

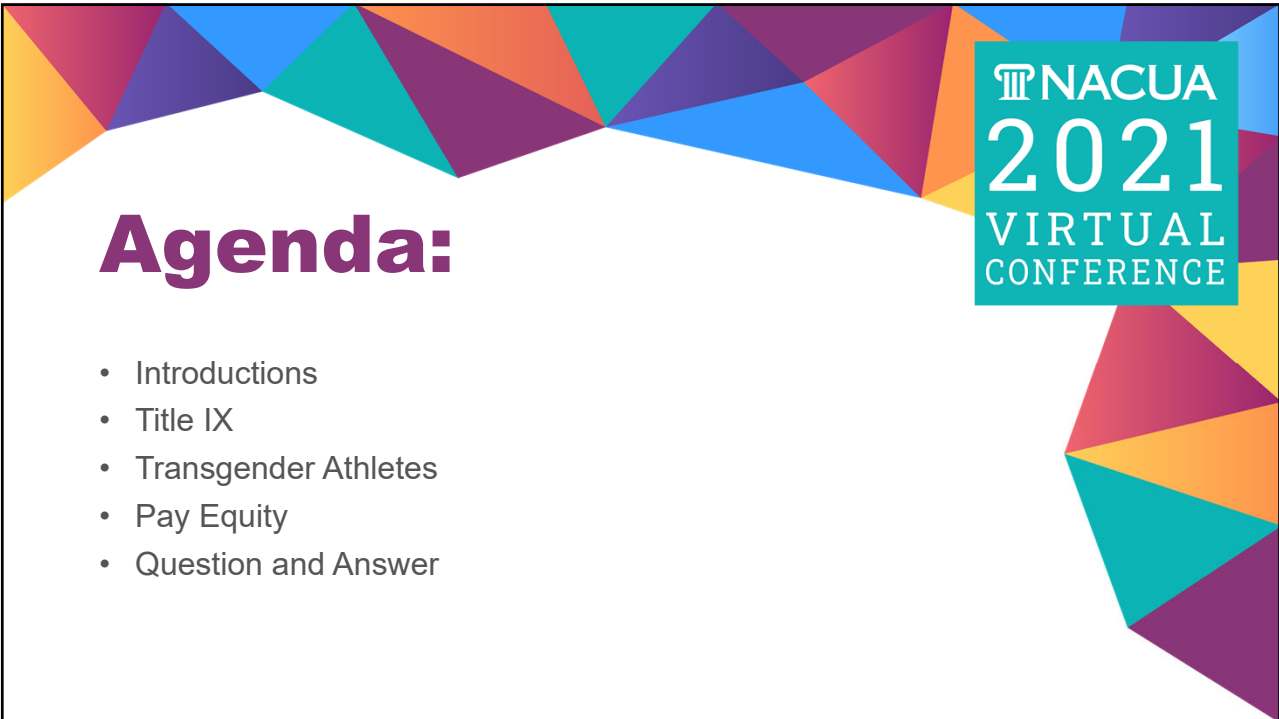


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Leveling the Title IX Athletics Playing Field: Sex, Race, LGBTQ+, and Pay Equity

Roberta A. Kaplan, Founding Partner, Kaplan Hecker & Fink LLP
Shannon Minter, Legal Director, National Center for Lesbian Rights
Lucy France, General Counsel, University of Montana
Moderator: Janet P. Judge, Partner, Holland & Knight LLP

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Agenda:

- Introductions
- Title IX
- Transgender Athletes
- Pay Equity
- Question and Answer

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Athletics Program Restructuring & Recent Title IX Litigation

Roberta A. Kaplan, Founding Partner,
Kaplan Hecker & Fink LLP

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Overview

- Title IX & Sports: Prong One Refresher
- Litigation in Connection with Recent Athletics Program Restructuring
- The Biden Administration Weighs In



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Title IX & Sports: Prong One Refresher



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Prong One: 1996 Policy Clarification

See Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, Off. for Civil Rights, U.S. Dep't of Educ., to Colleagues (Jan. 16, 1996) ("1996 Dear Colleague Letter"), <https://www2.ed.gov/about/offices/list/ocr/does/clarific.html>

- OCR evaluates Prong One on “a case-by-case basis,” not “through use of a statistical test”
- If a “participation gap” < size of a viable team → substantial proportionality
- Calculating the gap according to OCR:
 - Undergraduate enrollment: 52% women; 48% men
 - Athletic Participation: 47% women; 53% men
 - Total Athletes: 600 athletes
 - Formula: (number of male athletes (600 x 0.53) / percentage of males in student body (.48)) - total number of athletes (600) = **62 additional women-athletes**

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Prong One: Case Law

Evaluating the gap based on:

- Eliminated team size
 - *Ohlensehlen v. Univ. of Iowa*, 20 Civ. 80, 2020 WL 7651974, at *5 (S.D. Iowa Dec. 24, 2020).
- School's maximum roster size
 - *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 107-08 (2d Cir. 2012).
- School's average roster size
 - *Balow v. Mich. St. Univ.*, No. 21 Civ. 44, 2021 WL 650712, at *9 (W.D. Mich. Feb. 19, 2021).
- Average size of teams in NCAA division
 - *Lazor v. Univ. of Conn.*, No. 21 Civ. 583, 2021 WL 2138832, at *4 (D. Conn. May 26, 2021).
- Percentage size of the disparity
 - *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 975 (D. Minn. 2016) (collecting cases).
- Absolute number of student-athletes
 - *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 857 (9th Cir. 2014).



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Athletics Program Restructuring: Recent Litigation



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2020-21 Litigation Uptick

The image shows two news articles side-by-side. The left article is from the Washington Post, dated March 25, 2021, with the headline "Colleges cut sports to save money amid the pandemic. Then came the Title IX lawsuits." It features a photograph of a large group of people swimming in a pool. The right article is from Auburn University, dated February 14, 2021, with the headline "SURGE OF TITLE IX CASES IN COLLEGE ATHLETICS AND HOW COVID-19 IS NOT A DEFENSE." It features a photograph of swimmers in a pool. Both articles discuss the impact of Title IX lawsuits on college athletics during the COVID-19 pandemic.

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2020-21 Litigation Uptick

- *Cohen v. Brown Univ.*, 92 Civ. 197 (D.R.I.) (motion to enforce consent decree filed June 2020; settlement on appeal)
- *Sterman v. Brown Univ.*, No. 20 Civ. 358, 2021 WL 135978 (D.R.I. Jan. 14, 2021) (PI denied, MTD granted in part; voluntarily dismissed)
- *Balow v. Mich. St. Univ.*, No. 21 Civ. 44, 2021 WL 650712 (W.D. Mich. Feb. 19, 2021) (PI denied; appeal pending)
- *Ohlensehlen v. Univ. of Iowa*, No. 20 Civ. 80, 2021 WL 1257554 (S.D. Iowa Feb. 23, 2021) (PI granted; MTD denied)
- *Anders v. Cal. St. Univ., Fresno*, No. 21 Civ. 179, 2021 WL 1564448 (E.D. Cal. Apr. 21, 2021) (PI granted in part; MTD pending)
- *Keesing v. Bd. of Tr. of Stanford Univ.*, No. 21 Civ. 3555 (N.D. Cal.) (filed May 12, 2021; pending)
- *Guden v. Bd. of Tr. of Stanford Univ.*, No. 21 Civ. 3559 (N.D. Cal. May 20, 2021) (voluntarily dismissed)
- *Lazor v. Univ. of Conn.*, No. 21 Civ. 583, 2021 WL 2138832 (D. Conn. May 26, 2021) (TRO granted)

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2020-21 Litigation Uptick: Title IX Claims

The recent cases include the “triumvirate” of Title IX claims:

- **Effective Accommodation (i.e., Participation) Claims**

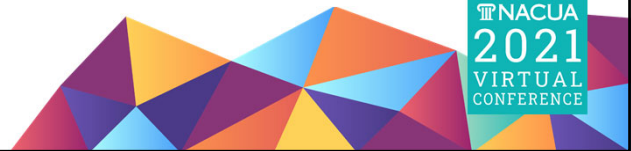
E.g., Lazor v. Univ. of Conn., No. 21 Civ. 583, 2021 WL 2138832, at *4 (D. Conn. May 26, 2021).

