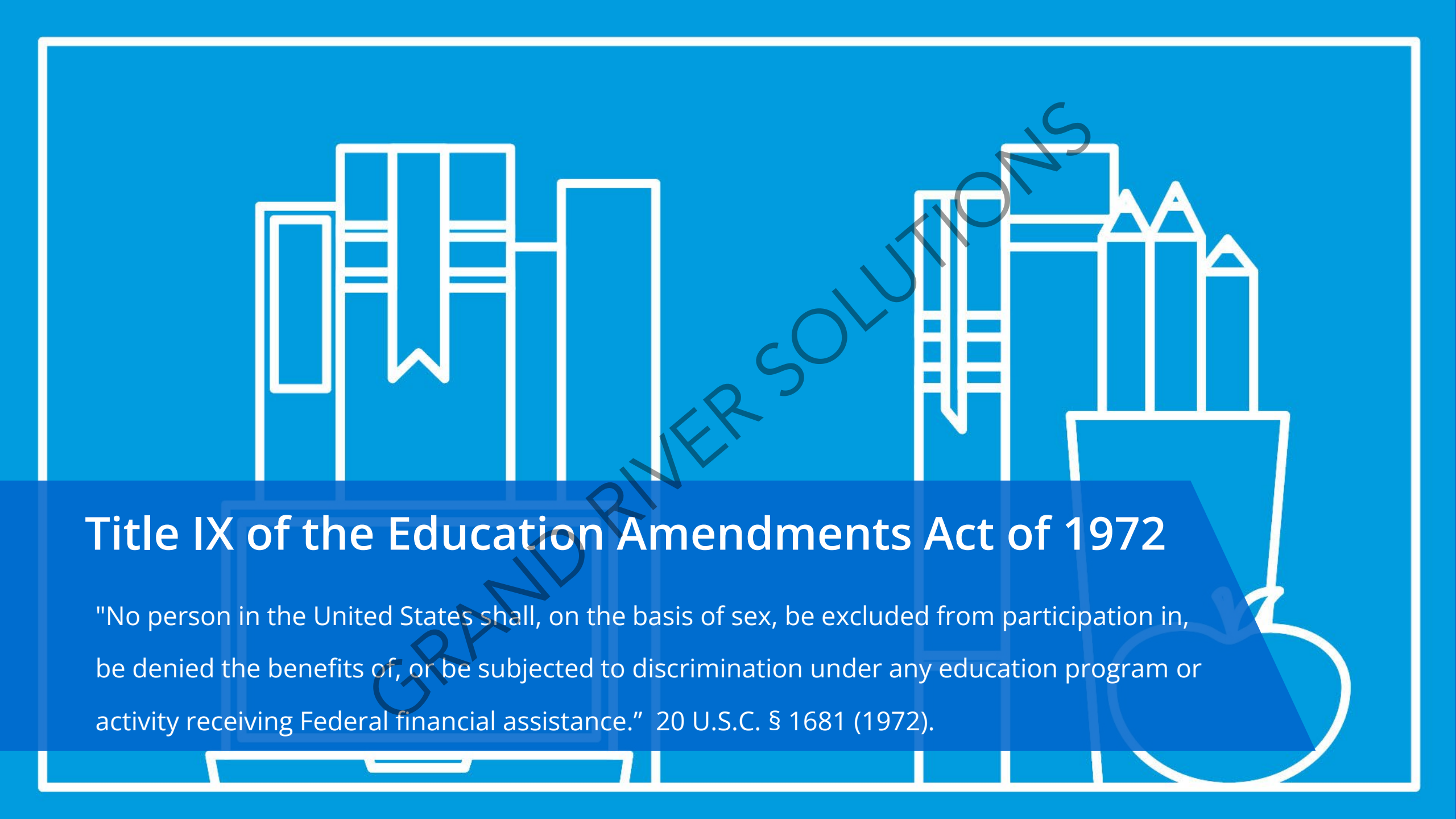
This presentation will not cover the Federal Register Notice of Interpretation (6.16.21): Orientation and Gender Identity in Light of Bostock v. Clayton County

Ted Lasso Inspiration

“

***You say impossible,
but all I hear is 'I'm possible.'***

”



Title IX of the Education Amendments Act of 1972

"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 (1972).

