Title IX:
Overview for Key Personnel

THE TRUST

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Introductions

- Presenter
- Table

Learning Objectives

- What is Title IX and what does it cover?
- Recognizing Sexual Harassment and Sexual Violence
- Overview of Title IX Processes and Key Personnel
- Executive Orders and OCR Guidance
- Foundation for specific role training

What is Title IX?

"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."

United States Congress, 1972

Title IX Regulations

- The Implementing Regulations are what an administrative agency like the U.S. Department of Education creates through a rule making process to dictate definitions, procedures, timelines, and expectations of carrying out the intent of the federal statute.
- The regulations have changed with the different presidential administrations in 2020 and 2024

Title IX 2024 Regulations

- 2024 Final Rule modified the regulations:
  - Expanded the protected persons under the scope to include sex stereotypes, sexual orientation, gender identity, pregnancy and related conditions, etc.
  - Increased obligations for training and proactive preventive measures
  - Expanded who can be a complainant (and did not require current conduct)

2024 Regulations Challenges

- Several states filed lawsuits challenging the constitutionality of the 2024 regulations arguing that DOE exceeded permitted authority under the Administrative Procedures Act (APA)
- Two courts have issued vacaturs regarding the Final Rule – one in January and one in February 2025
- There are appeals and other ongoing lawsuits

Kentucky and Texas Vacaturs

- January 9, 2025, a District Court Judge in Kentucky issued a vacatur
- February 19, 2025, a District Court Judge in Texas issued a vacatur
- Vacatur means it “takes the unlawful agency action off the books” (i.e. vacate)
- AKA – All of the 2024 changes you learned are gone

Important Notes

- Right now the vacaturs stand so the 2024 regulations are not implemented; however, there are intervenors seeking to appeal since this DOE won't appeal
- All of the lawsuits are still playing out through the various legal processes in the federal courts

Executive Orders

- January 20, 2025 (Inauguration Day) Pres. Trump released an executive order “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government”
- February 5, 2025 Pres. Trump released an executive order “Keeping Men Out of Women’s Sports”

"Defending Women" EO cont.

- Policy of the United States to only recognize two sexes – male and female
- Sex does not include gender identity
- Administration will enforce and interpret all laws related to sex to ensure only two sexes
- All federal agencies must utilize the definitions and terms in the EO

"Defending Women" EO cont.

- Requires federal agencies to use the word sex, not gender, in all policies
- Directs Attorney General to issue guidance as to Title IX in light of the components in the EO
- Directs Attorney General to issue guidance for EEOC to ensure people can express the binary nature of sex

2nd EO: Keeping Men Out of Women's Sports

- "It is the policy of the United States to rescind all funds from educational programs that deprive women and girls of fair athletic opportunities . . ."
- It is "the policy of the U.S. to oppose male competition participation in women's sports . . ."

"Women's Sports" EO cont.

- The Secretary of Ed shall "prioritize Title IX enforcement actions against educational institutions . . . that deny female students an equal opportunity to participate. . .by requiring them, in the women's category, to compete with or against or to appear unclothed before males."

Awards, Trophies, Records

- February 11, 2025
- DOE's Office of General Counsel's letter to NCAA and National Federation of State High School Associations
- Restore to female athletes the records, titles, awards and recognitions "misappropriated by biological males competing in female categories"

Awards, Trophies, Records, cont.

- K-12 school districts “strongly encouraged to keep factually accurate athletic records and to make corrections where male athletes were allowed to erase female records during the Biden administration.”
- Is this a Title IX issue? Unclear…

Executive Orders Definitions

- Sex: immutable biological classification as either male or female
- Women: adult and juvenile human females
- Men: adult and juvenile human males.
- Female: person belonging, at conception, to the sex that produces the large reproductive cell
- Male: person belonging, at conception, to the sex that produces the small reproductive cell

EOs Impact on Schools

- Directs the Attorney General to issue guidance on Title IX consistent with the policies and definitions in the EO
- Rescinds guidance documents and Attorney General Guidance that are inconsistent with the EO
- Ensures that “intimate spaces” (restrooms, locker rooms, showers) are designated by sex, not identity

EOs Impact on Schools, cont.

- OCR-directed investigation re federal funding for allowing biological men to compete on women's teams (Maine)
- OCR-directed investigation re federal funding for unequal restrooms at school (CO school retrofitted female restroom for "all sex bathroom)

EOs Impact on Schools, cont.