- **Unequal Treatment/Benefits Claims**

E.g., Anders v. Cal. State Univ., Fresno, No. 21 Civ. 179, 2021 WL 1564448, at *18 (E.D. Cal. Apr. 21, 2021).

- **Unequal Financial Aid Claims**

E.g., Ohlensehlen v. Univ. of Iowa, 20 Civ. 80, 2021 WL 1257554, at *2 (S.D. Iowa Feb. 23, 2021).



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2020-21 Litigation Uptick: State Law Claims

- **Breach of Contract**

- Claim that eliminating a team violated “[the school’s] obligation to provide [plaintiffs] with . . . promised varsity [sports] opportunities.”

- **Fraud/Misrepresentation**

- Claim that a school misrepresented or concealed that it planned to cut a team when recruiting students.

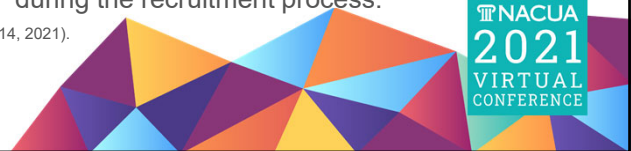
- **Promissory Estoppel**

- Claim that students “reasonably relied on [a school’s] promise of varsity [sports] opportunities to their detriment, by matriculating [there] and forgoing opportunities at other universities.”

- **Breach of Fiduciary Duty**

- Claim that student-athletes are in a “fiduciary relationship” with a school, “based on the trust and reliance they placed in [a school] representative” during the recruitment process.

Sterman v. Brown Univ., No. 20 Civ. 358, 2021 WL 135978, at *4-7 (D.R.I. Jan. 14, 2021).

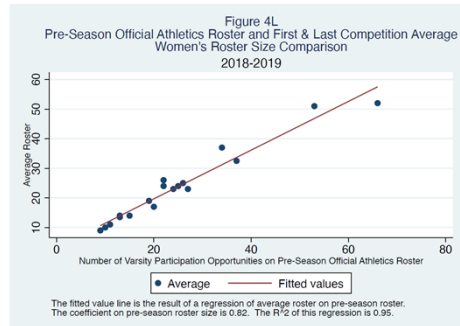


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Key to Success = Robust Data: *Cohen v. Brown University*

Table 3

Year	Fall Semester Student Body Ratios		Student Athlete Ratios		Difference
	% Male Students	% Female Students	% Male Athletes	% Female Athletes	
1998-1999	46.18%	53.82%	47.28%	52.72%	0.89%
1999-2000	47.35%	52.61%	47.67%	52.33%	0.27%
2000-2001	—	—	—	—	—
2001-2002	46.02%	53.98%	50.83%	49.17%	4.82%
2002-2003	45.77%	54.23%	47.90%	52.10%	2.14%
2003-2004	45.25%	54.75%	46.82%	53.18%	1.57%
2004-2005	46.27%	53.73%	50.75%	49.25%	4.47%
2005-2006	46.67%	53.33%	48.86%	51.14%	2.19%
2006-2007	48.53%	51.47%	50.97%	49.03%	2.44%
2007-2008	48.05%	51.95%	50.98%	49.02%	2.93%
2008-2009	48.25%	51.75%	50.73%	49.27%	2.49%
2009-2010	47.67%	52.33%	53.21%	46.79%	5.54%
2010-2011	47.80%	52.20%	48.70%	51.30%	0.91%
2011-2012	48.72%	51.28%	49.83%	50.17%	1.11%
2012-2013	48.22%	51.78%	48.56%	51.44%	0.34%
2013-2014	48.53%	51.46%	49.23%	50.77%	0.27%
2014-2015	48.87%	51.13%	49.97%	50.03%	1.10%
2015-2016	47.70%	52.30%	48.88%	51.12%	1.18%
2016-2017	47.79%	52.21%	50.42%	49.58%	2.81%
2017-2018	47.26%	52.74%	50.13%	49.87%	2.87%
2018-2019	46.38%	53.72%	48.96%	51.04%	2.68%
2019-2020	47.71%	52.29%	49.94%	50.06%	2.23%
2020-2021	47.71%	52.29%	48.00%	52.00%	0.29%