Title IX | Intent

- **Intent:** Bring treatment of the disadvantaged gender up to the level of the advantaged group.

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Title IX | Criticism

- **Ongoing Criticism:** Title IX causes men's sports to be cut
- **New Criticism:** "Title IX...integrates women and men in classrooms and segregates them in sports." – E. Sharrow



Title IX | Compliance Motivation

Failure to comply can result in

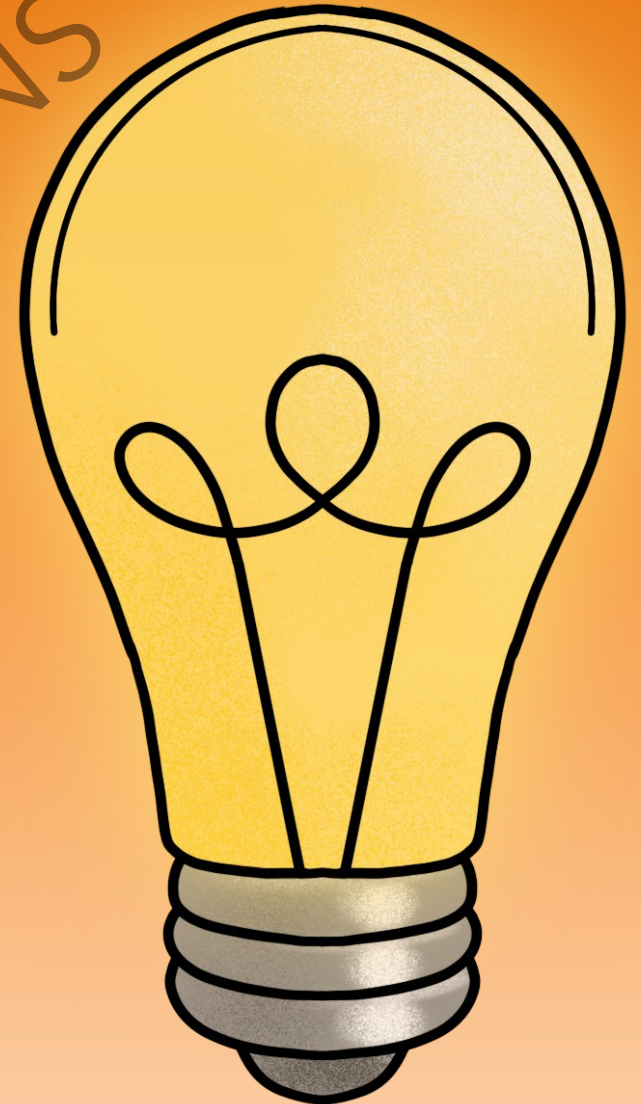
- Federal funding loss
- Lawsuits
- Reputational/brand damage



Title IX | Compliance Motivation

Successful compliance can enhance

- Enhance enrollment management
- Persistence and graduation
- Overall athletic program competitiveness
- Alumni engagement and giving
- Sponsorship opportunities



