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Association of
Title IX Administrators

NPRiMer: Preparing Your K-12 School or District for the 2023 Title IX Regulations

Training & Certification Course



Strategic Risk
Management Solutions



Any advice or opinion provided during this webinar, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.



CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

AGENDA

1

2022 NPRM

2

Scope & Applicability

3

Reporting & Response

4

Intake & Evaluation

5

Grievance Procedures

6

Pregnancy & Related
Conditions

7

2023 Athletics NPRM

8

What's Next?

LEARNING OUTCOMES

After completing this course, participants will be able to:

- Explain the NPRM rulemaking process and anticipated timeline for next steps
- Identify specific policy and process changes anticipated for compliance with the new regulations
- Evaluate current staffing and team structure and determine recommended changes
- Develop a training plan for all stakeholder groups

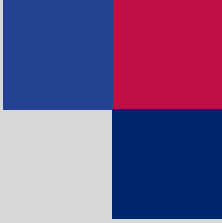
LEARNING OUTCOMES CONT.

- Assess current pregnancy and related conditions services and support and recommend necessary changes
- Distinguish between sex discrimination and sex-based harassment
- Understand areas where the sex-based harassment final rule is expected to allow flexibility to pursue best practices that exceed minimum compliance standards to ensure programmatic excellence and effective risk mitigation

NPRM OVERVIEW

- The Department of Education (ED) released a 701-page Notice of Proposed Rulemaking (NPRM) on June 23, 2022 – the 50th Anniversary of Title IX
- Published to the Federal Register on July 12
 - 60-day comment period ended September 12
 - ED received over 240,000 comments
 - ED must now respond to all the comments as part of the rulemaking process
- Final version will likely differ from NPRM
 - Less deviation expected than in the 2018 NPRM versus 2020 Regulations
- ED expects to release its Final Rule in October 2023

*See Slides 55-66 for Information on the 2023 Athletics NPRM



SCOPE & APPLICABILITY

SCOPE (§ 106.10)

- NPRM is broader than the 2020 Regulations
- Discrimination on the basis of sex includes
 - Sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
- Sex discrimination includes **sex-based harassment**
 - Replaces “**sexual harassment**” and includes
 - Quid pro quo, Hostile Environment, Sexual Assault, Dating Violence, Domestic Violence, and Stalking
- ED has announced a proposed rule regarding athletic eligibility based on gender may come later

HOSTILE ENVIRONMENT

- Hostile Environment Harassment (pg. 657-58)
 - Unwelcome sex-based conduct that is
 - Sufficiently severe **OR** pervasive, that, based on the totality of the circumstances **AND**
 - Evaluated subjectively and objectively
 - Denies or limits a person's ability to participate in or benefit from the recipient's education program or activity

SPOO VS. SORP

SPOO (2020 Regulations)

Severe **AND** Pervasive **AND** Objectively Offensive

SORP (2022 NPRM)

Sufficiently Severe **OR** Pervasive **AND** Evaluated Objectively
AND Subjectively

HOSTILE ENVIRONMENT (CONT.)

- OCR's proposed definition also provides factors for evaluating whether a hostile environment exists including:
 - Complainant's ability to access the education program or activity
 - The type, frequency, and duration of the conduct
 - The parties' ages, roles, and previous interaction(s)
 - The location and context of the conduct
 - The control the Recipient has over the Respondent
- Potential intersection with First Amendment

APPLICABILITY

- **Education program or activity**
 - Broadly interpreted to include:
 - Academic, extracurricular, and athletic programs
 - Activities on school network, bus, class, or facilities
- De Minimis Harm
- **Jurisdiction** over conduct subject to recipient's disciplinary authority
- Likely intersects with other district/school policies and state laws



Decision Point:
Will school/district policies change regarding out-of-school conduct?



Decision Point:
What other laws and policies need to be considered?

§ 106.11; NPRM pg. 666
§ 106.31; NPRM pg. 668

IF THE CONDUCT...

Occurred in your program
or activity

AND/OR

Is subject to your
disciplinary authority

AND/OR

Has led to a hostile
environment within your
program or activity

AND would meet Title IX, if proven...