ECF 380-2 & 380-13, *Cohen v. Brown Univ.*, No. 92 Civ. 197 (D.R.I. Sept. 2, 2020).

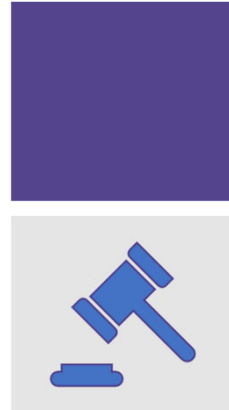


Takeaways

- Restructuring athletics programs can invite litigation
- Restructuring athletics programs can also create unexpected alliances
- Institutions will need to rely on Prong One in such litigation
- Robust data maintenance is essential



Title IX & Sports: The Biden Administration Weighs In



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Title IX Enforcement in the News

<https://www.theatlantic.com/culture/archive/2021/04/march-madness-could-spark-title-ix-reckoning/618483/>

CULTURE
The Title IX Loophole That Hurts NCAA Women's Teams
A little-known Supreme Court ruling makes it legal for the league to promote its men's and women's teams unequally.
MAGGIE MERTENS APRIL 1, 2021

The deeply entrenched sexism in intercollegiate sports means that male athletes are treated with red-carpet fervor, and women are treated as second-class citizens. (GETTY IMAGES / THE ATLANTIC)

When Sedona Prince, a center on the University of Oregon women's basketball team, shared a TikTok from the NCAA women's basketball tournament earlier this month, it went viral. Her video compared the women's weight room in San Antonio—a single small rack of dumbbells and a stack of yoga mats—with what the men's teams were provided at their tournament, in Indianapolis: a gym-size room full of squat racks, benches, barbells, and racks of heavy plates. Soon after, players and coaches from several teams began posting their own photos on social media: a buffet of steak and shrimp for the men, repackaged meals for the women. Swag bags full of celebratory gear blaring

Forbes
Where Is Title IX In The NCAA Weight Rooms?
Corinne Thomas Contributor @corinnethomas

Yesterday, University of Oregon Forward Sedona Prince used TikTok to reveal the glaring discrepancy between the facilities afforded the men's and women's basketball teams during this year's NCAA Basketball Tournament.

DESTROYS TOUGHEST CLOGS GET COUPON NOW

NCAA women's tournament 2021: Inside an overdue reckoning over inequity in basketball

Even if it's your daughter.

Big shot loses virtuoso's tender policy

There is a tremendous opportunity for change in the way Division I women's basketball is played, marketed and managed. In many ways, the comments I received over tonight's tournament, as it was noted that some of the issues we've highlighted have been "kicking around for years," demonstrate the need for change within the NCAA system.

https://www.espn.com/womens-college-basketball/story/_id/31182950/ncaa-women-tournament-2021-overdue-reckoning-inequity-basketball

Forbes
<https://www.forbes.com/sites/ceceliatowne/2021/03/19/where-is-title-ix-in-the-ncaa-weight-rooms/?sh=62d326aa7007>

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Balow v. Michigan State University, **No. 21-2283 (6th Cir.)**

May 26, 2021:

