



# UNTANGLING THE WEB OF TITLE IX

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# Before we begin:

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Today we are necessarily speaking in generalities rather than specifics

The information provided is not legal advice

**Information in this presentation may quickly become outdated**

Always research original sources of authority and update this information to ensure accuracy when dealing with a specific matter

Do not act or rely upon the information contained in this presentation without seeking the advice of an attorney

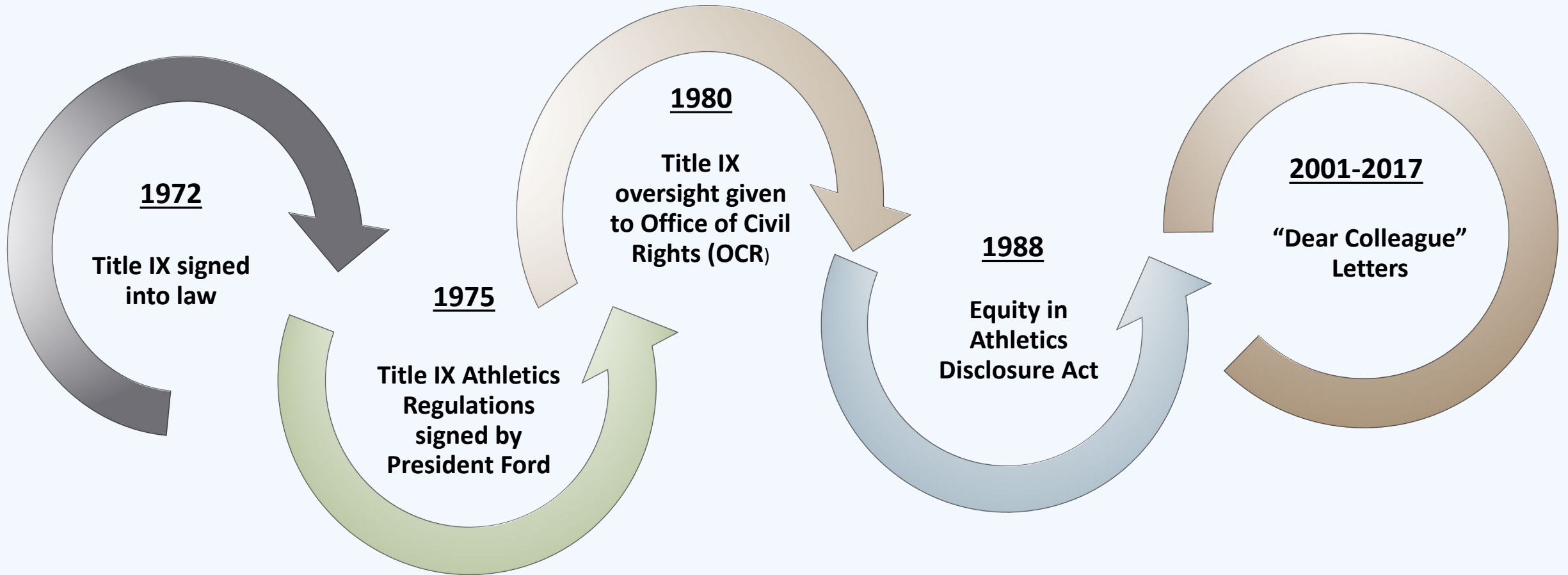
# The Fundamentals of Title IX

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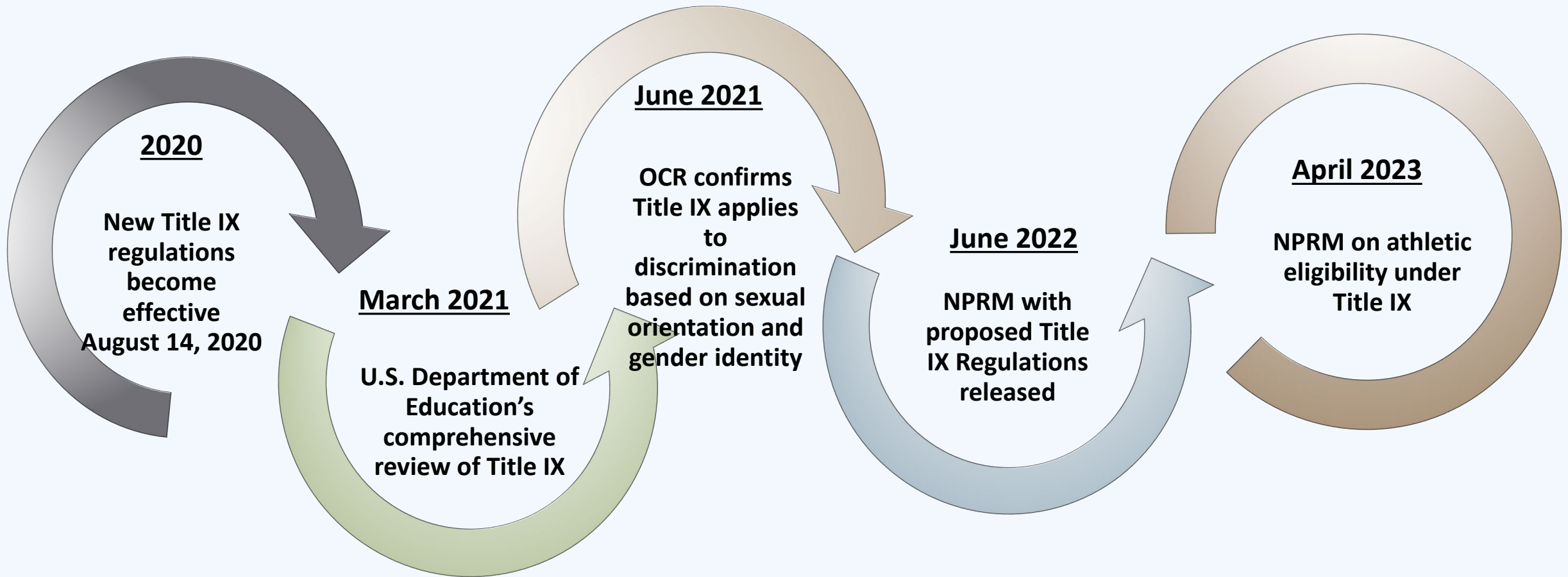
## Title IX, Education Amendments of (1972)

“No person . . . 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”

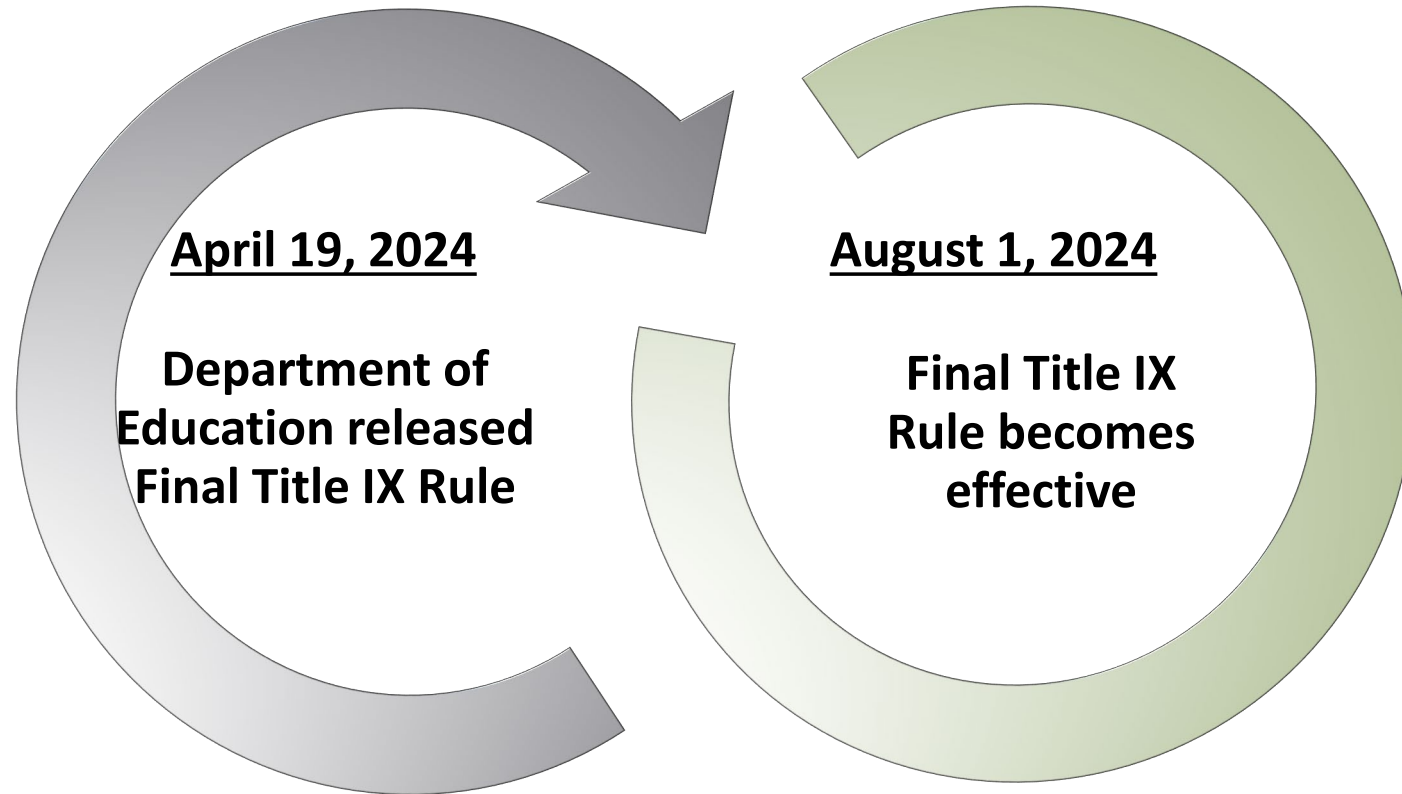
# Timeline of Title IX...



