

TITLE IX  
TRAINING  
AUGUST 7, 2024



NCSA

Nebraska Council of  
School Administrators



CURRENT STATUS

# “TITLE IX”

## ■ Part of the Education Amendments of 1972

Public Law 92-318

AN ACT

June 23, 1972  
[S. 659]

To amend the Higher Education Act of 1965, the Vocational Education Act of 1963, the General Education Provisions Act (creating a National Foundation for Postsecondary Education and a National Institute of Education), the Elementary and Secondary Education Act of 1965, Public Law 874, Eighty-first Congress, and related Acts, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “Education Amendments of 1972”.*

Education  
Amendments of  
1972.

## “TITLE IX”

- 20 U.S.C. § 1681

- 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 . . . .

# FEDERAL REGULATIONS

- “2020 Regulations”
- Issued by U.S. Department of Education May 19, 2020
- Effective August 14, 2020

# FEDERAL REGULATIONS

- “2024 Regulations”
- Issued by U.S. Department of Education April 29, 2024
- Effective August 1, 2024

# FEDERAL REGULATIONS

- How are federal regulations created and adopted?
- Administrative Procedures Act (5 U.S.C. § 500 et seq.)

# FEDERAL REGULATIONS

- Are they (regulations) the ultimate law-of-the-land?
- Not necessarily



# FEDERAL REGULATIONS

- Courts have power of review under the APA
- Court “shall” hold unlawful and set aside agency action, findings, and conclusions found to be ...
- ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right ...

# CHEVRON DOCTRINE

- 1984 Supreme Court (SCOTUS) case
- Situations where a federal statute is silent or ambiguous with respect to the specific issue at hand.
- Courts were required to defer to an agency determination if it had offered a permissible construction of the statute, even if not the reading the court would have reached if the question initially had arisen in a judicial proceeding.

# *LOPER OVER-RULE*

- Loper Bright Enterprises v. Raimondo, Secretary Of Commerce
- SCOTUS – June 28, 2024

## LOPER OVER-RULE

- *Chevron* cannot be reconciled with the APA by presuming that statutory ambiguities are implicit delegations to agencies.
- Perhaps most fundamentally, *Chevron's* presumption is misguided because agencies have no special competence in resolving statutory ambiguities. **Courts do.**

## LOPER OVER-RULE

- *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires . . .
- Courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

# LAWSUITS (& PRELIMINARY INJUNCTIONS)

June 13, 2024 (federal court in Louisiana)

- “The United States Department of Education ... [is] hereby enjoined and restrained from implementing, enacting, enforcing and taking action in any manner to enforce the Final Rule ... The final rule is hereby enjoined and restrained from going into effect”
- Louisiana, Mississippi, Montana, Idaho

June 17, 2024 (federal court in Kentucky)

- “The United States Department of Education ... [is] enjoined and restrained from implementing and enacting, enforcing, or taking any action in any manner to enforce the Final Rule ...
- Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia

June 11, 2024 (state court in Texas)

- Enjoined from using guidance documents from OCR

July 2, 2024 (federal court in Kansas)

- “Defendants are enjoined from enforcing the Final Rule against Kansas, Alaska, Utah, Wyoming, K.R.’s school, the schools attended by the current and prospective members of the Young America’s Foundation or Female Athletes United, as well as the schools attended by the children of the current and prospective members of Moms for Liberty.”\*\*\*

## LAWSUITS (& PRELIMINARY INJUNCTIONS)

- The State of Nebraska joined the states of Arkansas, Iowa, Missouri, North Dakota, and South Dakota, in a lawsuit against the U.S. Dept. of Education in federal district court for the Eastern District of Missouri.
- These States sought court order invalidating the 2024 Regulations as exceeding authority under the APA.

# LAWSUITS (& PRELIMINARY INJUNCTIONS)








- These States also sought a preliminary injunction during the pendency of the case.
- A preliminary injunction “pauses” or “stays” enforcement of any action until the case is decided.