Actual Motivation





Historical Context

Civil Rights

02



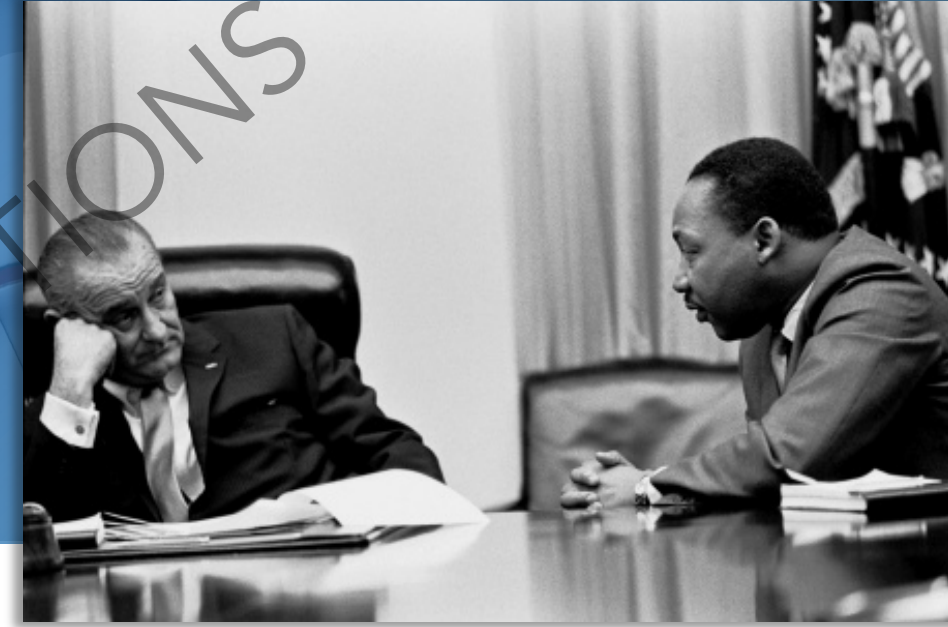
Historical Context

- **1868** – 14th Amendment granted citizenship to all persons "born or naturalized in the United States," including formerly enslaved people, and provided all citizens with "***equal protection under the laws***," extending the provisions of the Bill of Rights to the states.

Historical Context

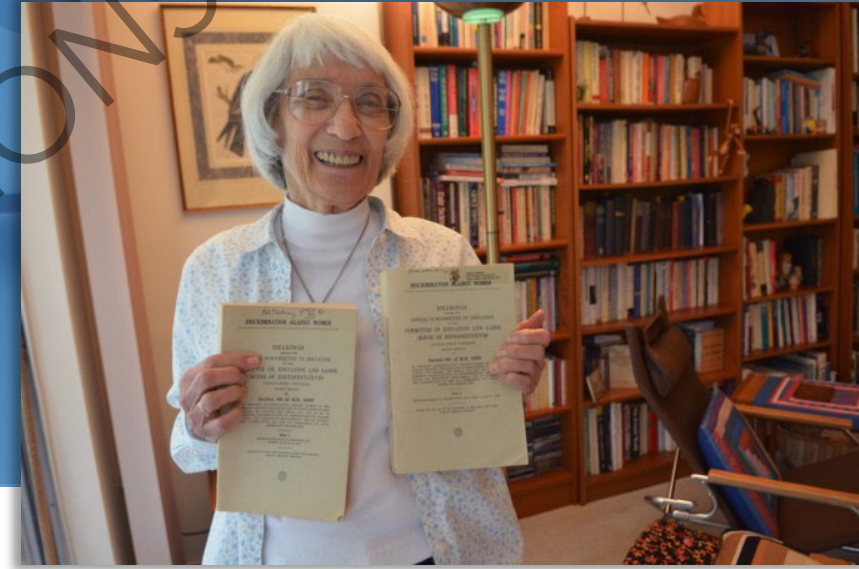
- **1964** – Title VII of the Civil Rights Act prohibits **employment** discrimination based on race, color, religion, sex and national origin.

Historical Context



- **1965 & 1968 – President Johnson** issues Executive Order 11246 prohibiting **federal contractors** (with consequences for not complying) from discrimination in employment on the basis of race, color, religion, or national origin. Subsequently included “sex” to the list and renamed E.O. 11375

Historical Context



- **1970 - Bernice Sandler** "Godmother of Title IX"

*"I had made the connection, that, since most universities and colleges had **federal contracts**, they were forbidden from discriminating in employment on the basis of sex."*

"How Bernice Sander, 'Godmother of Title IX', Achieved Landmark Discrimination Ban."

-NPR.com 1/10/219

- Which of Bunny's experiences stood out to you?
- How do/don't you relate to that experience?
- How might higher education (as an employee) be different today if Bunny had not filed the class-action complaint?

Historical Context



- **1970** – MI Rep. **Martha Griffiths** “Mother of the Equal Rights Amendment” make first speech in U.S. Congress about discrimination against women in education. OR Rep. **Edith Green** holds congressional hearings on women’s education and employment.

Historical Context



- **1972** – HI Rep. **Patsy Mink**, major author and sponsor of Title IX of the Civil Rights Act. IN Sen. **Birch Bayh** aka “Father of Title IX” contributes to crafting and getting bill passed. In 2002, Title IX renamed the “Patsy Mink Equal Opportunity in Education Act” in memoriam.