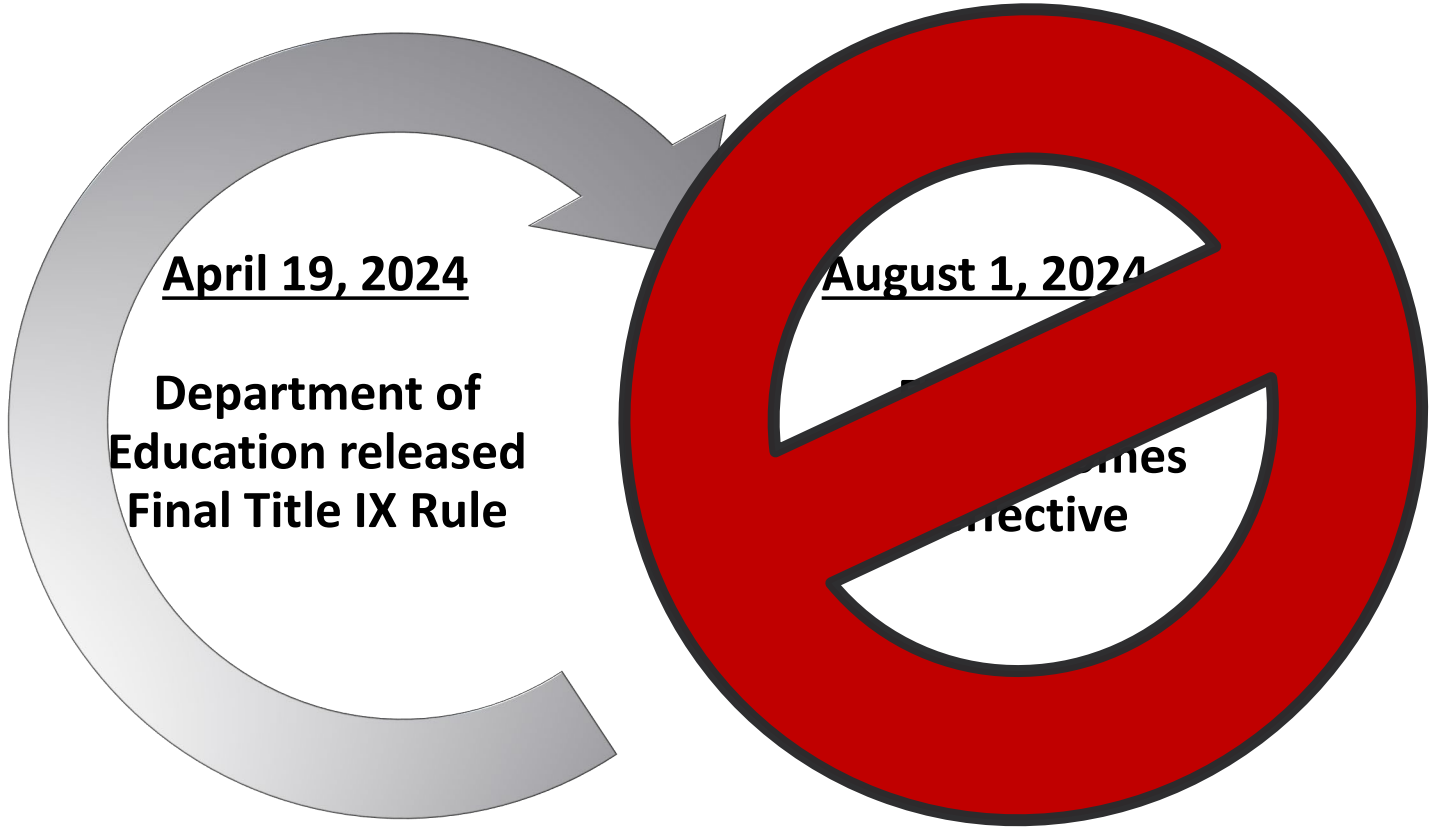
# Timeline of Title IX...



