



Friday Fun: Deciphering Title IX

MECOSTA-OSCEOLA ISD
FRIDAY, FEBRUARY 21, 2025

PRESENTED BY:
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Speaker Information

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- Chair, Education Practice Group
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Title IX | *OKAY ... NOW WHAT?!?!?*

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The graphic features the words 'TITLE IX' in large, white, sans-serif capital letters. Each letter is contained within a colorful speech bubble of varying shape and color (orange, red, purple, blue, green). Below the speech bubbles are seven stylized human icons representing diverse individuals in terms of gender and ethnicity. The background is a dark grey gradient.

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Terminology for Today

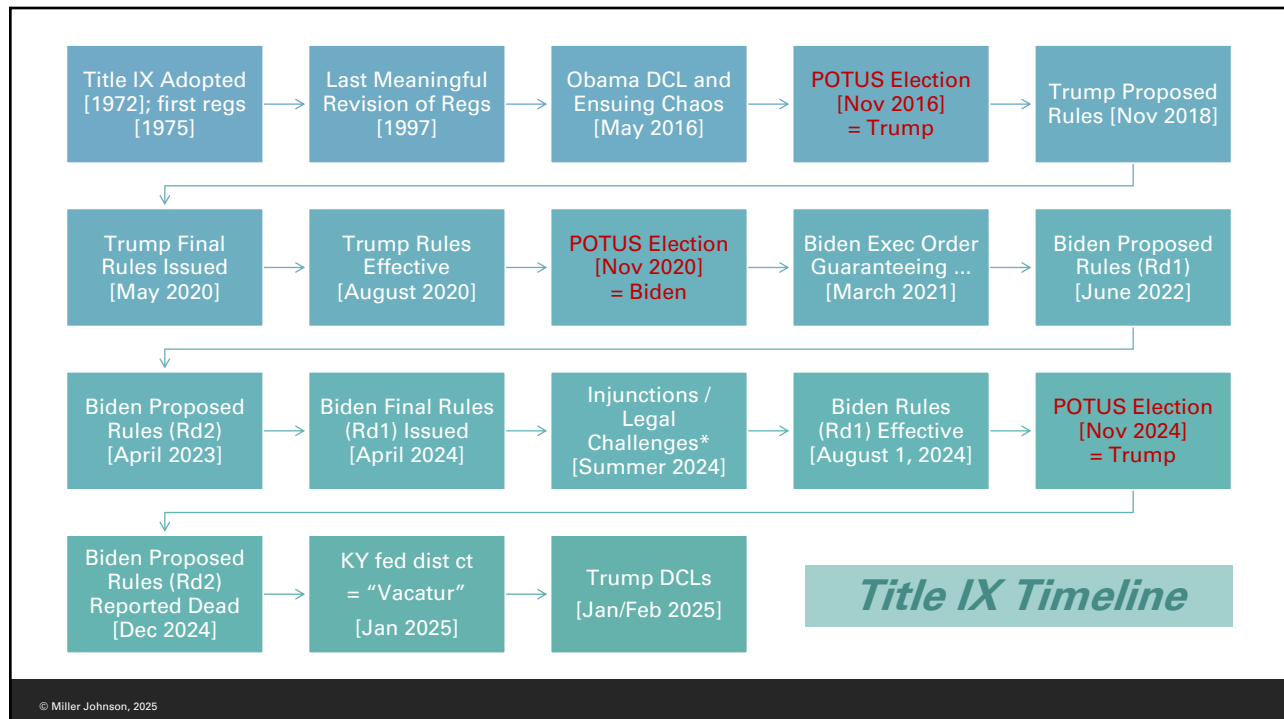
Trump Rules =
2020
Regulations

Biden Rules =
2024
Regulations

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The slide has a black background. At the top, the title 'Terminology for Today' is written in white. Below it is a thin white horizontal line. Two rounded rectangular boxes are positioned side-by-side. The left box is purple and contains the text 'Trump Rules = 2020 Regulations'. The right box is a lighter shade of purple and contains the text 'Biden Rules = 2024 Regulations'. The copyright notice is at the bottom left.

