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Title IX Regulations—HELPI

- 2020 Regulations
- 2024 Regulations
- What's the difference?
- What regulations does my District follow?

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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

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Learning Objectives

- What is Title IX and what does it cover? – 2020 and 2024 Title IX Regulations
- Recognizing Sexual Harassment and Sexual Violence
- Overview of Title IX Processes and Key Personnel
- Legal Challenges and Lawsuits
- Foundation for specific role training

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5 Types of Sex Stereotypes

1. Personality: women = accommodating and emotional; men = self-confident and aggressive
2. Domestic: women care for children, cook and clean house; men handle finances, work on car and do home repairs
3. Occupations: women = teachers and nurses; men = pilots, doctors, and engineers

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Sex Stereotypes

- “Fixed or generalized expectations regarding a person’s attitudes, behavior, self-presentation, or other attributes based on sex”
- 2024 Regulations
- OCR has been treating discrimination based on sex stereotypes as part of Title IX since at least 2012

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2024 Regulations Expand Protected Persons

Title IX covers “sex discrimination” based on:

- Sex stereotypes
- Sex characteristics
- Sexual orientation
- Gender identity
- Parental Status
- Pregnancy or related conditions

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Sexual Orientation

- No specific definition in regulations
- Generally applicable LGBTQ+
- Lesbian
- Gay
- Bisexual
- Queer

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Sex Characteristics

- Based on "a person's physiological sex-based characteristics"
- May include "anatomy, hormones, and chromosomes associated with male or female bodies"
- Includes "intersex traits" (born with reproductive or sexual anatomy that does not fit typical definitions of male or female—physical, hormonal or genetic)

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Sex Stereotypes, cont.

4. Physical appearance (body): women expected to be thin and graceful, men expected to be tall and muscular
5. Physical appearance (dress and grooming): women wear dresses and makeup; men wear pants and have short hair

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Parental Status

- Stepparent
- Legal custodian or guardian
- In loco parents
- Actively seeking legal custody, guardianship, visitation, or adoption

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Parental Status

The status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability is:

- Biological Parent
- Adoptive Parent
- Foster Parent

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Gender Identity

- No specific definition in regulations
- "An individual's sense of their gender, which may or may not be consistent from their sex assigned at birth"
- A person's "deeply felt inherent sense of their gender"

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Requirements re: Pregnancy

- Employee, student or legal representative must notify the District of the pregnancy
- Modifications or accommodations
- Student can inform Title IX coordinator (ex. appointment)
- Student will be late because of doctor's

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Examples of Pregnancy Related Conditions

- Fatigue
- Dehydration
- Nausea (morning sickness)
- Anemia
- Bladder dysfunction
- Infertility
- Recovery from miscarriage or abortion
- Prenatal or postpartum depression

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Pregnancy or Related Conditions

- Pregnancy, childbirth, termination of pregnancy, or lactation
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
- Recovery from pregnancy, childbirth, termination of pregnancy, or lactation

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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

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Who Can Be A Party To A Title IX Complaint?

- Student vs. Student
- Student vs. Staff
- Staff vs. Student
- Staff vs. Staff
- May be broader still under 2024 regs covering District "operations" (Board Member, Contractor, etc.)

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In Short, It May Be Tix If

Allegations involve

- Physical sexual activity or sexualized touching (caressing, massaging, etc.)
- Comments mentioning sex acts or relating to one's sexual orientation, gender identity, certain appearances, or certain behaviors
- Touching or exposing intimate body parts (breasts, buttocks, crotch, or pubic area)
- Pregnancy/termination of pregnancy
- Parental status

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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")

Liability for Deliberate Indifference (2020 regs)

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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

Actual Knowledge (2020 regs)

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2020 regulations:
 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.

District Liability: 2020 Regulations

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- Includes all the operations of the District regardless of where they are located - even outside the U.S.
- No longer requires "control" by District

Education Program or Activity (2024 Regs)

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- 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.

