



**VOGEL LAW FIRM PLLC**  
AN EDUCATION LAW FIRM

# **THE NEW TITLE IX REGULATIONS IN PUBLIC SCHOOLS**

**MAY 2024**

# DISCLAIMER

- The information provided during this presentation, including on this Power Point, does not and is not intended to constitute legal advice or create an attorney-client relationship.
- Instead, all information and content provided during this presentation are for general informational purposes only.
- Attendees are encouraged to contact their board attorney to obtain advice with respect to legal matters.

# STATUS OF THE NEW TITLE IX REGULATIONS

- April 19, 2024: Regulations issued
- April 29, 2024: Multiple lawsuits filed
- August 1, 2024: Effective date of new regulations

# 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.”

Title IX of the Education Amendments of 1972

20 U.S.C. § 1681



# TITLE IX IS ENFORCED IN TWO WAYS

- Administrative Enforcement
  - Office for Civil Rights (OCR), U.S. Department of Education
- Judicial Enforcement
  - Private right of action (lawsuit), *Cannon v. University of Chicago* (1979)

# FEDERAL REGULATIONS

- Federal regulations are the rules that are issued by federal agencies to assist the agencies in implementing the laws.
- Federal agencies must be authorized by law to issue regulations, and the regulations the agencies issue must be consistent with the law.
- Regulations generally go through a rulemaking process that requires prior notice and public comment on proposed regulations.

# WHY WERE NEW TITLE IX REGULATIONS ISSUED BY THE BIDEN ADMINISTRATION?

- Since the 2011 Dear Colleague Letter issued by OCR during the Obama Administration, successive administrations have reversed each other regarding Title IX implementation.
- The issue with the 2011 Dear Colleague Letter primarily concerned the lack of procedural protections that schools had to provide individuals who were accused of sexual harassment and sexual assault.

# WHY WERE NEW TITLE IX REGULATIONS ISSUED BY THE BIDEN ADMINISTRATION?

- The Trump Administration rescinded the Obama Administration's 2011 Dear Colleague Letter, as well as its 2014 Q&A document.
- In 2020, the Trump Administration also issued the first Title IX *regulations* regarding sexual harassment and sexual assault, requiring schools to provide individuals accused of sexual harassment and sexual assault with sufficient procedural protections.



# WHY WERE NEW TITLE IX REGULATIONS ISSUED BY THE BIDEN ADMINISTRATION?

- In June 2021, the Biden Administration announced a Title IX enforcement policy to interpret Title IX as prohibiting discrimination on the basis of sexual orientation and gender identity.
- In September 2021, 20 Republican-led states sued the Department of Education, and, in July 2022, a federal judge in Tennessee temporarily blocked the Department from enforcing the new enforcement policy in those 20 states pending the outcome of the case.
  - Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, South Dakota, and West Virginia

# WHY WERE NEW TITLE IX REGULATIONS ISSUED BY THE BIDEN ADMINISTRATION?

- On April 19, 2024, the Biden Administration issued new Title IX regulations regarding sexual harassment and sexual assault to accomplish two main goals:
  1. Reverse the Trump Administration's regulations requiring schools to provide sufficient procedural protections to individuals accused of sexual harassment and sexual assault.
  2. Codify in federal regulations that sex discrimination includes discrimination based on sex stereotypes, sex characteristics, sexual orientation, and gender identity.

# SOME OF THE CHANGES IN THE NEW TITLE IX REGULATIONS FOR SCHOOL BOARDS

## 1. Includes more conduct as “sex-based harassment”

Hostile environment harassment is 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.

Previously, the regulations prohibited unwelcome sexual conduct only if it was so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.

## **SOME OF THE CHANGES IN THE NEW TITLE IX REGULATIONS FOR SCHOOL BOARDS**

2. Requires schools to respond “promptly and effectively” upon knowledge of conduct that “reasonably may constitute sex discrimination.”

Previously, schools were required to respond when they had “actual knowledge” of allegations of “sexual harassment,” and only in a manner that is not deliberately indifferent.