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What Happened?

Ruling in *Tennessee v. Cardona* [federal district court in Kentucky]

- Preliminary injunction had been issued over the summer
- Jan 9, 2025 = Court holds Biden Rules are unconstitutional and violated the APA by being "arbitrary and capricious"
- The Court did not make injunction permanent as expected
- Instead, the Court ordered "**vacatur**"

What the heck is *Vacatur*?

- "Vacatur operates on the rule itself and prevents the rule's 'application to all who would otherwise be subject to its operation.'"
 - Quoting *East Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 987 (9th Cir. 2020)

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Dear Colleague Letter [01.31.25]

*[E]ffective immediately, the United States Department of Education's (ED) Office for Civil Rights (OCR) will enforce Title IX under the provisions of the 2020 Title IX Rule, rather than the recently invalidated 2024 Title IX Rule. Accordingly, lawful Title IX enforcement includes ... the definition of sexual harassment, the procedural protections owed to complainants and respondents, the provision of supportive measures to complainants, school-level reporting processes, and **the interpretation of "sex" to mean the objective, immutable characteristic of being born male or female** as outlined in the 2020 Title IX Rule.*

President Trump ordered all agencies and departments within the Executive Branch to "enforce all sex-protective laws to promote [the] reality" that there are "two sexes, male and female," and that "[t]hese sexes are not changeable and are grounded in fundamental and incontrovertible reality."

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Dear Colleague Letter [02.04.25]

Basically, a repeat of 01.31.25 DCL

More citations

Accordingly, open Title IX investigations initiated under the 2024 Title IX Rule should be immediately reevaluated to ensure consistency with the requirements of the 2020 Title IX Rule and the preexisting regulations at 34 C.F.R. 106 et seq.



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Rationale

- *Bostock* decision improperly expanded/extended to create unintended protections under Title IX
 - *Bostock* focused on hiring and firing
 - Expansion to schools, bathrooms, locker rooms, pronouns, etc. was improper
- **Contradicts position of Trump USDE in Aug 2020**
 - Thus, *Bostock* does not control the Department's interpretation of Title IX. However, with respect to complaints that a school's action or policy excludes a person from participation in, denies a person the benefits of, or subjects a person to discrimination under an education program or activity, on the basis of sex, **the *Bostock* opinion guides OCR's understanding that discriminating against a person based on their homosexuality or identification as transgender generally involves discrimination on the basis of their biological sex.** [08.31.20]

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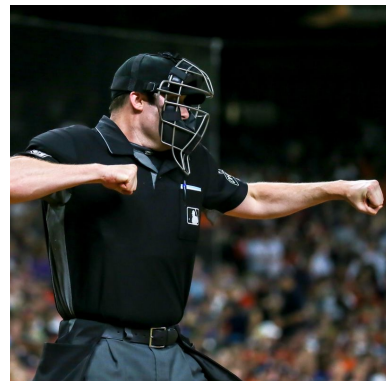
What Does All That Mean?

As a result of the Court's ruling, the Biden Rules are, essentially, "off the books"

As a result of the DCLs, the Biden Rules are clearly not going to be enforced

What about a legal appeal of the KY case?

- Who is going to file it?
- Trump administration will not fight the ruling – it was already plotting to withdraw the rules on its own



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Next Question ...

Should we act like Biden Rules never existed?

- Tough question; two schools of thought ...
- Option 1: From August 1, 2024 to January 8, 2025 the Biden Rules controlled; so, if we get a T9 complaint from this period, we should use the Biden Rules to investigate, etc.
- Option 2: The Court just said the Biden Rules were unlawful; why would we enforce an unlawful rule, even if the complaint happened during the time frame above?

What say you, Kevin?

- USDE cannot lawfully enforce the Biden Rules – and the Trump administration wasn't likely to do so anyway
- I'm leaning towards Option 2 – let's pretend the Biden Rules never happened and go back to using the Trump Rules (2020)

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What Happens Now?