YOU LIKELY HAVE JURISDICTION

TRAINING & TIXC REQUIREMENTS

- Various training requirements for:
 - All employees
 - TIXC, Investigators, Decision-makers, Informal Resolution facilitators and other persons responsible for implementing grievance procedures or modifying/terminating supportive measures
 - No training requirement for students under NPRM
 - All training materials must be made available on district/school website
- TIXC required to monitor for barriers to reporting



**Decision Point:
Training frequency and
modalities**

§ 106.8 NPRM pg. 662-65
§ 106.44 NPRM pg. 672



BEST PRACTICES

- Provide process, policy, and reporting training on a recurring basis.
- Train Title IX team members on supportive measures.
- Offer prevention education for employees and students.
- Integrate student and staff prevention programming and Title IX training requirements into existing efforts around similar topics such as bullying, harassment, and reporting requirements.

GROUP BRAINSTORM

How can you collect and analyze information about barriers to reporting?

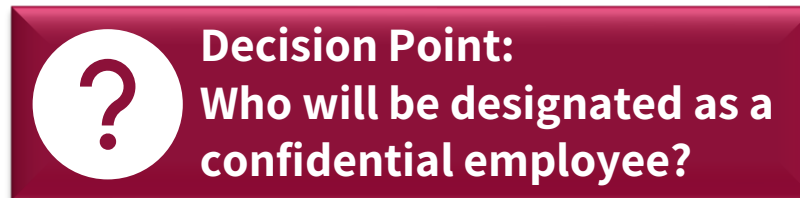


INTAKE & EVALUATION

- Notice & Complaints
- Intake & Initial Evaluation
- Dismissals
- Supportive Measures
- Emergency Removal
- Informal Resolution

CONFIDENTIAL EMPLOYEES

- **Confidential Employee** (p. 651)
 - An employee whose communications are privileged under State/Federal law based on their role with the District/school
 - An employee who has been designated as a confidential resource for the purpose of providing services to persons in connection with sex discrimination
 - Individuals conducting IRB-approved research
- Districts/schools can designate confidential employees
 - These employees are **not** required to make Title IX reports to the Title IX Coordinator, but should provide the TIXC's contact information
- All other employees remain mandated reporters



§ 106.44; NPRM pg. 674-675



BEST PRACTICE

- Require all employees, regardless of confidential status, to provide contact information for the Title IX Coordinator to any person making a disclosure of conduct that may implicated Title IX.

NOTICE & COMPLAINTS

- “Complaint” replaces “Formal Complaint”
- Districts/schools must respond when **any non-confidential employee** receives verbal or written notice or a complaint of discrimination or harassment
 - Complaints **do not** have to be submitted to Title IX Coordinator/Title IX Team Member
- Complaints can be made by a Complainant or the TIXC
 - A parent, guardian, or other authorized legal representative who has the authority to act on behalf of a Complainant can also file a complaint
- For allegations of sex discrimination, other than sex-based harassment, any student, employee, or third party may make a complaint

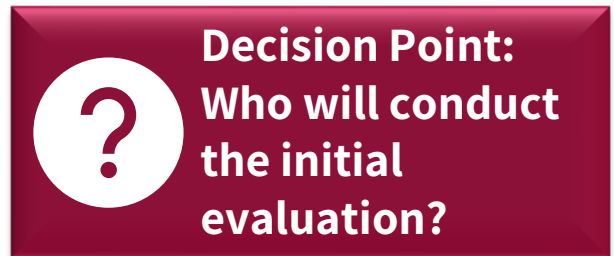
§ 106.2; NPRM pg. 651

§ 106.6; NPRM pg. 665

§ 106.45; NPRM pg. 682

INTAKE & INITIAL EVALUATION

- Once the TIXC has been notified of discrimination or harassment allegations, they must:
 - Treat parties equitably
 - Notify Complainant of procedures and, in the event of a complaint, prepare to notify the Respondent
 - Offer and coordinate supportive measures
 - Initiate grievance procedures or informal resolution as requested
- Initial Evaluation
 - Provides schools/districts with greater latitude to collect information before formal grievance process begins



§ 106.44(f); NPRM pg. 675-76

DISMISSALS (§ 106.45)

All dismissals are discretionary, but can occur when:

- The Respondent is unable to be identified *after reasonable steps to do so*
- The Respondent is no longer participating in the educational program or is no longer employed by the Recipient
- The Complainant withdraws all or a portion of the complaint and any remaining conduct would not be discrimination under Title IX
- It is determined that the conduct, even if proven, would not be discrimination under Title IX
 - *Prior to dismissing the complaint, the Recipient must take reasonable efforts to clarify the allegations with Complainant*

NPRM pg. 685-86

DISMISSALS (§ 106.45) (CONT.)