Historical Context



- **1972** – **President Nixon** signs Title IX into law.
- **1975** – **President Ford's** administration issues Title IX regulations (3-part/prong test established)
- **1979** – Office for Civil Rights created (enforces federal law)

Historical Context



- Litigation over Title IX (successful)
- Congress overturns with change in the law
- We will cover again later

Title IX

Prohibited Conduct

Prohibited Conduct

- *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, **on the basis of sex:**
- Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

Title IX

Prohibited Conduct

Prohibited Conduct

- Deny any person any such aid, benefit, or service;
- Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- Discriminate against any person in the application of any rules of appearance;
- Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

Title IX

Prohibited Conduct

Prohibited Conduct

- Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity."



Prohibited Conduct

Examples

03



Examples | Sex Discrimination



-Denying admission of a person into an educational or training program on the basis of sex;



-Disqualifying a person for a research position on the basis of sex when it is irrelevant to ability to perform the job;



-Providing unequal educational resources to students of one sex compared to another;



-Engaging in gender-based or sexual harassment such as making unwelcome sexual comments, advances, and/or name-calling on the basis of sex.

Examples | Sexual Harassment



Unwelcome and inappropriate advances to students and employees of a research lab made by professors, employees, researchers, teachers, and/or students;

Sexual assault of a student or employee by a doctor or other medical staff in a student sports medicine program or other clinical.



Covered Entities

Employment Implications

04



Who Investigates What?

- Sex discrimination/harassment in an **educational program** complaints => Office for Civil Rights (**OCR**)
- Sex discrimination for **employment** complaints => U.S. Equal Employment Opportunity Commission (**EEOC**)
- *Retaliation for filing a discrimination complaint is federally prohibited!*

Title IX Covered Entities

Colleges and universities,
including all the programs
they operate, regardless of
which program receives
federal financial assistance

Student Recruitment

Admissions

Counseling

Title IX

Covered Entities

Educational programs
(including individual
courses)

Research

Housing

Financial and
employment
assistance

Health and insurance
benefits and health
services

BEWARE closely held
organizations and
moving behavior "out
of campus control"

Title IX & Clery Act Violence

- Sexual and interpersonal violence response is another part of Title IX Compliance (as well as Clery Act compliance)
- Athletics leadership and staff are very often
 - **Responsible Employees/Persons with Authority** (Title IX) and/or
 - **Campus Security Authorities** (Clery)

Title IX & Clery Act Violence

- What are Athletics leadership and staff expected to do after receiving a report?
- What are Athletics leadership and staff **not** expected to do after receiving a report?

Hypothetical One

Several student-athletes are in the training room to receive treatment. A student trainer is providing the treatment, but the Head Athletic Trainer is providing oversight and is in the room.

The Head Athletic Trainer overhears the student-athletes gossiping about a teammate's sexual encounter while under the significant influence of alcohol (stumbling, etc.).

What to do?

Hypothetical Two

Several student-athletes are in the training room to receive treatment. A student trainer is providing treatment to Soccer Sue, but the Head Athletic Trainer is providing oversight and is in the room.

Soccer Sue seems upset, and later the student trainer confides to the Head Athletic trainer she's worried Soccer Sue may have been sexually assaulted last weekend.

What to do?

A Word About Athletes and Assault

- There are some studies that say that student athletes are more likely to commit violence, but there are a number that show student athletes are more likely to experience violence.
- My approach? Don't blame or accuse student athletes; engage and recruit them to lead and set an example.
- Natural leaders and team players.
- Students look up to them.
- Can gather and train them efficiently.

Switching Gears

And now
for something
completely different...



Title IX Employment Implications

- Salary and equity



Title IX Employment Implications

- Pure pay equity issues (beyond Athletics)
- Title VII, OFCCP, other laws
 - Equity regardless of sex/gender
 - Compare like to like
 - But we are not a factory (w/ banded pay)!
 - Higher ed titles
 - What about unicorns?
- Separately, is pay equity a Title IX Athletics issue?
 - Does higher pay mean a better coach?
 - Look at the market per sport (better/best may have different costs)
- Think broadly/narrowly; don't be cute.



Quiz

- Who does Title IX apply to?

- What is prohibited by Title IX?

- Is retaliation for reporting an employer or educational program Title IX complaint legal?

Break Time!

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Joe's major contribution to intercollegiate athletics came as:



A

Left wing for the Oswego State men's ice hockey team

B

Left field for the Oswego State baseball team

C

Left Tackle for the Oswego State football team

D

Left out of anything involving athletics



Title IX & Athletics

Access & Treatment

05

Title IX & Athletics

- **1979** – OCR's Intercollegiate Athletics Policy Interpretation
- **1987** – Civil Rights Restoration Act
- Equal **access** and equivalent **treatment**

What's a Sport?

