

### National Association of College and University Attorneys Presents:

### Title IX, One Year Later

### Webinar

### May 2, 2025

12:00 PM – 2:00 PM Eastern 11:00 AM – 1:00 PM Central 10:00 AM – 12:00 PM Mountain 9:00 AM – 11:00 AM Pacific

Presenters:

### **Eric T. Butler** Of Counsel Bricker Graydon

### **Bindu Jayne**

Title IX Coordinator Swarthmore College

### Janelle Ramsel

Chief Legal Officer & Secretary to the Board of Trustees Regis University

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# TNACUA

### Speaker Biographies Webinar

### Title IX, One Year Later



**Dr. Eric T. Butler**, a member of Bricker Graydon's Higher Education team, advises colleges and universities on compliance, governance, accreditation, and policy development, bringing a deep understanding of institutional operations and regulatory frameworks. Eric has extensive experience in higher education law, civil rights, administrative law, and public policy.

Prior to joining the firm, Eric served as Associate General Counsel to the Secretary of the Air Force, where he was the Air Force General Counsel's lead counsel to the U.S. Air Force Academy. In that role, he advised

senior leadership on academic program development, athletics, government ethics, fiscal law, and legislative policy. He also played a key role in facilitating major institutional initiatives, including the \$90 million renovation of Falcon Stadium and the development of federal administrative policy on copyright for academy civilian faculty members.

Eric also previously served as Assistant Attorney General for Higher Education in Colorado, where he provided legal counsel to public postsecondary institutions, focusing on Title IX compliance, civil rights, and litigation. Additionally, he has held leadership positions at John Carroll University and the University of Denver, where he oversaw Title IX compliance, developed institutional policies, and led strategic initiatives on gender equity.

Eric earned his Doctor of Philosophy in Higher Education from Texas Tech University, his Juris Doctor, cum laude, from Northern Kentucky University, and his Bachelor of Arts in International Politics, summa cum laude, from The University of Akron. His insights on higher education law and policy have appeared in publications such as The Chronicle of Higher Education, Inside Higher Ed, and Colorado Public Radio.



**Bindu Jayne** currently serves as the Title IX Coordinator at Swarthmore College, where she is charged with coordinating the College's centralized review, investigation, and resolution of reports of sexual assault and harassment and gender-based inequity. For over a decade, Bindu has worked in the equity and diversity space in higher education at such institutions as the University of Delaware, Appalachian State University, and Rowan University. In those positions, she oversaw offices responsible for responding to allegations of harassment and discrimination, providing educational opportunities about a variety of social justice initiatives, and

creating inclusive campuses for students, faculty, and staff.

Ms. Jayne is also a co-founder of Sage Education Consulting, LLC which provides Title IX-related investigation, adjudication, and policy drafting services to higher education clients. Prior to her work in higher education, she began her legal career as an associate in the Philadelphia office of Morgan Lewis. Bindu received a B.A. from Cornell University, magna cum laude, and a J.D. from the University of Pennsylvania Law School.



Janelle Ramsel has served as the Chief Legal Officer of Regis University since September 2020, and as the Secretary of the Board of Trustees since 2022. In this role, she advises the university on a wide variety of matters, including contracts, employment law, student affairs, compliance, policy work, and manages outside counsel on litigation matters. She previously served as the Assistant General Counsel and Title IX Coordinator at Valparaiso University, Title IX Coordinator for the University of Wisconsin-Milwaukee, and Law Clerk for the University of Wisconsin System. Janelle has engaged in significant professional service

and scholarship. She has taught Higher Education Law at Marquette University, and given presentations on Title IX to the Chicagoland Title IX Consortium, NAFSA, and AAUP. She is currently serving her fourth year on the NACUANOTES Editorial Board.

Janelle previously served as the District 1 Representative for the Young Lawyers Division of the Indiana State Bar, and as the District Nine Committee Member for the Wisconsin Office of Lawyer Regulation. Janelle also sat on the board for the nonprofit Girls on the Run of Northwest Indiana. Janelle received her B.A. from Valparaiso University. She received her MEdT from the University of Hawaii-Manoa while completing two years of AmeriCorps service through Teach for America. She received her JD from the University of Wisconsin-Madison, served as a Managing Editor for the Wisconsin Law Review, and received top honors from the Pro Bono Honor society for her commitment to Pro Bono work. Janelle completed her PhD at the University of Wisconsin-Madison in Educational Leadership and Policy Analysis with a dissertation titled "Addressing the 1:4 with IX in the B1G: How the Big 10 Interprets Federal Guidance into Student-on-Student Title IX Sexual Assault Policies."