Upon dismissing a complaint:

- Districts/schools must notify the Complainant of the basis for the dismissal
- Supportive measures should still be offered to the Complainant
- Must notify the Respondent of the dismissal and offer supportive measures if the Respondent has already been notified of the complaint
- All parties have a right to appeal the dismissal
 - What's Unclear?
 - Whether an unaware Respondent has this right



NPRM pg. 686-87



BEST PRACTICES

- Encourage use of a centralized reporting process to ensure that information gets to those who are trained to respond in a timely and efficient manner.
- Provide written notice of any determination, including a notice of dismissal.

SUPPORTIVE MEASURES (§ 106.44)

- Should restore or preserve the party's access
 - May not impose burdensome measures for punitive or disciplinary reasons
- Supportive measures may be continued, modified, or terminated at the conclusion of the grievance process or informal resolution
- Must provide an opportunity to seek modification or reversal of supportive measure (or lack thereof)
 - An impartial employee, not involved with the initial decision, must have authority to modify or reverse



NPRM pg. 676-77

REMOVALS (§ 106.44)

- **Administrative Leave**

- May place **employee** Respondents on administrative leave during grievance process

- **Emergency Removal**

- May remove **student** Respondents, on an emergency basis, if an individualized safety and risk analysis determines:
 - An immediate and serious threat exists and arises from the allegations
- Removes the “physical” threat requirement from the 2020 Regulations



REMOVALS (§ 106.44) (CONT).

- Following an emergency removal
 - A Recipient must provide the Respondent notice and an opportunity to challenge the removal
- What's Unclear?
 - Whether supportive measures that burden a student Respondent constitute a “partial removal” that can only be implemented after an individualize safety and risk analysis



**Decision Point:
Who will hear Emergency
Removal challenges?**

STUDENTS WITH DISABILITIES

- If a Complainant or Respondent is a student with a disability,
 - Throughout the grievance process the Title IX Coordinator must consult with the student's
 - IEP team; or
 - Section 504 team
 - A consultation must also occur when the Title IX Coordinator implements supportive measures involving a student with a disability
- If a student with a disability is subject to an Emergency Removal all rights under IDEA and Section 504 still apply and must be respected



Decision Point:
How will consultations be structured?



Decision Point:
How are manifestation determinations factored into the safety and risk analysis?

INFORMAL RESOLUTION (§ 106.44)

- Informal Resolution Requirements:
 - Voluntary by parties
 - TIXC must agree
 - Provide notice to parties in advance (detailed requirements)
 - Facilitator may not be Investigator or Decision-maker
 - Not permitted in complaints with a student Complainant and an employee Respondent
- Informal Resolution can occur **without** a formal complaint
- Information and records from the Informal Resolution cannot be used in the grievance process if the Informal Resolution is unsuccessful



Decision Points:
Will you offer IR?
Who will facilitate IR?



BEST PRACTICES

- Implement informal resolution processes to allow for an alternative to the formal grievance process.
- Consider offering multiple types of informal resolution that are consistent with the district/school culture and needs and are supported by necessary training and resources.



GRIEVANCE PROCEDURE

- Investigating
- Decision-making
- Evidence

GRIEVANCE PROCEDURE (§ 106.45)

- Section 106.45 requires a written procedure that establishes an equitable process that:
 - Prohibits conflict of interest or bias
 - Requires institutions to take reasonable steps to protect privacy without restricting a party's ability to obtain and present evidence
 - Allows for streamlined investigation and decision-making process
 - No requirement for a separate Decision-maker
 - Permissible for the Investigator to serve as the Decision-maker
 - Permissible for the TIXC to serve as the Investigator (and/or DM)



Decision Point:

Will the investigation and decision-making responsibilities be separated?

