



# UNFORCED ERRORS

**TITLE IX MISSTEPS THAT  
PUT SCHOOLS AT RISK**

THOMPSON & HORTON  
— PRESENTS —

# TACTIX

THE 2025 SEASON

FEBRUARY 12  
MAY 07  
AUGUST 27  
NOVEMBER 05



# But First: Federal Enforcement & Litigation Update





# Transgender Athletics Participation

## Little v. Hecox

Challenge to an Idaho law prohibiting transgender girls and women from participating on female teams. The law provides that if the sex of an athlete is challenged, the athlete's sex must be medically verified. **Waiting on SCOTUS Oral Argument & Opinion**

## West Virginia v. P.B.J.

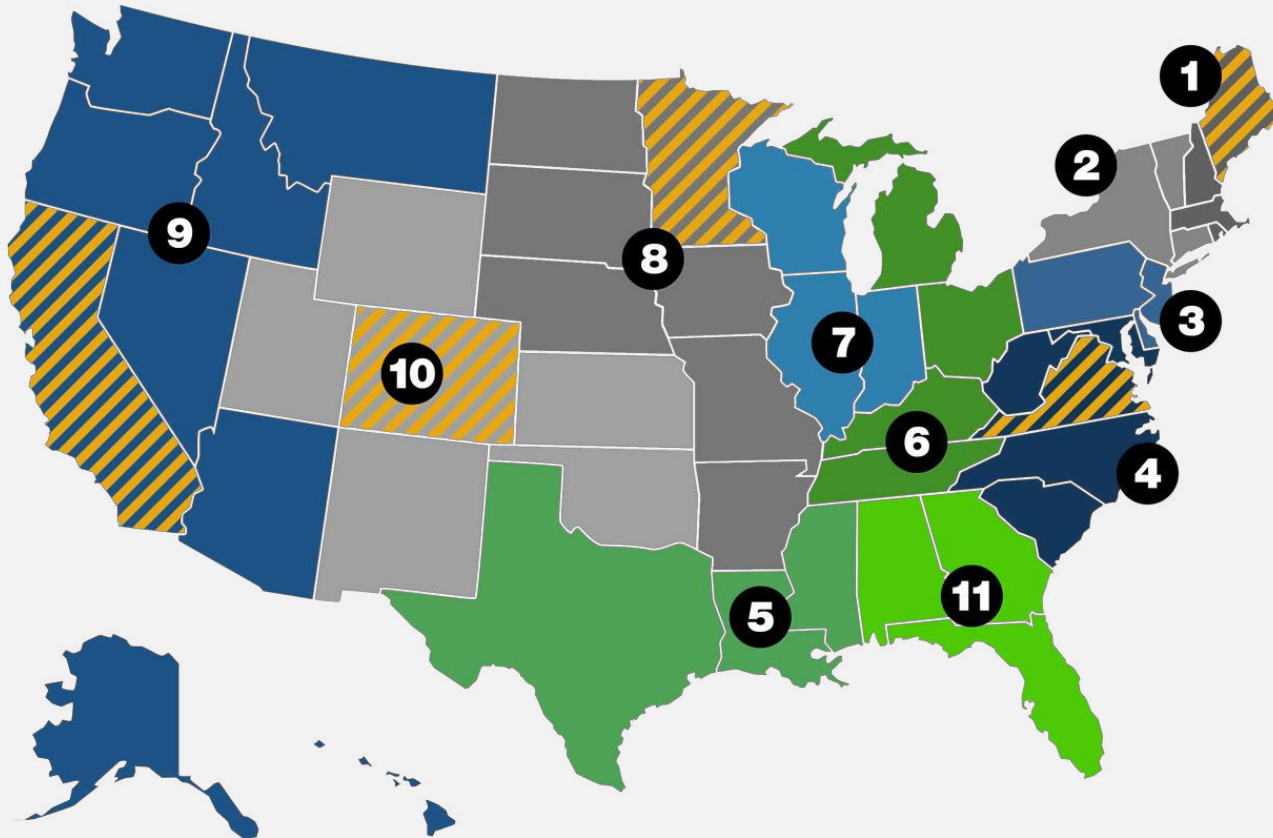
Challenge to a WV law requiring students to participate on single sex teams on the basis of their biological birth sex. Female teams are not open to males; anyone can compete on a male or co-ed team. **Waiting on SCOTUS Oral Argument & Opinion**