DOJ Civil Rights and DOE
file an amicus brief

No. 21-1183

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOPHIA BALOW, *et al.*,
Plaintiffs-Appellants
v.
MICHIGAN STATE UNIVERSITY, *et al.*,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLANTS AND URGING REVERSAL
ON THE ISSUE ADDRESSED HEREIN

EMMA LEHENY Principal Deputy General Counsel	PAMELA S. KARLAN Principal Deputy Assistant Attorney General
VANESSA SANTOS Attorney U.S. Department of Education Office of the General Counsel	ERIN H. FLYNN Yael BORTNICK Attorneys U.S. Department of Justice Civil Rights Division Appellate Section Ben Franklin Station P.O. Box 14403 Washington, D.C. 20044-4403 (202) 616-8271

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Balow v. MSU: PI Denied

The District Court addressed **Prong One** only:

- **Rejected the plaintiffs' expert's allegations of "roster inflation"**
- **Calculated a "participation gap"**
 - Participation gap = (number of male athletes / percentage of males in student body) - total number of athletes

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Balow v. MSU: PI Denied

The District Court concluded:

- There was a “participation gap”:
 - 2018-19: 27
 - 2019-20: 12
 - *MSU estimated the gap would increase from 12 to 15 after cutting men’s and women’s swimming & diving.*
- “MSU’s participation gap appears to be **lower than 2%.**”
- The estimated gap was “**less than the average size of a women’s team at MSU.**”
- The gap was **not large enough** to preclude substantial proportionality.



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Balow v. MSU: DOJ/DOE Amicus Brief

The Biden Administration has taken the position that *the Balow* Court misapplied Prong One in three ways:

1. Courts should look at the **absolute number** of the participation gap, **not the percentage** of the size of the athletic program.
2. **A gap of $\leq 2\%$ is not necessarily substantially proportionate.**
3. Courts should assess whether the gap could support a **viable team**, **not the school’s average-size women’s team.**



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Takeaways

The Biden Administration is:

- Paying attention to and engaging with Title IX compliance in intercollegiate athletics;
- Taking a muscular view of Prong One compliance.

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Transgender Athletes: Basic Concepts & Terminology

- Gender identity refers to a person's internal, psychological identification as male or female.
- A transgender girl or a transgender woman is a person who was identified as male at birth, but who has a female gender identity.
- A transgender boy or a transgender man is a person who was identified as female at birth, but who has a male gender identity.

Note: Some people do not identify as either male or female. Such a person may identify as nonbinary.

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Problems with the Term “Biological Sex”

- There is no medically or legally agreed-upon definition of the term.
- Those who use the term often do so in order to negate transgender identity—for example, by referring to a transgender woman as “biologically male.”
- Statements such as these—seeking to pit biology against transgender identity—are inaccurate for multiple reasons, including: (1) gender identity has a biological basis; (2) many transgender people undergo medical treatments that alter their biological makeup; (3) many cisgender people have atypical biological traits; and (4) there is no agreed-upon medical or legal definition of “biological sex.”



Karnoski v. Trump, 2018 WL 1784464 (W.D. Wash April 13, 2018)