Program Structure and Administration

Budget and support services?

Athletics aid available?

Recruitment?

What's a Sport?

Team Preparation and Competition

Practices provided similarly to other established sports?

Athletes eligible for athletics aid?

Athletes recruited similarly to other established sports?

What's a Sport?

Team Preparation and Competition

Ability matters?

Pre-season/post-season? Championships?

Purpose: compete vs support/promote other sports?

Title IX & Athletics

Overall men's vs. women's program comparison (not sport to sport)



Intercollegiate athletics
(evaluated separately)



Club sports (evaluated
separately)



Intramural sports
(evaluated separately)

Title IX Does Require

- EQUAL opportunity for both sexes to become intercollegiate athletes

Title IX Does Not Require

- Sports program at all
- Quality sports program, specific conference or level
- Specific # of teams overall
- Same # of teams for both sexes
- Same sports for both sexes

Title IX Does Require

- EQUIVALENT treatment of participants in OVERALL programs (i.e., not sport to sport)

Title IX Does Not Require

- = funding for both programs
- = funding/benefits to both teams in same sport
- Specific benefits in general or to a specific team

Title IX & Athletics

**1. Access | Accommodation of Interests
& Abilities** (includes 3-part & 2-part tests)

**2. Treatment | Athletic Financial
Assistance**

**3. Treatment | Other Athletic Benefits
& Opportunities** (offsetting benefits
permitted)

Title IX & Athletics

Access

Participation 3-part test

1a. Proportionality (within +/-1%)

1b. Continued program expansion for underrepresented sex

1c. Full accommodation of the underrepresented sex

Title IX & Athletics

Access

Competition 2-part test

There's more!

1d. Equivalently advanced competitive opportunities for both genders; or

1e. Demonstrate continuing upgrades of competitive opportunities for the historically disadvantaged sex

Title IX & Athletics

- **Access | Three-part test**
- 1a. Whether intercollegiate level participation opportunities for male and female students are provided in numbers **substantially proportionate to their respective enrollments**; or

Which sex is "underrepresented"?

A

Program	Enrollment	Participation
Men	55%	35%
Women	45%	65%
Total	100%	100%

B

Program	Enrollment	Participation
Men	55%	55%
Women	45%	45%
Total	100%	100%

C

Program	Enrollment	Participation
Men	55%	54%
Women	45%	46%
Total	100%	100%

Title IX & Athletics

- **Access | Three-part test**
- 1b. Where the members of one sex have been and are underrepresented among intercollegiate 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