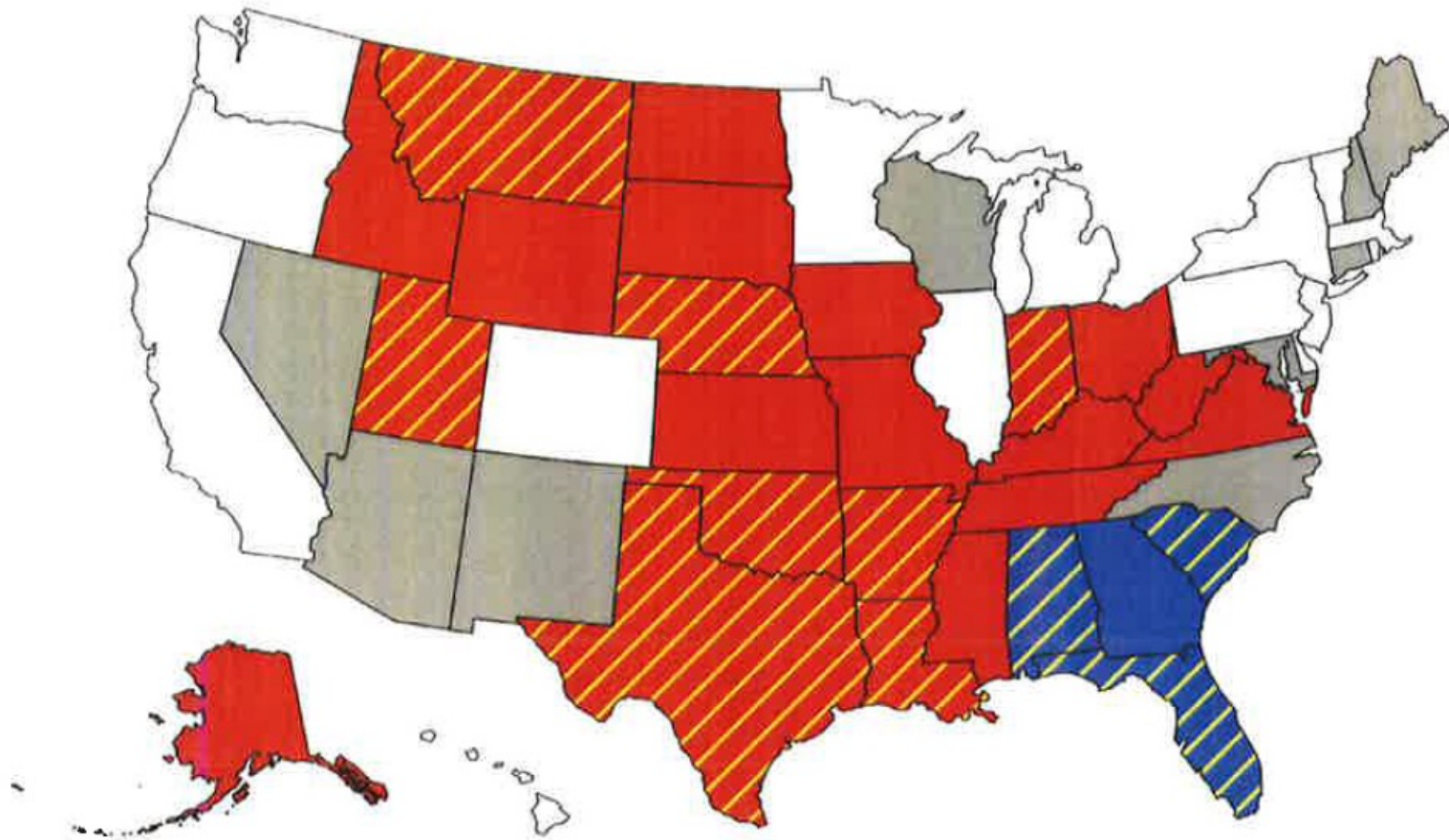


# LAWSUITS (& PRELIMINARY INJUNCTIONS)

- July 24, 2024 → E.D. Mo. enters Order granting Preliminary Injunction
- “[P]ending final resolution of this case, defendants, and all their respective officers, agents, employees, attorneys, and persons acting in concert or participation with them are enjoined from implementing, enacting, enforcing, or taking any action in any manner to enforce the Final Rule promulgated by the Department of Education titled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” and published in the Federal Register at 89 Fed. Reg. 33,474, set to become effective on August 1, 2024, against plaintiffs Arkansas, Missouri, Iowa, Nebraska, North Dakota, South Dakota and A.F., and is denied in all other respects.”

# 26 STATES WITH INJUNCTIONS

-  No Action
-  Amicus Brief
-  Complete Injunction
-  Do Not Implement (DNI) Directive
-  Current or Pending Litigation
-  Litigation & DNI
-  Injunction and DNI



# LAWSUITS (& PRELIMINARY INJUNCTIONS)

- August 1, 2024
- Department of Education website

As of July 31, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 [Final Rule](#) in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at <https://www2.ed.gov/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf>. Per Court order, this list of schools may be supplemented in the future. The Final Rule and this resource do not currently apply in those states and schools. Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools.



WHERE ARE WE AT TODAY?



# TITLE IX

- Title IX is “Title IX”
- Basic premise (no discrimination “on the basis of sex”) hasn’t changed since enactment in 1972

# TITLE IX

- Your goal?
- Not get sued; not have a complaint filed with OCR

# TITLE IX

- Substantive matters → follow statute (no discrimination “on the basis of sex”) and 2020 Regulations (for now)
- Procedural matters → follow 2020 Regulations, or (with some caution) elements of 2024 Regulations

# TITLE IX

- If your District has not modified its Title IX policy – e.g. you still have the 2020 version
  - You still have the 2020 Grievance Procedure
  - You still use these in your handbooks





# TITLE IX

- If your District has adopted a new Title IX policy and removed the Grievance Procedure from your policies

# AGENDA

1. Offenses covered under Title IX
2. Litigation involved
3. The role of the Title IX Coordinator
4. Reporting Title IX concerns
5. Investigating Title IX concerns
6. Resolving Title IX concerns
7. Recording efforts
8. Training
9. [Pregnancy and related conditions]
10. [Transgender students]



# TITLE IX OFFENSES



# TITLE IX OFFENSES

- Quid-pro-quo harassment
- Hostile environment harassment
- “Big Four” +

# QUID PRO QUO HARASSMENT

- 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.

## QUID PRO QUO HARASSMENT (2024)

- An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such aid, benefit, or service on a person's participation in unwelcome sexual conduct.

# QUID PRO QUO HARASSMENT

- Department said: “**threat of a detriment** falls within the definition of quid pro quo sex-based harassment, whether or not the threat is actually carried out because a threat to, for example, award poor grades unless a person participates in unwelcome sexual conduct, is a condition placed on the provision of the student’s education, which is a service of the recipient.”

# HOSTILE ENVIRONMENT

- 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.



## HOSTILE ENVIRONMENT (2024)

- Unwelcome sex-based conduct that, based on the totality of 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. creates a hostile environment).