Education Program or Activity (2020 Regs)

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- Respond promptly and effectively (vs. not act with "deliberate indifference" under prior regulations) when school has notice of conduct
- Proactively address sex discrimination in the program or activity
- Monitor for barriers to reporting conduct that may "reasonably" constitute sex discrimination AND take reasonably calculated steps to address

District Liability/Affirmative Duties (2024 Regs)

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Examples of Denial or Limitation to Educational Activity

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

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Title IX Sexual Harassment or Sexual Violence

- 3 Types
- All three require:

Unwelcome sexual conduct
+
(no consent)

Conduct effectively denies (or limits) a person's equal access to educational activity

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DOE: Sex Discrimination (2024 Regs)

- Pregnancy discrimination
- Unequal athletic opportunities
- Sex-based discrimination in STEM courses and programs
- Discriminatory application or enforcement of dress code policies
- Sex-based harassment
- Sexual violence
- Retaliation

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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 (i.e. that creates a hostile environment).

Type 2: Hostile Environment (2024 Regs)

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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 school's education program or activity.

Type 2: Severe, Pervasive and Objectively Offensive (2020 Regs)

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A school employee conditions the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (effectively the same under 2020 and 2024 regs)

Type 1: Quid Pro Quo

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(effectively the same under 2020 and 2024 regs)

[34 U.S.C. 12291(a)(30)]

- Sexual assault [20 U.S.C. 1092(f)(6)(A)(v)]
- Domestic violence [34 U.S.C. 12291(a)(8)]
- Stalking [34 U.S.C. 12291(a)(30)]

Type 3: Sexual Assault or Violence

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

5 Hostile Environment Factors

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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;

5 Hostile Environment Factors (2024 Regs)

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District's Obligations (Response)

- Respond promptly and effectively (vs. "not act with 'deliberate indifference'" under 2020 regulations)
- Address sex discrimination in the program or activity
- Designate confidential employees
- Monitor for barriers to reporting conduct that may "reasonably constitute sex discrimination" AND take reasonably calculated steps to address—Title IX Coordinator

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More Possible Scenarios

- Overnight trip, students play "Truth or Dare" and a couple are "dared" to have sex, and do
- Two special education students have sex in a school restroom
- Student comments to teacher she wants a dildo for Christmas, after winter break teacher asks her if she got the dildo

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Possible Title IX Scenarios

- 14 y.o. male student places his hand on a 13 y.o. female student's thigh and massages it
- Student calls another "shrimp dick" in front of a group of students—1 time? 20 times?
- "Nut Tag" Tuesday or "Whack a Sack" Wednesday

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Is it Title IX?

Your Turn

(Scenarios—Handouts)

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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)

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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

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

Key TIX Personnel

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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)

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**It's Title IX.
So, Now What Do We Do?
Grievance Procedures**

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

Explicit Bias

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Title IX requires that Key Personnel act impartially and avoid Explicit Bias, Conflicts of Interest, Perception of Bias, and Implicit Bias.

Impartiality and Bias

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- Packet and Policies
- Definitions
- Formal requirements
- Time Lines
- District Policies

Title IX Forms and Templates

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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
- Duties expand under 2024 regs
- Duty to monitor to determine if barriers to reporting potential Title IX incidents
- Can simultaneously serve as Coordinator AND Investigator AND Decision Maker
- Can delegate duties to others

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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

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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

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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

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Title IX Decision Maker

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

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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

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Examples of Supportive Measures

- Increase monitoring or supervision of students
- Counseling
- Modify courses
- Change schedule (mutual or individual)
- Repeat course

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Supportive Measures

- Designed to restore or preserve equal access to education program or activity
- Non-disciplinary or punitive
- Offered without charge
- Cannot unreasonably burden either complainant or respondent

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Informal Resolution Facilitator

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

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Dismissal of Allegation if Complainant Withdraws or Does Not Proceed