Still might see some legal wrangling, but **virtual certainty** the Biden Rules will never be in effect

We simply revert back to use of Trump Rules [Q: is this a good thing?]

Will require you to examine existing policy and administrative regulations

- Policy may not have changed as a result of Biden Rules
- But administrative regulations almost certainly did

Dust off old AR and get them ready for use / re-implementation

Make sure Title IX Coordinators are up on status and next steps

Possible updates? LOL

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Highlights/Basics from **Trump Rules (2020)**

Vocabulary = **Complainant / Respondent**

Single Investigator Model **Eliminated** [need investigator, decision-maker, appeal officer]

Sex Harassment = *Unwelcome conduct [on the basis of sex] determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a program or activity offered by the school*

- Other components to definition with limited K-12 applicability [quid pro quo, etc.]

Supportive Measures available no matter what

Limited opportunities for **Informal Resolution** [only if requested after formal complaint]

No Removal of student until Title IX investigation completed [Respondent presumed innocent]

All Staff have a reporting obligation [if they know, you know]

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So, Now What?



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Title IX Review

“No person . . . 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(a)

Translation:

We want an educational environment free from sex-based harassment

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School District Must ...



Take Immediate Action to End **Sex-Based Harassment** and Prevent its Occurrence

Appoint a Title IX Coordinator

Develop and Publish District-Wide Policies and Procedures

Train Employees and Students

Create a Climate that Encourages Reporting

Investigate Claims

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“New” Vocabulary

Complainant = an individual who is *alleged* to be the victim of conduct that *could* constitute sexual harassment

Respondent = an individual who has been *reported* to be the perpetrator of conduct that *could* constitute sexual harassment

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(Re)Defining Sexual Harassment

Headline: "For the First Time, Title IX Regulations Define Sexual Harassment"

Sexual harassment means one of the following types of behaviors:

- Conditioning aid, benefits, or services on an individual's participation in unwelcome sexual conduct (i.e., *quid pro quo* harassment)
- Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to an education program or activity
- Sexual assault, dating violence, domestic violence, or stalking [as defined by Clery Act and the Violence Against Women Act (VAWA)]
- Mostly postsecondary, but need to familiarize with these definitions

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Effective Denial of Equal Access

Does this mean a person's *total or entire educational access has been denied*?

- No. Complainants need not have dropped out of school, failed a class, had a panic attack or otherwise reached a "breaking point" or exhibited trauma symptoms
- Schools cannot turn away a complainant because they are "not traumatized enough"

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Effective Denial of Equal Access

Examples may include:

- Skipping class to avoid the harasser
- Decline in GPA
- Difficulty concentrating in class
- Quitting a team or other extracurricular activity

Complainant need not have “**already suffered loss of education before being able to report sexual harassment**” and while examples are illustrative, “**no concrete injury is required**” to provide an effective denial of equal access

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When Do We Have to Respond?

A recipient with actual knowledge of sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.

Any person may report sexual harassment/sex discrimination, regardless of whether the person is the alleged victim of the reported conduct

Reports can be made by mail, telephone, in-person, or by email, using the contact information for the Title IX Coordinator

Reports can be made at any time, including non-business hours

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What Does That Mean?

“Actual knowledge” of sexual harassment ...

- Report to a Title IX Coordinator
- Report to an official who has the authority to institute corrective measures on behalf of the school district
- **Report to *any* employee of an elementary or secondary school**
 - “arguably broadens ... an elementary or secondary school’s obligation to respond to Title IX sexual harassment”
 - “unreasonable to expect young children to seek out specific employees for the purpose of disclosing Title IX sexual harassment”

“In a Program or Activity” ...

- Any location, event, or circumstance over which the recipient exhibits substantial control over the alleged harasser and the “context” in which the harassment occurred
- Only have to address issues occurring against a person in the United States

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What Does That Mean?

“Not Deliberately Indifferent” ...