# HOSTILE ENVIRONMENT (2024)

- Whether a hostile environment has been created is a **fact specific inquiry** that includes consideration of the following:
  - The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
  - The type, frequency, and duration of the conduct;
  - The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  - The location of the conduct and context in which the conduct occurred; and
  - Other sex-based harassment in the recipient's education program or activity

# SEXUAL ASSAULT

- An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the federal bureau of investigation
  - **Forcible Rape-** the carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in the instances where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity
  - **Forcible Sodomy-**oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in the instances where the victim is incapable of giving consent because of his or her youth or because of his/her temporary or permanent mental or physical incapacity
  - **Sexual Assault with an object-**to use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or not forcibly or against the person's will in the instances where the victim is incapable of giving consent because of his or her youth or because of his/her temporary or permanent mental or physical incapacity

# SEXUAL ASSAULT

- An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the federal bureau of investigation
  - **Forcible Fondling**-the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity
  - **Incest**- nonforcible intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
  - **Statutory rape**- nonforcible sexual intercourse with a person who is under a statutory age of consent.

# DATING VIOLENCE

- Violence committed by a person
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - Where the existence of such a relationship shall be determined based on a consideration of the following factors
    - The length of the relationship
    - The type of relationship
    - The frequency of interaction between the persons involved in the relationship

# DOMESTIC VIOLENCE

- Felony or misdemeanor crimes committed by a person who
  - Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;
  - Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
  - Shares a child in common with the victim; or
  - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

# STALKING

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress

# GROOMING (ASM)

- Adult Sexual Misconduct (ASM) is any sexual activity (physical or not) directed to a child with the purpose of developing a romantic or sexual relationship.
- Not all actions will be criminal, per se.
- Inappropriate conduct may include sexual comments and questions, jokes, taunting, and teasing, whether in person, by phone, or using electronic means.
- Social media platforms, image sharing, video streaming

## CHARACTERISTICS AND TACTICS OF ASM PERPETRATORS

Adult sexual misconduct (ASM) can be perpetrated by adults in all job categories within schools (Shakeshaft, 2004b<sup>2</sup>). For the 2001 *Hostile Hallways: Bullying, Teasing, and Sexual Harassment at School* survey, representatives from the American Association of University Women interviewed a nationally representative sample of 2,064 public school students in grades 8-11. They investigated students' experiences of sexual harassment (defined as sexual teasing, bullying, and unwanted touching), including the jobs held by the perpetrators. Students reported that unwanted sexual contact most commonly originated from

- teachers (18 percent);
- coaches (15 percent);
- substitute teachers (13 percent); and
- bus drivers (12 percent).

ASM research suggests that perpetrators who work in schools target students using the same methods as those who target children in other settings: They zero in on those who are vulnerable (Shakeshaft, 2004b). Perpetrators are calculating in their approach; they isolate, manipulate, and lie to children to gain sexual contact and make them feel complicit (Robins, 2000).



# GROOMING (ASM)

EXAMPLES OF SCHOOL PERSONNEL CONDUCT	APPROPRIATE	INAPPROPRIATE/HARMFUL
<p>Verbal / Written / Online Communications</p>	<p>Praise            Positive reinforcement for good work or behavior            Humor and friendly comments            Compliments that are not personal in nature            Interactions with students in plain sight of all, with doors open</p>	<p>Sexually provocative or degrading comments            Risque jokes            Singled-out student(s) for favors            Written greeting card messages, notes, texts, emails, social media posts, or yearbook inscriptions that are highly personal in nature            Suggestive teasing that references matters of gender or contains sexual innuendo</p>
<p>Physical Conduct</p>	<p>Personal contact in safe-touch areas (i.e., shoulders, upper back, arms, head, and hands) as long as the behavior is obviously appropriate, such as when giving a handshake or a pat on the back            Legitimate nonsexual touching, such as a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee</p>	<p>Patting the buttocks            Hugging if the child is not receptive, if the staff member is hugging too often, or for too long, or if the contact is romanticized or sexually intimate            Touching that is intimate, romantic, or sexual in nature            Meeting students away from school grounds during out-of-school hours or taking them away from school grounds before or after school            Using corporal punishment            Showing printed or web-based pornography and/or engaging students in pornographic activities            Being alone in a locked room with a student            Using cyberspace to interact privately with a student, or without other's knowledge, consent, and supervision</p>

# GROOMING (ASM)

ASM perpetration behaviors are often seen in three phases (Shoop, 2004):

- **Trolling and Testing.** The abuser is screening for possible candidates by testing the boundaries of the student, the home environment, and the school environment. The abuser is trying to identify a vulnerable child. A child may be identified as vulnerable because he or she is unsupervised, may not have close parental relationships, may be lonely or needy, may have inappropriate boundaries, or may have low self-esteem. Also, the targeted or vulnerable child may be one that the perpetrator has access to in a private setting. It is difficult to identify the motive during this phase (Seattle Public Schools with funding from the U.S. Department of Education, 2013).
- **Grooming.** Some of the warning signs in this grooming phase may be nonsexual and include the offender trying to move the relationship to a personal level, telling the student their personal problems, discouraging the student from talking with other school employees, or asking the student to run personal errands (Seattle Public Schools with funding from the U.S. Department of Education, 2013).
- **Exploiting and Lulling.** This phase involves manipulating the student while becoming more aggressive with abusive behaviors. This includes both sexualized behaviors and other activity that is designed to keep the sexual relationship ongoing and undiscovered. Perpetrators persuade students to keep silent, either by intimidation or threats, or by manipulating the child's affections. Secrecy protects the abuser and isolates the victim (Seattle Public Schools with funding from the U.S. Department of Education, 2013).