# Timeline of Title IX (continued)...



# Timeline of Title IX (continued)...



# TIMEOUT!

On Monday, June 17, 2024, the U.S. District Court in Eastern Kentucky granted a preliminary injunction in favor of West Virginia and five other states, who sought to enjoin and prevent the enforcement of the U.S. Department of Education's new Title IX regulations/Final Rule, titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance." 89 Fed. Reg. 33474 (April 29, 2024).



The Order, which is limited to West Virginia, Tennessee, Kentucky, Ohio, Indiana, and Virginia, restrains the U. S. Department of Education **“from implementing, enacting, enforcing, or taking any action in any manner to enforce”** the new Title IX regulations which was scheduled to become effective August 1, 2024.

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In the order, Judge Reeves held that “the Department [of Education] would turn Title IX on its head by **redefining ‘sex’ to include ‘gender identity.’** But ‘sex’ and ‘gender identity’ do not mean the same thing. The Department’s interpretation conflicts with the plain language of Title IX and therefore exceeds its authority to promulgate regulations under that statute.”

*-State of Tennessee v. Miguel Cardona*

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As a result of this Order, at least for now, schools in West Virginia will continue to enforce and implement the 2020 Title IX regulations that are currently in place, even after August 1, 2024.

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# Winning the “Waiting Game”

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## Stay up-to-date

- Recent Cases, News, References

## Review policies and procedures

- Know what is in it and what isn't

## Conduct internal audits

- Know what you have and what you don't

## Continue educating

- Repeated exposure helps, even if the scope broadens

# UNDERSTANDING THE SCOPE OF TITLE IX

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AND HOW IT MIGHT CHANGE IF/WHEN THE 2024 REGULATIONS ARE  
IMPLEMENTED

Equality in education  
programs and activities

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# Current Title IX Regulations :

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34 C.F.R. §106.41:

(a) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any **interscholastic, intercollegiate, club or intramural athletics** offered by a recipient, and no recipient shall provide any such athletics separately on such basis.



**EVERY** program and activity that the district operates or sponsors—including its athletic program—is covered by Title IX.



# TITLE IX exercise:

## Evaluate your programs

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Facilities

- Practice, Training, Competitions

Equipment and supplies

Schedules

Meeting and Practice Times

Transportation and Allowances

Coaching (time, qualifications, compensation, duties)

Publicity

# PREGNANCY & TITLE IX

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# Pregnancy and Related Conditions

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Although Title IX has long prohibited discrimination on the basis of pregnancy and childbirth, the proposed 2024 regulations clarify that students and employees are protected from discrimination based on **PREGNANCY AND OTHER RELATED CONDITIONS.**

# Pregnancy or related conditions means:

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- (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
- (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

# Title IX and Pregnancy: Protections for Students

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A county board of education must not adopt or **implement** a policy, practice or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.

