

# Title IX Training Overview and Legal Update

June 27, 2024

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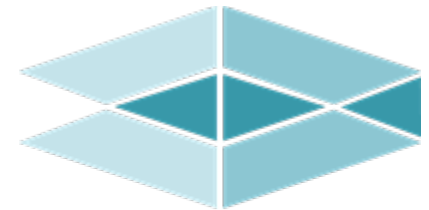
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In Partnership with NEOLA's Scott Brown

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# 2024 Title IX Regulations

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- Effective Date - August 1, 2024
  - 2024 regulations apply to conduct on or after August 1
  - 2020 regulations apply to conduct before August 1
- Ongoing Litigation in other States
  - All Injunctions Prohibiting Enforcement of the 2024 Title IX Regulations Have Been Limited to the State Where the Court is Located (Not WI)
  - Pending Cases

# 2024 Title IX Legal Challenges

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## ***State of Louisiana et al v. U.S. Dept of Education, 2024 WL 2978786***

- Preliminary injunction granted preventing Louisiana, Mississippi, Montana, and Idaho from enforcing 2024 regulations.
- Alleged that Department of Education overstepped Congressional authority when interpreting “sex” to include gender identity and sexual orientation.

## ***Tennessee v. Cardona, 2024 WL 3019146***

- Preliminary Injunction granted preventing Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia from enforcing 2024 regulations.
- Department likely exceeded delegated authority when defining gender identity and sexuality withing the definition of “sex”.
- Likely First Amendment Violation—Compelled speech, requires staff to refer to pronouns inconsistent with religious practice.
- Likely violates Parental Right to Control the Upbringing of One’s Children under the 14<sup>th</sup> Amendment.

# 2024 Title IX Legal Challenges

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## ***Texas v. Cardona, 2024 WL 2947022***

- Preliminary injunction granted preventing school districts and higher education institutions in Texas from enforcing 2024 regulations.
- The Department of Education cannot unilaterally redefine “sex” in a way that contradicts Title IX
- Plain meaning of the word “sex” meant the “biological and anatomical differences” between male and female students as defined at their birth.
- The interpretations under the new 2024 Title IX Final Rule would “shockingly transform American Education.”

## ***State of Alabama et al v. Cardona; State of Arkansas v. U.S. Department of Education***

- Alabama, Florida, Georgia, South Carolina, Arkansas, Missouri, Iowa, Nebraska, North Dakota, and South Dakota sued in federal court.
- No court orders yet but, like the other cases, these complaints seek preliminary injunction to enjoin enforcement of 2024 Final Rule.
- Injunction would be limited to states included in the lawsuit.
- Oral arguments scheduled for July.

# Title IX Implementation Proposed Timeline

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## **PLANNING – JUNE**

- Confirm Title IX Coordinator(s)
- Confirm investigators, decision makers, appeal decision-makers
- Review new NEOLA policy and each option
- Review templates for grievance process

## **POLICY AND ADMINISTRATIVE GUIDELINE ADOPTION - JULY**

- The Board should approve new Title IX Policy and Nondiscrimination Notice on or before August 1st (don't forget to factor in committee review and/or first, second readings, etc.)

## **TRAINING – JULY AND AUGUST**

- Title IX Coordinator(s)
- Investigators/Decision Makers
- All employees (Don't forget about coaches, advisors etc.)

# 2024 Title IX Regulations Upcoming Trainings

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- **July 9, 2024** – Intensive Title IX Coordinator Training
- **August 6, 2024** – Intensive Investigator/Decision Maker Training
- **August 27, 2024** – All Staff Title IX In-Service Training

# Title IX Overview - Statutory Authority

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Title IX of the Education Amendments 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

# Title IX Overview - Regulations

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- Title IX Regulations, Published May 19, 2020 (34 C.F.R. part 106)

“These regulations are intended to effectuate Title IX’s prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities.”

- Title IX Regulations, Published April 19, 2024 (34 C.F.R. part 106)

“The purpose of these amendments is to better align the Title IX regulatory requirements with Title IX’s nondiscrimination mandate. These amendments clarify the scope and application of Title IX and the obligations ... to provide an educational environment free from discrimination on the basis of sex, including through responding to incidents of sex discrimination.”



# 2024 Title IX Regulations

## Categories of Major Changes

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- Expanded Definitions of Sex Discrimination and Sex-Based Harassment;
- Enlarged Scope of Covered Activities and Complainants;
- Added Pregnancy and Pregnancy Related Conditions;
- Increased Title IX Coordinator Responsibilities;
- Revised Title IX Grievance Procedure Requirements;
- Considerations for Students with Disabilities;
- Enhanced Recordkeeping Requirements; and
- Increased Training Requirements.