### **Materials**

#### TITLE IX, ONE YEAR LATER

NACUA Webinar May 2, 2025

Bindu Jayne Partner Sage Consulting

**Dr. Janelle Ramsel** Chief Legal Officer Regis University

**Dr. Eric T. Butler** Of Counsel Bricker Graydon

#### Summaries of Recent Caselaw Developments:

#### 1. Williams v. Pa. State Univ. (3rd Cir. Apr. 1, 2025) (unpub.)

Order and Opinion affirming Grant of Summary Judgment for Defendants. Plaintiff, appearing pro se, brought claims against Pennsylvania State University (Penn State) alleging Title VI retaliation and discrimination based on issues with her professors, due process violations regarding her suspension hearing, and First Amendment retaliation based on her suspension and denial of her Title IX claim. Plaintiffs' claims stem from three separate incidents: (1) a Title IX investigation where the alleged perpetrator was found not responsible; (2) plaintiff's allegation that her professor retaliated against her by giving her a failing grade after she filed a complaint of racism against him; and (3) her suspension from Penn State following allegations of harassment against her former roommate and a Lyft driver. Turning first to plaintiff's claims of Title VI discrimination and retaliation, the Court found that plaintiff did not establish a prima facie case of retaliation as no casual connection was shown between her complaint and the failing grade she received. The Court also found that plaintiff's due process rights were not violated as she was given sufficient written notice of the charges and proposed sanctions against her prior to the hearing, had an advisor present at the hearing, and declined breaks to speak with her advisor present at the hearing, or privately. Although neither witness was present at the hearing, plaintiff was able to testify about her experience and provide her own evidence. Finally, the Court found plaintiff's First Amendment retaliation claim must also fail because she could not

establish a causal link between her posts on Twitter about the Title IX investigation and the outcome of her Title IX claim.

#### 2. Wells v. Tex. Tech Univ. (5th Cir. Mar. 3, 2025) (unpub.)

Order affirming the District Court's Dismissal of Plaintiff's Lawsuit. Plaintiff, an unpaid mentor who was removed from the Texas Tech University ("TTU") Innovation Hub, filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination, harassment, and retaliation based on sex. After receiving a Right to Sue Letter from the EEOC, plaintiff sued TTU and two university employees under Title VII, Title IX, and state law. Focusing first on plaintiff's Title VII claims, the court found that plaintiff's Title VII claims were untimely because she was not an "employee" for Title VII purposes while serving as a mentor for the TTU Innovation Hub. The court also concluded that plaintiff's Title VII retaliation claim failed because "retaliatory conduct that occurred in January 2022, or later, [was] too attenuated from her last employment in 2017." Turning to plaintiff's Title IX claims, the court affirmed the district court's findings that plaintiff's pre-2019 Title IX claims were untimely because her "2017 graduation from TTU and the 2019 dissolution of her first company that had ties with TTU [were] sufficient intervening actions...." Additionally, plaintiff did not allege a plausible Title IX claim for relief because she failed to establish sufficient facts to satisfy the two-prong test: "(1) a person authorized to address the harassment had actual notice of the behavior; and (2) even with this notice, the program's response to the harassment amounted to 'deliberate indifference.'" At no point did plaintiff allege facts to show that "the dean was a person who could address the harassment." Finally, the court affirmed the district court's holding related to plaintiff's state law claims and also noted that it properly denied her request to amend her complaint.

#### 3. Roland v. Donnelly Coll. (D. Kan. Feb. 20, 2025)

Order granting in part and denying in part Donnelly College's ("the College") partial motion to dismiss. Plaintiff is a former nursing student at the College who asserts claims for alleged violations of Title IX, Section 504 of the Rehabilitation Act, equal protection, and due process, as well as a state law claim for tortious interference with a contract against an individually named College professor. Plaintiff alleges that an unnamed professor referred to her test anxiety as "dumb" and sues the second professor who she claims "grabbed, [] squeezed, ... and rubbed his hand up and down her leg" and "placed his hand on her thigh" on one occasion and rubbed his body against hers on another. She also alleges the second professor made threatening remarks in class, including that "if anyone wanted to report him, it would not go well because of his status" with the College, that he could make complaints against him "go away," and that "[i]f anyone wants to do anything to me, I have guns," as well as disparaging remarks, such as"[w]omen don't learn well, and learn better if I piss them off." She asserts that she tried to meet with the College's Director of Nursing to discuss her concerns but was rebuffed. Then, during final exams, the second professor allegedly sat behind Plaintiff, "leaned forward, and whispered, 'You gonna wish you gave me some of that pussy,'" and then, failed her on the exam, which she asserts she would have otherwise passed had it been graded fairly. Subsequently, the College placed Plaintiff on academic probation and suspension, which delayed her graduation and required that she attend an extra semester during which she was once more placed into the second professor's

