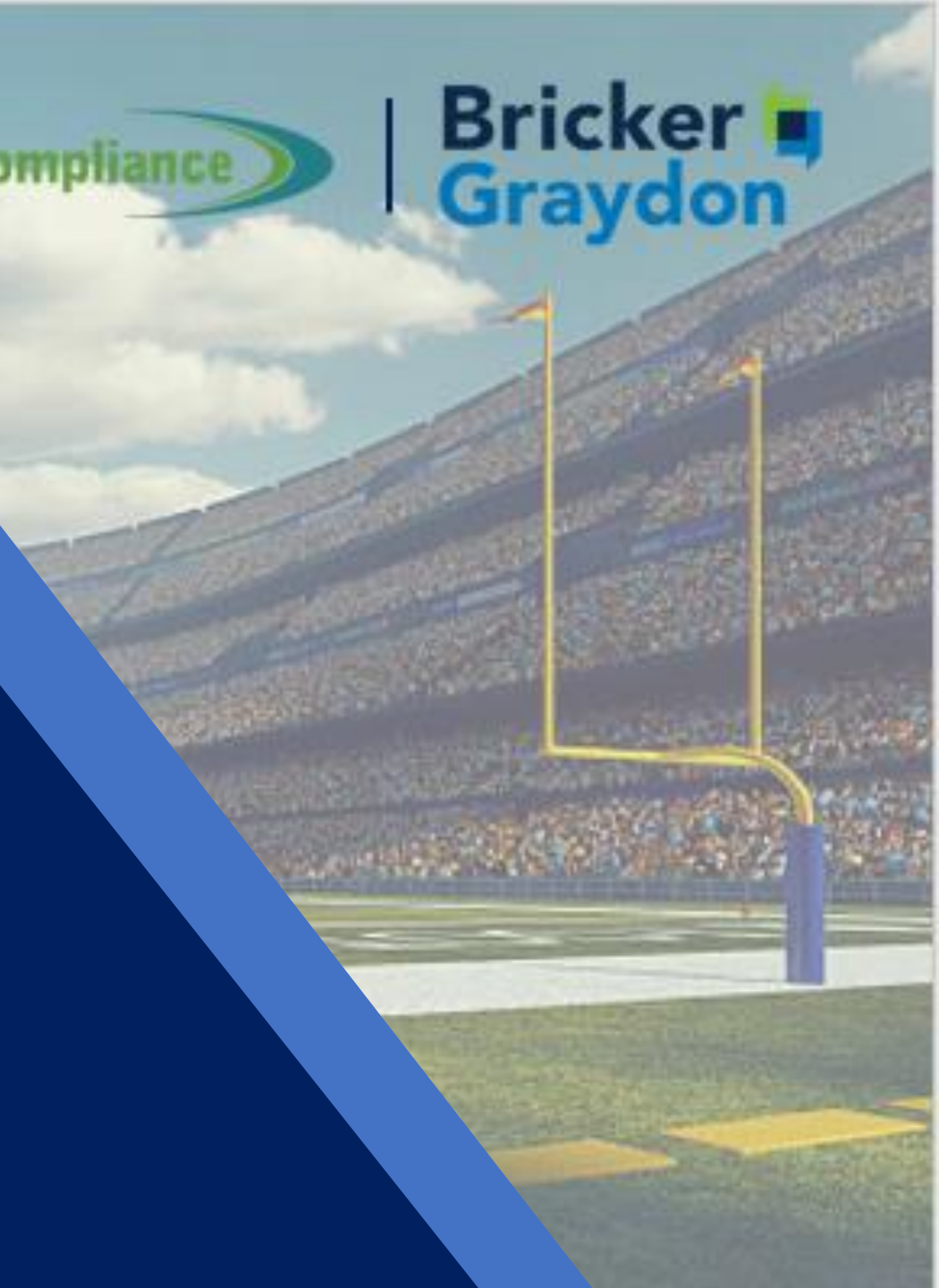


The 2<sup>nd</sup> Annual Athletic Department Toolkit  
Series: Balancing Compliance and Competitive  
Success in an Era of Change (Higher Education)

October 1, 2024  
12:00 p.m. – 1:00 p.m.

# Session 3: Play Offense, Not Defense: Complying with Title IX in an Ever Changing Environment



# Disclaimer

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This isn't legal advice!

*(but please ask questions if you have them)*

# Chime in!!

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- Today's webinar addresses hot topics – many of you have experienced, or are experiencing them – please feel free to chime in as we go!
- If you prefer to stay anonymous – feel free to message us directly or pose an anonymous question in the Q&A.

# Your Presenters

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**Kasey Havekost**  
Attorney



**Kylie Stryffeler**  
Attorney



# About this Series

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- Tuesday, September 17, 2024
  - Session 1: The New Department of Labor Overtime Exemption Rule: What Your Athletics Department Needs to Know for Paying Coaches
- Tuesday, September 24, 2024
  - Session 2: The Current Landscape of Student-Athlete Compensation
- **TODAY – Tuesday, October 1, 2024**
  - **Session 3: Play Offense, Not Defense: Complying with Title IX in an Ever-Changing Environment**
- Tuesday, October 8, 2024
  - Session 4: Tackling Areas of High Risk in Your Athletics Department

# Learning Outcomes

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1. Gain takeaways on how comply with Title IX athletics requirements.
2. Better understand the current landscape as it relates to Title IX athletics gender equity including its applicability to name, image, and likeness.
3. Learn about how state laws and subsequent litigation is shaping transgender participation in athletics.