The phases of exploitation are directed not only at the targeted student, but at fellow staff members. Socially skilled perpetrators usually work hard at making sure that they are well-liked by staff and that the student will not be believed, even if the sexual relationship is disclosed (Seattle Public Schools with funding from the U.S. Department of Education, 2013).

PHASES OF ASM PERPETRATION BEHAVIORS	SCHOOLS	PARENTS	STUDENTS
<b>Trolling and Testing</b>	Perpetrators may apply for jobs at schools with lax ASM policies or little understanding about the incidence of ASM in schools.	Perpetrators look for parents who need help or who are disengaged from their parenting roles.	Perpetrators look for students who are vulnerable and will be open to someone who wants to fill an emotional void.
<b>Grooming</b>	Desensitizing the student to inappropriate behaviors and making the child feel special in sexual and nonsexual ways.		
<b>Exploiting and Lulling</b>	Perpetrators become increasingly aggressive in defending their conduct by indicating they are more caring and engaged with students than other adults.	Perpetrators begin to assume a supportive family member role while isolating the student from his or her family.	Perpetrators bribe, extort, isolate, intimidate, manipulate, and/or coerce the student.

# GROOMING (ASM)

## COMMON TARGETS OF ASM

While almost all children and youths respond to positive attention from an educator and other adults within the school system, students who are estranged from their parents, who are unsure of themselves, who are engaged in risky behavior, or whose parents are engaged in risky behavior are often targeted, not only because they might be responsive, but also because they are more likely to maintain silence (Robins, 2000). These children are easier to control, may welcome attention, and could be perceived as less credible if they make allegations.

Females comprise the overwhelming majority of adult sexual misconduct (ASM) victims (Sedlak et. al., 2010). African-American children are nearly twice as likely as white children to be targeted, while Hispanic children face a slightly elevated risk as compared to non-Hispanic white children (Sedlak et. al., 2010). Children with disabilities are almost three times more likely than their disability-free peers to become ASM targets, and those with intellectual and mental health disabilities appear to be most at risk (Lund and Vaughn-Jensen, 2012). This problem is compounded when a disability interferes with a child's ability to report abuse to an adult (Skarbek, Hahn, and Parrish, 2009).

A recent survey of middle school and high school students ages 13 and older conducted by the Gay, Lesbian, and Straight Education Network (GLSEN) (Kosciw, Greytak, Palmer, and Boesen, 2014) found that children who are lesbian, gay, bisexual, transgender, or questioning their sexual identities (LGBTQ) sometimes hesitate to report ASM, believing that the incidence of homophobia among school personnel will prove to be an insurmountable barrier to getting help. In fact, GLSEN indicated that 56.9 percent of LGBTQ student responders were subjected to homophobic remarks from their teachers or other school staff.



WHERE IS SEX DISCRIMINATION  
PROHIBITED?





# ANY EDUCATION PROGRAM OR ACTIVITY

- All education programs or activities operated by the School

# ANY EDUCATION PROGRAM OR ACTIVITY (2024)

- “All” operations
- Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and context in which the sexual harassment occurs
- Includes when conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United State.

**LEGAL  
IMPLICATIONS  
FOR SEXUAL  
ABUSE OR  
HARASSMENT  
OF STUDENTS**



Title IX



42 U.S.C. 1983



State Tort Act

# ELEMENTS OF TITLE IX CASE



- Title IX Monetary liability requirements:
  - School official must have authority to take corrective action to address the alleged discrimination (**Appropriate Person**);
  - Appropriate Person must have **“actual knowledge”** of discrimination;
  - School official’s response amounts to **deliberate indifference** to discrimination/harassment



## TITLE IX VOCABULARY

- **Appropriate person:** An “appropriate person” is one who at a minimum has authority to address discrimination and to institute corrective measures on the recipient’s behalf.
- In Nebraska by statute an “appropriate person” would be a teacher, para-educator, or another school district employee.
- All are reporters of child abuse.

## TITLE IX VOCABULARY

■ **Actual Knowledge:** “School administrators have actual knowledge only of the incidents that they witness or that have been reported to them.”

■ *Doe v. Galster*, 768 F.3d 611 (7th Cir. 2014)

■ However, it has been held that “the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student.”

■ *Escue v. N. Okla. Coll.*, 450 F.3d 1146 (10th Cir. 2006)

## TITLE IX VOCABULARY

- **Deliberate Indifference:** The deliberate indifference standard has been described as “stringent” and “requiring proof that [the official] disregarded a known or obvious consequence of his action.”
  - *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397 (1977)
- Deliberate indifference is not a “mere reasonableness standard . . . it requires a showing of a response that was more deficient than merely “negligent, lazy or careless.”
  - *Davis v. Monroe Cty. Bd. of Educ.*, 536 U.S. 629 (1999)

## TITLE IX VOCABULARY

- **Said another way:**
- **You do NOT act with deliberate indifference if your actions were**  
**“NOT CLEARLY UNREASONABLE”**

## TITLE IX VOCABULARY

- **Even a showing of “heightened negligence” is insufficient to prove deliberate indifference**
- **Courts have found that intervention to investigate or stop harassment that was inept, erroneous, ineffective, or negligent was insufficient to prove deliberate indifference**
- **When a school receives actual knowledge that its remedial efforts in responding to harassment are insufficient and continue using those methods anyway, the institution may be liable under Title IX**

## BUT...OUR JURY SYSTEM

- There is a belief that schools are responsible 24 x 7 x 365.

