

Title IX in Transition:

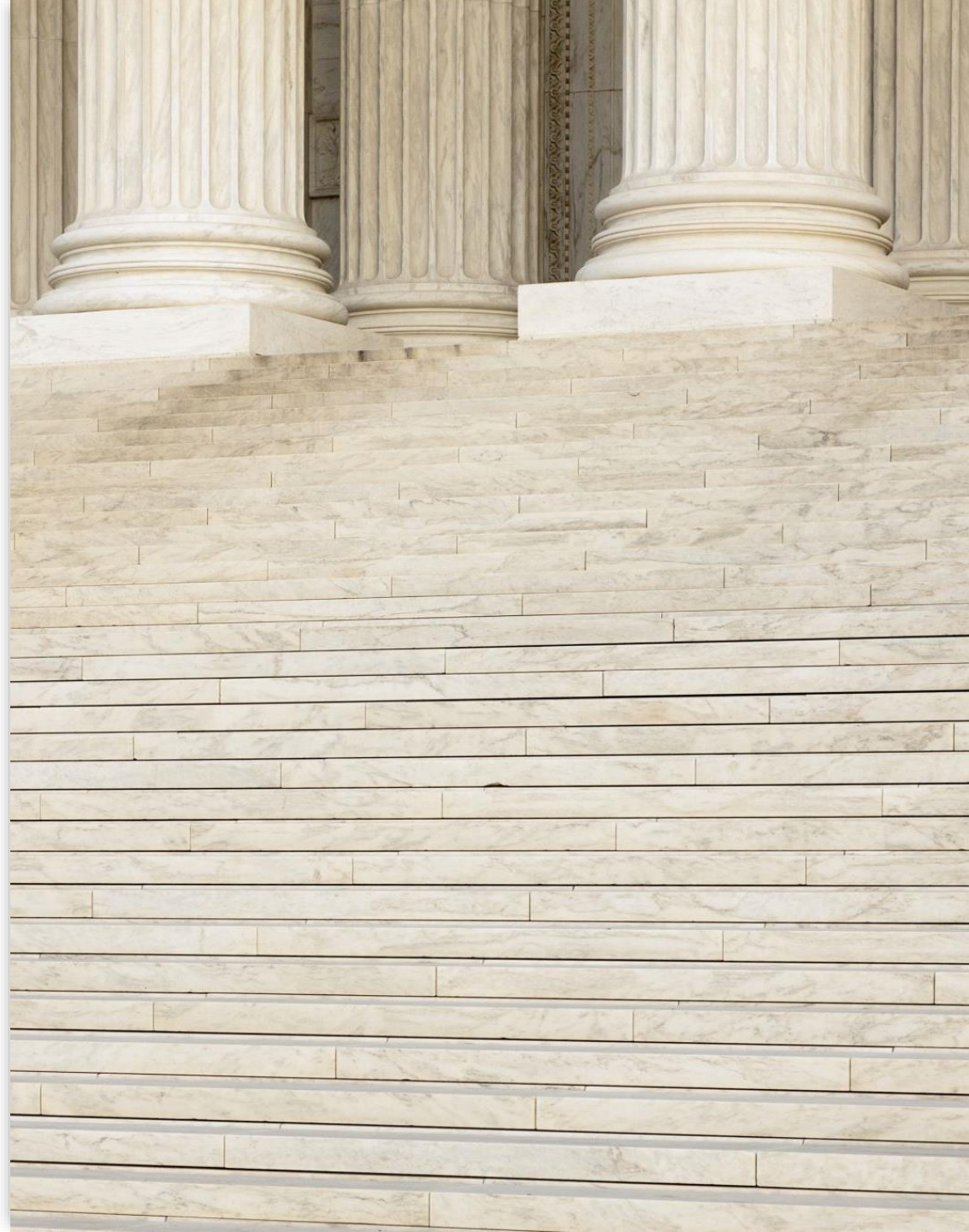
Practical Implications of Recent Legal Shifts

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Title IX Basics

- Adopted by Congress 1972
- Applies to any educational program or activity receiving federal financial assistance
- Enforced by the Department of Education Office for Civil Rights (OCR)
 - Promulgate regulations to enforce the statute
 - Investigate/ enter resolution agreements
 - OCR also issues guidance
- Established private right of action
 - Monetary damages
 - Federal district courts



Re-cap & Where We Are Today

- Biden Regs. effective August 1, 2024- temporary injunctions 26+ states
- Athletic Rule withdrawn by Biden admin Dec. 20
- Rules overturned nation-wide Jan. 9, 2025
- “2020” Rules effective immediately at all schools nationwide
- Jan. 20 Trump Executive Orders