A county board of education must not discriminate in its education program or activity against any student based on the student's **current, potential, or past pregnancy or related conditions.**

# Title IX and Pregnancy: Obligation of Schools

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*Under the proposed 2024 regulations:*

When a student (or parent) informs **any employee** of the pregnancy or related condition, the employee must promptly provide the student with the Title IX coordinator's contact information and advise the person that the Title IX coordinator can coordinate:

- **Specific actions to prevent sex discrimination AND**
- **Ensure equal access to educational programs**

*How should the District respond now?*

# Title IX Coordinator Obligations

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The school system must make reasonable modifications to its policies, practices and procedures to prevent discrimination and provide equal access to programs.



# What is a reasonable modification?

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- It depends! The Title IX coordinator must consult with the student to come up with the modifications.
  - (Think accommodations and the interactive process.)
- A modification that would fundamentally alter the nature of the program is **not** a reasonable modification.
- If the student accepts the modification, then it must be implemented!

# What are some reasonable modifications?

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- Breaks during class to express milk, breastfeed, or attend to health needs, including eating, drinking and restroom breaks
- Intermittent absences to attend medical appointments
- Access to online or homebound services
- Changes in schedule or course sequence
- Extensions of time for coursework and rescheduling of tests and examination

# What are some reasonable modifications?

(continued...)

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- Allowing a student to sit or stand, carry water or keep it nearby
- Counseling
- Change in physical space/furniture/supplies
- Voluntary access to separate and comparable programs or activities

# Title IX and Pregnancy: Student Absences and Documentation

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## **Voluntary leaves of absence**

- At a minimum, for the time deemed medically necessary
- If there is greater leave available, then for that leave
- When the student returns, they should be reinstated to the academic status they left and to the extracurricular status when the leave began

# Title IX and Pregnancy: Student Absences and Documentation

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A school must excuse a student's absences because of pregnancy or childbirth for as long as the student's doctor deems the absences medically necessary.

Schools cannot require a pregnant student to produce a doctor's note in order to stay in school or participate in activities, including interscholastic sports, unless the same requirement to obtain a doctor's note applies to all students being treated by a doctor.

Even when a student is in the later stages of pregnancy; schools should not presume that a pregnant student is unable to attend school or participate in school activities.

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# Title IX and Lactation

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Lactation space – other than a bathroom – must be provided to students and employees

- Must be clean
- Must be shielded from view
- Must be free from intrusion from others
- May be used for expressing milk for breastfeeding

PUMP Act

- Breaks required as often as needed for a year after the child's birth

# SEXUAL HARASSMENT

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2020 Title IX  
Regulations  
34 C.F.R. § 106.44

A recipient with actual knowledge of **sexual harassment** in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent ...



# Sexual Harassment V. Sex Based Harassment

HOW THE 2020 DEFINITION DIFFERS FROM THE PROPOSED 2024  
DEFINITION

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# SEXUAL HARASSMENT

is *currently* defined as:

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**Quid pro quo harassment**—that is, conditioning any educational opportunity or benefit on the granting of sexual favors—constitutes a *per se* violation of Title IX, regardless of its severity or pervasiveness. *Quid pro quo* harassment constitutes *conduct* without any constitutional protection.

Any form of **sexual assault, dating violence, domestic violence, or stalking** as defined by the Clery Act/VAWA constitutes sexual harassment. These forms of misconduct are so serious in and of themselves that no finding of “pervasiveness” is required.

***Unwelcome conduct of a sexual nature*** that is “so serious, pervasive, and objectively offensive that it effectively denies a person equal access” to an educational program as determined under a ***reasonable person*** standard.

# Sexual Harassment v. Sex-Based Harassment

## 2020: SEXUAL HARASSMENT

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

## PROPOSED 2024: SEX-BASED HARASSMENT

Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is:

- (1) Quid pro quo harassment;
- (2) Hostile environment harassment; or
- (3) Specific offenses
  - (i) Sexual assault meaning an offense classified as forcible or nonforcible sex offense under the FBI crime reporting system;
  - (ii) Dating violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the existence of certain factors (as later defined herein);
  - (iii) Domestic violence (as later defined herein)
  - (iv) Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
    - (A) Fear for the person's safety or the safety of others; or
    - (B) Suffer substantial emotional distress.