## 42 U.S.C. 1983



- The law is clear that physical sexual abuse of a student by a school teacher [or coach] is actionable under § 1983 if such physical abuse occurred under color of state law.
- In order for a School District to be liable under § 1983 for monetary damages, a Plaintiff must prove that the School District violated his/her constitutional right to liberty either "pursuant to official municipal policy" or as part of "a custom or usage with the force of law." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

## 42 U.S.C. 1983- VOCABULARY

1) the existence of a continuing, widespread, persistent **pattern** of constitutional misconduct by the governmental entity's employees;

2) **deliberate indifference** to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and

3) that the plaintiff was **injured** by acts pursuant to the governmental entity's custom, *i.e. that the custom was a moving force behind the constitutional violation.*



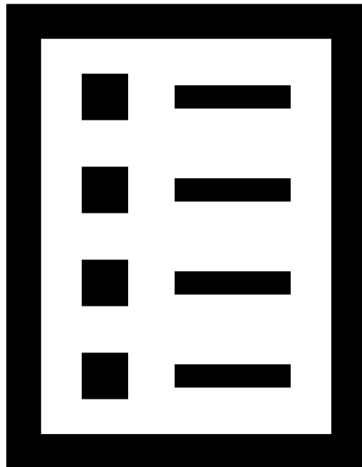
## 42 U.S.C. 1983-FAILURE TO TRAIN

- **Another angle for Plaintiffs - Failure to Train under § 1983:**
- **"In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983.**

## 42 U.S.C. 1983-FAILURE TO TRAIN

- One way to defend a failure to train claim is with strong board policies regarding training and preventing sexual abuse.
- Almost a perfect defense –
  - When the record clearly **indicates that the Board has developed and implemented policies and procedures for handling complaints of sexual abuse, and**
  - when the Board has implemented various programs to instruct principals [or other employees] on reporting procedures, **it is evidence of the Board's sensitivity to the constitutional rights of its students as they relate to incidents of child abuse.**
- *Thelma D. v. Board of Educ.*, 934 F.2d 929 (8th Cir. 1991)

# STATE TORT CLAIMS



- **Basis for negligence actions - e.g. duty, breach of duty, proximate cause, damages.**
  - **Failure to warn.**
  - **Failure to supervise.**
  - **Failure to follow policies, practices or procedures.**
  - **Negligent hiring/retention.**
    - **Reference letter for teacher who was accused of abuse of students.**
    - **Retaining teacher who has “crossed the line.”**

## STATE TORT CLAIMS

- In addition to the federal protections offered to victims of sexual abuse from their teachers or coaches, Plaintiffs have been successful in obtaining relief in State Courts.
- Generally, schools are not held vicariously liable for a teacher's sexual harassment through respondent superior.
- However, plaintiffs are generally **free to pursue claims against school districts for their own negligence.**

## WHAT IS A TITLE IX COORDINATOR?

- Under Title IX, a recipient must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and the Department's implementing regulations



# WHAT IS A TITLE IX COORDINATOR?

- Title IX coordinator is responsible for coordinating the recipient's responses to all complaints involving possible sex discrimination including:
  - Monitoring outcomes
  - Identifying and addressing any patterns
  - Assessing effects on the school climate
- *How do you do this?*

## WHAT IS A TITLE IX COORDINATOR?

- Title IX Coordinator is a creation from guidance and regulations
- Have a Title IX Coordinator
- Title IX Coordinator is involved in the investigation and resolution of complaints.
- Schools inform the Title IX coordinator of all reports and complaints raising Title IX issues

# WHAT IS A TITLE IX COORDINATOR?

- Should have **knowledge** of the recipient's **policies and procedures on sex discrimination** and should be involved in the **drafting and revision** of such policies and procedures to ensure that they comply with the requirements of Title IX.
- Recipients should provide Title IX coordinators with access to information regarding **enrollment** in particular subject areas, participation in athletics, administration of school discipline, and incidents of sex-based harassment.



# WHAT IS A TITLE IX COORDINATOR?

- Should give **regular training for faculty and staff** outlining their rights and obligations under Title IX including:
  - Appropriate responses to reports of sexual misconduct
  - Obligation to report sexual misconduct
  - The extent to which counselors and advocates may keep a report confidential

# WHAT IS A TITLE IX COORDINATOR?

- Give **regular training of students** outlining their rights under Title IX
  - What constitutes sexual misconduct?
  - What is a hostile environment?
  - Definition of consent
  - Reporting options
  - Grievance procedures
  - Disciplinary codes
  - Who at the school to speak to in confidence
  - Protections against retaliation



# INVESTIGATING TITLE IX CONCERNS



# WHO CAN FILE A TITLE IX COMPLAINT?

- ANYONE
- Not focused on the “formal” complaint process
- If someone brings to you a credible Title IX concern, the Title IX coordinator should determine what steps, if any, can be taken to resolve the issue
  - Is a complainant identified?
  - Is a respondent identified?

# FIRST STEPS



Title IX coordinator should sit down with the complainant (and parents if applicable) to discuss complaint, availability of remedies, supportive measures, availability of remedies



Remember the deliberate indifference standard!

## SUPPORTIVE MEASURES

- Individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:
  - Restore or preserve the party's access to the recipient's education program or activity, including measures that are designated to protect the safety of the parties or the recipient's educational environment; or
  - Provide support during the recipient's grievance procedure and (if applicable) informal resolution process

# SUPPORTIVE MEASURES

- Supportive measures may vary depending on what the recipient deems to be reasonably available. These measures may include, but are not limited to:
  - Counseling
  - Extension of deadlines and other course related adjustments
  - Restrictions on contact applied to one or more parties
  - Leaves of absence
  - Changes in class, work, housing, or extracurricular activity (regardless of whether there is not a comparable alternative)
  - Training and education programs related to sex-based harassment

# SUPPORTIVE MEASURES



Supportive measures must not unreasonably burden either party and must be designed to protect the safety of the parties or the recipient's educational environment, or to provide support during the recipient's grievance procedures/informal resolution process.



