



CRITICAL MOMENTS IN AMERICAN HISTORY

TITLE IX

The Transformation of Sex
Discrimination in Education

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TITLE IX: THE TRANSFORMATION OF SEX DISCRIMINATION IN EDUCATION

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THE TRANSFORMATION

A simple statute prohibiting sex discrimination in education has been transformed by the bureaucracy and the courts into a mandate for things never contemplated in the statutory text.

RESULTS OF THE TRANSFORMATION

- Numerical Parity in Athletics
- Private Right of Action to Recover Money Damages for Sexual Harassment by Employees and Students
- Establishment of a Parallel Criminal Justice System for Campus Sexual Assaults
- Redefining “Sex” to Include Gender Identity

TITLE IX'S UNTOLD STORY

Case Study in Lawmaking

Transformation came from unelected bureaucrats and the Courts—not Congress.

Most transformations are not law, but are treated as law.

Conclusions

Is this the best way to protect civil rights?

What are the consequences for the rule of law?



THE STATUTE

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.

CHAPTER I: THE STATUTORY TEXT

MEANING AT THE TIME OF PASSAGE



On the Basis of Sex

Due to biology as a female (xx) or male (xy).

Equality of opportunity

Bans “intentional,” “purposeful,” or “invidious” discrimination against males and females.

Jurisdiction

Any education program or activity directly receiving federal financial assistance.

Exemptions

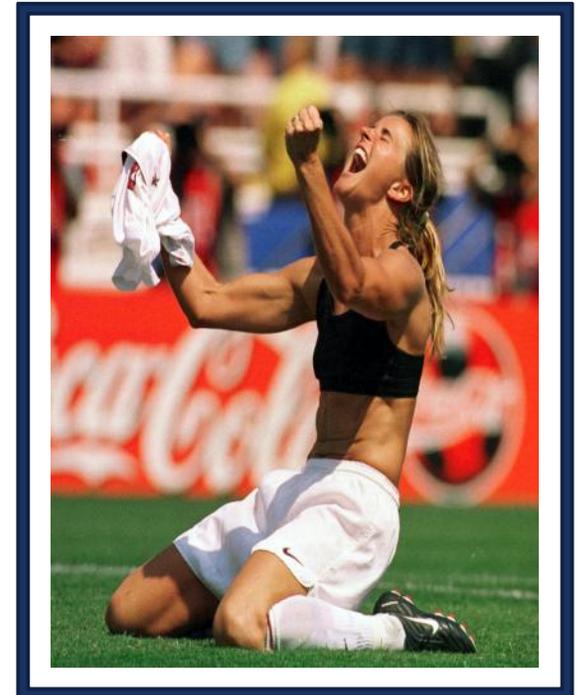
Residence halls, restrooms, fraternities, sororities, single-sex schools, and classes.

Affirmative Action

Permissible, but not to be required

CHAPTER 2: ATHLETICS

- Title IX Does not mention athletics explicitly
- Athletics as Educational Particularly at the middle and high school level— can be a mechanism for imparting important lessons (teamwork, self-sacrifice, the value of hard work, performing under pressure.)
- Nondiscrimination What is equal opportunity in sex-segregated sports?
- Key Interpretations 1975 Regulations and 1979 Three Part Test
- Three Part Test Numerical Parity is the only measure of nondiscrimination



1975 REGULATIONS

A school which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes
34 C.F.R. § 106.4(C)(1)

1979 POLICY GUIDANCE

- Not a Regulation
- Merely OCR's *Interpretation* of the 1975 Regulation
- Courts have given it great deference, but *Kisor v. Wilkie* (2019) may change that

THREE-PART TEST

Substantial
Proportionality

History and
Continuing Practice
of Program
Expansion

Full Accommodate
the Interests and
Abilities of the
Underrepresented
Sex

CONCLUSION

NUMERICAL PARITY IN ATHLETICS

- OCR has issued a number of clarifications of the three-part test
- These are reinterpretations of the interpretation of the regulation
- OCR, Schools, and Circuit Courts defer to numerical parity measure
 - Not an actual regulation
 - Instituted by a Guidance Document

CHAPTER 3

JUDICIAL ENFORCEMENT AND SEX HARASSMENT

Supreme Court established the private right of action in Title IX (*Cannon v. University of Chicago* (1979)).

Before *Cannon* (1979)

- SCOTUS had not found an implied private right of action to sue in Title VI
- SCOTUS rarely found such rights if they were not stated by Congress in the law's language.



TITLE IX AND SEXUAL HARASSMENT EXPANSIONS BY THE COURT

Supreme Court discovered sexual harassment as a form of discrimination based upon sex.

Key Court Cases

Franklin v. Gwinnett School District (1992)

Gebser v. Lago Vista School District (1998)

Expansions

- Sexual harassment by a teacher is a form of sex discrimination banned by Title IX.
- Schools could be held responsible under when a teacher sexually harasses students.
- Liability only if school district “has actual notice of, and is deliberately indifferent.”

TRANSFORMATIONS BY THE COURT AND OCR

Transformation in Franklin (1992) and Gebser (1997)

- remedies to include monetary damages from the school or school district students
- financial damages if sexually harassed by a teacher or agent of the school.