- “The response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the [district] into compliance. The premise, in other words, is an official decision by the [district] not to remedy the violation.”
- **“Clearly unreasonable in light of known circumstances ...”**
- Good news, right?

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Title IX Coordinator – Under 2020 Regs

Still required to have one or more persons identified

Must have someone with the title “**Title IX Coordinator**” – officially and publicly

Must be designated and “**authorized**” to coordinate district’s compliance efforts

- Check job description; inclusive, authorized?

Name and contact information, including email, must be posted/provided ...

- On district website
- Send information to students, parents or legal guardians, unions or professional organizations holding agreements with the district
- Listed in all handbooks

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Title IX Coordinator

Most Important Question to Know the Answer to ...

Who is the District’s Title IX Coordinator?

Important Questions to Ask ...

***Do We Have a Title IX Policy
(prohibiting discrimination on the basis of sex)?***

Do We Have a Procedure for Title IX Reporting/Investigating?

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Responding to Reports of Sexual Harassment

Any employee who has independent knowledge or receives a report of conduct that qualifies as sexual harassment (or discrimination) is required to report that information to a Title IX Coordinator

Upon receiving a report, the Title IX Coordinator must:

- Contact Complainant as soon as practicable
- Notify Complainant of his/her/their right to file a formal complaint and explain the grievance process
- Discuss and implement “**supportive measures**”

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Supportive Measures

Title IX was enacted to prevent sex discrimination and harassment from adversely affecting access to educational opportunities

Supportive measures should restore or ensure continued access to educational opportunities, must be free to Complainant, and may not be punitive or unreasonably burden Respondent

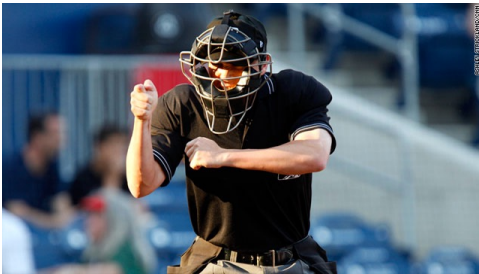
Non-exclusive examples of supportive measures include: **no-contact orders, referrals to victim advocacy resources, counseling, or health services; academic support; course modifications; schedule changes; transfers; housing changes; increased security and monitoring**

The Title IX Coordinator must consider, *but is not bound by*, Complainant’s wishes

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Temporary Removal



The temporary removal of a Respondent-student is **not** a supportive measure

- A Respondent-student may be removed based on an individualized assessment that he/she poses an **immediate** threat to the *physical health or safety* of Complainant or others
- Due process must follow immediately

A Respondent-employee may be placed on a temporary administrative leave

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Formal Complaint Response

Must investigate **every** formal complaint – can be filed by a complainant OR signed by the Title IX Coordinator (does not render impartial)

Specific steps for investigating, dismissing, and determining responsibility in formal complaint

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Required Elements for Grievance Procedures

- Treat parties equitably
- Objective evaluation of all evidence
- No conflict of interest for investigator or decision-makers
- Presumption respondent is not responsible
- Reasonably prompt timeframes
- Description or list of possible discipline/other remedies
- Statement of standard used (preponderance v. clear and convincing)
- Appeals procedures and bases
- Range of supportive measures available
- No breach of privilege without waiver

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Dismissals

The Title IX Coordinator **must** dismiss a formal complaint if:

- The allegations do not establish sexual harassment even if they are true
- The allegations did not occur in connection with the District's programs or activities
- The allegations did not occur in the United States
 - Need to document basis for dismissal

The Title IX Coordinator **may** dismiss a formal complaint if:

- Complainant requests dismissal
- Respondent's employment with or enrollment in the district ends
- Specific circumstances prevent the district from gathering sufficient relevant evidence to reach a final decision (e.g., passage of time, unavailability of witnesses or other information)

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Dismissals – Settings That Apply

The following settings are considered “within the education programs or activities” of a school district →