# Agenda

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- Title IX Gender Equity
  - Background
  - Athletic participation (the “three prong test”)
  - Athletic scholarships
  - Benefit and treatment areas (the “laundry list”)
- Title IX and NIL
- Transgender Participation in Athletics



- **Title IX Gender Equity**
  - Athletic participation (the “three prong test”)
  - Athletic scholarships
  - Benefit and treatment areas (the “laundry list”)
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# Title IX Gender Equity: Background



# The Law

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- Title IX Regulations
  - It prohibits schools that receive Federal funding from discriminating based on sex in their programs or activities, including its athletic program.
- "Dear Colleague" letters and guidance from OCR
- Case law
- OCR Case Resolutions

# How a recent SCOTUS case may upend Title IX guidance



- Recent SCOTUS decision that eroded *Chevron* deference
  - *Loper Bright Enterprises v. Raimondo* (U.S. June 28, 2024)
  - For example, this means that the courts deference/reliance on the 1979 Interpretation that sets forth the three part test could go away
- We are already seeing this argument →

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
CENTRAL DIVISION AT LEXINGTON  
CIVIL ACTION NO. 5:19-CV-00394-KKC  
*-Electronically filed-*

ELIZABETH NIBLOCK and ALA HASSAN, Individually  
and on behalf of all those similarly situated PLAINTIFFS

v. UNIVERSITY OF KENTUCKY'S MOTION FOR  
RECONSIDERATION OF COURT'S PREVIOUS RULING  
ON APPLICABILITY OF THE THREE-PART TEST

UNIVERSITY OF KENTUCKY, MITCH  
BARNHART and ELI CAPILOUTO DEFENDANTS

\*\*\*\*\*

Given the Supreme Court's decision in *Loper Bright v. Raimondo*,<sup>1</sup> the University moves this Court to reconsider its previous ruling on the applicability of the "three-part test" stated in the 1979 Policy Interpretation.<sup>2</sup> If necessary, the University suggests allowing both parties to file supplemental briefing.

# Why it is a good time to “play offense”

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Influx of complaints  
(and anyone can file a  
complaint with OCR)

Institutional  
restructuring due to  
financial  
challenges (may impact  
athletics programs)

NCAA Division I  
institutions and DEI  
requirement

# It can be tricky...

- Title IX Coordinators have the ultimate responsibility
  - But Athletics often has the data...
- Decisions – good and bad – flow downward to administrators and coaches
  - **Having a plan and oversight is KEY!**
- Compliance is a “snapshot in time”
- Rules, regulations, and requirements are dense and complicated



# How to **proactively** tackle this issue



# Overview of your Legal Duties

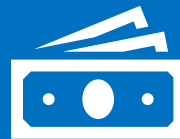
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- Must meet compliance with all three “buckets”:

Accommodation  
of Interests and  
Abilities



Athletic  
Scholarships



Benefit &  
Treatment  
Areas



# Overall program analysis

- Title IX regulations require that a school offer equivalent benefits, opportunities, and treatment to its men's and women's teams overall.
- Not sport-to-sport comparison (*e.g.*, men's basketball to women's basketball, baseball to softball)

Men's  
OVERALL  
PROGRAM



Women's  
OVERALL  
PROGRAM

# A note on EADA...

- Can be used to evaluate (1) athletic participation opportunities and (2) financial aid
- **EADA & Title IX**
  - Although it may not *fully* reflect, it is *pretty* close
  - Example: Title IX participants
  - In lawsuits, Plaintiffs often rely on EADA data and courts have used these numbers to issue preliminary injunctions

You can use the questions below to help assess your school's provision of scholarships and athletic financial assistance. Your school's athletic director or other school leaders may be able to provide you with the information needed to answer these questions. Also, the Department's Office of Postsecondary Education maintains the [Equity in Athletics Data Analysis \(EADA\) website](#), which publishes information provided by all coeducational schools that have an intercollegiate athletic program and participate in Federal Student Aid programs. Data on the EADA website may be helpful<sup>11</sup> in answering the questions below. But please note that OCR does not rely solely on this data or any one data point to determine compliance with Title IX.

U.S. DEPARTMENT OF EDUCATION

**EADA** Equity in Athletics  
Disclosure Act



- **Title IX Gender Equity**
  - Athletic participation (the “three prong test”)
  - Athletic scholarships
  - Benefit and treatment areas (the “laundry list”)
- Title IX and NIL
- Transgender Participation in Athletics

# Title IX Gender Equity: Athletic Participation

## The KEY Takeaway

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- **Do not add, eliminate, or transition a varsity sport WITHOUT doing an athletic participation analysis**

# The “three prong test”

- Your school has flexibility in choosing **one** of these options:
  1. **Substantial Proportionality:** whether the percentage of athletic participation compared to full-time undergraduate enrollment is "substantially" proportional
  2. **History and Continuing Practice:** whether you are adding opportunities for the underrepresented sex
  3. **Interests and Abilities of Students:** whether you are fully accommodating the interests and abilities of the underrepresented sex

# Prong 1

---

- Ask: Are the percentage of women and men participants on athletic teams equal to – or “**substantially proportionate**” to—the percentage of women and men enrolled full-time as undergraduates at your school?

**% full-time undergraduate male = % male participants**

**% full-time undergraduate females = % female participants**

# Athletic participants

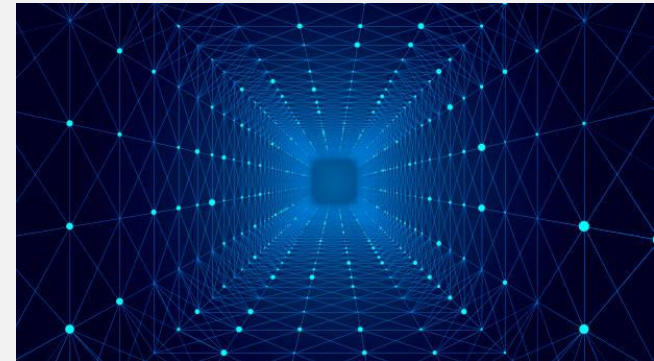
## 1. Can you count the *sport*?

- Sport on EADA/Traditional Sport?  
**Yes.**
- Emerging sports? **Likely yes.**
  - Keep records of how it meets the requirements 
- Other sports? **It depends...**
  - 1. Are you in a jurisdiction that recognizes it?
  - **2. Evaluate under 2008 DCL guidance**
  - Keep records of how it meets the requirements 



## 2. Can you count the *participants*?

- Counting participants has become increasingly complicated....



# How close is close enough?

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- Now you know how to count, what is “**substantially proportionate**”?
- What is the “safe harbor”?
- Two data points to consider:

## 1. Participation gap

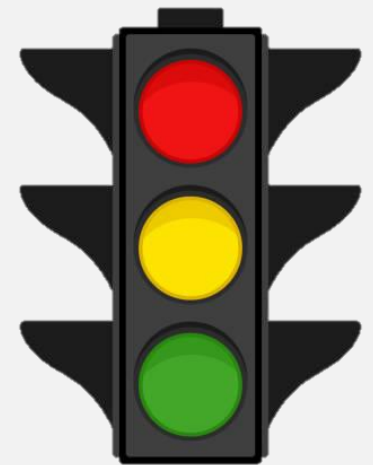
- How many additional opportunities are required for the underrepresented sex in order to achieve perfect proportionality?