# 2024 Title IX Regulations

## Sex Discrimination

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- Different Treatment or Separation on the Basis of Sex.
  - Districts may not treat individuals differently or separate them on the basis of sex in a manner that subjects the person “to more than de minimis harm.”
  - “Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.”

# 2024 Title IX Regulations – Sex Discrimination

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- Regulations apply to all forms of sex discrimination (not just sexual harassment) including athletics, hiring, etc.
- Discrimination on the basis of:
  - Sex stereotypes
  - Sex characteristics
  - Pregnancy or related conditions
  - Sexual orientation
  - Gender identity

# 2024 Title IX Regulations

## Sex-Based Harassment

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- Quid pro quo harassment: employee or agent conditioning provision of aid, benefit or service (same as 2020 regulations)
- Four types of conduct: sexual assault, dating violence, domestic violence and stalking (same as 2020 regulations)
- Hostile Environment: Unwelcome sex-based conduct that, based on the totality of the circumstances,
  - Is subjectively and objectively offensive and is so severe or pervasive that,
  - It limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.

# 2024 Title IX Regulations

## Scope of Conduct/Complainants

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- Districts have an obligation to address sex-based hostile environment harassment even when some conduct alleged to be contributing to the hostile environment occurred outside the District's education program or activity or outside the US.
- Former students and employees as well as others attempting to participate in a district's program or activities at the time of the conduct may bring a complaint.

# 2024 Title IX Regulations Pregnancy Discrimination

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- Prohibits districts from treating students, employees, or applicants differently based on sex in connection with parental, family, or marital status.
- Prohibits discrimination against students, employees, or applicants, based on pregnancy or related conditions, and requires recipients to take actions to prevent sex discrimination and ensure equal access to the recipient's education program or activity, such as by providing reasonable modifications for students, reasonable break time for lactation for employees, and lactation space for students and employees.
- Prohibits schools from requiring documentation from students to obtain reasonable modifications or other actions unless such documentation is necessary and reasonable.
- Pregnancy or related conditions means:
  - pregnancy, childbirth, termination of pregnancy, or lactation;
  - medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
  - recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.
- Title IX requirements related to pregnancy vary depending on whether the individual is a student or an employee.

# 2024 Title IX Regulations

## Pregnancy Discrimination

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- Pregnant Students – Upon notice of student pregnancy or related condition, the Title IX Coordinator must inform the student of the District’s obligation not to discriminate and:
  - provide the student with the option of reasonable modifications to the Board’s policies, practices, or procedures because of pregnancy or related conditions;
  - allow access, on a voluntary basis, to any separate and comparable portion of the District’s education program or activity;
  - allow a voluntary leave of absence;
  - provide lactation space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed; and
  - Provide grievance procedure.

# 2024 Title IX Regulations Pregnancy Discrimination

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- Pregnant Employees – The District must do all of the following:
  - Prohibit discrimination based on current, potential, or past parental, family, or marital status of an employee or applicant for employment, which treats persons differently; or that is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.
  - Treat pregnancy or related conditions as any other temporary medical conditions for all job-related purposes, including commencement, duration, and extensions of leave; payment of disability income; accrual of seniority and any other benefit or service; and reinstatement; and under any fringe benefit offered to employees by virtue of employment.
  - Provide reasonable break time for an employee to express breast milk or breastfeed as needed and will provide the employee with access to a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed.



# 2024 Title IX Regulations

## Title IX Coordinator Duties

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- Districts may designate multiple coordinators but must assign a lead coordinator ultimately responsible for oversight of District's compliance with Title IX.
  - May serve as investigator and decisionmaker.
  - May delegate specific duties to one or more designees.
- Title IX Coordinator must respond when the recipient has knowledge of conduct that reasonably may constitute sex discrimination, including:
  - Offering and coordinating supportive measures
  - Initiating a complaint, and
  - Taking prompt and effective action to end sex discrimination, prevent its recurrence, and remedy its effects.
- Must address all reports of sex discrimination – does not need to target only one individual.
- Ensure proper training and compliance with recordkeeping requirements.
- Ensure confidentiality of personally identifiable information.

# 2024 Title IX Regulations

## Duty to Report

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- Individuals with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively.
- All employees must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination.
- Eliminated “actual knowledge” standard under current Title IX regulations

# 2024 Title IX Regulations

## Grievance Procedures

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- Treat complainants and respondents equitably
- Ensure supportive measures
- Protect the privacy of parties and witnesses
- Establish reasonable timeframe (mandatory waiting periods have been eliminated)
  - Evaluation – dismiss or investigate/consolidate
  - Investigation
  - Determination
  - Appeal (if offered)

# 2024 Title IX Regulations Grievance Procedures

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- Definition of Complainant

- Student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination or
- A person other than a student or employee allegedly subjected to the same conduct and who was participating or trying to participate in district's program at time of conduct (*i.e., current or former student or employee or applicant*).