## Tirrell v. Edelblut

Challenge to NH law banning participation by transgender athletes on team based on gender identity. **Stayed pending SCOTUS Opinions in Hecox and PBJ**



# Title IX Enforcement Challenges



## **U.S.A. v. Maine Dept of Educ. (D. Me.)**

Enforcement action filed by DOJ

Nearing end of discovery

*Stayed during government shutdown*

## **California v. DOJ (N.D. Ca.)**

Complaint filed by CA

Motion to Dismiss briefing to be completed by Oct. 24

*Stayed during government shutdown*

## **Minnesota v. Trump (D. Minn.)**

Complaint filed by MN

Motion to Dismiss argued September 8

*Stayed during government shutdown*

## **Fairfax Cnty Sch. Bd. v. McMahon Alington Sch. Bd. v. McMahon (4th Cir.)**

Complaint filed by the districts

District court dismissed the complaint

Fourth Circuit granted districts' request for expedited briefing

***NOT stayed during government shutdown***

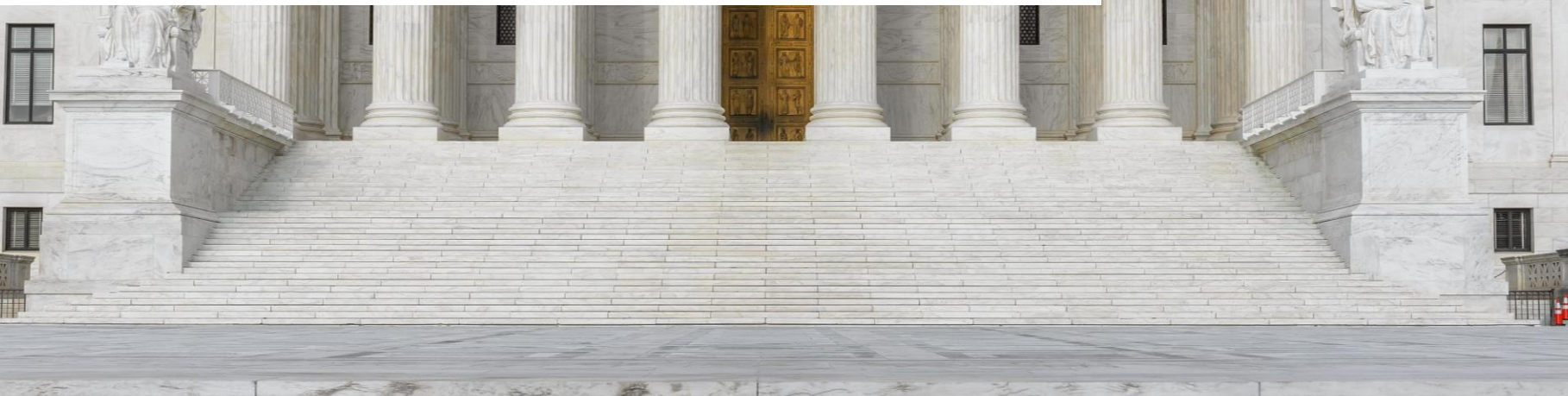
Government's response brief due Nov. 19

Oral argument scheduled for January 27-30, 2026