## 2. Percentage differential

- What is the difference between the full-time undergrad population vs. athletic participants?

# Percentage Differential

- Courts in the past have looked at this number
- Calculation
  - % full-time undergraduate male - % male participants = [*percentage differential*]
  - % full-time undergraduate females = % female participants = [*percentage differential*]
- Based on case law, if percentage differential is:
  - **Over 10% = unlikely compliant**
  - **Between 3.5% and 10% = less clear, but unlikely compliant**
  - **Below 3.5% = likely compliant**



# Participation Gap

- The most the important data point for courts
- **How many additional opportunities are required for the underrepresented sex in order to achieve perfect proportionality?**
  - If sufficient to field a “viable team” = **non-complaint** ✗
  - If not sufficient to field a “viable team” = **compliant** ✓
- Million dollar question: what is a “viable team”?
  - OCR examples:
    - 62 part. gap → can fit a viable team → **not compliant** ✗
    - 6 part. gap → cannot fit a viable team → **compliant** ✓
  - So what about 6-62 part. gap?



# Participation Gap – Magic Number?

- *Balow v. Michigan State*
  - So what about 6-62 part. gap?
  - Used viable team at issue – women's swimming and diving
  - **31 part. gap is enough to sustain a viable team** because the smallest swimming & diving team in the Big Ten Conference was 21 females






# Key Takeaways – Prong 1

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- Challenging because of the changing demographics
  - Rise of female students since 1970
- If relying on this prong:
  - Do an internal count – don't just rely on EADA data
  - Have rigorous and well-document procedures in place that support the roster numbers being used
  - Calculate the participation gap
  - **Consider having a roster management policy**
  - Consult with legal counsel and/or experts

# Prong 2

---

- In evaluating “**history**,” OCR looks at the institution’s record for:
    - adding teams, (within the last 3-4 years)
    - increasing participants on existing teams, and
    - the institution’s response to requests to add teams.
- 
- In assessing “**continuing practice**,” OCR examines:
    - the institution’s current policy for adding teams and
    - an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.



# Key Takeaways - Prong 2

- **You MUST have a long-term plan on program expansion (Gender Equity Plan)**
  - → If you don't have a plan, prepare one.
  - → Include benchmarks to expand women's participation (adding teams, **roster management**) and rough timetable
- **You MUST have a history of adding women's participation opportunities**
  - → Look at the last time you added a women's team. If more than 4 years have passed, be cautious (especially if you have added or are looking to add a men's team).
  - → Look at your women's sports participation over the past decade. If this number has dropped, be cautious (especially if your men's participation has gone up).
- **You MUST have a policy regarding requesting the addition of varsity sports.**
  - → If you don't have one, prepare a policy and procedure.
  - → If you have one, effectively communicate it (website, handbook, etc.) and make sure you document responses to sport requests.
- **Collect information from your students and others on campus including club and intramural sports**

# Prong 3

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- This is the most complicated because the metrics are nuanced
- Usually referred to as the "survey" prong
- **Question – is there enough (1) demand/interest, (2) skill/talent, and (3) competition at your school among [women/men] to sustain a viable team or sport?**
  - → If the answer is “no” to *any* of these questions, your school can likely use Prong 3
  - → If the answer is “yes” to *all* three questions, your school likely cannot use this option.

# Competition + Interest + Ability

## Competition

Are there other schools in your area or **region** currently competing in the sport?

*Look at normal competitive region; the average mileage to away events and conference opponents*

## Interest

Is there an unmet **interest** in a particular sport that is not offered at your school?

*Look at participation in club sports, intramural and recreation programs; requests from students/parents; **surveys**; high school and community participation in the College's normal recruitment area*

## Ability

Is there enough **talent and skill** among women in the student body to sustain a team in the sport?

*Look at whether students have experience or accomplishments playing the sport; administrators/coaches believe that there's enough talent to support a team; high participation in other sports that require similar skills*

# Surveys

- How to assess student's interests and abilities
- Note that you not have to administer a survey to rely upon prong 3
- OCR has released guidance on this prong because it has been controversial
  - Does not consider nonresponses to surveys as evidence of lack of interest or ability in athletics.
- Cross campus commitment





# Key Takeaways – Prong 3

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- Collect good information
  - Surveys can be complicated. Using an expert might be beneficial.
- Document the analysis
  - If you decide not to add a sport that has been requested, you should **document** the reasons you made that decision, which should include the results of assessing the abilities of interested students and viability of the sport.

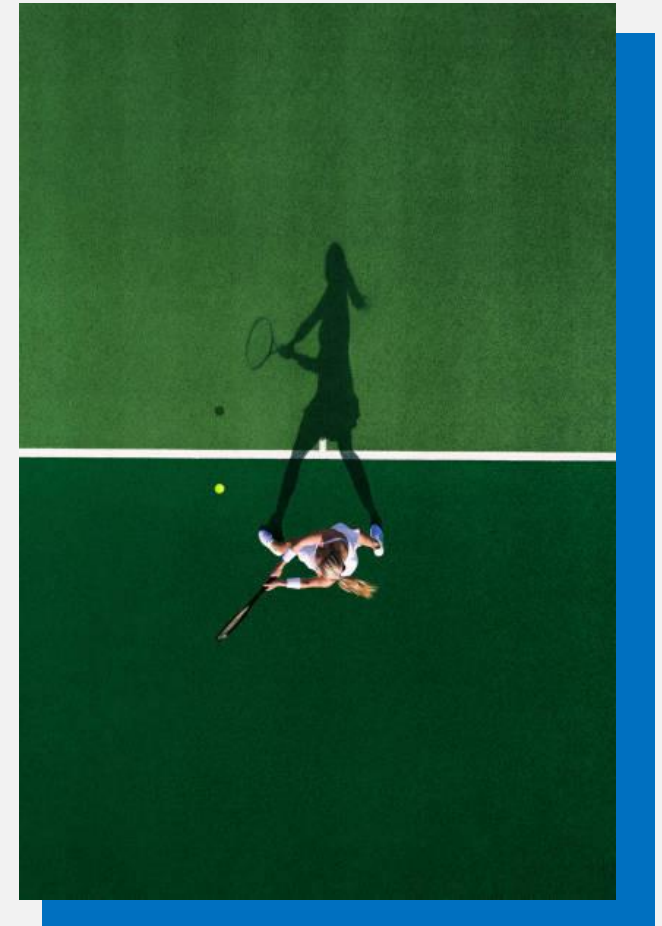


- **Title IX Gender Equity**
  - Athletic participation (the “three prong test”)
  - **Athletic scholarships**
  - Benefit and treatment areas (the “laundry list”)
- Title IX and NIL
- Transgender Participation in Athletics