class and subjected to additional alleged harassment, including commenting on her hair, nearly grazing her breast, and repeatedly touching her leg. Ultimately, she withdrew from the nursing program. Defendants moved to dismiss all claims except her §1983 claims. The court declined to dismiss the Title IX sex discrimination claim, reasoning Plaintiff had provided sufficient allegations to maintain a claim that she was subject to sex-based harassment, including by receiving lowered grades based on her refusal of a professor's advances. It rejected as irrelevant the College's concern that Plaintiff failed to identify a male student who was treated more favorably, "particularly when it is not at all clear that plaintiff intends to pursue a 'selective enforcement' theory of liability." However, it granted the motion to dismiss her sexual harassment and retaliation claims against the College since beyond seeking an unspecified meeting with the Director of Nursing, Plaintiff failed to allege that she "engaged in protected activity or, even assuming that she did, that any College official had knowledge that plaintiff had engaged in protected activity" and correspondingly, College officials lacked knowledge regarding the professor's alleged harassment. Finally, the court granted dismissal of the disability discrimination claim reasoning that her allegations supported that her exam grades were altered "not based on any perceived disability but in retribution for [her] response to defendant['s] alleged sexual advance," and because the sole comment regarding her test anxiety was made after she was advised that she was not meeting academic standards.

#### 4. Tirrell and Turmelle v. Edelblut (D. N.H. Feb. 12, 2025)

Second Amended Complaint. Plaintiffs, transgender female high school student athletes, challenged a New Hampshire statute, HB 1205, claiming it violated Title IX because it discriminated on the basis of sex, when it defined "sex" as a student's biological sex at birth and mandated that "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex," thereby excluding transgender females from participation in women's sports. Plaintiffs also challenged the January 20, 2025, Executive Order, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," and the February 5, 2025, Executive Order, "Keeping Men Out of Women's Sports," as facially discriminatory on the basis of sex in violation of Title IX, and as unconstitutional in violation of the Equal Protection clauses of the Fourteenth and Fifth Amendments and the separation of powers in Articles I and II of the U.S. Constitution.

#### 5. Tenn. v. Cardona (E.D. Ky. Jan. 9, 2025)

Order granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment. Plaintiffs, the states of Kentucky, Virginia, Indiana, Tennessee, and West Virginia, along with plaintiff intervenor Christian Educators Association International and A.C., by her mother, sued the U.S. Department of Education (the Department) challenging the Title IX Final Rule and its corresponding regulations, and alleged the regulations are invalid, the Department exceeded its lawful authority in implementing them, and that the regulations are otherwise contrary to law. In finding that the Department exceeded its statutory authority and relying on the Administrative Procedure Act (APA) in its reasoning, the court wrote "there is nothing in the text or statutory design of Title IX to suggest that discrimination 'on the basis of sex' means anything other than it has since Title IX's inception—that recipients of federal funds under Title IX may not treat a person worse than another similarly-situated individual on the basis of the person's sex, i.e., male or female." Finding that the Final Rule and its corresponding regulations exceeded the Department's authority, and violate the Constitution, the court granted plaintiffs' motion for summary judgment, and denied the Department's motion for summary judgment, ultimately barring the Final Rule from being enforced nationwide.

#### 6. <u>Slusser v. The Mountain West Conference (D. Colo. Nov. 25, 2024)</u>

Order denying Emergency Motion for Preliminary Injunction. Plaintiffs, several student athletes and participants in the Mountain West Conference (MWC), sought emergency injunctive relief against the MWC and its Commissioner regarding the MWC's "Transgender Participation Policy" (TPP) and San José State University's rostering of an alleged transgender woman on its women's volleyball team, asserting violation of Title IX, the Fourteenth Amendment, and First Amendment. Plaintiff-Intervenor University of Utah also joined in the claim that the TPP violates Title IX. Specifically, plaintiffs were requesting that the court require the MWC to "(1) rescind the TPP; (2) flip the wins granted [to the University] and the losses accorded forfeiting teams; (3) recalculate the teams' standings; and (4) enjoin [the University] from continuing to roster its alleged trans teammate and prohibit her from playing in the upcoming tournament." The request for injunction followed a slew of forfeits from teams scheduled to play against the University's women's volleyball team after news of the alleged transgender player on the team and the public acknowledgment of MWC's TPP. In denying the motion for injunction the court found plaintiffs failed to meet their burden of showing irreparable harm, as the alleged harm had already occurred, accounting for the fact the team member in question has been part of the team since 2022. Further, the court noted that plaintiffs' delay in filing the action until two weeks prior to the commencement of the MWC Tournament weakened their argument regarding irreparable harm. Additionally, the court found that plaintiffs failed to meet their burden to establish a likelihood of success on the merits with respect to their Title IX claims, Equal Protection claims, and First Amendment claims, explaining that the TPP has been in place since 2022, and schools that chose to forfeit their matches against the University during the 2024 season expressly acknowledged their understanding and application of the TPP, without protest.

