

The Administrator's Essential Guide to The Current State of Title IX

AASA 2023 Legislative Advocacy Conference

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Thompson & Horton

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Jackie Gharapour Wernz
Dallas

jwernz@thlaw.com



Holly McIntush
Austin

hmcintush@thlaw.com



BECAUSE IT'S NOT JUST BUSINESS

IT'S PERSONAL

LEGAL REPRESENTATION FOR EDUCATION, GOVERNMENT, AND PRIVATE BUSINESS

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- ✓ What is Title IX and why does it matter?
- ✓ What is the current state of the law and how do you comply?
- ✓ What changes are to come (and how do you prepare)?



**THIS IS
OUR AGENDA**



What is Title IX (And Why Does It Matter?)



Title IX of the Education Amendments of 1972

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.”

20 U.S.C. § 1681(a)



Title IX's Scope



Title IX's Scope

discrimination examples

- Different Treatment
- Disparate Impact
- Bullying
- Harassment
- Sexual Assault & Violence
- Domestic Violence
- Dating Violence
- Stalking
- Retaliation

Title IX's Scope

"on the basis of sex"

- "Sexual"
- Sex-based
- Gender-based
- Sexual orientation
- Gender identity*

*intimate facilities &
athletics are complicated
under Title IX

What's the Risk?

- ▶ U.S. Department of Education's Office for Civil Rights (OCR)
- ▶ U.S. Department of Justice's Civil Rights Division/Educational Opportunities Section (EOS)
- ▶ Lawsuits in federal courts

And don't forget trial in "the court of public opinion"



U.S. Department of Education's Office for Civil Rights Announces Agreement with Rhinelander School District to Ensure Compliance with Title IX Concerning Harassment Based on Gender Identity

July 6, 2023



Today the U.S. Department of Education's Office for Civil Rights (OCR) announced the Rhinelander School District entered into an agreement to ensure compliance with Title IX of the Education Amendments of 1972 when responding to harassment based on gender identity.

Based on the evidence in the investigation to date, OCR is concerned that the District response to the persistent harassment limited the student's participation in school activities. OCR is also concerned that the District records miscoded sex-based harassment, including the use of a slur for

U.S. Department of Education's Office for Civil Rights Reaches Agreement to Resolve Sexual Harassment Investigation of Montgomery College in Maryland

June 28, 2023



The U.S. Department of Education's Office for Civil Rights (OCR) today announced that Montgomery College, Takoma/Silver Spring Campus, has entered into a resolution agreement to resolve a sexual harassment complaint. OCR's investigation established that a College professor engaged in sexual harassment of female students during a class he taught by requiring the students to remove their shirts and wear only their bras – and then commenting on their bodies – ostensibly to demonstrate a medical assessment despite the fact that the assessment did not require the clothing removal, or the bodily commentary.


Seattle Schools settles sexual abuse lawsuit for \$3 million

May 9, 2022 at 6:31 pm | Updated May 10, 2022 at 2:25 pm

By [Monica Velez](#) 

Seattle Times staff reporter

Ken-Ton to pay \$17.5 million to settle sexual abuse claims against retired teacher

[Stephen T. Watson](#), [Dan Herbeck](#) Jun 9, 2022 Updated Aug 5, 2022  27

LOCAL

University Place School District to pay \$4.25M to students in sexual abuse cases



By [KIRO 7 News Staff](#)

August 26, 2022 at 6:56 pm PDT

LOCAL NEWS • News

Riverside Unified settles sex abuse lawsuit with 10 children for \$13.7 million

School district failed to take action against predatory Liberty Elementary technology aide, attorneys for victims say



What is the Current State of the Law?



Title IX Sexual Harassment



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FEDERAL REGISTER

The Daily Journal of the United States Government



Ⓜ Rule

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

A Rule by the [Education Department](#) on 05/19/2020



PUBLISHED DOCUMENT

Start Printed Page 30026

AGENCY:
Office for Civil Rights, Department of Education.

ACTION:
Final rule.

SUMMARY:
The Secretary of Education amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The final regulations specify how

DOCUMENT DETAILS

Printed version:
[PDF](#)

Publication Date:
05/19/2020

Agency:
[Department of Education](#)

Dates:
These regulations are effective August 14, 2020.