# Title IX Gender Equity: **Athletic Scholarships**

# Scholarships

- OCR considers whether the total amount of athletic scholarship aid a school makes available to men and women is “**substantially proportionate**” to their participation rates
- “substantially proportionate” = **within 1%**
  - However, this is subject to adjustment of disparities that are legitimate and non-discriminatory
  - What does this mean? Outside 1% might be okay if:
    - Actions are taken to promote athletic program development
    - Differences between in-state and out-of-state tuition
    - Unexpected fluctuations in participation (someone quits)



# The Calculation

- Calculation –

- Male

- Male participation = 59%
    - Male scholarship dollars awarded = 57.8%
    - **Difference = 1.2%** →

- Female

- Female participation = 41%
    - Female scholarship dollars awarded = 42.2%
    - **Difference = 1.2%** →

If institution can show they have **legitimate non-discriminatory reasons** for the 0.2% difference

→ **Complaint.**

# Key Takeaways - Scholarships

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- Analyze this each year
- Document legitimate, non-discriminatory disparities
- Keep copies of policies, procedures, and criteria for awarding scholarship including how determinations are made
- Exercise oversight of coaches

- **Title IX Gender Equity**
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# Title IX Gender Equity: **Benefit and Treatment Areas**

# Benefit and Treatment Areas

## The "Laundry List"



Equipment and  
Supplies

Scheduling Games and  
Practice Time

Travel and Daily  
Allowance

Coaching

Academic tutors

Locker Rooms and  
Fields, Courts, or Other  
Facilities for Practice  
and Competition

Medical and Training  
Facilities and Services

Housing and Dining  
Services

Publicity

Recruitment

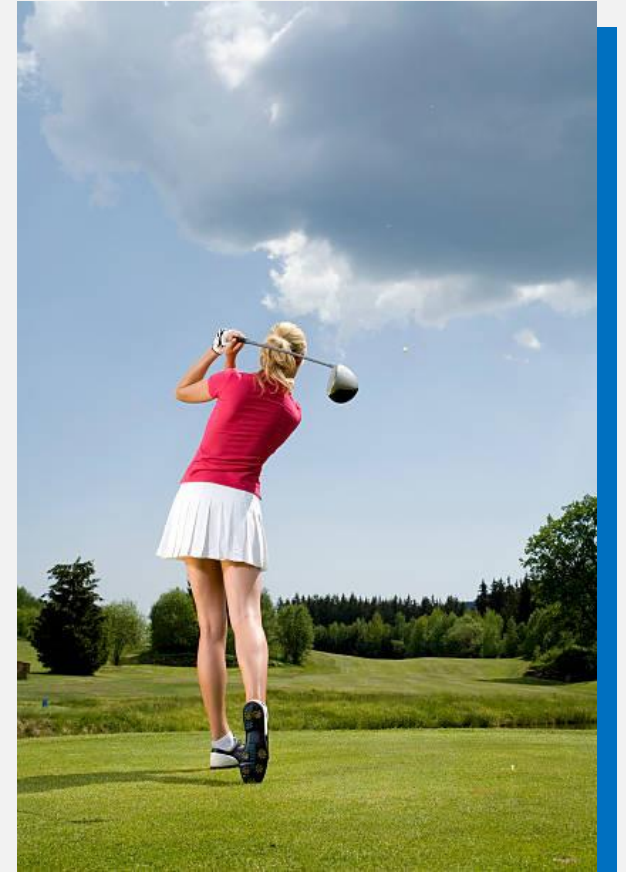
# What is a disparity?

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- There are going to be differences amongst the men's and women's program, but when is it a big enough difference to be a compliance concern?
  - Disadvantage *based on gender*
  - Depends on how many student-athletes it impacts
  - Depends on the benefit
- A disparity in of itself is likely not a Title IX violation, but a pattern or practice of multiple disparities may indicate discrimination and may rise to the level of a violation

# A few more notes...

- You can consider the nature of particular sports
- You (and your coaches) can make reasonable professional decisions, but it cannot be discriminatory
  - Example: less expensive equipment
  - If the reason is “tradition” or “that is the way it has always been done” you may want to reconsider





# Title IX and the Money


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- Funding does not have to be the same for the men's and women's overall program
  - Not dollar-for-dollar matching
  - But there are two program components where funding does matter: athletic scholarships & recruitment
- **What matters is the tangible benefits provided to students**
  - Evaluate what students *receive*, regardless of the source of the funds
  - Budget is intent



# Donations and Fundraising

## Donations

- If an entity provides benefits that creates a disparity, the school is on the hook to offset that disparity
  - Solution: Reallocate funds 
- If the benefits bring you closer to compliance, likely no disparity

## Fundraising

- Men's and women's programs have equitable opportunities to fundraise (allow teams to use facilities, etc.)
- Fundraising creates a disparity...
  - Challenging because some coaches effort is not rewarded while other coaches lack of effort and lack of donors is not penalized.

# Key Takeaways – Benefits and Treatment Areas

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- Keep your eyes and ears open
- Meet with your student-athletes and coaches
- Monitor how coaches are spending their budget
  - Monitor fundraising efforts and successes
  - Have conversations with donors
  - Be prepared to provide offsetting benefits
- Have administrators travel with teams
- **Identify and remedy immediate compliance concerns**



# Recap and Themes

**Do not add, eliminate, or transition a varsity sport WITHOUT doing a Title IX analysis – especially an athletic participation analysis**

## **Have a written Gender Equity Plan**

- Document! Document! Document!
- One that is current, supported by top leadership at the institution, and reviewed by department leadership continuously
- Have an administrator as a “point of contact/responsibility”
- In-house plan (committee) or external plan?
- Importance of start and end date

**Control your own destiny**

Federal judges and OCR investigators are not afraid to tell you how to run your athletic department.