#### 7. Kansas v. U.S. Dep't of Ed. (D. Kan. Nov. 12, 2024)

Notice of supplemental list of schools attended by plaintiffs. This notice of additional schools follows plaintiffs' pending challenge to the 2024 Title IX Final Rule from the U.S. Department of Education, which they claim impermissibly defined "sex discrimination" to include discrimination on the basis of gender identity. The enumerated institutions, which are attended by members or children of members of plaintiff organizations Young America Foundation and Moms for Liberty, span the P-20 spectrum and addend the ongoing preliminary injunction against implementation of the Rule including in the prior 26-page Notice of List of Colleges & Universities by Young America's Foundation and Female Athletes United.

#### 8. Doe v. Fla. Gulf Coast Univ. Bd. of Trs. (11th Cir. Sep. 18, 2024) (unpub.)

Opinion affirming the district court's judgment to deny Defendant's Motion to Proceed Anonymously. Plaintiff, a student at Florida Gulf Coast University (FGCU), brought due process, breach of contract, and a Title IX erroneous outcome claim against the University after he was found responsible for alleged sexual misconduct from 2019. Plaintiff claimed that FGCU should have applied its policy as amended by the 2020 Regs, which would have afforded him the right to receive a copy of the investigative report and to cross examine complainant, to its investigation. Because his allegations against FGCU included information about his underage drinking and drug use, as well as pertaining to potential exposure to a sexual infection, plaintiff sought to proceed anonymously. The district court denied his request for anonymity, and plaintiff sought appellate review under the collateral orders doctrine. Relying on Doe v. Frank for the proposition that "courts have often denied the protection of anonymity in cases where plaintiffs allege sexual assault, even when revealing the plaintiff's identity may cause her to 'suffer some personal embarrassment,'" the Eleventh Circuit reasoned that neither the inclusion of medical information regarding potential exposure to sexual infection nor underage drug and alcohol use, and attendant risks of either social stigma or potential prosecution, respectively, outweighs the presumption that parties ought to proceed publicly. The Court also found that although plaintiff's suit is against a public entity, the "government-activity factor" did not weigh in his favor, since FGCU was not acting as the government "in the traditional sense."

#### Summaries of Recent Regulatory Developments:

#### 1. <u>U.S Department of Education Announces Consequences for Maine's Title IX Further</u> Enforcement Action (Apr. 11, 2025)

U.S. Department of Education (the Department) announced that it is referring its Title IX investigation into the Maine Department of Education (MDOE) to the U.S. Department of Justice (DOJ) for further enforcement action. The Department announced that it will also initiate administrative proceedings to adjudicate termination of MDOE's federal K-12 education funding, including formula and discretionary grants that it states is due to MDOE's "continued refusal to comply with Title IX," and which follows the Department's noncompliance finding and issuance of a final warning letter.

### 2. <u>U.S. Departments of Education and Justice Create Title IX Special Investigations Team (Apr. 4, 2025)</u>

The U.S. Department of Education (ED) and the Department of Justice (DOJ) announced the creation of the Title IX Special Investigations Team (SIT) to ensure timely, consistent resolutions to protect students, "and especially female athletes, from the pernicious effect of gender ideology in school programs and activities." The Title IX SIT includes: (1) ED Office for Civil Rights investigators and attorneys; (2) DOJ Civil Rights Division attorneys; (3) ED Office of General Counsel attorneys; and (4) ED Student Privacy and Protection Office case workers and an FSA Enforcement investigator. SIT is responsive to Executive Orders "Keeping Men out of Women's Sports" and "Defending Women from Gender Ideology Extremism."

#### 3. U.S. Department of Education Rescinds Biden Administration NIL guidance (Feb. 12, 2025)

The U.S. Department of Education (the Department) announced the rescission of the Title IX guidance on Name, Image, Likeness (NIL) issued by the Biden Administration. The Department found the former guidance to be "overly burdensome, profoundly unfair, and [] well beyond what agency guidance is intended to achieve" and further wrote that because Title IX says nothing about how revenuegenerating athletics programs should allocate compensation among student athletes and that clear legal authority does not exist to support the guidance, it should be rescinded.