Effective Date:
08/14/2020

Document Type:

2020 Title IX Rules

- Issued by the Trump administration's Office for Civil Rights
- Effective August 14, 2020
- Will be in effect at least until the end of the current calendar year
- Include significant requirements for handling complaints of sexual harassment under Title IX

The 2020 Title IX Rules

What do they require?



Designate

A Title IX Coordinator



Identify

The Title IX Coordinator to your community, including by posting contact information (including email) online



Post

Post all training materials used to train Title IX team members on your district website

The 2020 Title IX Rules

What do they require?



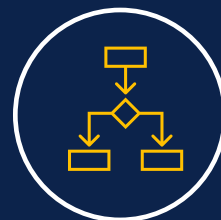
Train

Title IX Coordinator, Investigators, Decision-makers, Appeals Officers, and Informal Resolution Facilitators



Policy & Procedure

Have and share publicly a policy prohibiting Title IX sexual harassment and a grievance procedure



Process

Use the policy and grievance process any time a report of covered conduct is received

When Does the T9SH Process Apply?

1

When any employee of the school district has actual knowledge...

2

of "Title IX Sexual Harassment"...

3

"in an education program or activity" of the school district...

4

and "against a person in the United States"...

If the T9SH Process Applies...

If **any school employee** is aware of any information **even suggesting** that "Title IX Sexual Harassment" "in an education program or activity" and "against a person in the U.S." **is, has been, or might be happening**, the school cannot impose punitive or disciplinary consequences on the alleged perpetrator **until it has used the Title IX sexual harassment process**

