

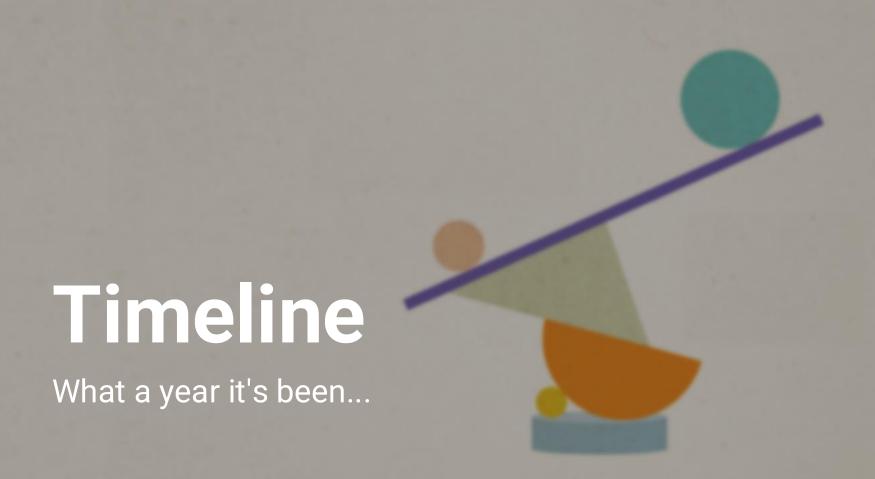


Title IX, One Year Later

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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: 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)





Grievance Process

- 2020 regulations are here to stay.
 - o 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

o 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
 - 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.¹



Federal Definition of "Sex": Bostock

- Bostock vs Clayton County: An Employer who fires an individual for being gay or transgender violates Title VII
 - o 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^{1:} 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
 - 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 Trainor¹ 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
 - In sports

EO on Keeping Men Out of Women's Sports¹

- 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 Sports²



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.
- Gender identity: individual's own sense of their gender
- Transgender: 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

- What about state non-discrimination laws that include gender identity as a protected class?
- What about S-As who have already received scholarship money/relied on scholarship money?

Pending Cases

- o 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 sports¹
 - 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
 - Protecting women's spaces²
 - Denver Public Schools gender-inclusive bathrooms³
- Enforcement mechanisms:
 - Withholding of federal funds
 - o Rapid Resolutions by the Title IX Special Investigations Team⁴
 - OCR Process Manual updated Feb 2025⁵



Enforcement in a New Government Structure

- Department of Education all but dismantled.
 - o 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.
 - 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.
 - 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 Project¹ is filing a number of scholarship-based challenges, which may dictate this area of law shortly
- Proposal (not yet enacted): Fullbright Scholarship for Women²



Future Civil Rights Enforcement

- Title IX has been in the spotlight for over a decade.
- Gradual shift in focus by campuses, media, and government.
 - o E.g. Title VI enforcement disputes.
- Robust regulations on resolution processes for sexual harassment under Title IX.
 - o Similar mandates to come for other civil rights obligations?
 - O Will the Title IX regulations serve as a model?

Taking Care of Campus Constituents





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