- **Title IX Gender Equity**
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  - Athletic scholarships
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# Title IX and NIL

# The answer is...

---

- “Publicity” component?
  - Provide equitable support to both men’s and women’s teams
- Athletic financial aid?
  - Provide proportionate NIL money to female and male student athletes
- Separate component area?
  - See *Schroeder, et al. v. University of Oregon*

Remember, as part of its broad prohibition on sex discrimination, a “school may not aid or perpetuate discrimination 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.” 34 C.F.R. § 106.31(b)(6)

# Schroeder, et al. v. University of Oregon

- First challenge on how NIL fits into Title IX
- Phrased as it might be a *separate* component

601. Defendant fails to provide equal treatment and benefits to its female student-athletes in some or all the categories set forth in the Regulations and the Policy Interpretation, including but not limited to:

- The provision of equipment, uniforms, and supplies;
- Scheduling of games and practice time;
- Travel, transportation, and per diem allowance;
- Opportunity to receive coaching and academic tutoring;
- Provision of locker rooms, practice, and competitive facilities;
- Provision of medical and training services;
- Provision of housing and dining facilities and services;
- Publicity & sports information services;
- Administrative support;
- Recruiting resources and support;
- Name, Image, Likeness support; and
- Resources necessary to provide any of the foregoing benefits or to provide the female athletes with a genuine Division I athletic experience.



# Key Takeaways

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- Review your practices and determine whether staff members are spending equal time with female and male athletes on NIL (education, facilitation, etc.)
- If you have a collective, try and forecast challenges with increasing communications between NIL collectives and coaches and staff

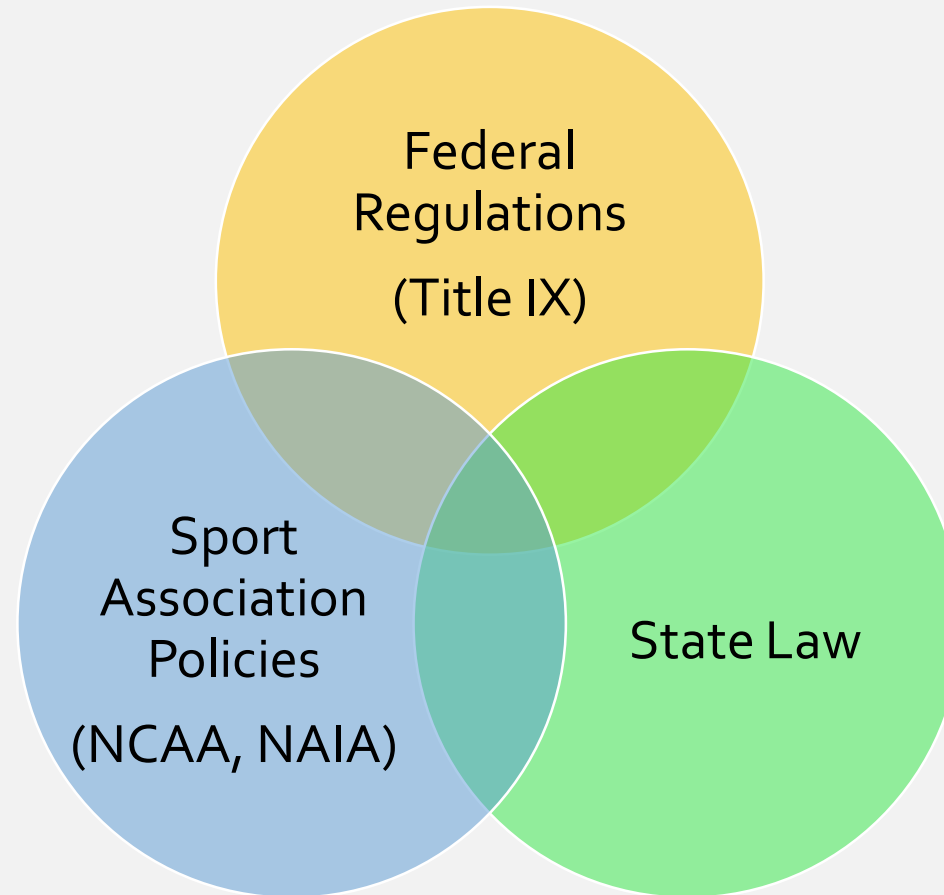


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# Transgender Participation in Athletics

# The Overlap

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# Federal Regulations (Title IX)