Biden Title IX Rule Vacated

- Decision overturns Rule in its entirety
 - “the *entire point* of Title IX is to prevent discrimination based on sex—throwing gender identity into the mix eviscerates the statute and renders it largely meaningless.”
- Rational:
 - Department exceeded its authority
 - Violates Constitutional Freedom of Speech protections
 - Arbitrary and Capricious
- Ambiguity for Title IX cases filed between 8/1/24 and 1/9/25

Trump Executive Orders

- **Definition of Sex:** “sex” is strictly biological male or female, effectively eliminating recognition of gender identity in federal policies.
- **Rescinded Past Guidance:** Any Department of Education guidance or policies that extended Title IX protections based on gender identity are now rescinded. This removes protections for transgender individuals put in place under the Biden administration.

DEFENDING WOMEN
FROM GENDER IDEOLOGY
EXTREMISM AND
RESTORING BIOLOGICAL
TRUTH TO THE
FEDERAL GOVERNMENT

Compare/Contrast

- Scope & Definitions
 - Narrowed definitions/application
 - Excludes Gender ID/sexual orientation
 - Jurisdiction limited
- Reporting/Notice
 - Actual Notice/Official w/Authority
 - Eliminates broad reporting requirements
 - No “monitoring barriers” to reporting required
- Grievance Procedures
 - Proscriptive
 - Live hearing & cross-examination required-postsecondary
 - Prohibits single-investigator model
- Training
 - Only T9 Personnel
 - Must post training on website
- Pregnancy
 - Less specific/same basic requirements
 - Mandatory lactation space requirements eliminated

2020 Rule

- No Single Model Investigator
- Sexual Harassment: Severe, Pervasive, Objectively Offensive
- “Sex-based”
- Grievance Process After Formal Complaint of Sex Harassment
- Live Hearing & Cross Exam
- Scope limited to educational program & activity in US

2024 Rule

- Investigator Can Make Decision
- Sex-based Harassment: Severe *or* Pervasive
- “Sex-based”
- Grievance Process for All Reports of Discrimination
- Hearing & Cross Exam Optional
- “Impact” within EPA
- Not limited to US



Supreme Court Framework

Gebser v. Lago Vista Independent School District (1998 524 U.S. 274)

Davis v. Monroe County Board of Education (1999 526 U.S. 629)

Supreme Court Framework

**1. Sexual
Harassment**

**2. Actual
Knowledge**

**3. Deliberate
Indifference**

Notice/Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment
- Made to the Title IX Coordinator
- Or to any school official who has the authority to institute corrective measures on behalf of the school
- Or to any employee of an elementary and secondary school
- **2024 RULES:**
- All employees had obligation
- Included pregnancy in reporting requirement
- Monitoring barriers to reporting

Definition of Sexual Harassment

1. “Hostile Environment”: Unwelcome sexual conduct that is so severe and pervasive and objectively offensive it effectively denies a person equal educational access
2. Quid Pro Quo
3. Clery/VAWA Sex Offenses

Definition of Harassment

Sex-based Harassment (2024/Biden Rule)

- “sexual harassment and other harassment on the basis of sex, including on the bases described in [34 C.F.R.] § 106.10” 34 C.F.R. 106.2. It includes “[u]nwelcome 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. . . .” 34 C.F.R. § 106.2 (emphasis added); 89 Fed. Reg. 33498

Sexual Harassment (Current/Trump Rule)

- “conduct on the basis of sex” that is “[u]nwelcome 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 education program or activity.” 34 C.F.R. 106.30 (effective Aug. 14, 2020).

Jurisdiction

- Educational program or activity
 - Locations, events or circumstances over which the school exercises substantial control over both the respondent and the context in which the alleged discrimination occurred
 - Any building owned or controlled by student organization officially recognized by the school
 - 2024 Rule
 - extended to contexts in which school exercises disciplinary authority
 - could apply outside program or activity or outside US if *some* of the conduct occurred in educational program or activity

Definitions & Scope

- Prohibits discrimination on the basis of sex
 - Jan. 9 KY decision rules “on the basis of sex” means biological sex
 - Trump Exec. Orders clarify sex/gender means biological sex
 - *Bostock* is limited to Title VII; does not apply to Title IX