#### 4. <u>Dear Colleague Letter: U.S. Department of Education to Enforce 2020 Title IX Rule Protecting</u> <u>Women (Jan. 31, 2025)</u>

U.S. Department of Education, Office for Civil Rights Dear Colleague Letter re: Enforcement of the 2020 Title IX Rules. The Letter states the binding regulatory framework for Title IX enforcement includes the principles and provisions of the 2020 Title IX Rule, 34 C.F.R. 106, and excludes and vacates the 2024 Title IX Rule. Pursuant to the Letter, open Title IX investigations initiated under the 2024 Title IX Rule should be immediately reoriented to comport fully with the requirements of the 2020 Title IX Rule. The Letter also states that Title IX must be enforced consistent with President Donald J. Trump's January 20, 2025, Executive Order: "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government." Resources pertaining to Title IX and the 2020 Title IX rule can be found here.

5. <u>OCR Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the</u> <u>Context of Name, Image, and Likeness (NIL) Activities (Jan. 16, 2025)</u>

The U.S. Department of Education, Office for Civil Rights (OCR), published a Fact Sheet clarifying that under Title IX, schools remain responsible for offering equal opportunities in their athletic programs, including Name, Image, and Likeness (NIL) compensation paid to college athletes. Specifically, the Fact Sheet states that NIL deals should be considered part of an institution's athletic financial assistance, similar to grants-in-aid or cost-of-attendance funds, which are used to calculate equal athletic opportunities for men and women. The Fact Sheet further explains that a school's Title IX obligations may apply regardless of whether a student-athlete ultimately secures NIL benefits through their own school or with third parties. Finally, the Fact Sheet notes it does not have the force and effect of law and is not meant to be binding beyond what is required by statutory and regulatory requirements already in place.

6. <u>Department of Education Overview of the Law Webpage Updated Following the Vacating of the</u> 2024 Rule (Jan. 14, 2025)

The U.S. Department of Education (the Department) updated its resource page on Title IX following the January 9, 2025, court order vacating the 2024 Final Rule. The page notes that "on January 9, 2025, a federal district court issued a decision vacating the 2024 Final Rule. Consistent with the court's order, the 2024 Title IX regulations and these resources are not effective in any jurisdiction." No new resources have been posted; the 2020 amendments are available on the webpage, along with additional information and technical assistance.

7. <u>U.S. Dept. of Education withdrawal of Notice of Proposed Rulemaking "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance...</u> (Dec. 26, 2024)

U.S. Department of Education (the Department) withdrawal of the Notice of Proposed Rulemaking (NPRM) "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams." The NPRM published April 13, 2023, and provided that "if a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied." The Department received over 150,000 comments on the NPRM within thirty days. In recognition of multiple pending lawsuits related to the application of Title

IX in the context of gender identity and athletic eligibility criteria, as well as the numerous comments opposed to the NPRM, the Department withdrew the NPRM and terminated the rulemaking process.

#### Additional Recommended Readings:

- 1. NACUA's Transition Series, First 100 Days Litigation Tracker
- 2. Cases
  - a. <u>State of Maine v. U.S. Dep't of Aq.</u> (D. Ma. Apr. 7, 2025)
  - b. *Bostock v. Clayton County*, 590 U.S. 644 (2020)
- 3. Executive Orders
  - a. <u>"Restoring Equality of Opportunity and Meritocracy"</u> (Apr. 23, 2025)
  - b. <u>"Keeping Men Out of Women's Sports"</u> (Feb. 5, 2025)
  - c. <u>"Defending Women from Gender Ideology Extremism and Restoring Biological Truth to</u> <u>the Federal Government"</u> (Jan. 20, 2025)
- 4. Agency Guidance
  - a. <u>Guidance on President Trump's Executive Orders Defending Women and Children</u> (Feb. 19, 2025)
    - Dep't of Health and Human Services
  - b. <u>Press Release re U.S. Department of Education to Investigate Title IX Violations in</u> <u>Athletics</u> (Feb. 6, 2025)
     U.S. Dep't of Education
  - c. <u>Title IX Dear Collegue Letter</u> (Feb. 4, 2025) U.S. Dep't of Education, Office for Civil Rights
  - d. Press Release re "Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace" (Jan. 28, 2025) U.S. Equal Employment Opportunity Commission
  - e. <u>Press Release re U.S. Department of Education Launches Investigation into Denver</u> <u>Public Schools for Converting Girl's Restroom to All-Gender Facility</u> (Jan. 28, 2025) U.S. Dep't of Education
  - f. <u>Participation Policy for Transgender Student-Athletes</u> (Feb. 6, 2025) NCAA
- 5. <u>U.S. Department of Education, OCR, Case Processing Manual</u> (Feb. 19, 2025) U.S. Dep't of Education, Office for Civil Rights
- Fact Sheet: President Donald J. Trump Protects Safety, Fairness, and Dignity in Women's Sports (Feb. 5, 2025)
   The White House
- 7. PUMP Act
- 8. Pregnant Workers Fairness Act (PWFA)