## ***National Association of Diversity Officers in Higher Education v. Trump*** (4th Cir.)

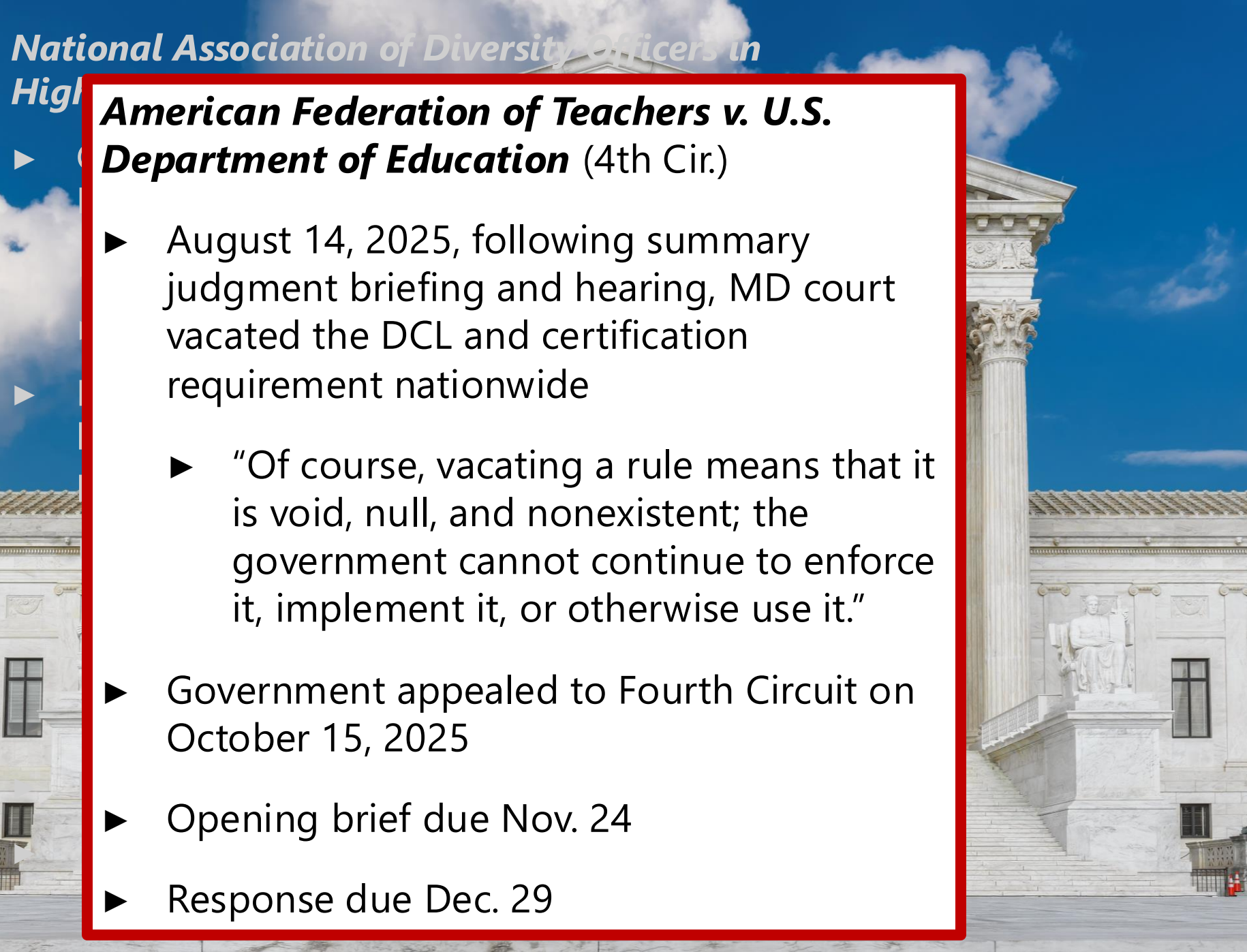
- ▶ Challenging president's executive orders calling for end of DEI Programs:
  - ▶ Certification provision for grants and contracts
  - ▶ Enforcement provision
- ▶ MD District court issued preliminary injunction February 21, 2025, but was lifted by Fourth Circuit March 14, 2025 pending appeal
- ▶ Fully briefed; oral argument heard September 11
- ▶ Awaiting ruling

# DEI Litigation



**American Federation of Teachers v. U.S.  
Department of Education** (4th Cir.)

- ▶ August 14, 2025, following summary judgment briefing and hearing, MD court vacated the DCL and certification requirement nationwide
  - ▶ “Of course, vacating a rule means that it is void, null, and nonexistent; the government cannot continue to enforce it, implement it, or otherwise use it.”
- ▶ Government appealed to Fourth Circuit on October 15, 2025
- ▶ Opening brief due Nov. 24
- ▶ Response due Dec. 29



