

HUSCH BLACKWELL

Advanced Title IX Workshop: The New Administration

Spring 2025

Agenda

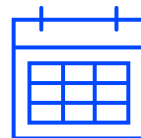
Regulatory/Legal Update

Due Process Expectations

Title IX and Gender Identity

Title IX and Free Speech

Title IX and Freedom of Religion



Regulatory/Legal Update

Status of the Biden-Era Regulations

- Vacated nationwide by *State of Tennessee v. Cardona* (E.D. Ky., Jan. 9, 2025)
- Department of Education *has not* appealed
- Victim rights groups seek to intervene post-judgment to appeal vacatur but an ultimate reversal of vacatur is unlikely
- February 4, 2025, Dear College Letter from ED reverts to August 2020 regulations



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ACTING ASSISTANT SECRETARY

February 4, 2025

Dear Colleague:

This letter¹ is to clarify that, in light of a recent court decision, 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,² rather than the 2024 Title IX Rule.³ Accordingly, lawful Title IX enforcement includes, *inter alia*, the definition of sexual harassment, the procedural protections owed to complainants and respondents, the provision of supportive measures to complainants, and school-level reporting processes as outlined in the 2020 Title IX Rule.

Core Elements of the Biden-Era Regulations

- Defined “sex” broadly for purposes of sex discrimination and sexual harassment to include gender identity and sexual orientation
- Addressed sex “separation,” including separation based on gender identity
- Created more elaborate processes for investigating and adjudicating adverse treatment sex discrimination
- Modified and relaxed processes for investigating and adjudicating sexual harassment
- Revised and augmented pre-existing Title IX guidance and regulations on pregnancy discrimination

Governing Regulations Today



- August 2020 (Trump, '45) regulations pertaining to sexual harassment and related procedures
- Pre-existing Title IX regulations at 34 C.F.R. part 106

Example

On October 1, 2024, in a state not subject to an injunction, a school received a complaint of student-on-student sexual assault and commenced an investigation pursuant to the Biden-era regulations. The investigation has now concluded, and a hearing date has been set.



Example

On November 1, 2024, in a state not subject to an injunction, a school received a complaint of student-on-student sexual assault filed by a complainant who withdrew in September 2024 and had no connection to the school at the time the complaint was filed. The investigation is currently ongoing and would otherwise conclude in approximately a month.



Example

On January 19, 2025, in a state where the Biden-era regulations had not been enjoined, a school received a complaint filed by a transgender student who complained they were discriminated against by a faculty member who exhibited anti-transgender bias in grading. The school has not yet notified the respondent.



Example

As of January 1, 2025, in a state not subject to an injunction, a school adopted a pregnant student accommodations policy that tracks all requirements of the Biden-era regulations.



Enforcement

- Title IX regulations are enforced by OCR
- OCR staffing has been dramatically reduced
- Many regional OCR offices have closed
- OCR is apparently prioritizing Title VI complaints



Questions



Due Process Expectations

Scope of August 2020 Regulation Coverage

- Sexual harassment
 - Quid pro quo, hostile environment, sexual assault, domestic violence, dating violence, and stalking
- Not
 - Adverse treatment discrimination
 - Failure to accommodate pregnancy

Conflicts of Interest and Bias



- Conflict: a material connection to the parties or subject matter that would cause a reasonable outsider to question the subject's ability to be fair and impartial
- Bias: a predisposition against a party or a type of scenario

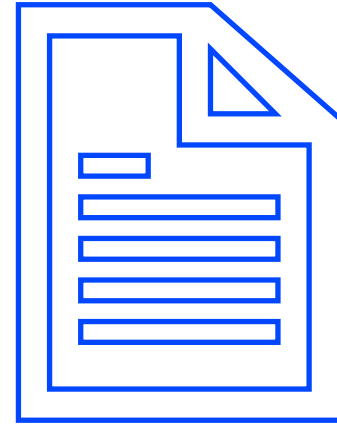
Example

A faculty member selected to serve on a hearing panel also serves on a university-wide “Diversity, Equity, and Inclusion” task force that published an extensive report documenting the institution’s history of anti-female bias, noting the overrepresentation of men in STEM fields, and advocating for additional opportunities for women. The Title IX case involves a claim that a male engineering student sexually assaulted a female engineering student.