### Title IX, One Year Later

May 2, 2025

If you are an attorney applying for Continuing Legal Education credits (CLEs), you must sign this attendance record to verify your attendance. Please complete and return this form no later than Friday, March 9<sup>th</sup> to the CLE Credit Submission Portal (<u>www.nacua.org/submitCLE</u>).

\*Total CLE Credits = 120 minutes

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State & Bar Number (If Applying for CLE)



### Certificate of Attendance Webinar

### Title IX, One Year Later

May 2, 2025

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Note: Restrictions vary state by state and not all states will accredit this webinar.

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Amanda McLean

Amanda McLean Meetings and Events Coordinator



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# Title IX, One Year Later

Bindu Jayne, Partner, Sage Consulting Janelle Ramsel, Chief Legal Officer & Secretary to the Board of Trustees, Regis University Eric Butler, Of Counsel, Bricker Graydon

# Agenda

- Introduction
- Timeline: A Year in Review
- What We Know (for now.)
- What We Don't Know... Yet.
- Current Federal Civil Rights Landscape
- Audience Q&A and Closing Remarks



# Timeline

What a year it's been...



# **Timeline: A Year In Review**

- April 2024: Biden administration releases new Title IX regulations.
- Summer 2024: Piecemeal Title IX injunctions.
- January 9, 2025: 2024 Final Rule vacated entirely in *Tennessee v. Cardona*.
- January 16, 2025: Biden administration issues Title IX guidance on NIL
- January 20, 2025: President Trump inaugurated.
- January 20, 2025: Executive Order 14168 issued, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government



# **Timeline: A Year In Review**

- February 2025: Trump administration rescinds Title IX NIL guidance.
- February 4, 2025: DCL enforcing 2020 Title IX regulations.
- February 5, 2025: Executive Order 14201 issued, Keeping Men Out of Women's Sports.
- February 6, 2025: NCAA updates its Participation Policy for Transgender Student-Athletes
- April 23, 2025: Executive Order, Restoring Equality of Opportunity and Meritocracy



# **Timeline: A Year In Review**

"We'll see you in court."

- State of Maine
- Tirrell & Turmelle (New Hampshire)





# What We Know

(for now)



# **Grievance Process**

- 2020 regulations are here to stay. • Procedural Requirements
  - Written, signed formal complaint
  - Live hearings with cross examination
  - No single investigator model
  - Required grounds for dismissal
  - "actual knowledge" triggers notice

- Limitations on informal resolutions
- Additional review periods for evidence
- Role of advisors and college-appointed advisors
- Publicly available training materials
- Feb. 4, 2025 DCL: "[O]pen Title IX investigations initiated under the 2024 Title IX Rule should be immediately reevaluated to ensure consistency with the requirements of the 2020 Title IX Rule and the preexisting regulations at 34 C.F.R. 106 et seq."



# **Grievance Process**

- Covered Conduct
  - $_{\odot}$  Sexual Harassment is conduct on the basis of sex that is
    - Quid pro quo by a school's employee;
    - Unwelcome conduct that is severe, pervasive, and objectively offensive; or
    - Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking (as defined in VAWA)
  - Feb. 4, 2025 DCL: "President Trump ordered all agencies and departments within the Executive Branch to 'enforce all sex-protective laws to promote [the] reality' that there are 'two sexes, male and female,' and that '[t]hese sexes are not changeable and are grounded in fundamental and incontrovertible reality.' ED and OCR must enforce Title IX consistent with President Trump's Order."



# Federal Definition of "Sex": EO on Gender Ideology

(a) "Sex" shall refer to an individual's immutable biological classification as either male or female. "Sex" is not a synonym for and does not include the concept of "gender identity."