Transformation by OCR: DCL issued to influence Davis v. Monroe Co. Board of Education (1999)

Transformation in Davis (1999)

- Schools liable for sexual harassment or assault by *nd non-agents* of the school
- Schools responsible for student misconduct
- Paves the way for 2011 DCL

CHAPTER 4

TITLE IX AND SEXUAL ASSAULT

2011 DCL establishes Parallel Criminal Justice System

Problem	Too many sexual assaults occur on college campus. Are schools doing enough?
1999-2011	Schools generally refer incidents to law enforcement and occasionally impose discipline
Criminal Justice Response	Difficult to prove sexual assault beyond a reasonable doubt (99%) and unanimous verdict. Testimony in Court with cross-examination can be difficult for complainant
Rationale for 2011 DCL	If schools have liability for student on student sexual assault, then schools have an obligation to prevent sexual assault and to remedy incidents of sexual assault

2011 DEAR COLLEAGUE LETTER



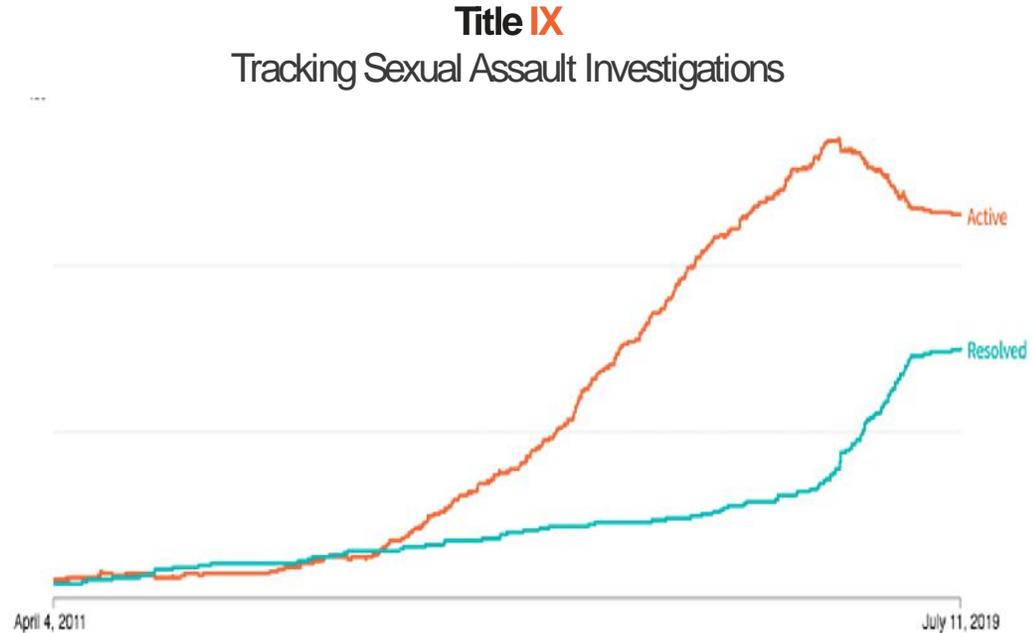
- Obama Administration sends 2011 Dear Colleague Letter mandating that parallel criminal justice system to deal with campus sexual assault.
- Only available to students in higher education.
- Non-students can pursue traditional criminal justice system.

CHARACTERISTICS OF 2011 DCL

- Guilt by Preponderance of Evidence (50.1%)
- Cross-Examination Discouraged
- May Not Have Access to Counsel
- May Not Have Access to Evidence

CONSEQUENCES OF 2011 DCL

- Public University Students have a due process right before being expelled
- System mandated by OCR often resulted in due process denials
- Over 300 lawsuits



DEVOS RESCINDS 2011 DLC

- Trump Administration has proposed regulations designed to ensure due process
- Trump Administration assumes the continued existence of a parallel criminal justice system
- Various Progressive Activists have Opposed the Regulations



LIKELY RESULTS

- Appellate Courts will define what is and is not required
- Sixth Circuit
- Seventh Circuit
- Court of Appeals of California

CHAPTER 5: TITLE IX'S NEW FRONTIER



Sex=sex assigned at birth

- OCR and DOJ jointly Issue transgender DCL (May 16, 2016).
- Gavin Grimm Case Pending.
- Letter redefines the term “sex” as “gender identity.”
- Fundamental change to Title IX’s permissible sex segregated activities.

SEX V. GENDER

Sex is a biological reality.

Gender is a social construct.

Although contemporary society uses the terms interchangeably, they are fundamentally different.

CONSEQUENCES OF 2016 TRANSGENDER DCL

Restrooms

Locker Rooms

Sports

TITLE IX'S UNTOLD STORY DISCRETIONARY BUREAUCRACY

The DISCRETIONARY BUREACRACY is an appointed agency that creates and enforces new substantive legal obligations beyond the text of the law.

MAJOR TRANSFORMATIONS

1979 Guidance establishing three-part test for athletics

1997 Guidance including peer-on-peer sexual misconduct

2011 Dear Colleague letter on sexual violence

2016 Transgender Guidance

HOW THE OFFICE OF CIVIL RIGHTS HAS CREATED NEW LAW UNDER TITLE IX

Issue a Guidance which may have new Policies

Choose whether and how stringently to enforce

Conduct compliance reviews at their discretion

File Amicus Briefs with any Court addressing similar policies

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QUESTIONS?