# Sex-Based Harassment, defined:

Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is:

- (1) **Quid pro quo harassment;**
- (2) Hostile environment harassment;  
or
- (3) Specific offenses.

## **Quid Pro Quo Harassment:**

- 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

# Quid Pro Quo Harassment

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Under the 2020 regulations, only employees could be accused of “quid pro quo” harassment.

Under the 2024 regulations, scope of quid pro quo is expanded to employees, agents, or other person...

- “other person” means that students are now included

...authorized by the recipient to provide aid, benefit, or service...

Explicitly or impliedly conditioning the provision of such aid, benefit, or service on a person’s participation in unwelcome sexual conduct.

# Sex-Based Harassment, defined:

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- (2) **Hostile environment harassment**;  
or
- (3) Specific offenses.

## Hostile Environment Harassment:

- 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 (i.e., creates a hostile environment).
- **Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:**
  - (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
  - (ii) The type, frequency, and duration of the conduct;
  - (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  - (iv) The location of the conduct and the context in which the conduct occurred; and
  - (v) Other sex-based harassment in the recipient's education program or activity

# Hostile Environment Harassment

## 2020 REGULATIONS

Defined Sexual Harassment as conduct on the basis of sex that satisfied one of the following:

(2) Unwelcome **conduct** determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity

## 2024 REGULATIONS

Now officially “Hostile Environment Harassment”

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 (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of certain factors.

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# Hostile Environment Harassment: Factors that must be considered

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- (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- (ii) The type, frequency, and duration of the conduct;
- (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- (iv) The location of the conduct and the context in which the conduct occurred; and
- (v) Other sex-based harassment in the recipient's education program or activity

# Sex-Based Harassment, defined:

Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is:

- (1) Quid pro quo harassment;
- (2) Hostile environment harassment; or
- (3) **Specific offenses.**

## Specific Offenses:

- (i) **Sexual assault** meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;
- (ii) **Dating violence** meaning violence committed by a person:
  - (A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - (B) Where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - (1) The length of the relationship;
    - (2) The type of relationship; and
    - (3) The frequency of interaction between the persons involved in the relationship;
- (iii) **Domestic violence** meaning felony or misdemeanor crimes committed by a person who:
  - (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;
  - (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
  - (C) Shares a child in common with the victim; or
  - (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or
- (iv) **Stalking** meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - (A) Fear for the person's safety or the safety of others; or
  - (B) Suffer substantial emotional distress.

# RESPONDING TO ALLEGATIONS OF TITLE IX...NOW

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2020 Title IX  
Regulations  
34 C.F.R. § 106.44

A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent ...

# ACTUAL KNOWLEDGE

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- Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient
  - 34 C.F.R. § 106.30
- When a school with actual knowledge of sexual harassment in its education program or activity refuses to respond to sexual harassment or a report of sexual harassment, such a refusal is clearly unreasonable under § 106.44(a) and constitutes a violation of the final regulations.



# ACTUAL KNOWLEDGE

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A school district has *actual knowledge* when **any** employee knows of sexual harassment.

An employee knows of sexual harassment when they have observed it or have heard about it.

Notice to a Title IX Coordinator or to an official with authority to institute corrective measures is actual knowledge.

**NOTE: The 2024 Regulations never mention “actual knowledge.”**

- **Instead, it says: A county board of education with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively.**

2020 Title IX  
Regulations  
34 C.F.R. § 106.44  
[Tab 2]

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, **must respond promptly in a manner that is not deliberately indifferent ...**



# Responding to Title IX Allegations

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A recipient's response **must treat complainants and respondents equitably by offering supportive measures** as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

- 34 C.F.R. § 106.44

# SUPPORTIVE MEASURES

**Non-disciplinary, non-punitive individualized services** offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Designed to restore or preserve equal access to the school district's education program or activity without unreasonably burdening the other party.

# SUPPORTIVE MEASURES

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ALL SUPPORTIVE MEASURES OFFERED MUST BE DOCUMENTED

Supportive measures must be **FREE** to the parties

Supportive measures can be changed or modified as the grievance process continues and as the needs of the complainant/respondent change.

The Department of Education will not deem a school district's determination regarding responsibility to be evidence of deliberate indifference by the school district, or otherwise evidence of discrimination under Title IX by the school district, solely because the Department would have reached a different determination based on an independent weighing of the evidence.