NPRM pg. 682-690

GRIEVANCE PROCEDURES (§ 106.45) (CONT.)

- Requirements continued:
 - Establishes a reasonably prompt timeframe for major stages of the grievance procedures
 - Evaluation, Investigation, Determination, Appeal
 - Requires an objective evaluation of permissible relevant evidence
 - Allows for additional provisions, so long as they are applied equally to the parties
 - For example, a school cannot allow Complainants to have multiple Advisors, but not Respondents
 - Describe range of supportive measures, sanctions, and remedies in sex-based harassment complaints



Decision Point:
Will your policies include additional provisions?

NPRM pg. 682-690



BEST PRACTICES

- Offer a streamlined, § 106.45-compliant, process to provide for a consistent response to stop, prevent, and remedy all forms of discrimination, including:
 - A process that separates investigation and decision-making responsibilities
 - This might involve an investigator making recommended findings to a neutral decision-maker, such as a school-based official or the TIXC
- Provide an appeal, especially if the investigator is also the decision-maker.

INVESTIGATING (§ 106.45)

- Recipients must provide a Notice of Investigation and Allegations (verbal or written) that includes:
 - Grievance procedures and any Informal Resolution options
 - Sufficient information to allow parties to respond (party identities, alleged conduct, date and location, etc.)
 - Statement prohibiting retaliation
- Advisors are not required



Decision Point:
**Will you permit Advisors
in your process?**

STANDARD OF PROOF (§ 106.45)

- Standard of Proof
 - Must use preponderance of the evidence *unless*
 - Clear and convincing is used in all other **comparable proceedings, including other discrimination complaints (Title VII, Title VI)**



Decision Point:
Which standard of proof will be used for employees? Students?



BEST PRACTICES

- Adopt the “preponderance of the evidence” standard of proof in all complaints unless it conflicts with other contract rights.
- Negotiate future contract rights to allow for the preponderance of the evidence to be used.
- Permit access to Advisors for all parties in all formal processes.
- If Advisors are provided by the district/school, provide adequate training on the applicable policies and procedures.

INVESTIGATING (§ 106.45) (CONT.)

- The Recipient must conduct an adequate, reliable, and impartial investigation of complaints that:
 - Allows an equal opportunity for parties to present inculpatory and exculpatory evidence
- Investigators must collect evidence and determine relevant evidence
 - Provide parties with description of relevant evidence and a reasonable opportunity to respond
 - First 10-day review period no longer required
 - Description does not have to be in writing



**How long will the parties have to review the evidence summary?
How will it be provided?**

NPRM pg. 688



BEST PRACTICES


- Provide a written document with, at minimum, an organized summary of the evidence for parties to review with their Advisor, if any.
- Offer an opportunity for the parties to respond to a draft of the document prior to finalizing it.

DECISION-MAKING (§ 106.45)

- The grievance procedures must
 - Provide a process that enables a decision-maker to adequately:
 - Assess the credibility of the parties and witnesses, and
 - Evaluate the evidence
 - To determine whether sex discrimination occurred
- A credibility assessment must not be based on a person's status as a Complainant, Respondent, or witness
- No second 10-day review period required
- No live hearing required

DECISION-MAKING (§ 106.45) (CONT.)

- Following the outcome determination:
 - Decision-maker must notify parties of complaint outcome, including determination and appeal procedures, if any
 - Remedies, if appropriate, must be provided and implemented
- No written determination letter required
- Appeals are not required under § 106.45
 - Recipients are not precluded from offering an appeal

 **Decision Point:**
Will the Decision-maker write a determination letter?

 **Decision Point:**
Will an appeal be available?

NPRM pg. 688-90



BEST PRACTICES

- Provide a written outcome notification including the determination and any opportunities for appeal.
- Offer one level of appeal if comparable procedures for complaints other than sex discrimination offer appeals.
 - Consider the impact of any *Goss*/due process hearing requirements.

GROUP BRAINSTORM

How does your school or district intend to structure staffing for investigations and decision-making?