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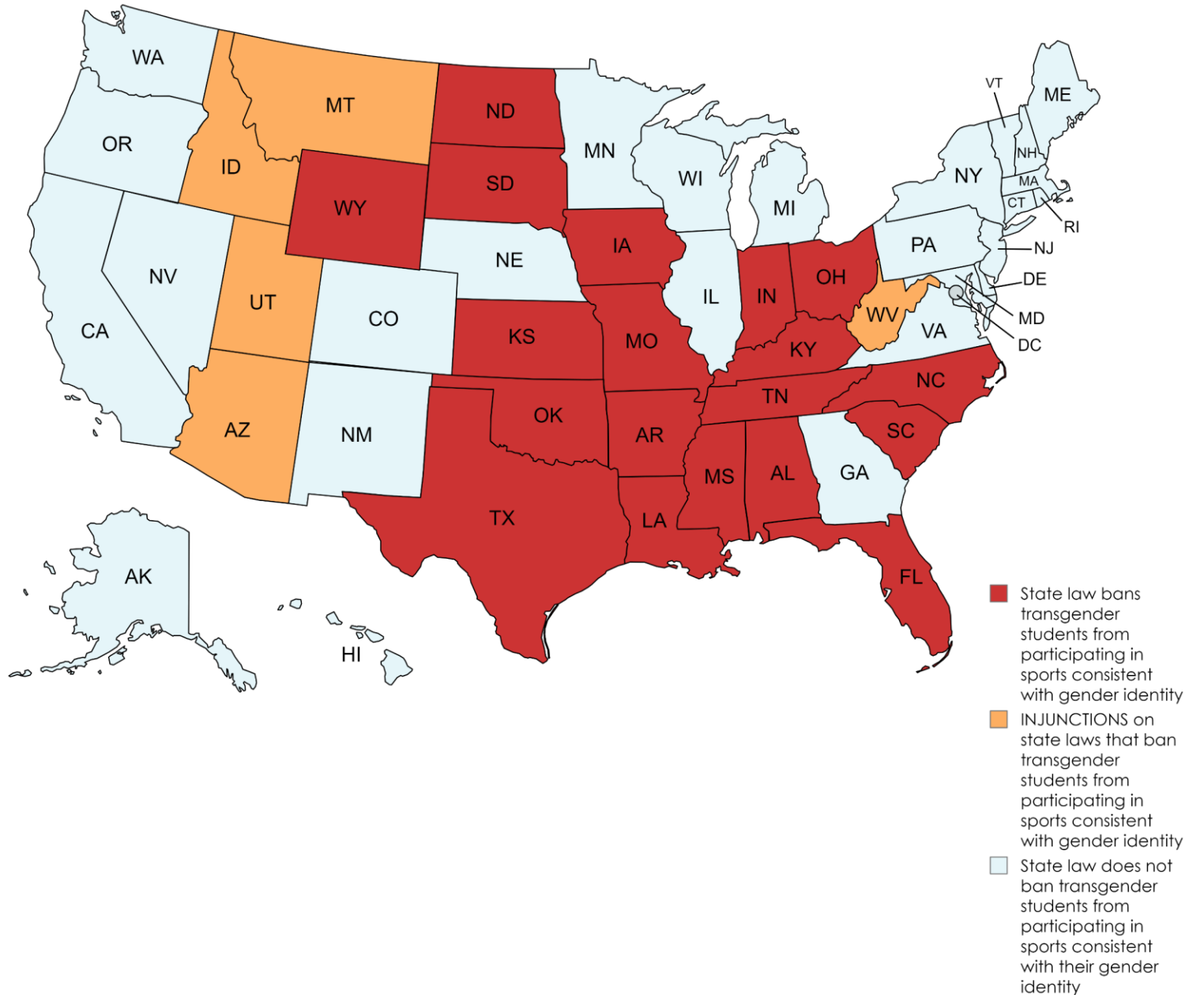
- When the 2024 regulations came out, it was unclear whether athletics was included in the scope of the "de minimus harm" provision
- Arguably, not allowing a student to participate on a team consistent with gender identity (which is a form of sex discrimination under the 2024 regs) is more than a de minimus harm = sex discrimination = school violates Title IX
- Now it is an issue because now you have a **conflicting state law** with a federal law... But not an issue because of the injunctions with the 2024 regulations?

# What about the Athletics NPRM?

- Prohibits blanket or one-size-fits-all ban on transgender student participation on teams consistent with their gender identity
  - Allow schools flexibility to develop team eligibility criteria that:
    - Serve important educational objectives, such as ensuring fairness in competition or preventing sports-related injury.
    - Account for the sport, level of competition, and grade or education level to which they apply.
    - Are not be premised on disapproval of transgender students or a desire to harm a particular student.
    - Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.
- As written, it would **conflict with state laws**.

# State Laws

- “Save Women’s Sports Act” or “Fairness in Women’s Sports Act”
- States in orange (plus Indiana) have had their transgender participation laws challenged in court



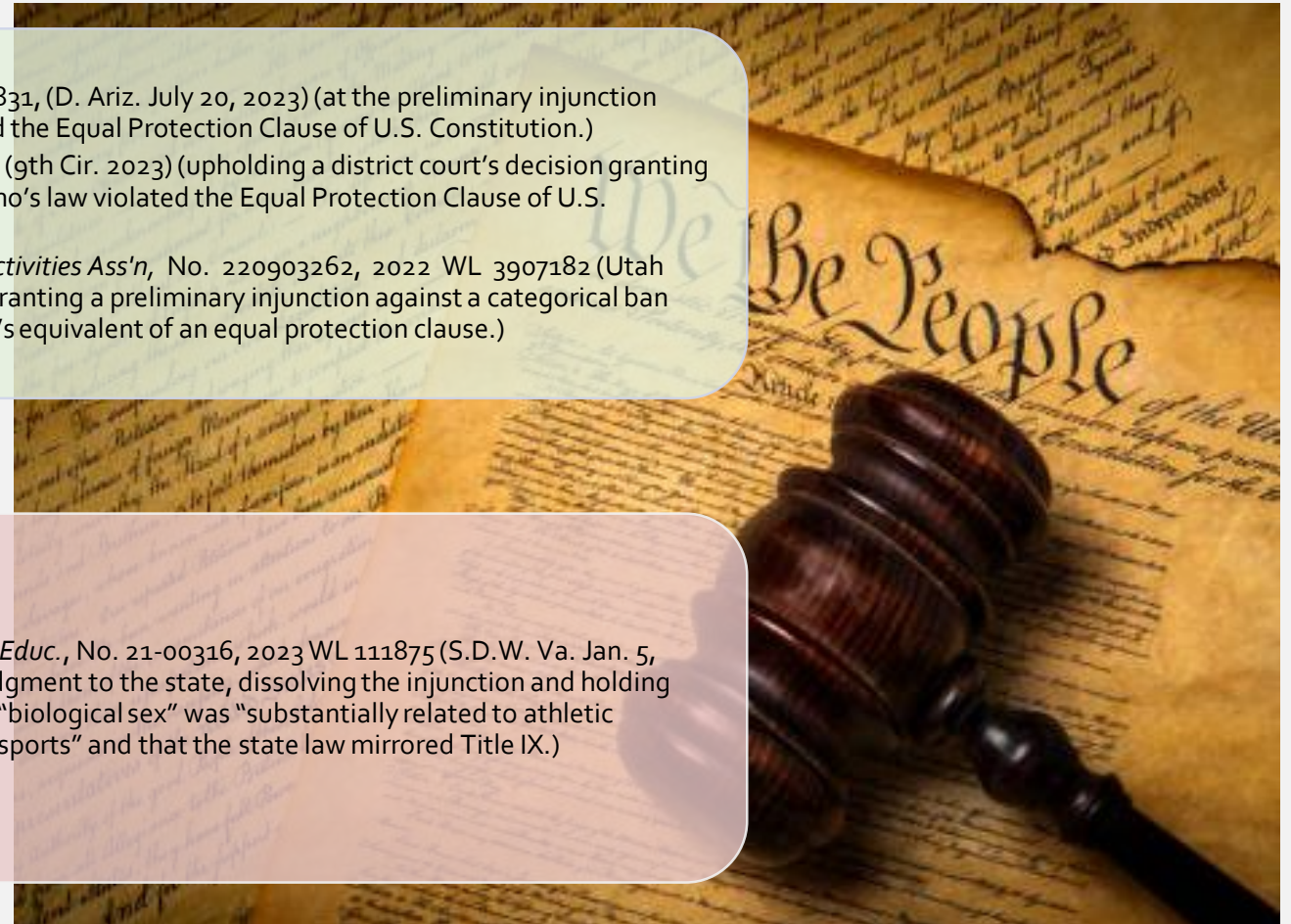
# Are these laws unconstitutional?