- (b) "Women" or "woman" and "girls" or "girl" shall mean adult and juvenile human females, respectively.
- (c) "Men" or "man" and "boys" or "boy" shall mean adult and juvenile human males, respectively.
- (d) "Female" means a person belonging, at conception, to the sex that produces the large reproductive cell.
- (e) "Male" means a person belonging, at conception, to the sex that produces the small reproductive cell.

(f) "Gender ideology" replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true. Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body.

(g) "Gender identity" reflects a fully internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum, that does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex.<sup>1</sup>



# Federal Definition of "Sex": Bostock

- Bostock vs Clayton County: An Employer who fires an individual for being gay or transgender violates Title VII

   EO cannot limit this order as it relates to employment discrimination
   Can only be revised by congress or the Supreme Court
- Tennessee vs Cardona states that applying Bostock to Title IX is an overreach, and Bostock did not apply to "bathrooms, locker rooms, or anything else of the kind."



# Agency Response to EO on Gender Ideology: EEOC

- EEOC Press Release Jan 28, 2025<sup>1</sup>: Cannot remove documents issued by majority vote
- Likely not to see EEOC enforcement actions protecting gender identity; will still see protections attach in private civil actions
- Moving towards compliance with EO

 Remove pronoun App, X gender marker, Mx from pronoun list, updating Know Your Rights posters, removed material about gender ideology on websites

 ${\rm \odot}{\rm Will}$  enforce women's rights to single-sex spaces at work



# Agency Response to EO on Gender Ideology: Title IX

- Feb 4, 2025 DCL from Acting Assistant Secretary for Civil Rights Craig Trainor<sup>1</sup> stating Title IX Complaints will be evaluated under the 2020 Title IX Rules
- Title IX no longer protects gender identity or sexual orientation
- Moving towards protecting "women's" spaces
   In employment
  - $\circ$  In sports



# **EO on Keeping Men Out of Women's Sports**<sup>1</sup>

- Prohibits individuals assigned as male at birth out of women's sports, but does not prohibit the reverse
- Prioritizes enforcement actions for schools that do not adhere to this separation
- Calls for recall of federal grants issued to schools that violate this order
- Feb 5, 2025 fact sheet: President Donald J Trump Protects Fairness, Safety, and Dignity in Women's Sports<sup>2</sup>



# EO on Restoring Equality of Opportunity and Meritocracy

- States an intention to remove disparate impact analysis in Title VI and other regulations, guidance, rules, and orders
- Disparate impact remains codified in federal law
- Still permitted under certain state laws, but may be preempted by federal law
- Recovery still available by private lawsuit
- Implications for title ix sports funding, equal pay laws and initiatives, hiring, terminations



# **Government Position on NIL**

January 2025: Guidance from Biden administration on House settlement and NIL payments to athletes

 Direct distributions would have to comply with Title IX, similar to scholarship distributions.





# **Government Position on NIL**

- February 12, 2025: (Press Release) "U.S. Department of Education Rescinds Biden 11th Hour Guidance on NIL Compensation"
  - "Enacted over 50 years ago, Title IX says nothing about how revenuegenerating athletics programs should allocate compensation among student athletes. The claim that Title IX forces schools and colleges to distribute student-athlete revenues proportionately based on gender equity considerations is sweeping and would require clear legal authority to support it. That does not exist."
- Has Title IX cycled back to Sen. Tower's vision in 1974?



# What We Don't Know (yet?)



# **Transgender Student Athletes**

- December 17, 2024: Senate Judiciary Committee Hearing on Legalized Sports Gambling
- February 5, 2025: Executive Order 14201 issued.
- February 6, 2025: NCAA revised its Participation Policy for Transgender Student- Athletes
- April 16, 2025: US v. Maine Department of Education


### Executive Order 14201 (Feb. 5, 2025)

- Policy: "rescind all funds from educational programs that deprive women and girls of fair athletic opportunities" and "oppose male competitive participation in women's sports more broadly..."
- Directed Secretary of ED to comply with TN v. Cardona; prioritize enforcement actions related to this policy; all exec agencies shall rescind funding to programs that don't comply; work with DOJ on enforcement.
- Directed Asst to the President for Dom.
   Policy to convene athletic orgs, female athletes harmed, and State Attorneys General to identify best practices.
- Directed Sec. of State to participate in sports exchanges that follow the policy; promote at the UN international rules and norms that comply with the policy.

#### NCAA Policy on Participation (Feb. 6, 2025)

- Def'ns:
  - Sex assigned at birth: male or female designation doctors assign to infants at birth, which is marked on their birth records.
  - <u>Gender identity</u>: individual's own sense of their gender
  - <u>Transgender</u>: individual whose GI or GE is different than their sex assigned at birth.