TYPES OF EVIDENCE

Relevant

Impermissible
(regardless of
relevance)

Not Relevant

§ 106.6; NPRM pg. 684

IMPERMISSIBLE EVIDENCE

- Evidence that is protected as privileged; unless the person holding the privilege has voluntarily waived it
- A party's records maintained by a physician, psychologist, or other recognized professional/paraprofessional in connection with treatment, unless the Recipient obtains that party's voluntary written consent
- Evidence that relates to the Complainant's sexual interests or prior sexual conduct, unless
 - Evidence is shown to prove someone other than respondent committed the alleged conduct; or
 - Specific evidence of prior conduct with the Respondent is offered to prove consent

§ 106.6; NPRM pg. 684



PREGNANCY & RELATED CONDITIONS

- Pregnancy Discrimination
- Reasonable Modifications
- Pregnancy Leave
- Lactation Space

PREGNANCY DISCRIMINATION

- Pregnancy or related conditions:
 - 1) Pregnancy, childbirth, termination of pregnancy, or lactation
 - 2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
 - 3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions
- Non-discrimination
 - Cannot adopt policies, practices, or procedures
 - To treat a student **OR** employee differently based on current, potential, or past pregnancy related conditions

§ 106.2; NPRM pg. 655
§ 106.21; NPRM pg. 667

PREGNANCY DISCRIMINATION (CONT.)

- Admissions/Enrollment
 - No pre-admission or enrollment inquiries as to marital status
 - Including asking “Miss or Mrs.”
 - Self-identification of sex is permissible if required from all applicants
- Employees and students should both be able to take voluntary leaves of absences and be reinstated upon return
- What’s Unclear?
 - Non-birthing parents
 - Scope of parental protections

§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 698-99

RESPONSE TO PREGNANCY

- Providing Information
 - When an employee acquires knowledge of a student's pregnancy or related conditions by the student...the employee must inform that person of Title IX support
- TIXC required response:
 - Prohibit sex discrimination
 - Reasonable modifications (document it!)
 - Allow access to separate and comparable program, if desired
 - Voluntary leave of absence
 - Availability of lactation space
 - Grievance procedures for sex discrimination complaints

§ 106.40; NPRM pg. 669-72



BEST PRACTICES

- When applicable, offer support to non-birthing parents in the event of a medical need for a birthing parent or newborn.
- Provide information on district/school website including:
 - The rights of pregnant students under Title IX
 - How to request support for pregnancy or related conditions
 - The processes available for requesting assistance and for challenging when a denial of assistance occurs.

LACTATION TIME & SPACE

- Employees and students must be provided reasonable break times for breastfeeding or expressing breast milk
- Lactation Space
 - Not a bathroom
 - Clean, shielded from intrusion
 - Can be used by a student or employee, as needed



Decision Point:
How many lactation spaces are needed to reasonably accommodate both student and employee populations?



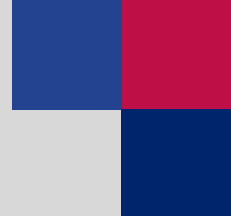
Decision Point:
What security measures are needed regarding access to lactation spaces, particularly for students?

§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 699



BEST PRACTICES

- Offer multiple spaces that include access to sinks, outlets, and refrigerators.
- Add lactation spaces to cleaning schedules in that building.
- Ensure space is available during any evening and weekend classes or programs.



2023 ATHLETICS NPRM

ATHLETICS NPRM OVERVIEW

- The U.S. Department of Education (ED) released a 115-page Notice of Proposed Rulemaking (NPRM) on April 6, 2023
- Published in the Federal Register on April 13
 - 30-day comment period ran until May 15
 - ED received over 150,000 comments
 - ED must now respond to all comments as part of the rulemaking process
- Final version will likely differ from the NPRM
- ED expects to release a Final Rule in October 2023

CURRENT REGULATION - § 106.41(B)

(b) **Separate teams.** Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

PROPOSED REGULATION - § 106.41(B)(2)

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:

- (i) be substantially related to the achievement of an important educational objective, and
- (ii) minimize the harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

SEX-RELATED ELIGIBILITY CRITERIA – ELEMENT I

Be substantially related to the achievement of an important educational objective.