# DEI Litigation

***National Education Association v. U.S  
Department of Education*** (D.NH)

- ▶ April 24, 2025, preliminary injunction against enforcement of February 14 DCL
- ▶ DCL was subject to APA and likely included components inconsistent with current law
- ▶ Motions for summary judgment (and to issue a permanent injunction) were briefed over the summer
- ▶ Still no ruling
- ▶ No motion to stay

▶ Response due Dec. 29

**DEI  
Litigation**

*National Association of Diversity Officers in  
Higher Education v. Trump (D. Md.)  
American Federation of Teachers v. U.S.*

► Civil Rights  
DEI Programs  
► Affirmative Action  
► Campus Climate  
► Enrollment  
► Preliminary Injunction  
but was lifted  
pending appeal  
Based on  
present  
by on  
if Govern  
expressed  
October  
fully briefed  
Opinion  
No  
Respo

***National Association for the Advancement  
of Colored People v. U.S. Dept. of  
Education*** (D.D.C.)

- April 24, 2025 –DC court issued preliminary injunction preventing enforcement of DCL
- DCL was subject to APA and likely included components inconsistent with current law
- Parties briefed issues in Government's motion to dismiss over the summer
- Still no further rulings
- No motion to stay

**DEI  
Litigation**



10

Surface Level  
Investigations &  
Determinations

**NOT TOP 10**

# #10 Not Digging In

► **Investigations** that:

- ✗ Simply ask parties or witnesses for written statements
- ✗ Do not ask follow up or issue-specific questions
- ✗ Rely solely on (or ignore) what parties previously told an administrator, counselor, or law enforcement officer



# Thorough Investigation

- ▶ The institution has the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility



# #10 Not Digging In

► **Written determinations** that:

- ✗ Do not decide disputed issues of fact and explain the reasoning
- ✗ Do not analyze the facts in relation to the relevant definitions of sexual harassment
- ✗ Rely on assumptions or stereotypes



# Complete Determination

- ▶ The written determination must include—
  - (A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
  - (B) A description of the procedural steps taken from the receipt of the formal complaint through the determination,...;
  - (C) Findings of fact supporting the determination;
  - (D) Conclusions regarding the application of the recipient's code of conduct to the facts;
  - (E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions, and whether remedies will be provided by the recipient to the complainant; and
  - (F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.



# Dig In

Be thorough



But also prompt





# **IN THE ZONE**

## **RULES AND BEST PRACTICES FOR TITLE IX INVESTIGATIONS**

**(HIGHER ED EDITION)**

A female referee in a black and white striped shirt with arms outstretched on a baseball field.

# MAKING THE CALL

**FAIR HEARINGS  
AND REASONED  
DETERMINATIONS  
UNDER TITLE IX**  
(HIGHER ED EDITION)



9

**Not Amending  
NOA with New  
Allegations**

**NOT TOP 10**

# #9 New Allegations

- ▶ The original complaint and NOA allege that respondent rubbed complainant between the legs. During the investigation, complainant describes that respondent put their fingers inside her vagina.
- ▶ New NOA?
- ▶ The original complaint and NOA allege that Remi and Ryan used AI to create a video showing two other students engaging in sexual activity and circulated it to other classmates. Remi denies involvement and says it was Roland.
- ▶ New NOA?



# New Allegations

- If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.



**RULES**



# New Allegations

- ▶ A new NOA when there are additional factual allegations or new parties is critical to:
  - ▶ Give the respondent notice of what they are accused of and an opportunity to respond
  - ▶ Ensure the decision maker knows what issues they are deciding





