

## Title IX Summit Keynote "Navigating Uncertainty"

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### Disclaimers



- We are not giving you legal advice
- Many of these cases may still be in appeals – stay tuned
- Consult with your legal counsel regarding how best to address a specific situation
- Feel free to ask general questions and hypotheticals
- Watch your inbox for a link to the slides!

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### What we can learn from the current landscape...



- Exec. Orders, Investigations, Funding risks
- 2020 regulations – a place of stability?
- Title IX and Transgender Athletes



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## Executive Orders and DOJ Memos

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### EOs and Memos



- On **January 21, 2025**, President Trump issued Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8633, directing the executive branch agencies to take action to end the adoption and use of "dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusion' (DEI) or 'diversity, equity, inclusion, and accessibility' (DEIA) that can violate the civil rights laws of this Nation."
- On **February 5, 2025**, the attorney general issued a memorandum promising that the DOJ's Civil Rights Division "will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds."

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### Three Types of Discrimination



- Disparate Treatment** Discrimination – Intentional differential treatment protected category.
- Disparate Impact\*\*\*** Discrimination – Facially neutral policy has an adverse outcome that disproportionately falls on a group based on race, color, or national origin.
- Hostile Environment** Harassment - Unwelcome 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 a recipient's education program or activity.

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**Example of Disparate Impact Discrimination\*\***



An institution's DEI Office sponsors a student-centered support group for African-American male students because they are a significant minority on campus. The support group's membership is not explicitly restricted only to students who are African-American. However, students interested in joining the organization must submit an interest form to the DEI Office describing why they are interested in joining the organization and how race has impacted their lived experience and world view. The stated mission of the organization is to bring Black male students together, so they do not feel so alone on campus. Although membership is not explicitly restricted, 98 of the 100 members of the group identify as Black and male. OCR receives a complaint from a White student who was denied membership to the organization after submitting an interest form. The student argues that the organization violates Title VI by excluding students based on race and Title IX by restricting access to the organization by sex.

Adapted from the Dear Colleague Letter – Activities and Programs that Promote Racially Inclusive School Communities (August 2023)

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**Executive Order: Disparate Impact**



- *Restoring Equality of Opportunity and Meritocracy* (April 23, 2025)
- "A key tool of this [DEI] movement is **disparate-impact liability**, which holds that a near insurmountable presumption of unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved, and even if everyone has an equal opportunity to succeed."
- Revoking prior presidential actions and regulations that rely on disparate impact in Title VI enforcement.
- U.S. Attorney General will no longer pursue cases based on disparate impact.

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**False Claims Act memo**



- May 19 – Citing the AG Memorandum *Ending Illegal DEI and DEI Discrimination and Preferences* (Feb. 5, 2025), the memo cites the False Claims Act (31 U.S.C. § 3729) as a "primary weapon" against "waste, fraud and abuse."
- "a federal contractor or recipient of federal funds knowingly violates civil rights laws including but not limited to Title IV, Title VI, and Title IX, of the Civil Rights Act of 1964 - and falsely certifies compliance with such laws."
- "Accordingly, a university that accepts federal funds could violate the False Claims Act when it encourages antisemitism, refuses to protect Jewish students, allows men to intrude in to women's bathrooms, or requires women to compete against men in athletic competitions. Colleges and universities cannot accept federal funds while discriminating against their students."



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### False Claims Act Summary

- False Claim Act originally established in 1863 to combat contractor fraud during the Civil War
- allows for a “Qui Tam” action that provides for a private actors to sue on behalf of the government
- Elements:
  - The representation must be **fraudulent, knowing, and material**.
  - a representation regarding compliance with civil rights laws would have to be **both** false and material.
  - Materiality is ultimately an issue of law and fact to be decided by a court.

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### Key Takeaways

- Be prepared for sudden changes;
- Educate your campus on the EOs and the impacts to your work;
- Seek advice early and build networks to help internally and externally.
- Be alert to DOJ, OCR, and other government interpretations of EOs – determine enforcement scope;
- Pay attention to investigation notices;
- Keep Calm and Carry On.

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## Navigating Title IX & Transgender Student-Athletes

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### Executive Orders, Investigations, and Litigation, oh my.



- On February 5, 2025, the current administration signed the “Keeping Men Out of Women’s Sports” executive order. Following this, the NCAA revised its policy to align with the federal directive. However, some schools and sports associations have chosen to adhere to their state laws, allowing transgender students to participate on athletic teams consistent with their gender identity, despite the risk of administrative investigations. This underscores the complexities of the legal landscape.
- **NOTE: This is an evolving area of compliance**

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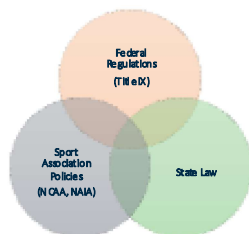
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### Big Picture




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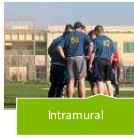
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### Reminder



- What athletics programs are subject to Title IX? ALL OF THEM.