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Rescinded Documents

- Department of Education Guidance Documents including, in part:
  - 2024 Title IX Regulations: Pointers for Implementation (July 2024)
  - Letter to Educators Title IX's 49th Anniversary (June 23, 2021)
  - Enforcement of Title IX in light of Bostock v. Clayton County (June 22, 2021)
  - AG Memorandum re: Application of *Bostock* to Title IX
  - EEOC Enforcement Guidance on Harassment in Workplace (April 29, 2024)

DOE/OCR

- January 31, 2025, the U.S. Department of Education issued a “Dear Colleague” letter indicating OCR will return to enforcing the 2020 Title IX regulations
- OCR’s Directed Investigations into schools regarding Title IX and athletics (ex. ME) and gender neutral restrooms (ex. CO)
- Portal created by the Department of Education to report issues with schools

OCR is Proactive and Agressive

- OCR is not waiting for complaints by students/parents on issues it considers most important
  - Transgender females' participation in sports
  - "Intimate spaces"
- Aggressively seeking order denying federal funding if not in compliance

OCR Complaints

- Under the Dear Colleague guidance, OCR will not investigate a **Title IX** complaint if the conduct was discrimination based on sexual orientation, gender identity, or any of the other expanded scope provisions of the 2024 regulations
- OPEN QUESTION: What about a monitoring agreement under 2024 regulations???

Athletics/Sports Teams

- Still need to provide equal access in athletic opportunities based on sex
- OCR will likely not allow a school to permit a student who was not assigned to female sex at birth to compete on a girl's/women's sports team
  - Challenge by trans girl
  - Challenge by female (sex assigned at birth)
- Changed sex on birth certificate issue?

Intimate Spaces

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- OPEN QUESTION: What about a monitoring agreement under 2024 regulations???

Single Sex Activities

- Girls On the Run
- Girls Who Code
- Open question?

What about 9th Circuit cases on Sexual Orientation and Transgender as TIX?

- E.O. and Dear Colleague to contra
- Likely legal challenges to E.O.? We will watch
- Transgender students' rights and school's responsibilities—bullying and harassment policies still apply and should be enforced via school discipline policies, not Title IX

What to Do Now

1. Review and revise Title IX policies
2. Review and revise Title IX forms and templates
3. Train all personnel AGAIN (Folks are confused and whiplashed—and understandably so!)
4. Reach out to legal when you have cases that you may have started investigating under the 2024 regs or which were decided under the 2024 regs or you have any lingering questions

What is Title IX?

"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."

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Title IX

- Title IX covers sex discrimination in many areas such as sports, discrimination in enforcement of school rules, dress codes, grading discrimination, sex-based bullying, sexual harassment and/or sexual violence; programs and activities (Girls Who Code and Girls on the Run)
- Sexual harassment is the most common you will encounter

Who can be a party to a Title IX complaint?

- Student vs. Student
- Student vs. Staff
- Staff vs. Student
- Staff vs. Staff

Why do we care whether TIX applies?

- TIX protects vulnerable classes of persons
- Possible OCR complaint
- Potential District liability
- Following TIX procedures delays the typical discipline processes for students and staff

School Liability

A school will violate Title IX where it has ***actual knowledge*** of an allegation of sexual harassment experienced by *an individual in the educational program* and the school acts with ***deliberate indifference*** to that notice.

Actual Knowledge

Whenever any employee has notice that sexual harassment might have occurred, the school's response obligation is triggered.

- Notice of conduct that would meet the definition if true

Liability for Deliberate Indifference

A response to notice of sexual harassment that is clearly unreasonable in light of the known circumstances will subject the District to liability under Title IX (i.e. the District can be found to be acting “deliberately indifferent”)

Education Program or Activity

- Any location, event, or circumstance over which the school exhibits substantial control over both the alleged harasser and the context in which the harassment occurred.
- Does not include conduct that occurred outside of the U.S.

Title IX Sexual Harassment or Sexual Violence

- 3 Types in the definition in the regs
- All three require:

Unwelcome sexual conduct
(no consent)
+
Conduct effectively denies (or limits) a person's equal access to educational activity

Type 1: Quid Pro Quo

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

Type 2: Severe, Pervasive and Objectively Offensive

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's (school's) education program or activity

Severe and Pervasive

- No specific definitions in the regulations, but the more severe the conduct, the less need to show pervasiveness.
- Pervasive means widespread, persistent, and/or exists throughout an entire system or institution.
- They work in tandem so that if something is more severe, it may be less pervasive and still meet Title IX and vis versa.