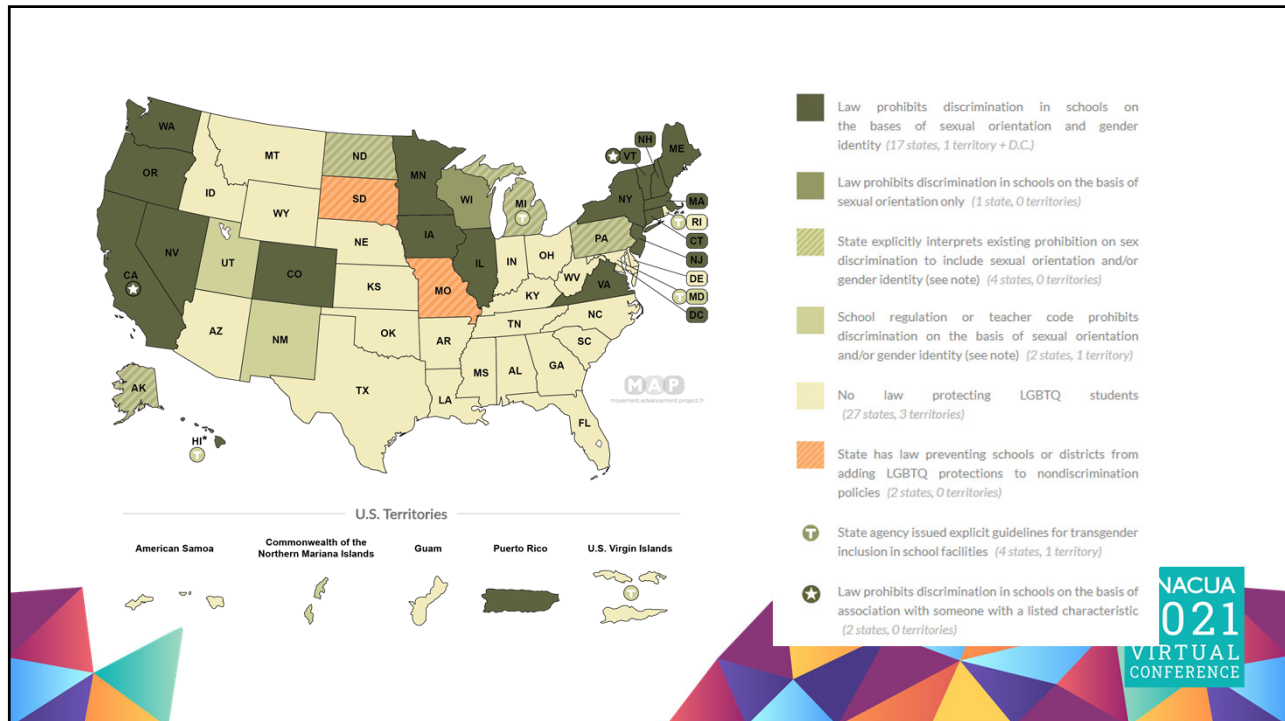
“The Court notes that the Implementation Plan uses the term ‘**biological sex**,’ apparently to refer to the sex one is assigned at birth. This is somewhat misleading, as the record indicates that gender identity—“a person’s internalized, inherent sense of who they are as a particular gender (*i.e.*, male or female)” — is also widely understood to have a “biological component.”



NCAA Policy on Transgender Athletes (adopted 2011)

"The NCAA Board of Governors firmly and unequivocally supports the opportunity for transgender student-athletes to compete in college sports. This commitment is grounded in our values of inclusion and fair competition."

1. A transgender man (i.e., a person assigned female at birth but whose gender identity is male) who is taking testosterone as a treatment for gender dysphoria may compete on a men's team but may not compete on a women's team without changing that team status to a mixed team.
2. A transgender woman (i.e., a person assigned male at birth but whose gender identity is female) who has completed one calendar year of testosterone suppression medication for the treatment of gender dysphoria may compete on a women's team. Prior to the completion of one year of testosterone suppression treatment, she may compete on a men's team but may not compete on a women's team without changing it to a mixed team status.



States that currently Ban Transgender Girls from School Sports

- Alabama
- Arkansas
- Florida
- Idaho (enjoined)
- Mississippi
- Montana
- Tennessee
- North Dakota
- South Dakota
- West Virginia

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Relevant Federal Laws

- Equal Protection Clause
- Title IX

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Bostock v. Clayton County, Ga.

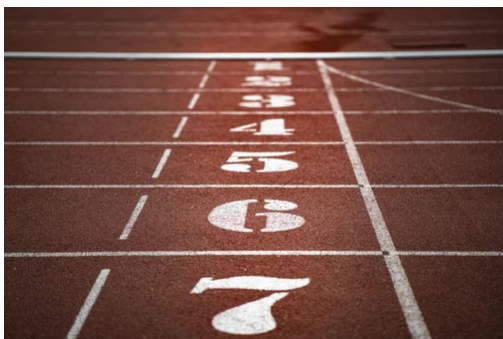
“When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.”