Sticky Issues
Title IX
Sexual
Harassment



1

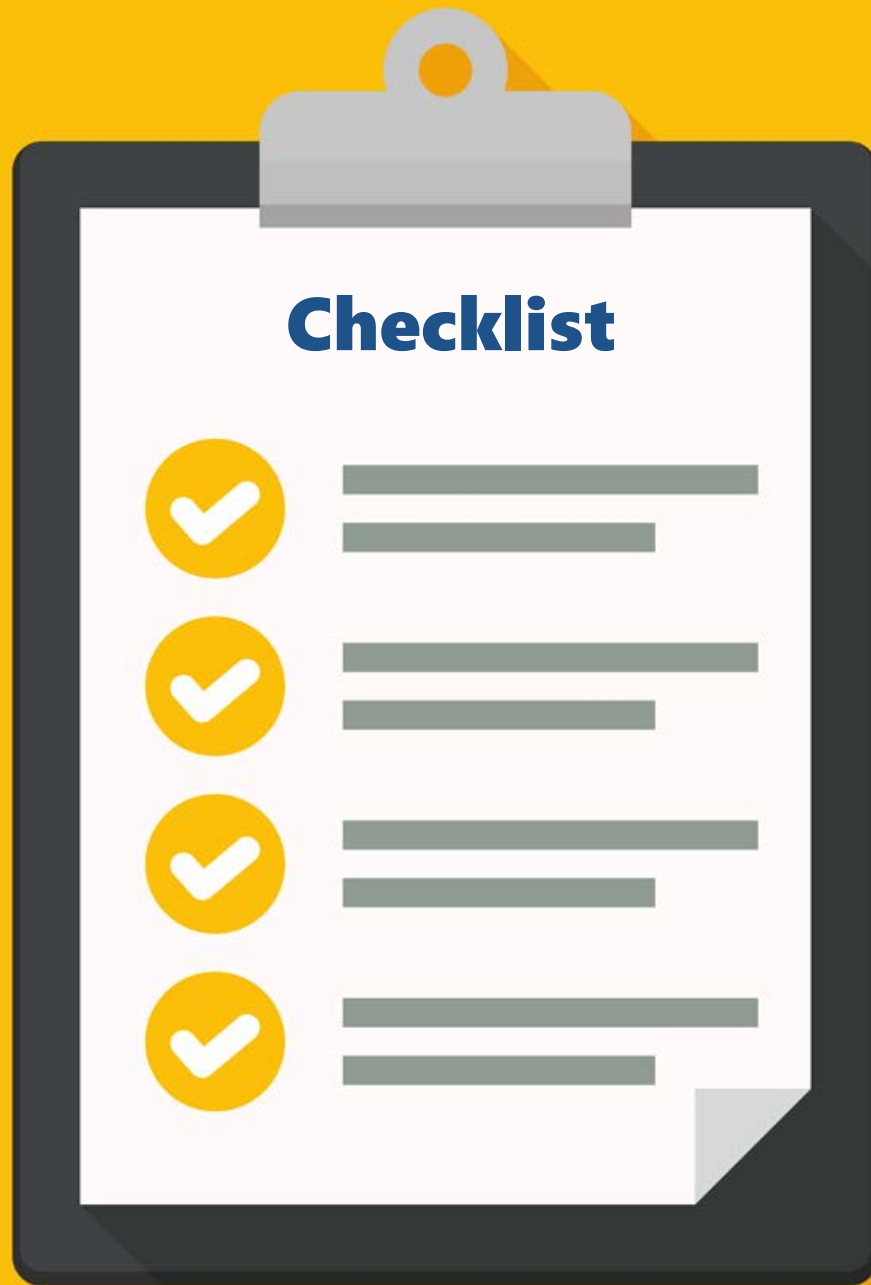
Lengthy process

2

Limits on sharing
information with the
public

3

Limits on responding to
off-campus conduct



1

Review personnel designations and update webpages and publications

2

Verify training on your website and plan additional training for the new school year

3

Review and revise policies and procedures

Transgender Issues



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What We Know



Title IX protects students from discrimination and harassment based on failure to comply with gender-based norms



Title IX protects students from discrimination and harassment based on sex- and gender-stereotyping



Title IX protects students from harassment and most discrimination based on their sexual orientation or gender identity *status*

What We Don't Know



Does Title IX require that employees use a student's preferred names and pronouns? What about students? What if there is a religious objection?



Does Title IX require that students be allowed to participate on athletic teams and use intimate facilities that match their gender identity?



What notice is due to parents/guardians if a school learns information about a student's sexual orientation or gender identity that the parent doesn't know?

Sticky Issues

Transgender Student Issues Under Title IX



1

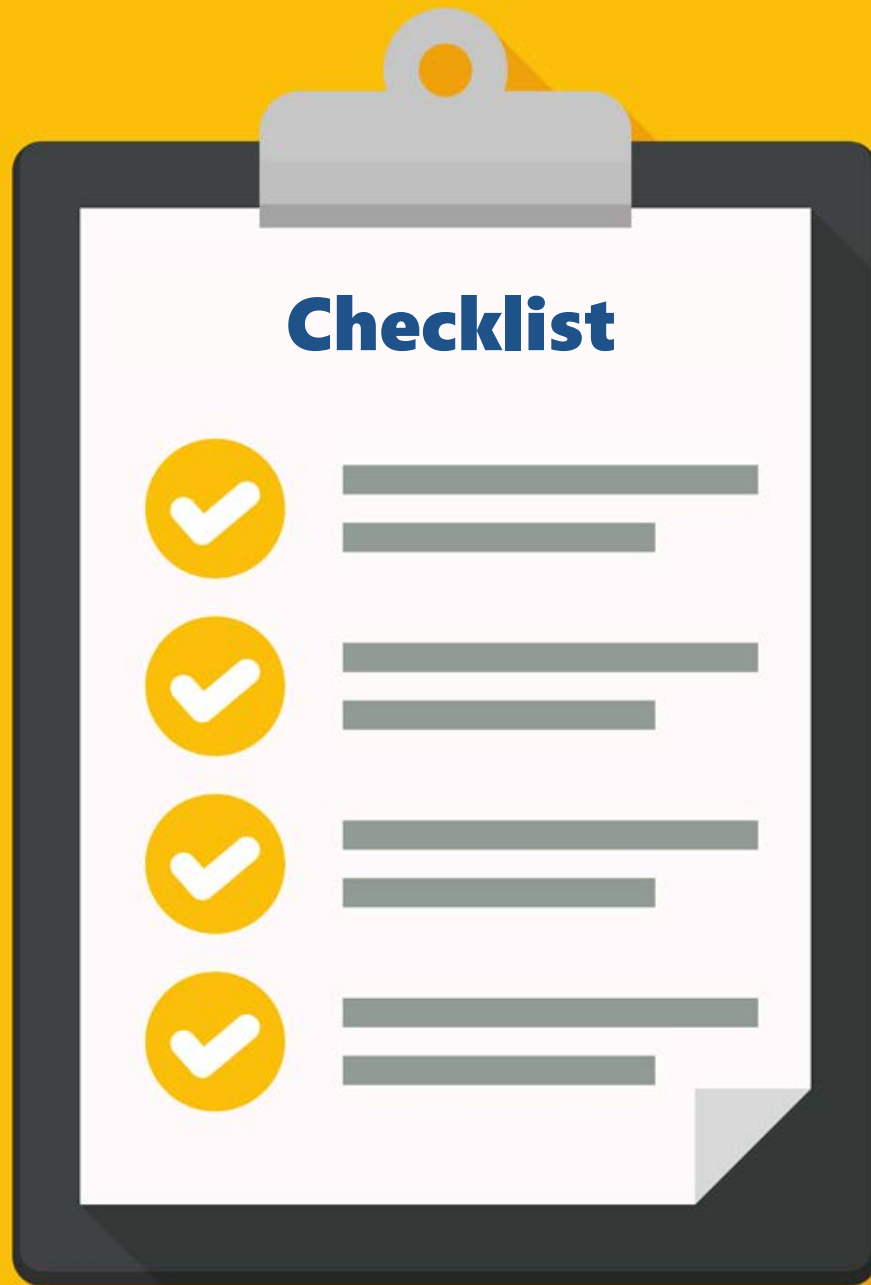
Conflicting State Laws
(athletics, bathrooms,
parental notice)