## **SOME OF THE CHANGES IN THE NEW TITLE IX REGULATIONS FOR SCHOOL BOARDS**

### 3. Increases the potential for informal resolution.

Schools may offer an informal resolution process if appropriate whenever they receive a complaint of sex discrimination or have information about conduct that reasonably may constitute sex discrimination.

Previously, schools were permitted to use an informal resolution only if a formal complaint alleging sexual harassment had been filed.

## **SOME OF THE CHANGES IN THE NEW TITLE IX REGULATIONS FOR SCHOOL BOARDS**

4. Allows the investigator and the decisionmaker to be the same person in grievance proceedings (known as the “single investigator” model).

Previously, the “single investigator” model was prohibited.

## **SOME OF THE CHANGES IN THE NEW TITLE IX REGULATIONS FOR SCHOOL BOARDS**

5. Expands the scope of “sex discrimination” to include “discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”

Previously, there was no regulation on the scope of sex discrimination because the Trump Administration’s 2020 regulations focused on providing rules regarding a school’s response to actual knowledge of sexual harassment or sexual assault.

# CONFLICT BETWEEN NEW TITLE IX REGULATIONS AND STATE LAW

- Under the Supremacy Clause of the U.S. Constitution, federal law is “the supreme Law of the Land” notwithstanding any state law to the contrary.
- Express preemption
- Implied preemption
  - Conflict preemption
  - Field preemption
- However, federal law does not supersede state law “unless that was the clear and manifest purpose of Congress.”



## CONFLICT BETWEEN NEW TITLE IX REGULATIONS AND STATE LAW

- New Title IX regulation: “The obligation to comply with Title IX and this part is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or this part.”
- But if the new Title IX regulation’s prohibition of discrimination on the basis of sex stereotypes, sex characteristics, sexual orientation, and gender identity is not the clear and manifest purpose of Congress, then the new Title IX regulations have not preempted state law.

# CONFLICT BETWEEN NEW TITLE IX REGULATIONS AND STATE LAW

- Kansas:

2023 Session Laws Chapter 84, SB 180

“Section 1. (a) Notwithstanding any provision of state law to the contrary, with respect to the application of an individual’s biological sex *pursuant to any state law or rules and regulations*, the following shall apply:

(1) An individual’s “sex” means such individual’s biological sex, either male or female, at birth;

# CONFLICT BETWEEN NEW TITLE IX REGULATIONS AND STATE LAW

- Kansas:

2023 Session Laws Chapter 13, HB 2238

Sec. 3. (a) Interscholastic, intercollegiate, intramural or club athletic teams or sports that are sponsored by a public educational entity or any school or private postsecondary educational institution whose students or teams compete against a public educational entity *shall* be expressly designated as one of the following based on biological sex:

- (1) Males, men or boys;
- (2) females, women or girls; or
- (3) coed or mixed.

(b) Athletic teams or sports designated for females, women or girls shall not be open to students of the male sex.

# CONFLICT BETWEEN NEW TITLE IX REGULATIONS AND STATE LAW

- North Carolina:

Session Law 2023-109, Fairness in Women's Sports Act

e. All teams participating in interscholastic or intramural athletic activities *shall* comply with the following:

1. Each team shall be expressly designated by the biological sex of the team participants as one of the following:

I. Males, men, or boys.

II. Females, women, or girls.

III. Coed or mixed.

2. Athletic teams designated for females, women, or girls shall not be open to students of the male sex.

3. For purposes of this sub-subdivision, a student's sex shall be recognized based solely on the student's reproductive biology and genetics at birth.

# NEXT STEPS

- School boards have the following options with respect to the issue of whether sex discrimination includes discrimination on the basis of sex stereotypes, sex characteristics, sexual orientation, and gender identity :
  - Revise board policies and/or the school district's practices to be consistent with the new Title IX regulations (and case precedents, if applicable)
  - Postpone revision of board policies and school district practices until the courts rule in the pending lawsuits, assuming the courts rule prior to the August 1 effective date
  - Ignore the new Title IX regulations (and case precedents, if applicable) on the ground that they go beyond the Title IX statute and are therefore invalid and/or on the ground that they conflict with a state statute that exposes the board to liability if it is violated.

# THANK YOU!

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