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### Legal Authority



- Title IX Regulation (34 CFR 106.41)
- "Dear Colleague" letters and guidance from OCR
- OCR Case Resolutions
- Case law




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### Title IX Athletics Regulation (34 CFR 106.41) (unchanged since 1975)



- (a): **"General.** 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."
- (b): **"Separate teams.** Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered, unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

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## Recent



## Where do we start to see transgender students in the Title IX conversation?

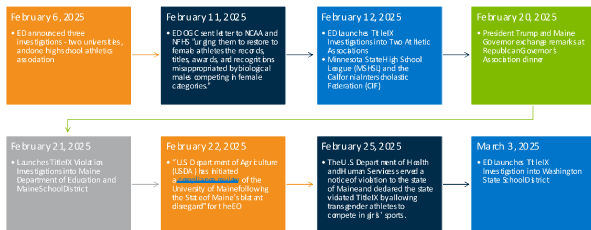
- May 2016 – OCR and DOJ issues a joint Dear Colleague Letter on Title IX and Transgender Students
- February 2017 – DCL is rescinded by First Trump Administration
- June 2020 – the Supreme Court issued its decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), holding that discrimination based on sexual orientation or gender identity is sex discrimination under Title VII of the Civil Rights Act of 1964
- January and March 2021 – President Biden directed the Dept. of Ed. in two Executive Orders to review its current regulations
- July 2022 – the Title IX NPRM was released and announced plans to issue a separate NPRM on athletic participation
- April 2023 Athletics NPRM would have permitted transgender students to participate
- December 2024 Athletics NPRM is removed from consideration
- January 2025 – Kentucky Fed. Court vacated 2024 Title IX regulations nationwide

## Executive Orders in 2025



- "[Keeping Men Out of Women's Sports](#)," Feb. 5, 2025
  - Consistent with EO 14168 ("Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," Jan. 20, 2025)
- Secretary of Education will:
  - Protect all-female athletic opportunities and all-female locker rooms by prioritizing Title IX enforcement actions against those that do not comply
  - Bring regulations and policy guidance into line with the Congress' existing demand for "equal athletic opportunity for members of both sexes;" and
  - Resolve pending litigation consistent with this policy.

## Federal Investigations



## Maine Investigation – HHS



- March 17 – HHS Civil Rights Office Determined that Maine Violates Title IX by allowing males in women's sports
  - Specifically, Maine Department of Education, the Maine Principals' Association, and Greely High School
  - HHS offered them an opportunity to voluntarily commit within 10 days to resolve the matter through a signed agreement or risk referral to the U.S. Department of Justice for appropriate action.




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## Maine Investigation – USDA



- March 19 – USDA announced that the "University of Maine clearly communicated its compliance with Title IX"
- UMaine confirmed that they:
  - Do not permit a male student-athlete to identify as a female student-athlete to establish individual eligibility for NCAA-sanctioned women's sports.
  - Do not permit a male to participate in individual or team contact sports with females.
  - Comply with NCAA regulations and do not permit a male student athlete to participate in NCAA-sanctioned women's sports.
- April 7 – Maine's AG sues USDA over withdrawing funding without process
- April 11 – Emergency TRO granted in Maine's favor
- May 2 – USDA settles with Maine – case dismissed




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## Maine Investigation – DoEd



- March 19 – U.S. Department of Education's Office for Civil Rights Concludes that the Maine Department of Education Is Violating Title IX
- OCR has issued a proposed Resolution Agreement to the MDOE to resolve the Title IX violations. OCR has offered MDOE an opportunity to voluntarily agree within 10 days or risk imminent enforcement action including referral to the U.S. Department of Justice (DOJ) for proceedings.




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### Proposed Action Items from DoEd



- The proposed Resolution Agreement requires the following action items:

1. Directive Issuance and Compliance Reminder
2. Specification of Title IX Compliance Requirements
3. Restoration of Individual Recognitions for Female Athletes
4. Apology Letters to Female Athletes
5. Rescission or Revision of Prior Guidance Documents
6. Annual Certification of Compliance and Reporting

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### Federal Funding Freezes?



- March 20, 2025 – Reports that the White House was freezing \$175 million of federal funding to UPenn, citing the institution's policies on transgender athletes
- March 25, 2025 – UPenn gave an update on its website:
  - Confirming that "faculty across seven different schools received stop work orders last week on federally contracted research, amounting to approximately \$175M."
  - Saying that "during the 2021-22 season, a student-athlete who had transitioned while on leave from Penn the previous year competed in women's swimming, in full compliance with NCAA rules and Title IX policies in place at the time."




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### Litigation



- The EO challenged in case involving 2024 constitutional challenge to New Hampshire's state law banning transgender women and girls from competing in women's sports.
- Tirrell et al v. Edelblut et al*, Case No. 1:24-cv-00251 (D.N.H.)
  - Two high school transgender girls challenge the "Keeping Men out of Women's Sports" EO in Amended Complaint.




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# State Laws

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## State Laws – Where do we stand?