2

Lack of court guidance in
many jurisdictions

3

Fierce community and
media scrutiny



1

Ensure processes are in place to address bullying, harassment, and discrimination

2

Work with legal counsel to address overlap, if any, with state laws

3

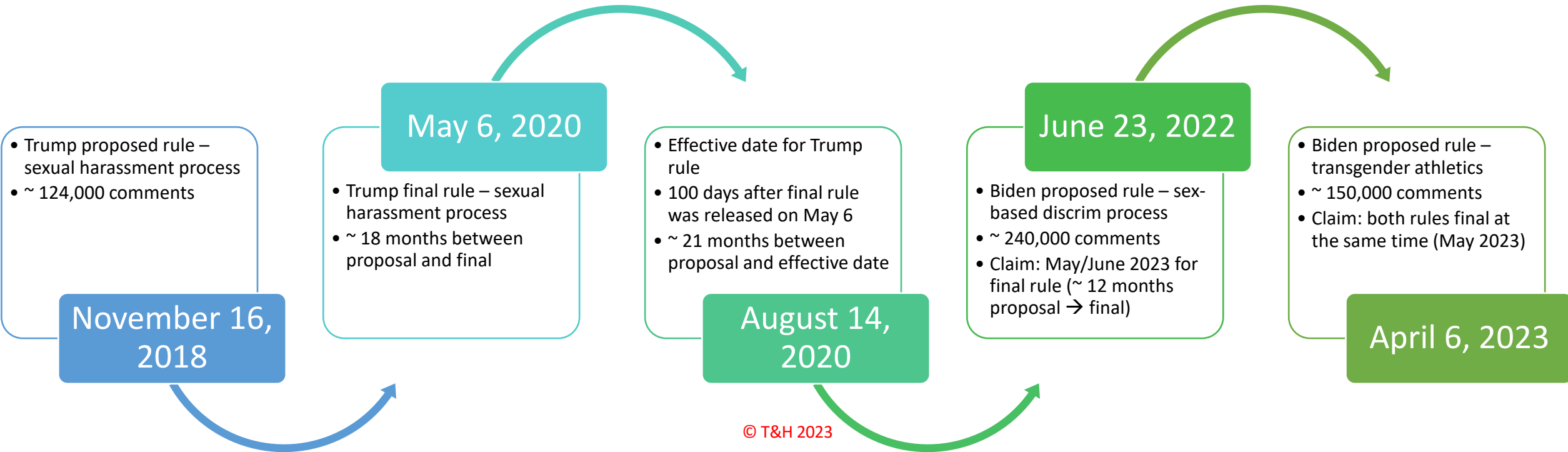
Communicate expectations to teachers and staff



What Changes Are to Come and How Do You Prepare?



