




**June 18, 2024**

## What You Need to Know About the Biden Administration's New Title IX Changes

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## POMS

### Before We Begin – A Word of Warning

- Federal Judge in Louisiana blocked implementation just last week (only applies to Louisiana, Mississippi, Idaho, and Montana).
- Just yesterday (6/17/24), another District Court Judge in Kentucky also blocked the changes in 5 other states (Kentucky, Ohio, Tennessee, Indiana, Virginia, and West Virginia)
  - At least 2 other similar challenges are underway involving at least 10 different states.
  - Governors in many states are advising education officials not to adhere to the changes.
- The implementation date is August 1, 2024, but these court challenges may impact that.
- Changes and comments are more than 1,500 pages - **We're all working through it!**

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## POMS

### Presenters

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## POMS

### Title IX – In Its Entirety

#### Title IX provides:

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.

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## POMS

### Consistent Concepts

- Effect on educational benefits.
- Access to educational programs or activities.
- Due process.
- Conflict of interest.

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## POMS

### New Definitions

- **Complainant**
  - Student or employee.
  - Other person – attempting to participate in educational programs or activities.
- **Confidential employee**
  - Covered by federal or state laws.
  - Confidential resource for providing services connected with sex discrimination (only information related to sex discrimination).
  - Institutional review (Higher Ed).

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## New Definitions – cont.

### Parental Status

- Under 18
- Or someone over 18 incapable of self-care
- Parent
  - Adoptive parent
  - Foster parent
  - Step-parent
  - Legal custodian or guardian
  - In loco parentis
  - Actively seeking legal custody, guardianship, visitation, or adoption

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## New Definitions – cont.

### Pregnancy or related conditions

- Pregnancy, childbirth, termination of pregnancy and lactation.
- Medical condition.
- Recovery.

### Relevant

- May show alleged sex discrimination occurred and may aid the Decision Maker.

### Remedies

- Restore or preserve access (after a determination).

### Retaliation

- Intimidation, threats, coercion.

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## New Definitions – cont.

### Sex-Based Harassment

- Quid Pro Quo
- Hostile environment
  - Totality of circumstances – Fact-based
  - Ability to access the education program or activity
  - Frequency
  - Age
  - Location

### Specific Offenses

- Sexual assault
- Dating violence
- Domestic violence

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## New Definitions – cont.

### Student with Disability

- IDEA Coverage

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## Scope 106.10 (One of the Bases for Legal Challenges)

### Discrimination on the basis of sex includes:

- Sex stereotypes
- Sex Characteristics
- Pregnancy
- Sexual orientation
- Gender identity

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## The Challenge – Title IX vs. Title VII

### *Bostock v. Clayton County* – US Supreme Court - Title VII-

**“...it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”**

“Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.”

GORSUCH, J., DELIVERED THE OPINION OF THE COURT, IN WHICH ROBERTS, C. J., AND GINSBURG, BREYER, SOTOMAYOR, AND KAGAN, JJ., JOINED. ALITO, J., FILED A DISSIDENTING OPINION, IN WHICH THOMAS, J., JOINED. KAVANAUGH, J., FILED A DISSIDENTING OPINION.

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## Process

- Supportive Measures
- Roles
- Investigations

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## Supportive Measures

- Both complainants and respondents
- Facilities use and availability
  - *De minimis harm* (106.31)
- Must not create an unreasonable burden
- Both informal and formal reports
- Provide equal access to the educational program or activity
- Not disciplinary in nature
- Document **EVERYTHING!**

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## Roles

- Coordinator
- Investigator
- Decision Maker (Hearing Officer)
- Appeal Process Option
- **Perceived** Conflict of Interest and Bias Concerns

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## Investigations

- When in doubt – **report!**
- Single investigator model
- Informal resolution process
- Retaliation, retribution
- Preponderance of evidence vs. clear and convincing – standards of proof
- Opportunity to respond – both parties
- Documentation, documentation, documentation (shared with all parties)

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## Training

- Schools must provide annual training to **ALL** employees about the school's Title IX obligations, the scope of conduct that constitutes sex discrimination and sex-based harassment, and all applicable notification and information requirements.
- Additional, specific, and extensive training is required for all Coordinators, Investigators, and Decision Makers/Hearing Officers.

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## Keep Your Eyes Open

- **What might happen?**
  - Other Injunctions/Stays.
  - States where their Governor has made known they do not intend to comply.
- **Current DOE proposal on athletics (106.41)**
  - Not changing, excludes contact sports.
    - "Boxing, wrestling, rugby, ice hockey, football, basketball, and other sports, the purpose or major activity of which involves bodily contact."
  - Proposed changes – a policy denies or limits participation, must for each sport and level – competition and grade or educational level:
    - Be substantially related to the achievement of an important educational objective.
    - Minimize harm from limitation.

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## Disclaimer

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## Thank you



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## Questions and Contacts

If you have any questions or need to discuss Title IX in further detail, please don't hesitate to call or email.

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