The Formal Complaint

- Signed writing
- From the alleged victim or Title IX Coordinator
- Alleging sexual harassment
- Indicating a desire to initiate the grievance process



Example

A student calls the Title IX Coordinator and verbally reports that a faculty member offered the student better grades for sexual favors. The student states during the call that they wish to “file a complaint” and “have this investigated and resolved.”



Pre-Closure Review of The Evidence



- Parties and advisors must be provided access to all inculpatory and exculpatory evidence
- At least ten days before the investigation is concluded
- Evidence should be provided in physical copy or electronically

Live Hearings

- All formal complaints of sexual harassment are determined through a live hearing before an impartial decision-maker
- “Live” = synchronous and contemporaneous participation from all parties and their advisors



Example

Before January 20, 2025, a school began investigating a complaint that a male supervisor denied a female subordinate a promotion because the supervisor believed he “needed a strong man in this role.” On March 1, 2025, the investigator issued an investigation report and a decision finding the supervisor responsible under a preponderance of the evidence standard.



Cross-Examination



- Advisor for each party asks questions, including cross-examination questions, of the other party and witnesses
- Presumably, the strict exclusionary rule is still not in effect

Example

Under a school's sexual harassment hearing policies, only the hearing panel chair is permitted to ask questions of the parties and witnesses. Advisors are required to submit a list of questions in advance of the hearing, and the hearing panel chair may ask the questions if the chair deems them to be relevant.



Questions



Title IX and Gender Identity

Executive Order on Gender Identity 1/20/2025

- Sex is “not changeable” and refers to an “immutable biological classification”
- Agencies must enforce laws “governing sex-based rights” to “protect men and women as biologically distinct sexes”
- Agencies must remove all statements, regulations, guidance, etc. that “promote or otherwise inculcate gender ideology”

Status of the 1/20/2025 Executive Order

- Executive order is subject to early injunctions in various contexts (e.g., prisons; gender-affirming care; government websites)
- Does not appear to be enjoined in its entirety vis-à-vis education contexts



Executive Order on Women's Sports 2/5/2025

- ED will continue to comply with the vacatur of Biden-era regulations from E.D. Ky.
- Take action to affirmatively protect all-female athletic opportunities and all-female locker rooms, including through enforcement action
- Prioritize enforcement actions against institutions that deny female students an equal opportunity to participate in sports

Caselaw is Mixed

- Several decisions hold that Title IX contemplates only a binary, biology-based definition of “sex”
- Several decisions hold that gender identity is included in the concept of “sex” for Title IX purposes
- Only the Supreme Court can resolve the split of judicial authority

Example

A college has a women's league and men's league for intramural ultimate frisbee. Two transgender women play on a team in the women's league, and the team wins the league easily. No transgender men participate on any of the designated men's teams.



Example

A classroom building is four floors tall and has a women's and men's restroom on each floor. The institution converts the women's restroom on the first floor into a multi-stall, gender-neutral bathroom, resulting in there being four men's restrooms, three women's restrooms, and one gender-neutral restroom in the building.



Example

A university permits a transgender female to join the varsity women's volleyball team. The transgender female receives a starting position. All other members of the team identify as “biological” females.



Investigations/Enforcement Actions

- Maine Department of Education, et al. (athletics participation)
- San Jose State University (athletics participation; volleyball)
- University of Pennsylvania (athletics participation; swimming)
- Denver Public Schools (restroom)
- Massachusetts Interscholastic Athletics Ass'n (athletics participation; basketball)

Sex-Based Stereotyping

- Long recognized theory of sex discrimination under Title VII, Title IX, and other civil rights laws
- Current Administration appears to still acknowledge sex-based stereotyping as a viable form of harassment or discrimination *provided* sex is considered an immutable, biological category

Example

A biological female who is in peak physical condition and an excellent cheerleader is denied a spot on the cheerleading squad because the student has “masculine” physical traits like short hair and broad shoulders and typically wears pants and baggy clothing instead of more “feminine” attire favored by other cheerleaders.