Where Are We & How Did We Get Here?





HOMEROOM

THE OFFICIAL BLOG OF THE U.S. DEPARTMENT OF EDUCATION

ED.gov

From the Secretary

A Timing Update on Title IX Rulemaking

Posted by U.S. Department of Education [May 26, 2023](#) [Headlines, News, Title IX](#)

The Biden-Harris Administration is committed to ensuring all students are guaranteed an educational environment free from discrimination on the basis of sex. To that end, amending the Department of Education's (Department's) regulations that implement Title IX of the Education Amendments of 1972 (Title IX) is a top priority to ensure full protection against sex discrimination for all students in federally funded education programs and activities.

The Title IX proposed regulations that the Department released in July 2022 are historic. They would strengthen protections for students who experience sexual harassment and assault at school, and they would help protect LGBTQI+ students from discrimination. The Department received more than 240,000 public comments on the proposed rule – nearly twice as many comments as the Department received during its last rulemaking on Title IX. Carefully considering and reviewing these comments takes time, and is essential to ensuring the final rule is enduring. That is why the Department is updating its Spring Unified Agenda to now reflect an anticipated date of October 2023 for the final Title IX rule. In addition, the Department is updating its Spring Unified Agenda to reflect an anticipated date of October 2023 for its proposed Athletics regulation, which received over 150,000 comments during its recent public comment period from April 12 – May 15, 2023. The Department is currently reviewing each of these comments, and is grateful for the extensive public participation and comments received in this rulemaking process.



Major Changes: Grievance Process Rules

- Would apply to all sex-based discrimination, not just harassment
- Hostile environment would be "severe **or** pervasive"
- Some potential changes regarding off-campus conduct
- Fewer explicit requirements for the grievance process

The Good News...

- Steps you have already taken are not a waste because the rules (presumably) will go into effect (eventually)
- The delay provides us more time to think about changes to be made—if we use that time!
- Nothing prevents you from updating policies this summer to implement elements of the amendments that seem likely to be finalized as proposed, are non-controversial in your community, and make sense for your institution