# THE TITLE IX GRIEVANCE PROCESS

WHAT IS IT AND  
WHEN DOES IT  
OFFICIALLY BEGIN?

# The Grievance Process

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**Begins once a formal complaint is filed**

- **NOTE: The 2024 proposed regulations get rid of the “formal complaint” requirement (see next slide)**

A school district’s “grievance process” = its Title IX policy and procedures

DO NOT confuse “grievance process” with filing something with the grievance board; a citizen’s complaint or any other process where we file a “grievance.”



# Definition of Complaint

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## 2020 REGULATIONS

Previously “Formal Complaint”

A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and **requesting that the recipient investigate the allegation of sexual harassment.**

Required to be signed

## 2024 REGULATIONS

An **oral or written** request to the recipient that **objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.**

# Definition of Complainant

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## 2020 REGULATIONS

“An individual who is alleged to be the victim of conduct that could constitute **sexual harassment.**”

## 2024 REGULATIONS

(1) A student or employee who is alleged to have been subjected to conduct that could constitute **sex discrimination under Title IX** or this part; or

(2) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient’s education program or activity at the time of the alleged sex discrimination

**Includes volunteers**

## TITLE IX TEAM TASK:

“EQUAL TREATMENT, EVERY TIME”

**The purpose of the grievance process is to ensure that both the complainant and respondent are treated equal.**

Must follow a process that complies with the regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

- Requires an **objective evaluation of all relevant evidence** – including both inculpatory and exculpatory evidence.
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- Presumption that **the respondent is not responsible for the alleged conduct until a determination** regarding responsibility is made at the conclusion of the entire process.

# THE DECISION-MAKING PROCESS

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Under the 2020 Regs, only the Decision-Maker can make determination that a Title IX violation has or hasn't occurred.

The 2024 Regs allow the Title IX Coordinator or Investigator to serve as the Decision-Maker.

# Tasks of the Decision-Maker

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Provide the parties the opportunity to cross examine the other party and/or witnesses through the exchange of RELEVANT, written questions.

Review the Investigation Report

Issue a written decision which makes a finding as to:

- EVERY Allegation
- Remedies and/or sanctions to be imposed.

# Cross-Examination Procedure required in the 2020 regs

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Decision-Makers must allow each party the opportunity to question other parties and witnesses.

- By submitting written, relevant questions to any party OR witness.
- Decision-Maker is responsible for reviewing all questions for relevancy and distributing it to the parties to answer.
- Parties WILL NOT exchange questions/answers directly to each other.
- Decision-Maker sets the timeframe for the cross-examination process and shares the answers to the parties. Follow-up questions are allowed.



# Relevancy Determination



Decision-Maker is tasked with making a relevancy determination as to EVERY question submitted.



If a question is deemed “irrelevant,” the Decision-Maker **MUST** notify the party and explain the reasoning.



Irrelevant questions will not be permitted.



Questions related to inadmissible evidence are considered irrelevant.

# Inadmissible Evidence

Inadmissible evidence is evidence that cannot be presented to the Decision- maker

## Examples of Inadmissible Evidence/Questions

Treatment records from a medical professional\*\*

Any statements made by a party or witness who does not submit themselves to cross examination

Any questions that seek the disclosure of information that is protected under a legally recognized privilege, such as patient-doctor, attorney-client, or spousal privilege.\*\*

\*\* Unless the person holding the privilege waives the privilege in writing.

## Failure/Refusal to Participate in Cross-Examination

Under the 2020 regulations, should any party or witness not participate in cross-examination during a live hearing, the Decision-Maker cannot use any part of their testimony in reaching final determination regarding responsibility.





# Standard of Evidence: PREPONDERANCE OF THE EVIDENCE

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WHETHER IT IS MORE LIKELY THAN NOT  
THAT THE RESPONDENT COMMITTED THE  
ALLEGED SEXUAL HARASSMENT.

# THE APPEAL

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Both parties must be offered an appeal from a determination regarding responsibility, and from a school district's dismissal of a formal complaint or any allegations therein.

# The Grievance Process: Appeal Process

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## 2020 REGULATIONS

An appeal may be made on the following grounds:

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

## 2024 REGULATIONS

A recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints.

# QUESTIONS?

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