8

**Cookie-Cutter  
No Contact  
Orders**

**NOT TOP 10**

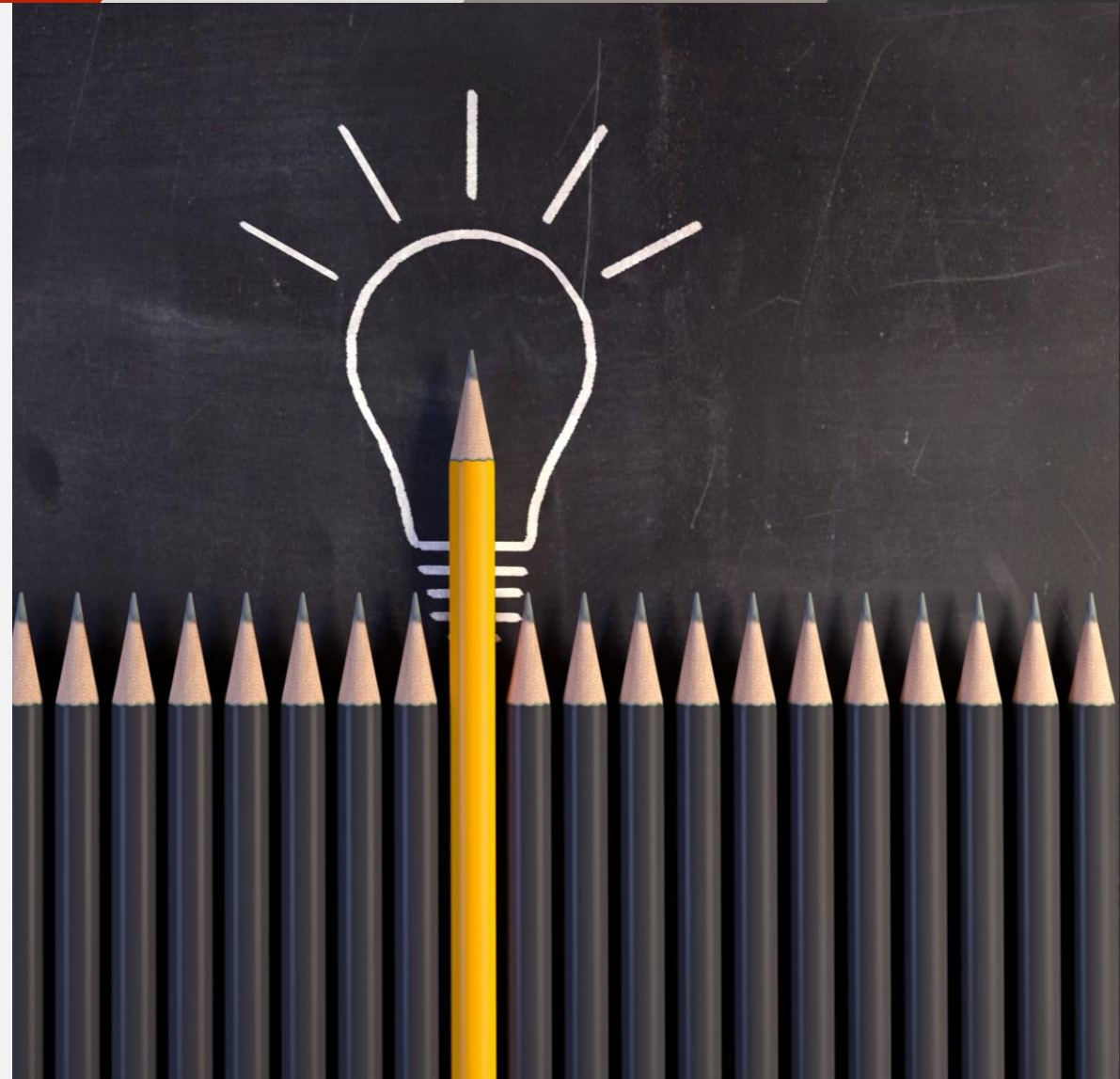
# #8 NCO Missteps

- × Not letting parties know an NCO is available
- × Not ironing out the details, especially if students have shared classes or activities
- × Not monitoring to ensure compliance and responding to violations
- × Not fully advising parties about retaliation, including through 3<sup>rd</sup> parties



# NCO-Pro

- ▶ Especially when the grievance process takes months, a well-thought-out no-contact order can help preserve access to your education programs and activities for both parties.
- ▶ Parties may determine that the NCO is sufficient and choose to enter an informal resolution agreement rather than continue the formal grievance process.