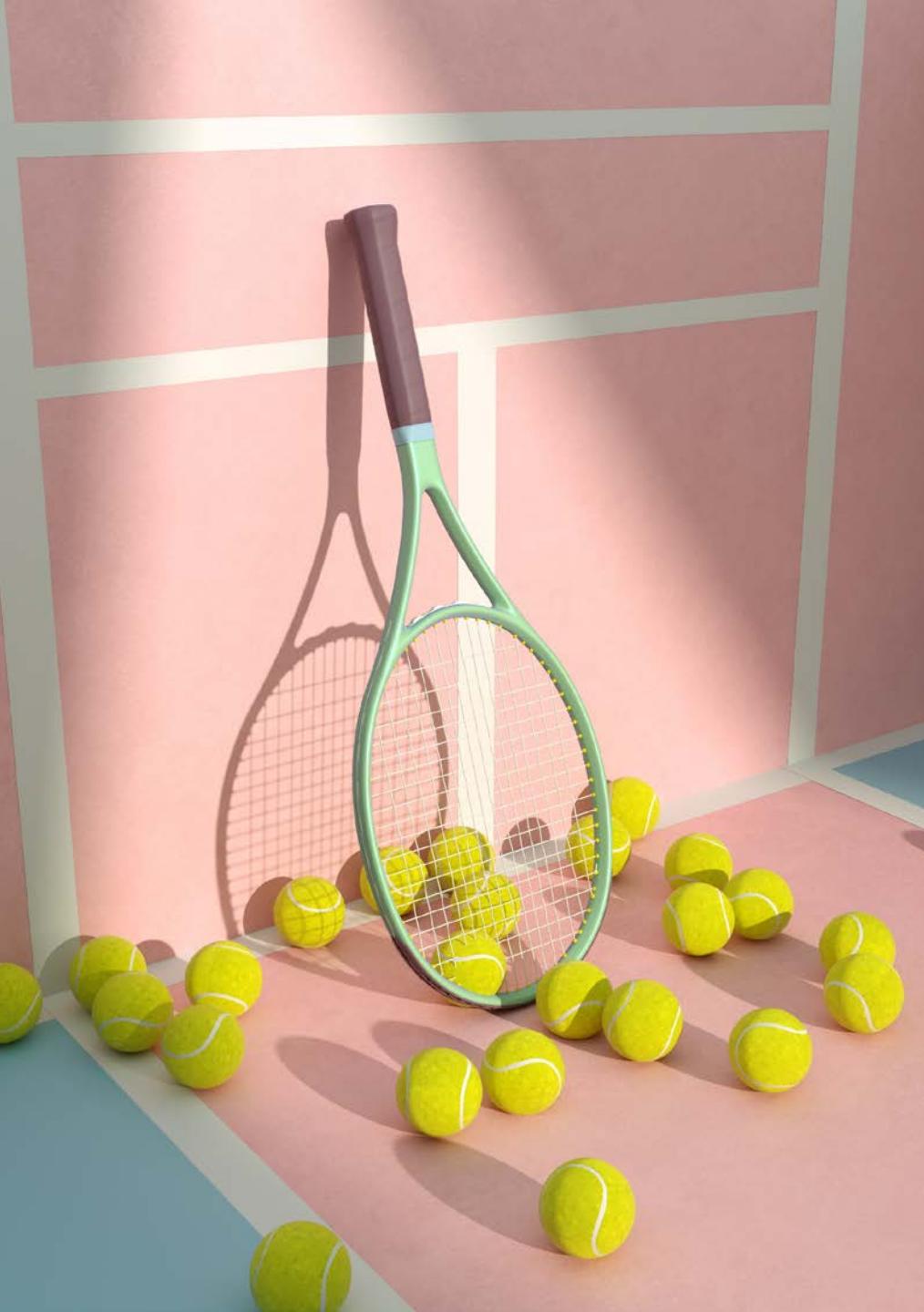
The Bad News...

- We may be looking at a mid-year rollout which will be even more challenging than a summer one
- We are stuck with the 2020 amendments, many of which are inefficient and ineffective
- You now must consider policy updates to your **current** policies, procedures, and other materials under the 2020 amendments **in addition to** thinking through changes that may need to be implemented mid-year
- Your Title IX “team” and employees need to keep up their training on the current rules **and** be scheduled for training in November, December, or January on the new rules



Major Changes: Transgender Athletics

- Under the proposed regulation, schools would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity



Major Changes: Transgender Athletics

A school could adopt or apply sex-related criteria limiting or denying a student's eligibility to participate on a male or female team consistent with their gender identity only in limited circumstances. Specifically, any such criteria:

- Must be substantially related to the achievement of an important educational objective
- Must minimize harm to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied

Analysis must be specific to each sport, level of competition, and grade or education level



www.titleXtips.com

How to Make—and Keep—a Resolution to Prepare for the New Title IX Rules

🕒 JANUARY 18, 2023

📁 IN: 2022 REGULATIONS, IN THE NEWS, POLICIES AND PROCEDURES, PROPOSED REGULATIONS, TRAINING



We are barely into 2023, and it's shaping up to be the biggest year yet for Title IX. From transgender [bathroom bans](#) and [athletic participation](#) battles to growing scrutiny on general [athletics equity](#) and [pregnant and parenting students](#), Title IX will continue to have its moment in the sun in 2023 as it has for the past few years. Of course, the biggest news for Title IX in 2023 will undoubtedly be the issuance of the Biden administration's new Title IX rule. The Department of Education recently [confirmed](#) that it intends to hoist the new regulation on schools in May 2023. Schools, colleges, and universities will once again have to comply with an entirely new grievance structure quickly over the summer.

The School Administrator's Title IX Gameplan for the New School Year



Kendra Yoch
Counsel

**Thompson
& Horton** LLP
ATTORNEYS | COUNSELORS



Jackie Wernz
Partner

Tuesday, July 25, 2:00 p.m. ET

AASA
THE SCHOOL SUPERINTENDENTS ASSOCIATION

**Questions?
Thank you!**

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