A recipient must not impose such measures for punitive or disciplinary reasons



A recipient may, as appropriate modify or terminate supportive measures at the conclusion of the grievance procedures/informal resolution, or the recipient may continue them beyond that point



## SUPPORTIVE MEASURES

- If the complainant or respondent is a child with a **disability**, the Title IX Coordinator must consult with one or more members, as appropriate of the student's IEP team. The IEP team will help the Title IX Coordinator comply with IDEA placement rules.

## DOCUMENTATION!

- If the inquiry ends with a meeting with the complainant and the offer and acceptance of supportive measures - be sure to document the meeting, what was discussed, and the outcome!



# INVESTIGATION

- Recipient should provide for an adequate, reliable, and impartial investigation of complaints.

# INVESTIGATION

## When should I investigate?

- Every complaint, although the extent may vary depending on the circumstances
- Example:
  - Sexual assault on or near campus versus
    - May involve interviews with witnesses, the complainant, respondent, video footage review, police involvement
  - One-off comment by another student
    - May involve a quick conversation with the teacher or respondent and the offering of supportive measures

## Why should I investigate?

- Deliberate indifference
- Opportunity to remedy concern
- Opportunity to impose disciplinary sanctions

# NOTICE TO RESPONDENT AND COMPLAINANT

- Provide or offer some type of notice to complaint:
  - Sufficient information available at the time to allow the parties to respond to the allegations. Includes
    - Identities of parties
    - Conduct alleged to constitute sex discrimination and
    - The date and location of the incident

# COMPLAINT BY TITLE IX COORDINATOR

- To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following factors:
  - The complainant's request not to proceed with initiation of a complaint
  - The complainant's reasonable safety concerns regarding initiation of a complaint
  - The risk that additional acts of sex discrimination would occur if a complaint is not initiated
  - The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence
  - The age and relationship of the parties, including whether the respondent is an employee of the recipient
  - The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals
  - The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
  - Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedure.

# INVESTIGATION

## Procedures:

- Provide the parties with the opportunity to present witnesses and provide pertinent information
- An evaluation of all relevant information and documentation to the alleged discriminatory conduct

## Who should be the investigator?

- We recommend that the Title IX Coordinator is involved in selecting the investigator depending on the circumstances of the complaint
- Could be the Title IX Coordinator or someone else

## Timelines?

- See timelines in 2020 Regulations
- If using 2024 Regs as guidelines, be reasonable and flexible

# INVESTIGATION

- Treat complainants and respondents equitably
- Avoid conflicts of interest or bias
- Do not predetermine or assume respondent is responsible
- Protect privacy
- Do not allow retaliation
- Only consider relevant evidence
  - Avoid sexual history of complainant and/or respondent
  - Avoid privileged information



# INVESTIGATION

- Conclusion of investigation
  - Provide the parties an “opportunity” to review the evidence
  - Written report
    - Preponderance of the evidence standards
  - Waiting periods?
    - Not necessary- but use your best judgment

# HOW TO PERFORM AN INVESTIGATION



## Preparation

Notify appropriate administrators

Formulate questions to ask alleged victim, perpetrator, and witnesses

If students involved, contact parents of alleged victim

Gather info from records, etc.



## Contact police/authorities?

Note: OCR has stated that police investigations or reports **do not relieve** the school of its duty to respond promptly and effectively.

Legal standards for criminal investigations are different and so police reports or investigations may not be determinative of whether harassment occurred under Title

IX

# HOW TO PERFORM AN INVESTIGATION

- **Actual investigation**
  - Interview alleged **victim**
  - Interview alleged **perpetrator**
  - Interview **witnesses**
  - **Follow up** interviews with alleged victim and perpetrator

# HOW TO PERFORM AN INVESTIGATION

## ■ Interviews

- Take **notes**
- If possible, have someone else present who can also take notes
  - This person can also serve as a **witness** if the interviewee later recants.
- **Ask the witness to not talk** with other witnesses, the accused or the complainant
- Find out if the witness is also a potential complainant.
- If witnesses are going to guess or give an opinion, **make sure they tell you it is a guess/opinion**

# HOW TO PERFORM AN INVESTIGATION

- **Does the witness know other witnesses?**
- **Does the witness know of other incidents?**
- **What does the witness know about the complainant—other incidents/information?**
- **Advise the witness to come to you if anyone threatens/harasses him/her**
- **Advise the witness to contact you if he/she thinks of anything else**
- **Ask if there is anything else the witness wants to tell that you didn't ask**
- **Is there any documentary evidence?**

## HOW TO PERFORM AN INVESTIGATION

- **“What happened then,” “then what happened,” “what happened next”— boring, but not leading.**
- **Anything else ...Anything else ...?**
- **Keep linking pronouns to actual proper names— “when you say ‘she’, who do you mean?”**

# HOW TO PERFORM AN INVESTIGATION

- **Adopt a calm, impartial, fair, and deliberate mindset; do not prejudge the allegations or create that perception**
  - Open ended questions
  - Be the calm one in the storm; no witch-hunts--reputations are at stake
- **Your actions will be reviewed, and challenged**
  - The materials you develop and your communications may be subject to later disclosure

# IMPARTIALITY

- Impartial means that you do not have any **prejudice** towards the complainant or respondent i.e. lack of bias
- Impartial means that you will render a decision based **ONLY** on the **evidence**
- Impartial means you do not opine about the facts before considering **ALL** the **facts**
- Impartial means you avoid **conflicts of interest**: an investigator or decision maker should recuse themselves from a particular case if they have a conflict of interest



# AVOIDING BIAS



**Confirmation Bias**: placing more value on information that supports our existing belief



**Anchoring Bias**: being overly influenced by the first piece of evidence/information we receive



**Misinformation effect**: the tendency for post-event information to interfere with the memory of the original event. Knowledge of this effect has led to a mistrust of eyewitness information.