7

Going Beyond the  
Allegations at the  
Evaluation Stage

**NOT TOP 10**

# #7 Predetermination

- ▶ A student reports a sexual assault, the Title IX Coordinator refers the student to the counseling center but does not offer the Title IX grievance process because
  - × The student is known to exaggerate and have a conflict with the respondent
  - × The allegation is implausible, the respondent was off campus at an extracurricular activity
  - × (K12) Even if the allegation is true, the behavior would be related to the respondent's disability and no discipline would be possible



# Dismissals

## Mandatory

- The conduct, if true, would not meet the definition of sexual harassment under Title IX
- The conduct did not occur in the institution's education program or activity
- The conduct did not occur against a person in the U.S.

## Permissive

- The complainant withdraws the complaint or allegations in writing
- The respondent is no longer enrolled or employed by the institution
- Specific circumstances prevent the institution from gathering sufficient evidence



**RULES**

Complaint is dismissed (or not filed) for a **mandatory reason**, use another policy to address, including potential discipline

Complaint is dismissed (or not filed) for a **discretionary reason**, provide supportive measures, no discipline





6

Forgetting the  
Full Scope of  
Title IX

**NOT TOP 10**

# #6 Beyond Sexual Harassment



**Since 2020, we  
have been laser-  
focused on  
Title IX Sexual  
Harassment**



The background of the slide features three interlocking puzzle pieces. A large green piece occupies the left and top-center areas. A yellow piece is on the right side. A red piece is at the bottom center, partially overlapping the green piece. The text 'Sexual Harassment' is centered on the green piece.

# **Sexual Harassment**



# Beyond Sexual Harassment



# Scope of Title IX

(With limited exceptions), in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

1. Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
2. Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
3. Deny any person any such aid, benefit, or service;
4. Subject any person to separate or different rules of behavior, sanctions, or other treatment

A magnifying glass with a black handle and a silver rim. Inside the lens, the word **RULES** is written in bold, black, sans-serif capital letters. The magnifying glass is positioned on the right side of the slide, partially overlapping the list of rules.

**RULES**

# Scope of Title IX

(With limited exceptions), in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

5. Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;
6. Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;
7. Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

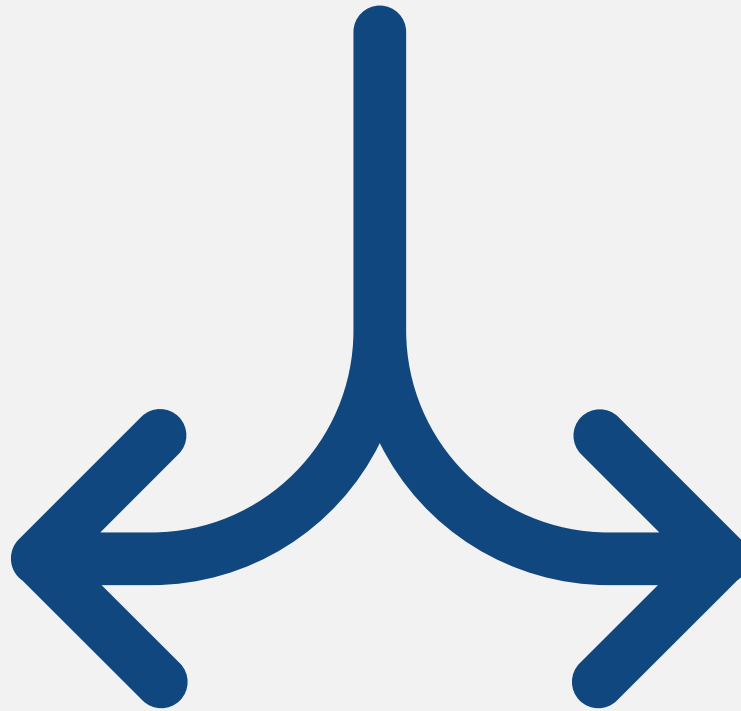
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**RULES**