- Current temporary injunction blocking enforcement:
  - Arizona** (*U.S. v. Harris*, July 2023, after denied in Sept 2024)
  - Idaho** (*U.S. v. Little*, Aug 2020, up held in Aug 2023)
  - Utah** (*U.S. v. Utah HSAAs*, Aug 2022)
  - West Virginia** (*B.P.J. v. West Virginia*, July 2023)
  - New Hampshire**, (*Torresano Tur melvire*, Edelblut, Sept 2024 has a temporary injunction not allowing only the two named plaintiff to sue it but says to go by who is at the door to file the lawsuit, court wins)
  - Montana** (*U.S. v. Montana*, Oct 2023) – has permanently blocked the state's ban as it applies to higher education, but not K-12.
- Now current temporary injunctions, so the laws enforcement is:
  - Ohio** (*Moore v. Yort*, April 2025 – emergency stay of injunction pending appeal on part of it), B.A. 2023)
  - Florida** (*U.S. v. Aronson*, N. v. Desmond Dec. 2024)
  - Indiana** (*U.S. v. Indiana Public Schools*, August 2022)
- Permanent injunctions granted to individual students:
  - Tennessee** (*U.S. v. Equivox I, Inc.*, March 2 024)

**State law blocked by temporary injunction** (States not participating in court-confirmed cases)

**State law blocked by permanent injunction** (States not participating in court-confirmed cases)

**State law not blocked by injunction** (States not participating in court-confirmed cases)

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## Are these laws unconstitutional?

Bricker  
Graydon

Some courts have said yes, but they used intermediate scrutiny to analyze the state law.

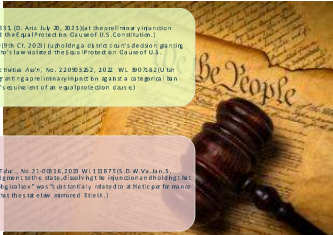
• *Pruneyard, 275 U.S. 446 (1927)*, 446 U.S. 713 (1980) (the state's prohibition on the Am. Legion to wear buttons that said "I am an American" was unconstitutional.)

• *Archer v. City of St. Paul*, 507 U.S. 514 (1993) (the city's ordinance requiring apartment owners to have their lawns mowed by the city was unconstitutional.)

• *United States v. Carolin. Am. Nat. Indus. Co.*, 359 U.S. 173 (1959) (the state's law requiring the state to provide a minimum wage for its employees was unconstitutional.)

One court has said no, but they also used intermediate scrutiny

• *U.S. v. Windsor*, 570 U.S. 743 (2013) (the state's law requiring the state to provide a minimum wage for its employees was unconstitutional.)



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## Do these laws conflict with Title IX?

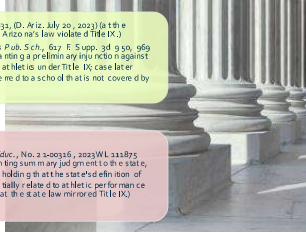


Some courts have said yes

- *Doe v. Home*, 2023 WL 4663831 (D. Ariz. July 20, 2023) (a Title IX preliminary injunction precluding Arizona's law violated Title IX.)
- *A.M. by E.M. v. Indianapolis Pub. Schs.*, 652 F. Supp. 3d 950, 969 (S.D. Ind. July 26, 2022) (granted a preliminary injunction against transgender participation in athletics under Title IX; case later dropped after student transferred to a school that is not covered by the law.)

One court has said no

- *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2-000315, 2023 WL 332875 (S.D.W. Va. Jan. 5, 2023) (granting summary judgment to the state, dissolving the injunction and holding that the state's definition of "biological males" substantially related to athletic performance and fairness in sports and that the state law mirrored Title IX.)




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Example 1: *Madeline Moe v. Yost* in Ohio

- Challenging the constitutionality of H.B. 68 (the Safe Act/Save Women's Sports Act) with focus on medical care (banning hormones and some gender affirming care)
- Trial Court said the law is constitutional, denied the injunction
- Plaintiffs filed an appeal requesting an injunction
- Oral argument held on September 11, 2024 (expedited)
- On March 18, 2025, the appeals court **reversed** the trial court's decision and told the trial court to issue permanent injunctions regarding enforcement of H.B. 68's provisions on puberty blockers and hormones for the purpose of assisting "the minor individual with gender transition."
- Motion to Stay proceedings filed in Ohio Supreme Court

## Ohio's Save Women's Sports Act

- Teams must be designated based on the sex of participants
- Must not knowingly allow a male to participate on a female team
- Creates a private right of action if rights are deprived and for retaliation for reporting violation

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## Supreme Court Involvement?



- In July 2024, attorney generals from the states of West Virginia (*B.P.J. v. West Virginia State Board of Education*) and Idaho (*Hecox v. Little*), asked the U.S. Supreme Court to hear the cases.
  - Lower courts and Circuit courts disagree over whether laws prohibiting transgender individuals from access consistent with their gender identity are subject to heightened constitutional scrutiny.




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**Key Takeaways**

- Ensure you are complying with federal orders, state law, and NCAA policy
- **To the extent they may conflict, consult with your general counsel**
- Policies and tabletop exercises
- Do you have a policy that prohibits discrimination based on gender identity?


**Bricker  
Graydon**

# Thank You

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