3. Risk that additional acts of sex discrimination would occur if complaint is not initiated
4. Severity of the alleged sex discrimination
5. Age and relationship of the parties, including whether the respondent is an employee

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Dismissal of Allegation if Complainant Withdraws or Does Not Proceed

To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following eight (8) factors:

1. Complainant's request not to proceed
2. Complainant's reasonable safety concerns regarding initiation of complaint

2024 Regs

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Complaint Triggers the Investigation

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

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Complainant

- 2020 regs: Individual who is alleged to be the victim of "current" conduct
- 2024 regs: Individual who is alleged to be the victim of conduct that could constitute sexual harassment (or sex discrimination) whether it occurred in the past and including a victim who is an applicant to an educational program or activity

Is there a statute of limitations?

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Dismissal of Allegation If Complainant Withdraws or Does Not Proceed

7. Availability of the evidence to assist a decisionmaker
8. Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating the grievance procedures

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Dismissal of Allegation If Complainant Withdraws or Does Not Proceed

6. Scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination or sex discrimination alleged to have impacted multiple individuals

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District's Obligations (Response)

- Respond promptly and effectively (vs. not act with "deliberate indifference" under prior regulations)
- Address sex discrimination in the program or activity
- Designation of confidential employees
- Monitor for barriers to reporting conduct that may "reasonably constitute sex discrimination AND take reasonably calculated steps to address—Title IX Coordinator

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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

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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

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TRAINING
2020 Regs

A District must ensure that Title IX Coordinators, investigators, decision-makers and any person who facilitates an informal resolution process, receive training in:

- Definition of sexual harassment, grievance process, how to serve impartially, conflicts of interest, etc.

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Important Changes in Obligations

- Training
- Non-discrimination Policy
- Requirements of the policy
- Publication requirements

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Grievance Procedures (2024 regs)

- Title IX Coordinator can also be Investigator and Decision Maker
- Supportive measures
- Informal Resolution offered earlier and encouraged
- Consult one member of IEP/504 team if Complainant or Respondent has IEP or 504 (“student with disability”)

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Requires the District to adopt, publish and implement a policy stating the recipient does not discriminate on the basis of sex and prohibits sex discrimination.

Non-Discrimination Policy

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TRAINING
2024 Regs

All employees must be trained on:

- District's obligations to address sex discrimination in its education program or activity;
- Scope of conduct that constitutes sex discrimination under Title IX and this part, including the definition of sex-based harassment; and
- All applicable notification and information requirements.

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TRAINING
2024 Regs

The District must ensure that employees, Title IX Coordinator, decisionmaker, investigator) receive training related to their duties under Title IX promptly upon hiring or change of position, and annually thereafter.

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Non-Discrimination Policy

The District does not discriminate on the basis of sex and prohibits sex-based discrimination in any education program or activity that it operates, as required by Title IX, including in employment.

[Sample language that DOE states meets the minimum requirements of the 2024 changes.]

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Non-Discrimination Policy

The notice must include:

- A statement that the District does not discriminate on the basis of sex and prohibits sex discrimination
- Statement that inquires about Title IX may be referred to the Title IX Coordinator, OCR, or both
- Name/Title, address, email and phone number of Title IX Coordinator
- How to locate the policy
- How to report information that may be a Title IX violation

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Non-Discrimination Policy

Requires the District to provide notice of the policy to student, parents, guardians, or other authorized legal representatives of elementary school and secondary school students, employees, applicants for admission, and all unions and professional organizations holding collective bargaining agreements with the recipient.