**Halo** effect: your overall impression of a person influences how you feel and think about their character. This especially applies to physical attractiveness influencing how you rate their other qualities.

# BURDEN OF PROOF- PREPONDERANCE OF THE EVIDENCE

**“More likely  
than not”**

**“Greater  
Weight of  
Evidence”**

# FEDERAL RULES OF EVIDENCE 401: TEST FOR RELEVANT EVIDENCE

- Evidence is relevant if:
  - (a) it has a tendency to make a fact more or less probable than it would be without the evidence; and
  - (b) the fact is of consequence in determining the action.

# HOW TO PERFORM AN INVESTIGATION

- Document conclusions and findings
  - **Thoroughly document** the entire investigation and any responsive action
  - Organize and **retain all notes** and evidence
  - **Save** electronic communications
  - **Statute of Limitations does not start to run until student is 21 YEARS OLD**

# HOW TO PERFORM AN INVESTIGATION— WHEN THE POLICE ARE ALSO INVOLVED

- Remember - OCR says you cannot rely on outcome of police investigation
- Important not to interfere with police investigation
- Do not wait for police investigation to end before taking action

# HOW TO PERFORM AN INVESTIGATION— WHEN THE POLICE ARE ALSO INVOLVED

## ■ Understand differences in Roles

Police Investigator	Administrative Investigator
<ul style="list-style-type: none"><li>• Trying to establish probable cause for arrest</li><li>• Uses a wide lens</li><li>• Employs a variety of tactics</li><li>• Works for society in the interest of justice</li></ul>	<ul style="list-style-type: none"><li>• Concerned with equity-civil right issue</li><li>• Looks at only the reported case</li><li>• Generally straight forward approach</li><li>• Works for school to ensure policy compliance</li></ul>

# HOW TO PERFORM AN INVESTIGATION— WHEN THE POLICE ARE ALSO INVOLVED

- Talk to police about Title IX Requirements for concurrent investigation
- Models for Concurrent Investigation
  - Independent: Each investigator works on their own. Information is shared only through formal process as investigations reach certain stages
  - Joint: Investigators communicate frequently through informal and formal methods with status updates
  - Simultaneous: Investigators work together by coordinating efforts

## DISMISSALS?

- Possible under 2020 Regulations
- (But see 2024 Regs)
- All Title IX concerns should be addressed and remedied as appropriate
- Do not get bogged down in the regulations



# EMERGENCY REMOVAL

- May utilize emergency removals, provided that:
  - Individualized safety and risk analysis
  - Determination that an imminent and serious threat to the health and safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination
  - Provide respondent with notice and an opportunity to challenge the decision immediately following the removal
  - Subject to limitations under the IDEA

# ADMINISTRATIVE LEAVE

- May place an employee respondent on administrative leave during the pendency of the grievance procedure
- Subject to Section 504 and the ADA

# STATE LAW ON STUDENT DISCIPLINE AND TEACHER CANCELLATION/TERMINATION

- Complying with the NE discipline act and the Teacher Tenure Act for cancellation and termination complies with Title IX best practices
  - They provide notice
  - They include investigation
  - Both parties can review the evidence and question each other during the hearing
  - The burden of proof is on the school
  - There is an impartial decisionmaker
  - There is an opportunity for the decisionmaker to evaluate credibility
- Involve Title IX Coordinator more than you may have before

# END OF TITLE IX COMPLAINT

Best practice is to have another person involved to review the investigation

- i.e. investigator has Title IX Coordinator review or Title IX Coordinator has administrator review their work

Why?

- Two sets of eyes helps catch matters that one person may have missed
- Deliberate indifference standard
- Helps maintain impartiality

What would that person do?

- Independently assess whether the conclusions of the investigations are supported by the evidence; that the investigation was handled properly; all parties provided due process; did not consider inappropriate evidence; all relevant parties and witnesses interviewed; assure no issues with credibility; followed all procedures

Last step:

- Initiate disciplinary sanctions or remedies as necessary

# APPEALS

- Offer of appeal
- Could be to the superintendent
- Put limits in your procedure



RECORDKEEPING

# RECORDKEEPING

- For each complaint of sex discrimination, record documenting the informal resolution process or the grievance procedures and the resulting outcome
- For each notification, the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX, records documenting the actions the recipient took to meet its obligations
- All materials used to provide training
- Note: SOL for Title IX lawsuit is 4 years after the student turns 21



[PREGNANCY  
AND RELATED  
CONDITIONS]



# NONDISCRIMINATION

- Cannot discriminate in an educational program or activity against any student based on the student's **current, potential, or past pregnancy or related condition**
- (It is not discrimination to allow a student to voluntarily participate in a separate program that is comparable to one utilized by students who are not pregnant)

## RESPONSIBILITY OF TITLE IX COORDINATOR

- Include Title IX Coordinator when a student, person who has a legal right to act on behalf of the student, informs ***any employee*** of a student's pregnancy or related condition, the employee must promptly.