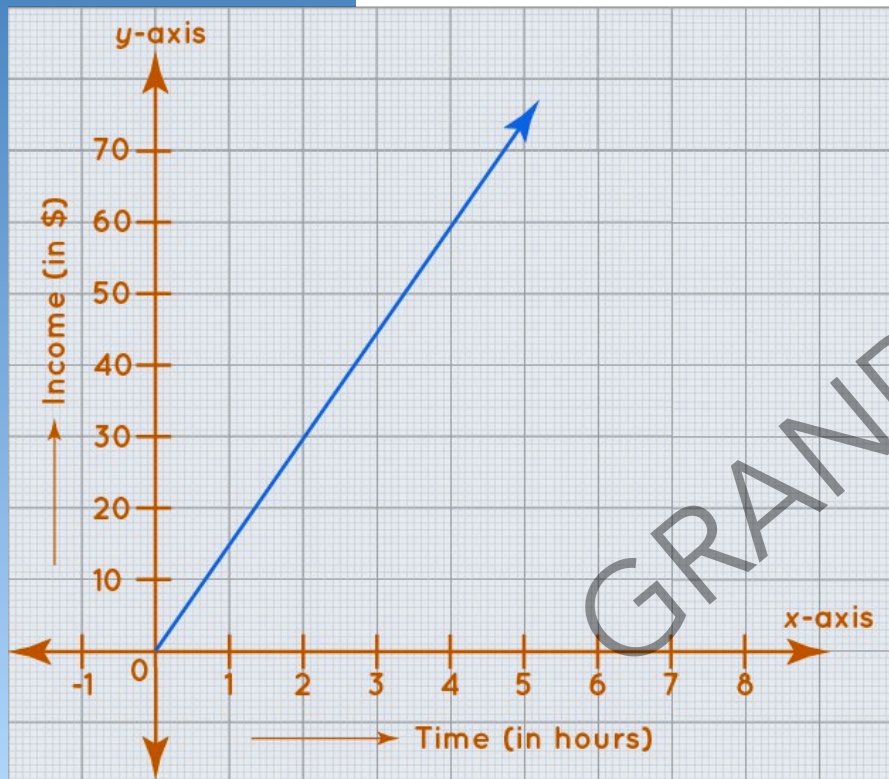
Title IX & Athletics

- **Access | Three-part test**
- 1c. Where members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as provided 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

Access | Three-part Test

Linear Graph



- So how do we know?
- Survey
- Forums
- Contact address to express interest
- Other?

Title IX & Athletics Treatment | Athletic Financial Assistance

- Count the money (awarded, not just budgeted)
- Count the participants (first countable contest status)
- **Note:** athlete's aid is counted ONCE program-wide (not by sport)
- **BEWARE:** multi-year scholarships are not (yet) currently specifically noted for Athletic Financial Assistance or the "Laundry List" but take care to ensure equitable application should be applied.

Title IX & Athletics

Treatment “Laundry List”

Treatment | Other Athletic Benefits & Opportunities (benefits can offset)

- Provision and maintenance of equipment and supplies
- Scheduling of games and practice times
- Travel and per diem allowances
- Opportunity to receive tutoring and assignment and compensation of tutors
- Opportunity to receive coaching, and assignment and compensation of coaches

Title IX & Athletics

Treatment “Laundry List”

Treatment | Other Athletic Benefits & Opportunities (benefits can offset)

- Provision of locker rooms, practice and competitive facilities
- Provision of medical and training facilities and services
- Provision of housing and dining facilities and services
- Publicity
- Support services
- Recruitment of student-athletes



Title IX & Evaluation

Show Me the Data

06

Title IX & Evaluation

Policy Review



Institutional policies
and administrative
guidelines



Athletic handbook



Athletic Code of
Conduct



Individual team
rules and
discipline policy

Title IX & Evaluation

Participation Data

Number of total men and women at the institution.

Total number of men and women participating in each institution's sport.

Note: Multi-sport athletes are counted for each sport.

Title IX & Evaluation

Funding Regardless of Source



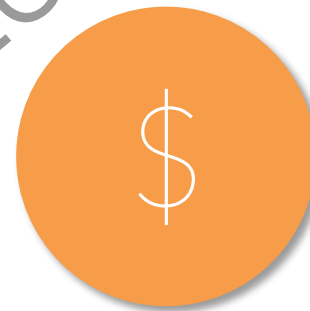
Budgets and
expenditures



Booster clubs and
donations



Endowments



Fundraising



Guarantees and
ticket sales

Title IX Fundraising Hypothetical

- **Funding *regardless* of source**
- The Development Office calls. Famed and beloved alum Rich Olson has decided to sell his petroleum company for north of \$2 billion and donate 10% to his alma mater, dedicated to financially support the baseball team. He played left field (actually).
- \$200 million is by far the largest gift in your institution's history.
- As you are celebrating what will surely be a glistening new stadium, private jet travel, and many baseball championships in the years to come, something makes you think back to Joe and Cora...

Title IX Fundraising Hypothetical

- Funding *regardless* of source

Program	Enrollment	Participation	Sports	Expenditures
Men	47%	51%	8	50%
Women	53%	49%	10	50%

- What are the issues?
- How can you address?
- What can you tell the Development Office?

Title IX & Evaluation

Athletics Aid | Who Counts?

- **Status as of first countable contest** (all seasons)
 - On roster? Yes
 - Joins after? Yes
 - Leaves team after? Yes
 - Practices or becomes medical hardship? Yes





Title IX & Evaluation

Expenditure “Treatment” Examples

- Per diem, pre/post-game meals
- Housing funds
 - Travel
 - Night before home contest
 - During term breaks

Title IX & Evaluation

Expenditure “Treatment” Examples

- Recruitment funds
- Athletic trainers & sports information staff travel
- Print materials (media guides, schedule cards, etc.)
- Student manager compensation



External Media

- Not bound by Title IX; they can report on one gender, etc.
- But are we helping or encouraging them to do so?