- Definition of Complaint

- A “complaint” is a request that objectively can be understood as a request to investigate and make a determination about alleged discrimination under Title IX.
- A complaint may be oral or written

# 2024 Title IX Regulations Grievance Procedures

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- The 2024 Regulations eliminate the requirement to separate the Coordinator, Investigator, and Decisionmaker roles.
  - One person may be Title IX Coordinator, Investigator, and Decisionmaker.
  - One person may be Investigator and Decisionmaker.
- However, some roles must still be separated.
  - Appeal decisionmaker may not serve as the Investigator or Decisionmaker
  - The information resolution facilitator may not serve as Investigator

# 2024 Title IX Regulations Grievance Procedures

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- Only permissive dismissal (no mandatory).
- May dismiss if:
  - Unable to locate respondent;
  - Respondent is not enrolled or employed;
  - Complainant voluntarily withdraws some or all allegations in complaint, Title IX coordinator declines to initiate, and district determines that without allegations, no sex discrimination even if proven; or
  - District determines allegations, if proven would not constitute sex discrimination.

# 2024 Title IX Regulations Students with Disabilities

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- If a party is a student with a disability, Title IX coordinator must determine how to comply with IDEA and/or 504 during the grievance process and implementation of supportive measures by:
  - Consulting with one or more members of the student's IEP team; or
  - Consulting with one or more members of the student's 504 team.

# 2024 Title IX Regulations

## Record Keeping

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- Retain for seven years:
  - For each complaint, records related to informal resolution or grievance procedure and outcome
  - For each notification received by Title IX coordinator of possible conduct under Title IX, records documenting actions the District took to meet its obligations
  - Training materials



# 2024 Title IX Regulations Training Requirements

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- Employees with a Title IX role (Coordinator, Investigator, Decisionmakers)
  - Promptly upon hiring or changing roles and annually
  - District's obligation to address sex discrimination
  - Scope of conduct that constitutes sex discrimination including definition of sex-based harassment, notification and information requirements (pregnancy and response to conduct that may reasonably constitute sex discrimination)
- Training on topics related to responsibility:
  - Obligations to respond to sex discrimination
  - Grievance procedure
  - How to serve impartially – avoiding prejudgment, conflicts of interest and bias
  - Meaning of relevant in relation to questions and evidence and impermissible evidence.

# 2024 Title IX Regulations Training Requirements

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- For Informal Resolution Facilitators
  - Upon designation and annually.
  - District's obligation to address sex discrimination
  - Scope of conduct that constitutes sex discrimination including definition of sex-based harassment
  - Notification and information requirements
  - Rules and practices of informal resolution process and how to serve impartially.
- For All Employees
  - Upon hire or change in position and annually.
  - District's obligation to address sex discrimination;
  - Scope of conduct that constitutes sex discrimination including definition of sex-based harassment, notification and information requirements.

# 2024 Title IX Regulations NEOLA Policy Update

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- The Policy Drafting Process
- Why two Title IX (2) Policies?
- NEOLA's Title IX Administrative Guidelines
- Available NEOLA resources
- Future Crosswalk between former policy, new policy, and alternative complaint procedures

# 2024 Title IX Regulations NEOLA Policy Considerations

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- Defining or excluding “Confidential Employees”
- Selecting and designating Title IX Coordinator(s)
- Preserving Flexibility in the Grievance Procedure
- Setting Grievance Procedure Timelines and Extensions
- Designating Appeal Decisionmakers and Facilitators of Informal Resolution
- Identifying Potential Disciplinary Sanctions

# Title IX Resources

## Sample Notice of Nondiscrimination

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The 2024 amendments require districts to prominently include all elements of its notice of nondiscrimination on its website and in each handbook, catalog, announcement, bulletin, and application form that it makes available to people entitled to notice, or which are otherwise used in connection with the recruitment of students or employees.

Sample notice from U.S. Department of Education:

- [ABC School] does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and its regulations, including in admission<sup>4</sup> and employment.
- Inquiries about Title IX may be referred to [ABC School's] Title IX Coordinator, the U.S. Department of Education's Office for Civil Rights,<sup>5</sup> or both. [ABC School's] Title IX Coordinator is [name or title, office address, email address, and telephone number].
- [ABC School's] nondiscrimination policy and grievance procedures can be located at [include link to location(s) on website or otherwise describe location(s)].
- To report information about conduct that may constitute sex discrimination or make a complaint of sex discrimination under Title IX, please refer to [include link to location(s) on website or otherwise describe location(s)].

# Title IX Resources

## U.S. Department of Education

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- <https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf> (unofficial regulations)
- <https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf> (fact sheet)
- <https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-summary.pdf> (summary sheet)
- <https://www2.ed.gov/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf>  
<https://www2.ed.gov/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf> (resource for drafting policy)

# Thank You!

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