



Association of  
Title IX Administrators

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# Time with IX: Expanded Scope of Title IX

Erin Agidius, J.D., Consultant, TNG

Dan Fotoples, J.D., M.A., Director of Content Development, TNG

Kim Pacelli, M.Ed., J.D., Partner, TNG

# Today's Presenters



**Erin Agidius, J.D.**  
Consultant, TNG



**Dan Fotoples, J.D., M.A.**  
Director, Content Development,  
TNG



**Kim Pacelli, M.Ed., J.D.**  
Partner, TNG

# 2024 Title IX Regulations Litigation

- Opponents of the 2024 Title IX Regulations sought, and were granted, **injunctions** to delay or halt implementation of the Regulations
  - **Injunction:** A court order requiring an individual or entity to either perform or stop performing a specific action
- Generally, courts granted injunctions based on questions around the validity of the gender identity provisions and the hostile environment definition
- If the 2024 Regulations are not enforceable as a result of an injunction, schools, districts, and institutions in those states should continue to follow the **2020 Regulations**
  - The 2024 Regulations also are not enforceable in some individual schools and institutions

# 2024 Title IX Regulations Litigation

- Implementation will be unsettled for the foreseeable future
  - Appeals will continue and, eventually, trials
  - Consult legal counsel to determine implementation plans and risk strategy
- **Note:** Some states also have “Do Not Implement” directives from state officials
  - Independent from any federal lawsuits or injunctions
- Track developments on ATIXA’s Regulations website, [www.atixa.org/regs](http://www.atixa.org/regs)
  - State-by-state information on injunctions and Do Not Implement directives
  - Lists of individual schools or institutions impacted by the Kansas injunction

# Retroactivity

- The 2024 Regulations apply **only** to sex discrimination alleged to have occurred **on or after** August 1, 2024
  - For conduct alleged to have occurred prior to August 1, 2024, the 2020 Regulations apply
- Recipients will need to maintain/update policies, procedures, and training that are compliant with the **2020** Regulations and **2024** Regulations
  - If your institution is not fully compliant with 2020, now is the time





# **What allegations and behaviors are subject to the 2024 Title IX Regulations?**

# Title IX: Scope

## Sex-Based Discrimination

- Inequitable Treatment
  - Sex Characteristics
  - Sex Stereotypes
  - Pregnancy or Related Conditions
  - Sexual Orientation
  - Gender Identity
- Exclusion from Participation

## Sex-Based Harassment

- Quid Pro Quo
- Hostile Environment Harassment
- Dating Violence
- Domestic Violence
- Stalking
- Sexual Assault
  - Rape
  - Sodomy\*
  - Sexual Assault with an Object\*
  - Fondling
  - Incest
  - Statutory Rape

## Retaliation

\*ATIXA recommends removing these behaviors from policy, as they are covered by the Rape definition and are inconsistent with the Clery Act

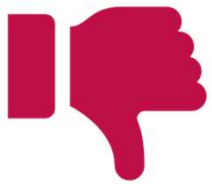
# Sex Discrimination



# Sex Discrimination

- **Sex discrimination** encompasses discrimination based on:
  - Inequitable treatment based on sex or gender
    - Sex characteristics
    - Sex stereotypes
    - Pregnancy or related conditions
    - Sexual orientation
    - Gender identity
  - Exclusion from participating on the basis of sex or gender identity
    - *De Minimis* harm

# Common Types of Discrimination



## Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliation or perception of affiliation with protected characteristic



## Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups



## Harassment

- Quid Pro Quo
- Hostile Environment



## Retaliation

- Prohibited if engaged in protected activity
- Suffered adverse academic or employment action

# ***De Minimis* Harm**

- In the limited circumstances where Title IX permits different treatment or separation based on sex, an institution **must not** implement differential treatment by means that subjects a person to **more than *de minimis* harm**
- Adopting a policy or practice preventing someone from participating in a program/activity **consistent with their gender identity** violates the *de minimis* harm provision
- Notable exceptions:
  - Religious exemptions
  - Fraternities and sororities
  - Housing (but note state law may be broader)
  - Athletics