Severe/Pervasive Analysis

1. Degree to which the conduct affected the complainant's ability to access the District's education program or activity;
2. Type, frequency, and duration of the conduct;
3. Parties' ages, roles within the District's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;

Severe/Pervasive Analysis

4. Location of the conduct and context in which the conduct occurred; and
5. Other sex-based harassment in the District's education program or activity.

Objectively Offensive

- Whether a reasonable person in similar circumstances would find it offensive, hostile, or intimidating.
- Subjective feelings or interpretations may not be the sole basis for evaluating whether a Title IX violation has occurred.

Type 3: Sexual Assault or Violence

- Sexual assault as defined in 20 U.S.C. 1092(f)(6)(A)(v)
- Dating Violence as defined in 34 U.S.C. 12291(a)(10)
- Domestic violence as defined in 34 U.S.C. 12291(a)(8)
- Stalking as defined in 34 U.S.C. 12291(a)(30)

Education Program or Activity

Schools are only required to address sexual harassment in the education program or activity, which is

- Any location, event, or circumstance over which the school exhibits **substantial control over both the alleged harasser and the context in which the harassment occurred**

Against a Person in the United States

- This is a jurisdictional requirement for application of Title IX
- Students in a study abroad program are not protected by Title IX outside the U.S.
- Final rule notes that though not required, a school may initiate a student conduct proceeding against a perpetrator or offer supportive measures to a victim

Examples of Denial to Educational Activity

- Skipping classes or school refusal
- GPA goes down
- Difficulty concentrating in class
- Bedwetting, crying at night
- Quitting sports or extracurricular activities to avoid contact with alleged perpetrator

Possible Title IX Scenarios

- 14 you. male student places his hand on a 13 you. female student's thigh and massages it
- Kindergarten male student asks female student to show him her privates, she does and he touches her
- "Nut Tag" Tuesday or "Whack a Sack" Wednesday

More Possible Scenarios

- Two special education students have sex in a school restroom—does consent matter? What concerns do you have
- Student comments to teacher she wants a dildo for Christmas, after winter break teacher asks her if she got the dildo
- 8th grade special education student elopes to area outside fence where grades 1-3 are having field day and exposes himself

Title IX Can Be Difficult for Schools/Staff/Students

- Violations of processes/procedure can become the subject of an OCR complaint/investigation
- Title IX process may take 60 days or more
- No discipline can be taken against the Respondent until the full process has completed

Is it more than Title IX?

- Mandatory report to DCS and/or law enforcement
- HR issues
- Report to State Board of Education (unprofessional conduct by adult employee)

Is it Title IX?

Your Turn

(Scenarios)

It's Title IX.
So, now what do we do?

Grievance Process

Process

District employee learns of allegations which--if true--are covered by Title IX

Coordinator receives complaint (allegations); meets with victim to discuss Title IX and supportive measures,

Coordinator provides notice of allegations to Respondent

Investigator investigates, shares evidence, and drafts report

Decision Maker writes decision

Appeal (if made by party)

Key TIX Personnel

- Title IX Coordinator
- Title IX Investigator
- Title IX Decision Maker
- Title IX Informal Resolution Facilitator
- Title IX Decision Maker on Appeal

Title IX Forms and Templates

Packet and Policies

- Definitions
- Formal requirements
- Time Lines
- District Policies

Impartiality and Bias

Title IX requires that Key Personnel act not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Explicit Bias

- Forming opinions based on prejudices or attitudes toward certain groups
- Positive or negative preferences for a particular group
- Examples: racism, sexism, ageism

Conflicts of Interest and/or Perception of Bias

- Actions may create a reasonable impression that the actor's ability to perform duties is impaired
- Examples: family or close friend relationship, prior negative or positive interactions with party
- Reality of smaller districts in smaller towns

Implicit Bias

- Unconscious bias
- Based on subconscious feelings, perceptions, attitudes, and stereotypes developed as a result of prior influences and imprints
- Does not require animus
- Implicit bias can be reduced/managed by discussing and recognizing
- Analysis not required by 2020 regulations (DEI connection—politics)

Title IX Coordinator

- Oversees the District's response to the Title IX, the personnel involved, supportive measures, the timelines, and implementation of any remedies/discipline

Title IX Investigator

- Collects documents, videos, pictures, etc. (tangible evidence)
- Interviews parties and witnesses
- Shares evidence with the parties
- Writes investigation report
- Sends investigation report to parties, Coordinator and Decision Maker

Title IX Decision Maker

- Offers parties ability to ask questions
- Reviews evidence and investigation report
- Writes decision
- Sends decision to Coordinator, and parties
- Notifies parties of the right to appeal