# RESPONSIBILITY OF TITLE IX COORDINATOR

- Title IX Coordinator to coordinate:
  - Inform the student (or legal guardian) of the rights and protections under Title IX
  - Make reasonable modifications to policies, practices, or procedures
  - Allow the student to voluntarily access any separate and comparable portion of the recipient's education program or activity
  - Allow the student to take a voluntary leave of absence to cover, at a minimum, the time deemed medically necessary by the student's healthcare provider
  - Ensure student can access a lactation space

# REASONABLE MODIFICATIONS

- Must be based on the student's individualized needs
- Must consult with the student
- A modification that can fundamentally alter the nature of its education program or activity is not reasonable
- The following are assumed reasonable in all circumstances and do not need documentation to support
  - Bigger uniforms
  - Allowing student to keep water nearby and to drink it
  - Use of a bigger desk
  - To sit or stand
  - Take breaks to eat, drink, use the restroom
  - Utilizing lactation spaces

# REASONABLE MODIFICATIONS

- Student has discretion to accept or decline each reasonable modification offered
- If modifications accepted, school must implement them
- Can include, but are not limited to:
  - Breaks during class to express breast milk, breastfeed, or attend to health needs such as eating, drinking, using the restroom
  - Intermittent absences to attend medical appointments
  - Access to online or homebound education
  - Changes in schedule or course sequence
  - Extensions of time for coursework and rescheduling of tests and examinations
  - Allowing a student to sit or stand or carry water nearby
  - Counseling
  - Changes in physical space or supplies (footrest or larger desk)\
  - Elevator access
  - Other changes to policies, practices, or procedures.

# REASONABLE MODIFICATIONS

## ■ Documentation

- Cannot require supporting documentation unless the documentation is necessary and reasonable for the school to determine reasonable modifications (or time off)

# LEAVES OF ABSENCE

- Must allow at a minimum as long as the student's healthcare provider says is medically necessary
- If your district has a leave policy that allows more time, you must allow the student to elect to take that amount of time off instead
- When the student returns, the student must be reinstated at the academic status, and as practicable, to the extracurricular status the student held when the leave began

# LACTATION SPACES

- Must be a space other than a bathroom
- Clean
- Shielded from view
- Free from intrusion of others



# CERTIFICATION TO PARTICIPATE

- Cannot require a student to provide certification from a healthcare provider or any other person that the student is physically able to participate in a class, program, or extracurricular unless
  - Certified level of physical ability or health is necessary for participation
  - School requires that level of certification from everyone
  - The information is not used to discriminate



[TRANSGENDER STUDENTS]



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# TRANSGENDER STUDENTS & BATHROOMS AND LOCKER ROOMS

- 
- (Nearly) Every federal case to evaluate the issue has held that transgender students are entitled to use the restroom (& Locker room) associated with their gender identity under Title IX and the Equal Protection Clause of the 14th Amendment.

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# FAILED OPPOSITION ARGUMENTS- PRIVACY

- 
- Protecting student privacy is an important governmental objective- but—
  - Public restrooms are inherently non-private
  - Transgender students pose no greater threat to the limited privacy that exists than an “overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions.”
  - If a student is uncomfortable being in front of *any* other student, they are able to utilize the private stall

# FAILED OPPOSITION ARGUMENTS

- Religious Freedom
- Courts have said that a policy allowing transgender students to use the bathroom that corresponds to their gender identity does not violate the first Amendment because such a policy is neutral on religion.
- I.E. the policy “does not require only religious students to share a locker room with a transgender student . . . In other words, [the policy] affects all students and staff – it does not place demands on exclusively religious persons or conduct.”

# TRANSGENDER STUDENTS IN PUBLIC RESTROOMS

- First Case to uphold a policy of separating restrooms by biological gender
- *Adams v. Sch. Bd. of St. Johns Cnty.* (11<sup>th</sup> Circuit Dec. 30, 2022)
  - “Separating school bathrooms based on biological sex passes constitutional muster and comports with Title IX”

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# HOW DO I KNOW?

- 
- **Gender identity—A person’s sincerely held core belief of their own gender**
    - **Medical history**
    - **Care or treatment of the gender-related identity**
    - **Consistent and uniform assertion of the gender-related identity**
    - **Any other evidence that the gender-related identity is sincerely held, part of a person’s core identity or not being asserted for an improper purpose.**

# FAQ ON GENDER IDENTITY

- Determining gender identity
- The Department said:
  - The Department is aware that many recipients rely on a student's consistent assertion to determine their gender identity, or on written confirmation of the student's gender identity by the student or student's parent, counselor, coach, or teacher.
  - Requiring a student to submit to invasive medical inquiries or burdensome documentation requirements to participate imposes more than de minimis harm.
  - Not allowed to require updated birth certificate or evidence of medical treatment



# FAQ ON GENDER IDENTITY AND SEXUAL ORIENTATION

## ■ Parental rights

### ■ Department said:

- When a parent and minor student disagree on how to address sex discrimination against that student, **deference to the judgment of the parent**, guardian, or other authorized legal representative with a legal right to act on behalf of that student **is appropriate**.
- **Nothing in the final regulations prevents a recipient from disclosing information** about a minor child **to their parent** who has the legal right to receive disclosures on behalf of their child.

# SUMMARY

- Handle cases on an individualized basis
- Do not have to have a policy (not recommended)
  - Court cases outside of the Title IX realm have not been successful for anti-lgbtq policies
- Do not lie to parents
- No affirmative duty to inform parents
- No violation if you choose to inform parents