#### • NCAA Men's Teams:

 regardless of sex assigned at birth, S-A may participate with a men's team

#### • NCAA Women's Teams:

- S-A assigned male at birth: may not compete on women's team; may practice on team consistent with GI
- S-A assigned female at birth: if begun hormone therapy – may not compete on women's team but can practice with women's team



#### ... and then this was added

"The participation policy for transgender student-athletes adopted by the Board of Governors and effective February 6, 2025, does not permit competition by an individual assigned male at birth to compete on a women's team. The policy is clear that there are no waivers available, and students assigned male at birth may not compete on a women's team with amended birth certificates or other forms of ID. Student-athletes assigned male at birth may not receive athletic scholarships that are otherwise designated for women. If competition occurs, the team will be considered a mixed team and not eligible to compete against women's teams. This also applies to a student-athlete assigned male at birth competing as an individual against women. Such individual competition is not permitted under the policy. Any previous policies that permitted mixed team competition against a women's team are rendered moot and not applicable as the BOG policy adopted in February 2025 supersedes all previous policies."



#### **Transgender Student Athletes**

- State Law Considerations
  - $_{\odot}$  What about state non-discrimination laws that include gender identity as a protected class?
  - $_{\odot}$  What about S-As who have already received scholarship money/relied on scholarship money?
- Pending Cases

US v. Maine Department of Education (complaint filed April 16, 2025)
 Maine v. US Department of Agriculture (decided April 11, 2025)
 Tirrell and Turmelle v. Edelbut (second amended complaint filed on Feb. 12, 2025 adding EO 14201)



## **Pregnancy: What Protections Remain?**

#### • Cardona vs Tennessee dicta:

"While there appears to be at least one provision that is not directly impacted by the plaintiffs' challenge, see 34 C.F.R. § 106.40 (Aug. 1, 2024) ("Parental, family or marital status; pregnancy or related conditions), it simply is not proper for the Court to rewrite the regulations by excising the offending material, particularly when rulemaking is the exclusive duty of the Executive Branch"

- Pregnant Workers Fairness Act (PWFA)
- PUMP Act
- State Law



#### What Does Enforcement Look Like Now?

- Title IX OCR Enforcement focused on:
  - Transgender women in sports<sup>1</sup>
    - University of Pennsylvania \$175 million (found responsible)
    - HHS Civil Rights Office Compliance Review of the Main Dept of Ed
    - San Jose State University
    - Massachusetts Interscholastic Athletic Association
  - $\odot$  Protecting women's spaces^2
    - Denver Public Schools gender-inclusive bathrooms<sup>3</sup>
- Enforcement mechanisms:
  - $_{\odot}$  Withholding of federal funds
  - $\circ$  Rapid Resolutions by the Title IX Special Investigations Team<sup>4</sup>
  - $_{\odot}$  OCR Process Manual updated Feb 2025  $^{5}$



## **Enforcement in a New Government Structure**

- Department of Education all but dismantled.
  - $_{\odot}$  March 2025: Reduction in Force from 4,100 to 2,100.
  - Closing Chicago, Philadelphia, New York City, Dallas, San Francisco, Boston, and Cleveland
    - Atlanta, Denver, KC, Seattle, and DC left to carry the load
- "Expediated" case processing.
- Delegation of enforcement activity to DOJ.
  - $\circ$  Other agencies with enforcement power under Title IX for federally funded programs.



## **Federal Funding as an Enforcement Tool**

- Retracting & freezing federal contracts.
  - o E.g. Harvard, Princeton, Columbia, Maine
- Impact on new awards.
  - $\circ$  New emphasis on executive interpretation in boilerplate terms of funding?
- Student Financial Aid.



## **Current Federal Civil Rights Landscape**

What can we learn from the ebbs and flows of Title IX jurisprudence?



#### What about Title IX Scholarships?

- Open question about whether pool and match (title VI protections) apply to sex-based scholarships

   Equal Protection Project<sup>1</sup> is filing a number of scholarship-based challenges, which may dictate this area of law shortly
- Proposal (not yet enacted): Fullbright Scholarship for Women<sup>2</sup>



#### **Future Civil Rights Enforcement**

- Title IX has been in the spotlight for over a decade.
- Gradual shift in focus by campuses, media, and government. • E.g. Title VI enforcement disputes.
- Robust regulations on resolution processes for sexual harassment under Title IX.

 $_{\odot}$  Similar mandates to come for other civil rights obligations?  $_{\odot}$  Will the Title IX regulations serve as a model?

#### **Taking Care of Campus Constituents**





# Questions?



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