Example

A biological, male applies for an open faculty position in the Department of Gender Studies. While acknowledging his stellar academic credentials, the committee rejects the applicant because it believes the applicant will have trouble “relating to” and “interacting with” a predominantly female student body. One committee member writes on their notepad: “Dresses like a male parent from the insurance commercial Can’t relate to women in this major”



Example

A student is subjected to repeated jokes and epithets targeting the student for being gay, and an anti-gay slur is spray-painted on the student's car.



Example

A gay student is subjected to repeated, explicit jokes and epithets referencing genitals and various sex acts the student is thought to have performed on other students. A graphic depiction of a same-sex scenario is drawn on the student's white board.



Grabowski v. Ariz. Bd. of Regents (9th 2023)

“[In *Bostock*] the [Supreme] Court held that discrimination ‘because of’ sexual orientation is a form of sex discrimination under Title VII. We conclude that the same result applies to Title IX.”

Department of Education v. Louisiana (2024)

- Supreme Court declines to lift a stay of the Biden-era Title IX regulation imposed by a federal court in Louisiana
- Supreme Court denies the stay, allowing the injunction to remain in place
- “Importantly, all Members of the Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity . . .”

Questions



Title IX and Freedom of Speech

Executive Order on Free Speech (1/20/2025)

- Prohibits all federal departments, agencies, entities, officers, employees, or agents from acting or using Federal resources to unconstitutionally abridge the freedom of speech
- Requires government to ensure that “taxpayer resources” are not used to “engage in or facilitate any conduct” that would unconstitutionally abridge free speech

Title IX Codification of First Amendment Supremacy

Nothing in [the Title IX regulations] requires a recipient to:

- (1) Restrict any rights that would otherwise be protected from government action by the First Amendment to the U.S. Constitution;
- (2) Deprive any person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or
- (3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

34 C.F.R. § 106.6(d)

Common Intersection Points

- Hostile environment harassment predicated on speech
- Application of Title IX policies to off-campus speech
- Chosen names and pronouns
- Faculty conduct in the classroom and academic freedom



Example

Male student engages in a political protest on campus, repeatedly and loudly refers to a female politician as a “stupid bi*,” and asserts that any woman who votes for the politician is also a “stupid bi***.” Several female students who hear the protest file hostile environment sexual harassment complaints against the male student.**



Hostile Environment 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 the recipient's education program or activity.

Guidance on “Offensive Speech”

“Free speech rights apply in the classroom (e.g., classroom lectures and discussions...). In addition, First Amendment rights apply to the speech of students and teachers... Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. [T]he offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.”

2003 Revised Sexual Harassment Guidance at 22 (emphasis added)

Example

A female student athlete with an active social media presence makes several posts using epithets to refer to male student athletes. The student athlete also makes several posts specifically trashing men's teams and mocking the teams' poor performance despite them having the "athletic department in their pocket."



Constitutional Jurisdictional Limits

- Constitution generally limits a public school's authority to sanction off-campus speech unless (perhaps) it has a disruptive effect on campus or otherwise in operations
- The fact that people are offended or upset about off-campus speech is probably insufficient to establish a disruptive effect
- Special rules may exist for students in certain professional schools who have adopted professional conduct codes (e.g., law; medicine; counseling; social work; nursing)

Example

A male student in an MD program repeatedly makes sarcastic posts on social media about female patients in general and makes a particular post mocking women who have suffered from ovarian cancer.



Chosen Names and Pronouns

- Current administration's position is that Title IX does not cover gender identity discrimination and harassment
- Current administration is likely to contend that compelled use of chosen names and pronouns violates the First Amendment, regardless of whether Title IX covers gender identity discrimination



Example

A transgender male student wishes to be called “Tom” and has requested the use of “he/him/his” pronouns. A graduate teaching assistant refers to Tom as “Daphne” (the student’s legal name) and refers to the student using “they/them/theirs” or sometimes “she/her/hers” pronouns. The graduate teaching assistant does not believe in gender identity as a concept and contends the use of the student’s chosen name and pronouns is compelled, expressive speech that the graduate assistant disagrees with.