TIX Decision Maker on Appeal

If an appeal is made by a party, the decision maker on appeal rules on the appeal and writes a decision

Informal Resolution Facilitator

- Trained to facilitate resolution or to settle the matter between the parties
- Often uses mediation
- Prepares Resolution Agreement

Formal Complaint

- Document filed by complainant or signed by Title IX Coordinator alleging sexual harassment against a respondent and requesting an investigation
- Complainant must be participating in or attempting to participate in the education program at the time of filing
- Document or electronic submission that contains physical or digital signature of complainant

Formal Complaint Triggers the Investigation

- Formal Complaint triggers responsibility to conduct an investigation that complies with the adopted grievance process
- Upon notice of a formal complaint, the Title IX Coordinator will provide a written notice to parties explaining basic rights during the process and will assign an investigator

Supportive Measures

- Designed to restore or preserve equal access to education program or activity
  - Equal access means the same access someone who has not experienced sexual harassment has
- Non-disciplinary or punitive
- Offered without charge
- Cannot unreasonably burden either complainant or respondent

Supportive Measures

- Non-disciplinary
- Non-punitive
- Individualized to the person and situation
- Offered as appropriate and without charge

- Must be offered to Complainant
- May be offered to respondent if appropriate
- Do not unreasonably burden either a complainant or respondent

Examples of Supportive Measures

- Counseling
- Modify courses
- Change schedule
- Repeat course
- Increase monitoring or supervision of students

Supportive Measures

- If respondent is an employee, you may send employee home on administrative leave as a supportive measure – not considered disciplinary.
- If respondent is a student you ***cannot*** remove them from an educational activity as a supportive measure ***UNLESS*** there is need for an emergency removal - necessary to protect an individual from IMMEDIATE THREAT TO **PHYSICAL** HEALTH OR SAFETY

Mandatory Dismissal of Formal Complaints

- The complaint does not state an allegation of **sexual harassment**, even if all facts are found to be true
- The sexual harassment, even if it did occur, did not occur in the **school's program or activity**
- The sexual harassment did not occur against **a person in the United States**

Permissive Dismissal of Formal Complaints

- If the Complainant notifies the Title IX Coordinator that s/he wants to withdraw the complaint
- If the Respondent's employment or enrollment with the school ends
- If circumstances, such as several years between the conduct and the complaint or a complainant's refusal to cooperate, prevent the gathering of evidence sufficient to render a determination

Determining When Title IX Coordinator Proceed w/o Complainant

- The Title IX Coordinator may sign a formal complaint on behalf of the complainant, and/or may decide not to dismiss allegations or a complainant even if complainant requests dismissal.
- Consider whether District would be deliberately indifferent to the notice of potential sexual harassment if the Coordinator does not proceed

Considerations

To make the determination, the Title IX Coordinator may consider (8 factors from 2024 Regulations):

- Complainant's request not to proceed
- Complainant's reasonable safety concerns regarding initiation of complaint
- Risk that additional acts of sex discrimination would occur if complaint is not initiated
- Severity of the alleged sex discrimination
- Age and relationship of the parties, including whether the respondent is an employee

Considerations Cont.

- Scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination or sex discrimination alleged to have impacted multiple individuals
- Availability of the evidence to assist a decisionmaker
- Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating the grievance procedures

Procedural Requirements

- Parties may have an advisor of their choice
  - Advisor may be an attorney, but does not have to be
  - Parents of minor students are not advisors, but do have the right to be present with their child
    - i.e. a minor student may have both a parent and an advisor present/notified

Procedural Requirements

- Parties have the opportunity to inspect and review evidence collected during the investigation
  - Should sign a non-disclosure agreement (NDA), which does not restrict either party's ability to discuss the allegations or gather and present evidence

TRAINING

- A District must ensure that Title IX Coordinators, investigators, decision-makers and any person who facilitates an informal resolution process, receive training in the definition of sexual harassment, grievance process, how to serve impartially, conflicts of interest, etc.
- All employees are not required to be trained, but it is a good idea to give some training to all employees because of actual knowledge/notice considerations

Informal Resolution Process

- When: After a Formal Complaint Received
- What: Settlement or restorative process
- How: Mediation is common process

Why Parties May Prefer Informal Resolution

- Parties may be more satisfied if they have a say in creating the outcome
- Process may be less adversarial
- They can control the outcome
- Resolutions can include creative solutions
- Process is shorter and does not involve a full investigation and determination

QUESTIONS???

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