Some courts have said yes, but they used intermediate scrutiny to analyze the state law.

- *Doe v. Horne*, 2023 WL 4661831, (D. Ariz. July 20, 2023) (at the preliminary injunction phase, Arizona's law violated the Equal Protection Clause of U.S. Constitution.)
- *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023) (upholding a district court's decision granting a preliminary injunction, Idaho's law violated the Equal Protection Clause of U.S. Constitution.)
- *Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL 3907182 (Utah Dist. Ct. Aug. 19, 2022) (granting a preliminary injunction against a categorical ban under the Utah Constitution's equivalent of an equal protection clause.)

One court has said no, but they also used intermediate scrutiny

- *B. P. J. v. W. Va. State Bd. of Educ.*, No. 21-00316, 2023 WL 111875 (S.D.W. Va. Jan. 5, 2023) (granting summary judgment to the state, dissolving the injunction and holding that the state's definition of "biological sex" was "substantially related to athletic performance and fairness in sports" and that the state law mirrored Title IX.)



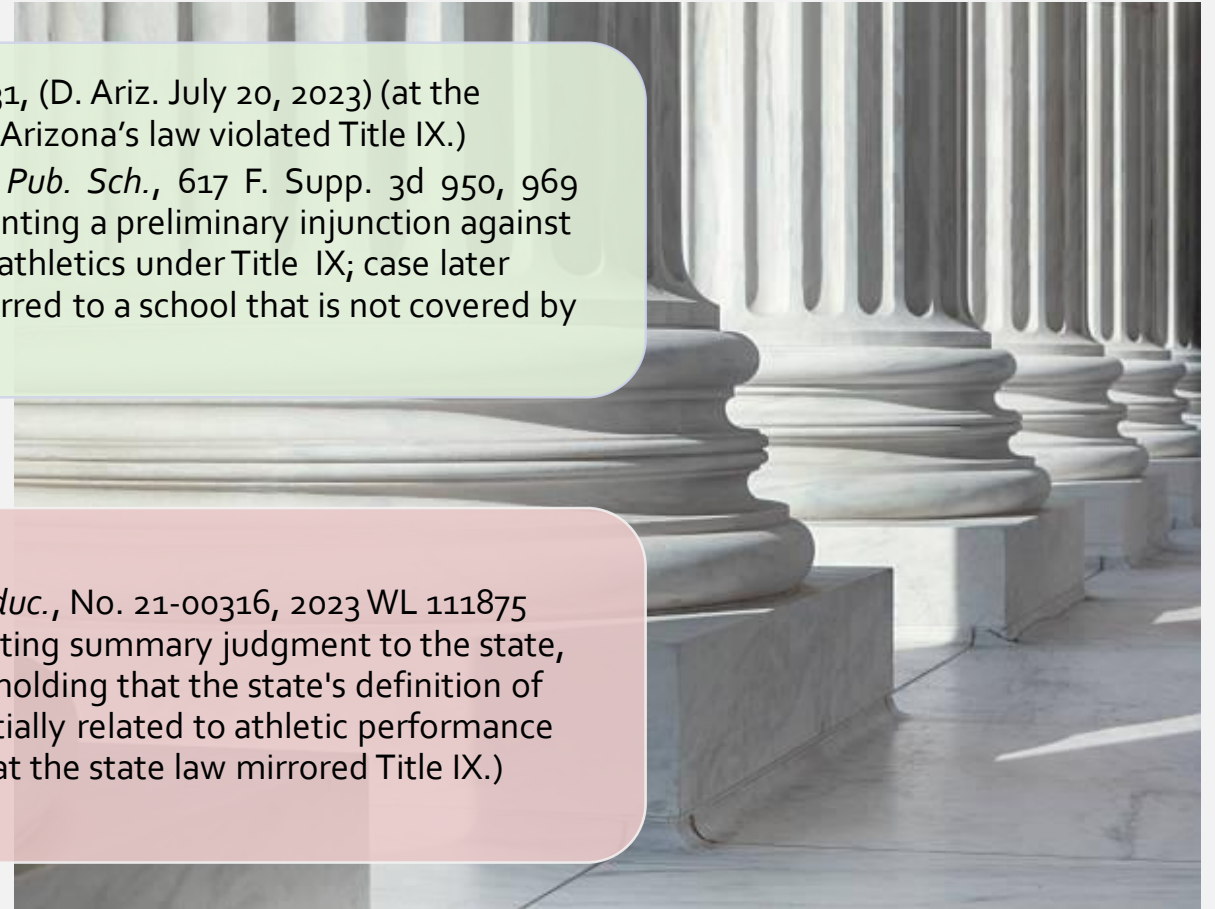
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- *A.M. by E.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950, 969 (S.D. Ind. July 26, 2022) (granting a preliminary injunction against transgender participation in athletics under Title IX; case later dropped after student transferred to a school that is not covered by the law.)

One court  
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# Where do we stand in Ohio?