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Internal Media

What do our press releases and our own web site look like? Equitable?

"Gotta read the fine print" for certain sports?

What about our internal press and publicity tools? Are we using the power of those equitably?

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Internal Media

- Hypo: Yuan YouTube is a first year graphic design phenom. Yuan's videos have been called "Disney quality" and he will be interning this year for the hockey teams making top notch videos for Men's and Women's hockey games. He has no interest in other sports and doesn't want to do videos for football, basketball, field hockey, or any other teams. Your Communications lead says no brainer to hire Yuan.
 - Do you see any issues?
 - Is there any other information you need?





What about NIL?!



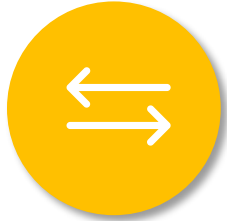
Title IX & NIL

Implications

07



Title IX | Name, Image & Likeness



Equal Treatment

Ensure equal opportunities for media training and institutional facilitated contracts



Beware

Earned income impacts student-athletes' financial aid packaging



Beware

International student-athletes are at risk of losing F1 (aka student) visa status if employed

Questions?

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Break Time!

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Review & Apply

Title IX & EADA

08



Ted Lasso Inspiration

“

*There's two buttons I never like to hit, alright?
And that's 'panic' and 'snooze.'*

”

Review and Apply Title IX to Athletics

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Title IX | Institutions MUST provide!

Equal Access | Accommodation of Interests

Equal Treatment | Athletic Financial Assistance

Equal Treatment | Other Athletic Benefits & Opportunities

Title IX | Evaluation Progression



Access | 3-part test (1)

- Proportionality; or
- Continued program expansion for underrepresented sex; or
- Full accommodation of the underrepresented sex

(count participation per sport)

Access | 2-part test (1)

- Equivalently advanced competitive opportunities; or
- Demonstrate continuing upgrades of competitive opportunities

Cutting Sports

BEWARE if cutting sports for underrepresented sex...

- Must be in compliance in ALL other areas (access, scholarships, treatment)

Treatment | Financial Aid

- Assess the proportionality of aid to participation
(count aid per overall program)

Treatment | Benefits & Opportunities

- The “Laundry List”
 - **Beware:** new topics may be relevant under overall Title IX compliance!

Tiering

BEWARE impact

- Participant proportion? i.e. by team doesn't "count"
- Scholarships proportion?

“EADA Report” | Equity in Athletics Disclosure

- Designed to make prospective students aware of a school's commitment to providing equitable athletic opportunities for its men and women students.
- Any co-educational institution of higher education that participates in a **federal student aid program** must prepare an EADA Report by October 15 and submit.
- Data published at Office of Postsecondary Education on the Equity in Athletics Data Analysis Cutting Tool website located at <http://ope.ed.gov/athletics>

BEWARE

- Title IX and EADA are NOT the same!
- Drastically different definitions...

EADA Report

- What do you notice?
- General Information: # FT undergraduates, breakdown by gender
- Athletics Participants
- Coaching Staff & Salaries
- Revenues & Expenditures
- Supplemental Info



Title IX

- Must comply if institution accepts **federal funding**
- DO count participants that join after first date of competition
- DON'T count male practice players on women's team as participants (not S-A).

EADA

- Must comply if institution participates in **federal student loan program**
- DON'T count participants that join after first date of competition
- DO count male practice players on women's team as participants

Title IX

- DON'T count scrimmage...best practice is first contest toward contest maximums.
- DON'T count volunteer assistant coaches
- DO separate athletic scholarships by regular season, 5th year and summer term

EADA

- DO count scrimmage as first contest (if scored).
- DO count volunteer assistant coaches
- No mention, presumption is combine all athletic scholarships together

Title IX

- DO include all fund sources for recruitment expenses
- Game day compliance is evaluated by quality and other criteria.
- Compliance does not rely on total expense or revenue analysis.

EADA

- DON'T count expenses not reimbursed by institution (i.e. donated funds)
- DO count game expenses by team / participant
- DO tally all total expenses and revenues by sex

EADA Takeaway

- Supplemental Info Section
- "EADA report is not indicative of Title IX compliance due to differences in data collection requirements."