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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

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Informal Resolution Process

- When: 2024 Regs allow even without/before a Complaint, 2020 Regs require Complaint
- What: Settlement or restorative process
- How: Mediation is common process
- We'll discuss more in the Coordinator training

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Non-Discrimination Policy

The notice must prominently be included in/on the recipient's:

- Website
- Handbooks
- Catalog, announcements or bulletins
- Application forms

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Intentional misgendering or not using the person's preferred pronouns can also be considered sex discrimination (sexual harassment)

Use of Pronouns

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Not at this time—although the legal analysis is the same. DOE indicated it will issue separate guidance specific to sports teams. That guidance is currently in the rulemaking process.

*Doe v. Home – 9th Circuit Case enjoining AZ law banning transgender males from participating in women's sports from being enforced against two transgender females who never went through male puberty due to puberty blockers

Women's Sports Teams

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Hot-button Issues

Women's Sports Teams

Use of Pronouns

Restrooms and Locker Rooms

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The 2024 Lawsuits

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Restrooms & Locker Rooms continued

- 9th Circuit case (14th Amendment privacy right does not provide parent with fundamental right to determine bathroom policies of District)
- Options: single-occupancy facilities or gender-neutral facilities
- Focus on resolution between the complaining parties

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Restrooms & Locker Rooms

It can be considered sex discrimination to prohibit persons from using the restroom, locker room, or shower facility associated with the gender to which they identify.

- District cannot separate students or subject them to different treatment if it causes "more than *de minimis* harm"

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Preliminary Injunctions Enjoining States

- The Preliminary Injunctions granted prevent (enjoin) the U.S. Department of Education from "implementing, enacting, enforcing, or taking any action to enforce" the 2024 Regulations in the party states and in some schools with party organization members

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Pending Lawsuits Cont.

- There are 9 lawsuits with a combination of 26 states, several national organizations, and some school districts as plaintiffs in the lawsuits
- None of the cases are in the 9th Circuit (AZ's Circuit)
- Arizona is not a plaintiff state in any of these, nor are any Arizona school districts, but one case affects some Arizona schools (Kansas case)

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Pending Lawsuits

Several lawsuits ask the courts to block the new rules alleging that the regulations exceed the Agency's rule-making authority to expand "sex" to include "gender identity, sexual orientation, sex stereotypes, and sex characteristics, and that some provisions violate the First Amendment's protections for Free Speech and Free Exercise of Religion.

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The Supreme Court

- On July 22, 2024, U.S. DOE filed an application for a partial stay of the injunctions entered by the federal courts in Kentucky and Louisiana with SCOTUS (5th and 6th Circuits)
- DOE argued that the injunctions should be stayed EXCEPT for the "controversial" portions of the rule relating to gender identity argued in the lawsuits

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More from Kansas...

- The Court ordered the organization-plaintiffs to file a list of "schools" in which they have members/parents by 7/15/2024 so the U.S. DOE has notice of which schools are affected
- The Court also permitted the parties to supplement that list on an ongoing and indefinite basis
- Multiple lists have been filed since 7/15/2024 and we are actively monitoring

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Kansas Preliminary Injunction

- Enjoins DOE from enforcing 2024 regulations in Kansas, Utah, Alaska, and Wyoming, AND
- 1. Schools attended by members of Young America's Foundation
- 2. Schools attended by members of Female Athletes United
- 3. Schools attended by minor children of members of Moms for Liberty

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Before attending more specialized training as Coordinator, Investigator, or Decision Maker, download your District's Governing Board Policies on Title IX, Sexual Harassment, and Bullying and related procedural policies and bring them to your next training.

YOUR HOMEWORK

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SCOTUS Per Curiam Ruling

- All Justices accept that preliminary injunctive relief is proper as to the three provisions of the rule regarding gender identity
- 5 Justices concluded the 3 allegedly unlawful provisions "are not readily severable" from the balance of the rule
- 4 Justices disagreed, concluding that the 3 provisions are severable

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DOE's Arguments

The courts discussed only 3 provisions/issues as "likely to have success on the merits"

1. Expansion of sex discrimination to include gender identity
2. Use of facilities by transgender students
3. "Hostile environment" definition including gender identity

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QUESTIONS???