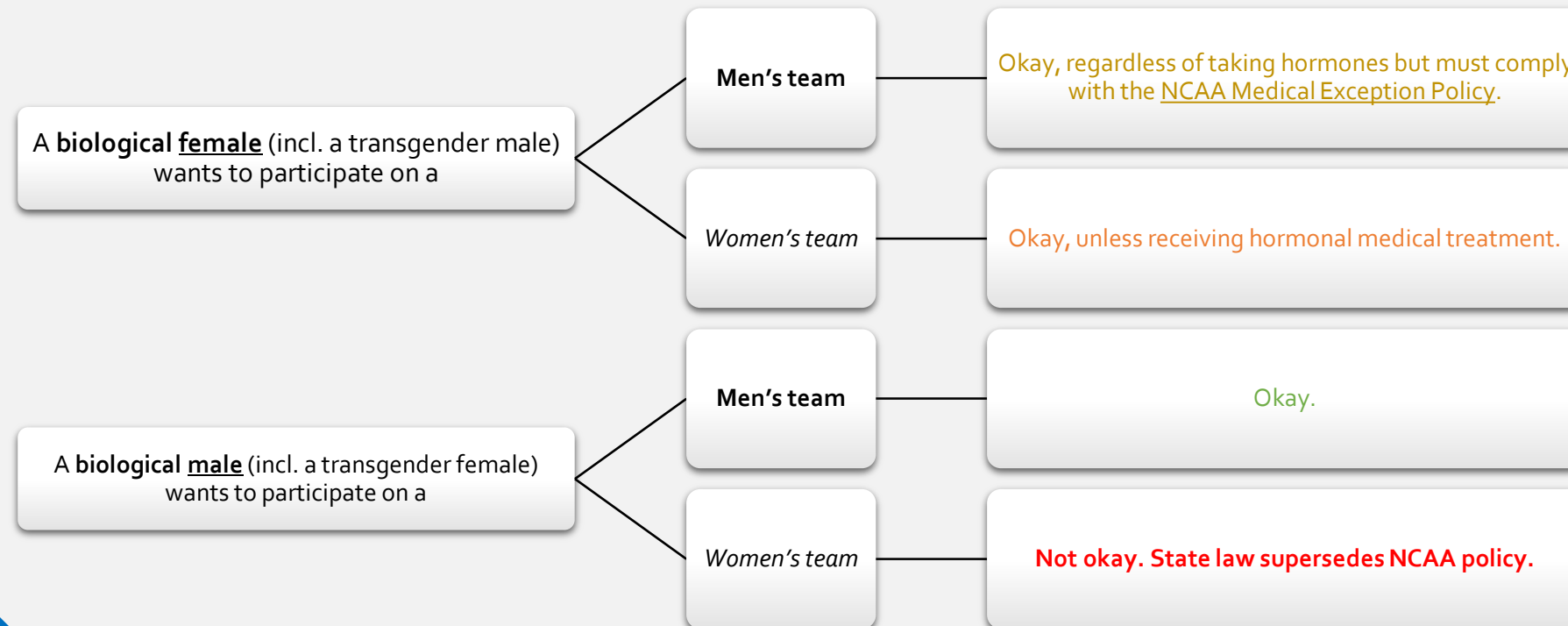
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- Ohio HB 68
- Before HB 68 went into effect, a lawsuit was filed and the State of Ohio was temporarily enjoined from enforcing the Act. On August 6, 2024, a Franklin County Common Pleas judge held that HB 68 was constitutional and vacated the temporary restraining order.
- As a result, the State of Ohio may enforce the law
- **With the uncertainty of the 2024 regs, follow state law**
  - But what about your NCAA or NAIA obligations?



# NCAA Policy

- Do states with the “Save Women’s Sports Act” / “Fairness in Women’s Sports Act” conflict with the NCAA’s Policy?
  - Not entirely



# Challenges to the NCAA Policy

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- *Gaines et al v. NCAA et al* (N.D.Ga.) filed March 14, 2024
  - Several college athletes filed a lawsuit against the NCAA and some member institutions over its transgender athlete policies claiming that the NCAA's policies fail to protect the fairness and safety of its athletes.
  - Alleges that the NCAA's policies discriminate against cisgender women and violate Title IX rights.
  - Class action lawsuit seeks a nationwide ban on transgender women participating in women's NCAA sports, and the invalidation of all athletic records of transgender women who have participated in NCAA events. The plaintiffs also want to ban transgender women from using women's locker rooms, restrooms, and showers at NCAA institutions.

# NAIA Policy

- New as of April 8, 2024
- Prohibits biological males from participating on female designated teams



## TRANSGENER PARTICIPATION POLICY

The NAIA supports fair and safe competition opportunities for all student-athletes. Title IX ensures there are separate and equal opportunities for female athletes. As a result, the NAIA offers separate categories of competition in all sports except for competitive cheer and competitive dance, which are both co-ed.

Student-athletes may participate in NAIA competition in accordance with the following conditions.

- A. Participation by students in sports designated as male by the NAIA:  
All eligible NAIA student-athletes may participate in NAIA-sponsored male sports.
- B. Participation by students in sports designated as female by the NAIA:  
Only NAIA student-athletes whose biological sex\* is female may participate in NAIA-sponsored female sports. They may participate under the following conditions:
  1. A student who has not begun any masculinizing hormone therapy may participate without limitation.
  2. A student who has begun masculinizing hormone therapy may participate in:
    - a. All activities that are internal to the institution (does not include external competition), including workouts, practices, and team activities. Such participation is at the discretion of the NAIA member institution where the student is enrolled; and
    - b. External competition that is not a countable contest as defined by the NAIA (per NAC Policy Article XXV, Section A, Item 12). Such participation is at the discretion of the NAIA member institution where the student is enrolled.

An NAIA institution that has a student-athlete who has begun masculinizing hormone therapy must notify the NAIA national office. The national office will take the necessary steps to provide appropriate privacy protections.

This policy will be subject to review in light of any legal, scientific, or medical developments.

# Questions?

[REGISTER HERE](#) for the remaining session of the Athletic Department Toolkit Series

- Tuesday, October 8, 2024 – Session 4: Tackling Areas of High Risk in Your Athletics Department

## Free Bonus Session

A Primer on Esports on Campus

October 11, 2024 12:00-1:00pm EST

Register [HERE](#)

*Discover the growing world of esports on campus. We'll introduce attendees to the essentials of esports, review how esports is impacting higher education, and we'll talk through considerations that go into setting up a successful program while exploring the legal considerations you need to know. Perfect for those new to the esports landscape.*



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