Title IX Personnel

<u>TITLE</u>	<u>RESPONSIBILITIES</u>	<u>TRAINING</u>	<u>STATUS</u>
Title IX Coordinator (multiple &/or deputies)	Coordinate, Intake Reports & Complaints, T9 analysis, Initiate Formal Complaint, Implement Supportive Measures	Sexual Harassment, Investigation & Grievance Procedure, Hearings, Appeals & Informal Resolution (as applicable); Impartiality, Relevance, Privilege	Must be Employee May Not Serve as Decision-Maker
Investigator	Conduct Fair, Objective and Impartial Investigation, Differentiate b/w Related & Relevant Evidence & Privilege	Sexual Harassment; How to Conduct an Investigation, Impartiality, Relevance, Privilege, Report-Writing	Staff or External May Not Serve as Decision-Maker
Decision Makers	Evaluate Evidence, Make & Write Decision, “Rule” on Relevancy during adjudicative process	Sexual Harassment, Hearing Process, Technology, Evidence/Relevancy	Staff or External Cannot Serve in Any Other Capacity
Advisor(s)	Question Opposing Party & Witnesses *POSTSECONDARY ONLY	None required	Party provided Staff or External
Informal Resolution Facilitator	Informal Resolution Processes	Informal Resolution Processes	Staff or External



Complaints

- 2020: Only formal complaints trigger Title IX requirements. In writing, “signed” by complainant
- 2024: An oral or written request to the school that objectively can be understood as a request for the school to investigate and make a determination about the alleged discrimination

Reluctant Complainant

- 2020 Rules; generally defer to Complainant's wishes (serious or ongoing threat)
- 2024 Rules-T9C must consider:
 - Complainant's safety concerns
 - Risk of recurrence
 - Severity of allegations (require removal or discipline?)
 - Age & relationship of parties
 - Scope of misconduct/pattern/other "victims"
 - Availability of evidence
 - Whether discrimination can be addressed w/o grievance process



Supportive Measures

- 2020 Rule-less tolerance for measures which burden/penalize the respondent
- No Contact Orders should be mutual
- Emergency removals more stringent criteria-immediate threat to physical safety of another
- 2024 required “appeal” of supportive measures
- 2024 required coordination with IEP (K-12)

Grievance Procedures

- Formal complaint required
 - Complainant must be participating/attempting to participate at the time of the complaint
- Apply only to allegations of sexual harassment when allegations meet threshold definition of sexual harassment
- Higher ed requires live hearing & cross-examination
- May not limit parties' rights to discuss case with others (no gag orders)
- Opportunities to review evidence (not just a “description” of the evidence/two ten-day periods)
 - “reasonable steps to prevent unauthorized disclosure” not in 2020 Rule
- School may choose preponderance or clear and convincing

Dismissal of Complaint

2020 Rule:

- Mandatory dismissal if the allegation does not meet the definition of sexual harassment
- Discretionary
 - Complainant requests withdrawal of complaint
 - Respondent no longer affiliated with school

2024 Rule:

- All dismissals discretionary & had higher bar

Informal Resolution

- Discretionary
- If deemed appropriate by T9C
- IR process must be in writing
- Not permitted in Student v. Employee matters*
- Formal complaint required*
- Both parties voluntarily agree
- Facilitator must be trained/conflict & bias free
- Facilitator may not be Investigator or Decision-maker*

Pregnancy & Related Conditions

- Both 2020 & 2024 Rules provide protections for pregnant students & employees
- 2024 clarified expectations/processes
- 2020 Rules do not have Notice/Reporting requirement related to pregnant students
- Requirement for lactation spaces no longer explicit
 - Federal laws PWFA & PUMP Act require for employees



What to Expect Under Trump Admin

- Confirmation of new Secretary of Education, Linda McMahon pending; interim/acting secretary & staffing of key roles
- Future of the Department of Education?
 - Elimination?
- Future of OCR?
 - Status of pending investigations?
 - Enforcement priorities?
 - Move to Department of Justice?

PRESS RELEASE

U.S. Department of Education Launches Investigation into Denver Public Schools for Converting Girl's Restroom to All-Gender Facility

East High School now has an exclusive restroom for male students and no restroom for female students on its second floor

JANUARY 28, 2025

Related Content

[U.S. Department of Education Issues Statement on the Nation's Report Card](#)

The U.S. Department of Education released the following statement in response to the public release of the scores from the 2024

Related & Overlapping Laws

State laws

Judicial
decisions

Clery/VAWA

Title VII & other
employment
laws

Pregnancy
related laws

FERPA

Next Steps



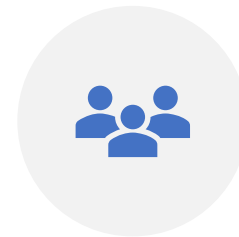
UPDATE POLICY



COMMUNICATIONS



MANDATORY
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Q&A

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