- Proposed regulation does not limit the important educational objectives a recipient may seek to achieve
- Recipients must consider whether the objective could be accomplished through alternative criteria that would not limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity
- Recipients would not be permitted to rely on false assumptions about transgender students
- Any sex-related eligibility criteria must account for factors that affect students in the particular grade or education level

SEX-RELATED ELIGIBILITY CRITERIA – ELEMENT II

Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

- **Limit** – to disallow transgender students from participating fully on a male or female team consistent with their gender identity
- **Deny** –to foreclose students’ opportunity to participate on male or female teams consistent with their gender identity
- A recipient would be in violation of the proposed regulation if it can reasonably adopt or apply alternative criteria that would be a less harmful means of achieving the recipient’s important educational objective

EFFECT OF THE PROPOSED RULE

- The proposed rule effectively prohibits categorical bans applied to entire groups of student-athletes based on gender identity:
 - Examples of Prohibited Laws and Policies:
 - A state law that would require that all students participate on athletic teams consistent with their sex assigned at birth
 - A state law that prohibits all student-athletes who are trans girls or trans women from participating on girls' or women's athletic teams
 - A policy that requires all prospective trans female student-athletes to submit to hormonal testing but does not require the same of trans male or cisgender student-athletes

WHAT IS UNKNOWN?

- What does “minimize the harm” mean in application?
- Does the harm minimization element apply to cisgender students who alleged their athletic opportunity is limited or denied by policy permitting participation in accordance with gender identity?
- What creates a competitive lack of fairness?
- How does the regulation apply to middle/junior high school students?
- Will the regulation prohibit limiting athletic participation based on hormonal differences?
- How should intersex and non-binary scholarship recipients be counted for purposes of assessing proportionality for equity purposes?

WHAT IS UNKNOWN? (CONT.)

- How should recipients respond in situations in which a student identifies as gender fluid?
- Whether the proposed rule:
 - Requires recipients to accommodate a student based solely on their own representations of their gender identity.
 - Permits or prohibits recipients from requiring parental/guardian or doctor verification of gender identity to “prove” gender identity in situations in which the student is a minor.
 - Permits or prohibits recipients from requiring a birth certificate or updated birth certificate information to “prove” gender identity.
 - Permits or prohibits recipients from requiring parental/guardian notification of gender identity to “prove” or “confirm” gender identity in situations in which the student is a minor.

ATHLETIC-RELATED DECISION POINTS



Decision Point:
Will the school/district implement a policy that restricts athletic participation based on gender identity?



Decision Point:
How will the school/district navigate conflicting state law or governing body policies and federal regulations?



Decision Point:
How will the school/district document its attempts to minimize harm and rationale for such actions?

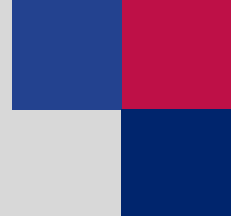
ATIXA'S SUGGESTIONS FOR MINIMIZING HARM

- Involve effected student(s) in an iterative process or conversation to identify the harm caused by the policy and determine strategies or remedies that could be successful given the student's circumstances and wishes.
- Establish an all-gender league with no sex- or gender-related criteria. Some situations may lend themselves to this kind of solution, like recreational leagues or some club sports.
 - Minimizing harm would probably necessitate a reasonable level of competition in any alternative league.
- Collaborate with the student to identify alternative athletic opportunities and facilitate participation in those opportunities.
 - Another sport or competition may not have the same kinds of safety or fairness concerns, depending on age or level.
- Identify opportunities with other recipients that may be suitable for the individual and facilitate pursuit of those opportunities.



BEST PRACTICES

Permit all student-athletes to participate in athletics in alignment with their gender identity.



WHAT'S NEXT?

THINGS TO DO BEFORE IMPLEMENTATION

- Review today's decision points
- Prepare to expedite policy revisions in your school or district
- Educate community about future changes
 - The final changes may be different from the NPRMs
- Review current policies, practices, publications, and websites
 - Create a checklist of changes that will need to be made to each
- Work with your legal counsel to determine what specific state laws or precedents might apply
- **KEEP FOLLOWING THE 2020 REGULATIONS!**



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Questions?

regs@atixa.org

www.atixa.org/regs

Thanks for joining us today.



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