Participation 3-part Test

Prong 1: Proportionality

- Analyze overall enrollment

	FT Undergrad Enrollment	
Program	# FT Undergrad Enrollment	Rate of Enrollment
Men	4,000	40%
Women	6,000	60%
Totals	10,000	100%

Participation 3-part Test

Prong 1: Proportionality

- Analyze athletic participation

Athletic Participation		
Sport	# Women	#Men
Baseball		40
Volleyball	15	
Soccer		25
Soccer	20	
Totals	35	65
Rates	35%	65%

Participation 3-part Test

Prong 1: Proportionality

- Compare rates: enrollment vs participation

	Compare Rates	
Program	Rate of Enrollment	Rate of Participation
Women	40%	35%
Men	60%	65%
Totals	100%	100%
Access Evaluation		NOT IN COMPLIANCE!

Participation 3-part Test

Prong 1: Proportionality

Potential Remedies?

- There *may* be a buffer of 2-5% based on OCR's 1996 Policy Clarification mathematical calculation (depending upon size of athletics program...larger programs get less leeway)
- Roster management
- Remove impediments for multi-sport student-athletes

Participation 3-part Test

Prong 2: Expansion history

- Analyze history of program expansion

Athletic Participation		
Sport	Women	#Men
Baseball		1960
Volleyball	1980	
Soccer		1970
Soccer	2000 (20+ years ago)	
Access Evaluation		NOT IN COMPLIANCE!

Participation 3-part Test

Prong 2: Expansion history

Potential Remedies?

- Add new teams for underrepresented sex
- Add opportunities on existing teams (such as Junior Varsity with competition AND coaching)
- Replace teams for underrepresented sex
 - **ONLY** if old team demonstrates lack of interest and lack of competition
 - **AND** new team provides greater number of opportunities in comparison to old team

Participation 3-part test

Prong 3: Full, effective accommodation

- Club Women's Tennis desires varsity elevation
 - Sufficient competition in reasonable distance?
 - Sufficient interest on campus and recruitment pipeline?

Participation 3-part test

Prong 3: Full, effective accommodation

Sufficient competition within mileage radius?

	Sufficient Competition within mileage radius		
Program	# of Trips	Total Miles	Ave. RT Trip Mileage
Women	20	6,000	300
Men	30	12,000	400
Women's Tennis	Est. 10	Est. 1,000	Est. 100

Participation 3-part test

Prong 3: Full, effective accommodation

Sufficient on-campus interest and pipeline?

- There is an on-campus tennis court.
- Club Women's Tennis has consistently had 15 participants each year for the past five years.
- 10 high schools with a 250-mile range of the institution sponsor varsity tennis for girls.

Participation 3-part test

Prong 3: Full, effective accommodation

Implications of Institutional Choice

- Elevate Club Women's Tennis to varsity
 - Will meet Part 3 of the 3-part test and be in compliance with Title IX.
- Maintain club status of Women's Tennis
 - Will be in violation of Title IX and may be subject to loss of federal funding, lawsuits and reputational damage.

Competition 2-part test

Prong 1: Equivalent competition level

Elevating Women's Tennis

- Institution decides to elevate club women's tennis to varsity.
- Newly minted varsity women's tennis team joins the same conference its peer varsity sports compete in.
- **=> in Title IX compliance...thus far!**

Treatment

What about...

- **Athletics Aid:** institution does not offer athletics aid to any student-athletes
 - => *in Title IX compliance...thus far!*
- **Benefits & Opportunities:** institution reviews the “laundry list” and ensures equitable treatment to women’s tennis student-athletes

Outcome: Title IX compliance!

Quiz: Of all the people on Earth who could teach it,
the best trainers on Title IX and Athletics are:

A

Cora and Joe

B

Joe and Cora

C

A and B

Questions?

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Ted Lasso Inspiration

“

*Doing the right thing is never the
wrong thing.*

”

Sources

- [Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance](#)
- [National Women's Law Center](#)
- [Office for Civil Rights | U.S. Department of Education](#)
- [Title IX: A Brief History \(I. Valentin\)](#)
- [Title IX and Intercollegiate Athletics \(V. McMurtie Bonnette\)](#)
- [Title IX | US Dept of Health & Human Services](#)
- [Women's Sports Foundation](#)

Thank you!

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