- Buildings or other locations that are part of the school’s operations, including remote learning platforms;
- Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred;
 - Did the District fund, promote or sponsor the event or circumstance where the harassment occurred?
- Off-campus buildings owned or controlled by a student organization officially recognized by a post-secondary school, such as a building owned by a recognized fraternity or sorority

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Dismissals - Other Remedial Measures

If Complaint is dismissed before investigative resolution, consider whether there are other remedial measures that would be appropriate to remedy the effects of harassment or prevent recurrence:

- Climate checks
- Sexual Harassment Training
- Increased security or monitoring
- Policy/procedure revision
- Redress educational impact
- Investigate under other Board Policy or Code of Conduct



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Informal Resolution

Informal resolution may consist of the following, as well as other informal resolution procedures:

- A written agreement, facilitated by the Title IX Coordinator or others
- Restorative practices
- Facilitated mediation

Once a formal complaint is filed, the District may not informally resolve allegations of sexual harassment unless:

- Complainant and Respondent have been advised of their rights and the circumstances in which informal resolution may preclude resumption of a formal complaint investigation
- Complainant and Respondent have voluntarily consented to informal resolution, in writing
- The Complaint is not against an employee

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Retaliation

Retaliation is broadly prohibited by the 2020 regulations

“For the purpose of interfering with Title IX rights” or “because the person has participated or refused to participate in any manner in a proceeding under Title IX regulations”

Charges against an individual for SCC violations not involving sex discrimination or sexual harassment, but arising out of the same facts or circumstances, constitute retaliation IF the purpose is to interfere with any right or privilege secured by Title IX



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Confidentiality

All information connected with a report must be treated as confidential and only shared with individuals as necessary for conducting the investigation, providing supportive measures, or otherwise carrying out appropriate District functions

CANNOT prohibit parties from discussing complaint allegations

If individual requests no investigation/discipline, Title IX Coordinator should provide information/supportive measures and evaluate whether request may be honored without threat to educational environment

If Title IX Coordinator proceeds, individual has no obligation to participate

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Other Odds & Ends from 2020 Regs

Decision-maker cannot be the investigator or the Title IX Coordinator

Appeals permitted – with different decision-maker

Informal resolution is PROHIBITED, except in limited circumstances

Training required; materials to be posted online

Must maintain records for 7 years



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Essential – Staff Support

Administrators must understand importance of role in supporting Title IX compliance

Awareness of policy

Awareness of procedures

Model behavior

Foster a culture of accountability

Create a culture of reporting

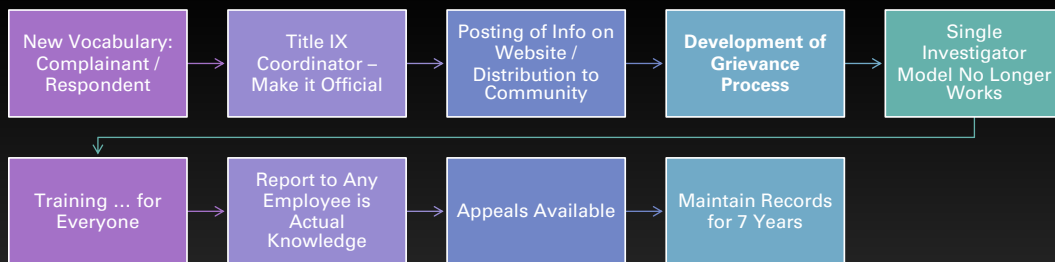
Be the “eyes and ears” for Title IX Coordinator/District

May need to serve as investigator, decision-maker, or appellate officer

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IX Things to Remember



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Practical Guidance

Sexual harassment under Title IX is ...

- Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to an education program or activity

High threshold to demonstrate violation

Every instance of an interaction between a boy and a girl is not automatically Title IX

Thoughtfully aggressive

Vigilant, but not reactionary

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What About LGBTQ+ Students?

Clearly the focus of the Trump administration

Executive Order re: "two genders"

- Existing federal law
- Existing court cases
- Michigan law (ELCRA)

Challenge: Legal Reality v. Political Expedience

Enforcement Considerations

- Federal v. State
- Private Right of Action

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What About LGBTQ+ Students?