Bostock v. Clayton County, Ga., 140 S. Ct. 1731 (2021)



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Challenges to Transgender-Inclusive Athletic Policies



Soule v. Conn. Ass'n of Sch.,
No. 3:20-cv-00201 (RNC), 2021 WL
1617206 (D. Conn. Apr. 25, 2021)
(dismissed as moot)



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Challenges to State Laws Banning Transgender Girls from School Sports



Hecox v. Little,
479 F. Supp. 3d 930, 943 (D.
Idaho 2020) (enjoining Idaho
Code Ann. § 33-6201-6206).



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Pay Equity for Collegiate Coaches

- 1979: 37% wage disparity overall per U.S. Bureau of Labor Statistics (U.S. BLS)
- 2018: 19% wage disparity overall per U.S. BLS
- “The gender pay gap spans almost every industry, and sports is no different.”
Olivia Abrams, *Why Female Athletes Earn Less Than Men Across Most Sports*,
Forbes, June 23, 2019.
- 2004-2010 Div. I head coaching salaries for men have increased \$314,100
compared with female head coaches at \$197,800. (58.6% compared to 41.4% at
the median). *NCAA Gender-Equity Report 2004-2010*
(<https://www.ncaapublications.com/productdownloads/GEQS10.pdf>).



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Applicable Laws

- Equal Pay Act of 1963
 - 29 U.S.C. § 206(d) (part of Fair Labor Standards Act)
- Title VII of the Civil Rights Act of 1964
 - 42 U.S.C. § 2000e-2
- Title IX of the Education Amendments of 1972
 - 20 U.S.C. §§ 1681-1688
- State Law
 - *E.g. Massachusetts Equal Pay Act (2018)*



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EEOC Guidance

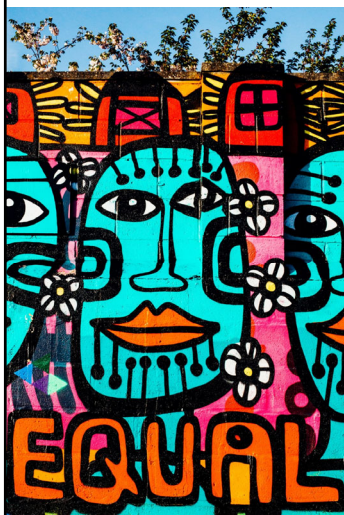
U.S. Equal Employment Opportunity Commission

- *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions*, Equal Employment Opportunity Commission (1997).
 - Acknowledges problems with pay disparities (“overall pattern of employment of coaches by educational institutions is not gender-neutral”)
 - Describes the EPA and Title VII burden shifting analyses



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Prima Facie Case



Appropriate Comparator who is not the same sex and who receives a higher salary.

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Comparator Factors

- ***Equal:***
 - Skills
 - Experience, training, education, ability
 - Effort
 - Teaching/training, counseling/advising, program management, budget management, fundraising, public relations, recruiting
 - Responsibilities
 - # of players, # of assistant coaches, media management
 - Working Conditions

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Affirmative Defenses to EPA and Title VII Claims

Factor Other than Sex

- Revenue
- Marketplace
- Prior Salary
- Sex of Student Athletes
- Experience, Education, Abilities
- More Duties



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What is on the Horizon?

- *David Leonhardt, "Massages vs. doubleheaders" New York Times, June 4, 2021 (opining that revenue differences do not explain disparities in treatment of Women's College World Series versus male baseball)*
- *OFCCP agreement with UConn to pay \$249,539 to female coaches and athletic staff after finding of underpayment compared with men in similar positions. Associated Press, Oct. 20, 2020*
- *State Laws, e.g., Massachusetts*



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