# Sex-based Harassment

# Sex-Based Harassment

- Subset of sex discrimination
- Includes (the “Big Six” offenses):
  - Quid Pro Quo (QPQ)
  - Hostile Environment Harassment
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking
- No consent definition provided
  - ATIXA recommends adopting a definition in institutional policy



# Quid Pro Quo

- “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 an aid, benefit, or service on a person’s participation in unwelcome sexual conduct”
- If a **student** occupies a position as an “other person authorized by the Recipient...” then QPQ **could** apply
- Definition encompasses:
  - Extracurriculars and academics
  - Detriment or threat thereof
  - If an individual purports to have authority to provide some aid, benefit, or service, even if they are unable to do so

# Hostile Environment Harassment

- Definition:
  - 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

Lower/broader standard than the 2020 Regulations, with First Amendment implications

# Hostile Environment Harassment

- The Regulations provide factors for evaluating whether a hostile environment exists
  - Complainant's ability to access the education program or activity
  - Type, frequency, and duration of the conduct
  - Parties' ages, roles, and previous interactions
  - Location and context of the conduct
  - Institutional control over the Respondent
- These are **factors**, not requirements
  - There could be other factors to consider, too



# Hostile Environment Harassment

- Districts and institutions should **not** construe this definition or act in a way that conflicts with the First Amendment
  - A transphobic statement alone is likely **not** enough to create a hostile environment that overcomes First Amendment protections
  - Likewise, one or a few instances of misgendering or deadnaming would likely **not** be enough to meet the threshold, though intent and context will matter
- Some forms of harassing speech are not protected by the First Amendment
  - Repeated misgendering or deadnaming done in a demeaning or taunting way
  - Teasing, name calling, and crude sexual gestures disparaging a student's perceived lack of masculinity
- The more the conduct is targeted or intended for personal harm, the less likely it will be protected

# Retaliation

# Retaliation

## Defined as:

- Intimidation, threats, coercion, or discrimination against any person
- By the institution, a student, an employee, or other person authorized by school/district to provide aid, benefit, or service under education program or activity:
  - For the purpose of interfering with any right or privilege under Title IX, **OR**
  - Because the person has reported information, made a complaint, assisted, or participated or refused to participate in any manner in any part of a Title IX Resolution Process

- **Institutions may require** employees to participate as witnesses without it being retaliatory
- Cannot require students to participate as parties or witnesses
- Retaliation allegations should be resolved under the Title IX Resolution Process

# Initiating Complaints

# Complaints

Notably, the 2024 Title IX Regulations also permit some types of complaints from individuals who were not impacted by the alleged behavior, which could lead to more complaints

- Individuals who may make a complaint depends on the **nature** of the complaint:
  - **Sex-Based Harassment:**
    - A Complainant, or parent/guardian
    - Title IX Coordinator
  - **Sex Discrimination:**
    - A Complainant, or parent/guardian
    - Title IX Coordinator
    - Any student or employee
    - Any other person participating or attempting to participate in the institution's education program or activity at the time of the alleged sex discrimination

# Takeaways

# Takeaways

- Retraining employees to recognize and report sex discrimination
- Retraining investigators for sex discrimination and disparate treatment complaints
- Plan for increase in complaints
- Invest in Informal Resolution





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**Questions?**



# Thank you!

We hope to see you at our next Time with IX!

Contact us:

Erin Agidius, J.D.

- [erin.agidius@tngconsulting.com](mailto:erin.agidius@tngconsulting.com)

Dan Fotoples, J.D., M.A.

- [dan.fotoples@tngconsulting.com](mailto:dan.fotoples@tngconsulting.com)

Kim Pacelli, M.Ed., J.D.

- [kim.pacelli@tngconsulting.com](mailto:kim.pacelli@tngconsulting.com)