Biden Rules had expanded definition of “sex discrimination” which explicitly covered LGBTQ+ individuals

That definition goes away, but ...

- *Bostock* decision from SCOTUS*
- ELCRA Amendment
- Michigan Supreme Court (*Rouch World* decision)
- *Doe v Alpena Schools*

Assume protections for LGBTQ+ students and applicability of Title IX, ELCRA, other civil rights law

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LGBTQ+ Athletics

Reality v. Hype

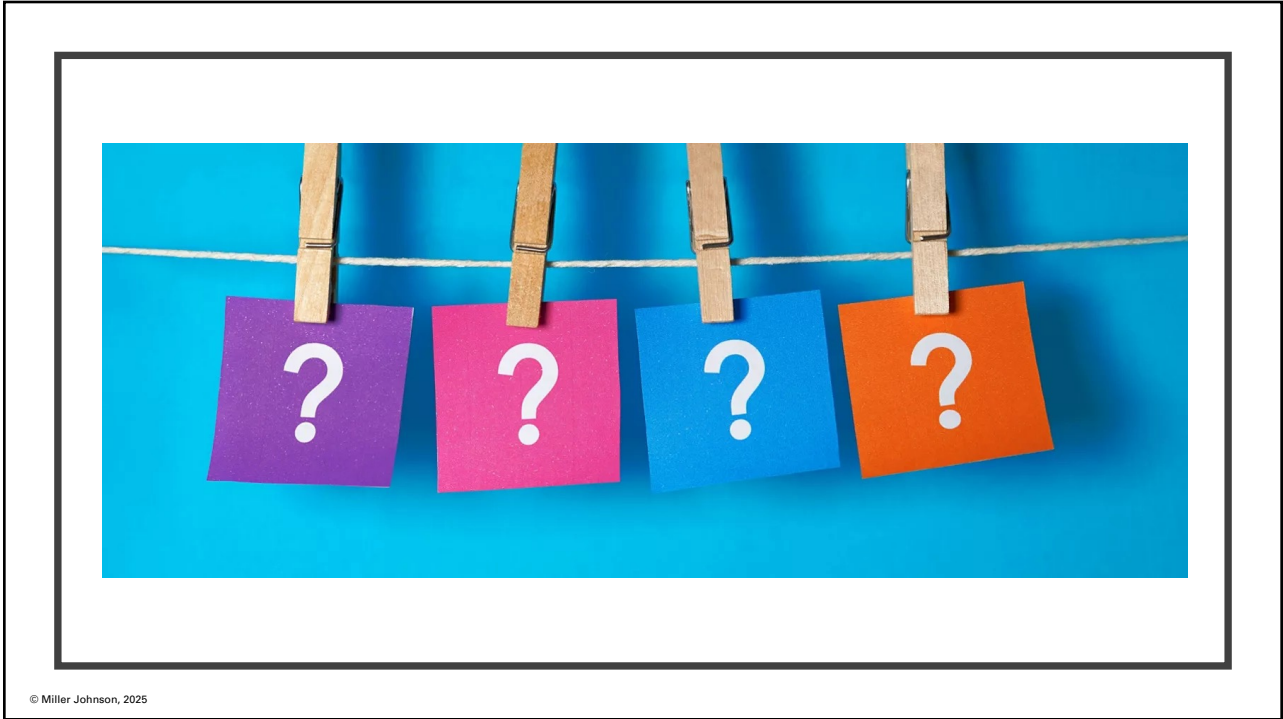
- This impacts VERY few students
- Biological girls can already play boys' sports under MI law
- Not the issue it is reported to be
- There will be lawsuits

Running for Cover

- NCAA → “President Trump’s order provides a clear, national standard. NCAA ... will take necessary steps to align NCAA policy ... subject to further guidance from the administration.”
- MHSAA → Horse & Buggy in a Race Car World

What to do right now?

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