Vlaming v. West Point Sch. Board (Va. 2023)



- Teacher required to use chosen names and pronouns stated viable claims for:
 - Violation of religious freedom rights
 - Violation of free speech rights through compelled speech

Parents Defending Education v. Olentangy Local School District (S.D. Ohio 2023)

- School policy prohibiting students from intentionally misgendering peers is not a facial violation of the Constitution
 - Policy permissibly regulated discriminatory speech
 - Policy did not compel speech
 - Policy did not constitute viewpoint discrimination

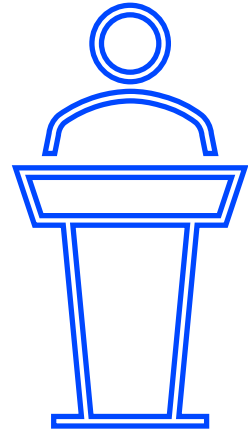
Example

A faculty member objects to an institutional policy requiring the use of chosen names and pronouns by faculty, including while teaching a course. The faculty member claims the policy interferes with pedagogy and constitutes compelled speech.



Meriwether v. Hartop (6th Cir. 2021)

- Refusal to use chosen names and pronouns is not *per se* discriminatory
- Faculty member may have a viable First Amendment claim rooted in academic freedom and/or freedom of religion



Questions



Title IX and Freedom of Religion

Executive Order on “Anti-Christian Bias” 2/6/2025

- Establishes a task-force to “eradicate Anti-Christian Bias”
- Task force to review all activities of various agencies, including ED, to identify “unlawful anti-Christian policies, practices, or conduct”
- Task force to “identify deficiencies in existing laws and enforcement or regulatory practices that have contributed to unlawful anti-Christian governmental conduct or private conduct. . . .”

Title IX Religious Exemption

“[Title IX] shall not apply to an educational institution which is controlled by a religious organization if the application of [Title IX] would not be consistent with the religious tenants of such organization.”

20 U.S.C. § 1681(a)(3)

Example

A religious college has a special pastoral ministry degree that is only open to biological men. The college expresses the religious belief that only men can be religious ministers. Women are allowed to pursue any other degree at the college. Some prominent women in the college's religious denomination argue that Scripture does allow women to be religious ministers.



Hunter v. U.S. Dept. of Education (9th 2024)

- Group of LGBTQ+ students sued ED and argued the Title IX religious exemption violates the U.S. Constitution
- Title IX's religious exemption does not violate the First Amendment's prohibition on the establishment of religion
- Title IX's religious exemption does not violate the Equal Protection Clause rights of LGBTQ+ students

Example

A faculty member at a public university refuses to meet with women in his office unless the door is open. The faculty member expresses a religious belief that requires him to avoid the “scandal” of being in a closed room with a woman who is not his spouse. A female student who wishes to have a private conversation with the faculty member, like male students can, complains the faculty member is engaging in sex discrimination.



Personal Freedom of Religion Rights

- Under federal law, religious freedom protections only apply against governmental actors and private, secular colleges and universities
- Government cannot violate the free exercise of religion or discriminate based on religion
- Private, secular colleges and universities cannot discriminate based on religion in employment

Free Exercise of Religion



- Government cannot target religion
- Government must treat religion just as good as other, non-religious based reasons for exemptions from generally applicable rules

Example

A faculty member at a public university refuses to meet with women in his office unless the door is open. The faculty member expresses a religious belief that requires him to avoid the “scandal” of being in a closed room with a woman who is not his spouse.

A female faculty member with a diagnosed mental health condition is allowed to have open door meetings with students as an accommodation for her disability.



Example

A religious student organization at a public university espouses certain “traditional” beliefs and requires all members to wear clothes to official student meetings that are “consistent with Christian modesty.” After several female students complain about the rule, the Student Senate passes a bylaw that no student group may regulate the attire of any member for religious reasons. Other student groups, such as the Student Senate itself, impose dress codes.



Example

A female faculty member at a private, religious institution refuses to use the preferred pronouns of a transgender student, citing her personal religious belief that sex is immutable and conferred by God. The institution itself has more liberal religious beliefs, including that Christian charity and pastoral outreach requires the institution to use preferred pronouns.



Questions



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