# Full Scope of Title IX

## Two Pathways

Title IX Sexual  
Harassment: must follow  
grievance procedure that  
complies with § 106.45



Other Sex-Based  
discrimination,  
harassment, and  
retaliation: must follow  
grievance procedure  
providing for prompt and  
equitable resolution of  
complaints



**5** Not Adjusting  
Attendance Policies  
& Deadlines for  
Pregnant Students

**NOT TOP 10**

# Pregnancy Accommodations

Institutions must

- ▶ treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity



# Pregnancy Accommodations

If an institution does not otherwise have a leave policy for students, or if a student otherwise does not qualify for leave, the institution must

- ▶ Treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began



# Pregnancy Accommodations

What to do:

- ▶ Institutions must excuse absences due to pregnancy or childbirth for as long as the student's doctor says is necessary
- ▶ This is true *even if* the instructor has a "strict" attendance policy or your state has a minimum attendance policy for obtaining class credit
- ▶ Colleges & universities should not hesitate to require instructors to adapt their attendance requirements
- ▶ K-12 schools should not hesitate to modify attendance-for-credit policies





**4** Not Accounting for  
Donor Funds

**NOT TOP 10**

# #4 Not Accounting for Donor Funds



An institution can accept voluntary support from donors, BUT it is the institution's responsibility to prevent inequitable results.

So, if a donor donates money only to a men's team, "your school must ensure that the benefits, opportunities, and treatment are equivalent for both men and women in its athletic programs."



# Benefits, Opportunities, & Treatment



1. Equipment & Supplies
2. Game & Practice Scheduling
3. Travel & Daily Allowance
4. Coaching
5. Academic Tutors
6. Practice & Competition Facilities
7. Medical & Training Facilities & Services
8. Housing & Dining Services
9. Publicity
10. Recruitment



**What if the  
donor makes a  
dedicated  
donation?**





**3** Forgetting Rules  
Regarding Single-  
Sex Opportunities

**NOT TOP 10**

# **#3 Exclusionary Special Opportunities**

A middle school sends female students to a "Girls in STEM" Conference. There is not an equivalent opportunity for male students.

The principal justifies this decision based on historical numbers showing female students are underrepresented in advanced science classes at the high school the middle school feeds into.



# Single-Sex Programs

Generally, cannot provide or otherwise carry out any education programs or activities separately, or require or refuse participation, based on sex. Exceptions:

- ▶ Contact sports in PE (including wrestling, boxing, rugby, ice hockey, football, basketball)
- ▶ Ability grouping in PE (as assessed by objective standards of individual performance developed and applied without regard to sex)
- ▶ Human sexuality classes
- ▶ Choruses (requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex)

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**RULES**

# Single-Sex Programs

Schools can provide nonvocational single-sex classes and extracurricular activities **if**:

- ▶ The aim is to:
  - ▶ Improve educational achievement of its students, through a district's overall established policy to provide diverse educational opportunities; or
  - ▶ Meet the particular, identified educational needs of its students; **and**
- ▶ The single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

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**RULES**

# **#3 Exclusionary Special Opportunities**

That same middle school sends male students to a leadership academy geared specifically for male students.

The principal justifies this decision based on historical numbers showing male students are more likely to have discipline and attendance issues – something this program says its graduates do better at.



# Single-Sex Programs

Additional requirements for single-sex programs:

- ▶ The objective is implemented in an evenhanded manner;
- ▶ Student enrollment is completely voluntary;
- ▶ All other students, including students of the excluded sex, have a substantially equal coeducational class or extracurricular activity in the same subject or activity; and
- ▶ A recipient that provides a single-sex class or extracurricular activity...may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.



# Single-Sex Programs

In cases where the name of a school-sponsored club has raised an inference that the school imposes a preference or restriction based on sex, OCR has required that schools clearly state in their public facing communications (websites, catalogues, materials, promotional materials, recruiting materials, admissions and registrar information, etc.) that **membership or participation in the school-sponsored club is not limited by sex.**

Must communicate effectively to school community and the public that school-sponsored clubs do not limit participation or affiliation based on sex, and are **open to all students regardless of sex**, despite their name.

Archived Q&A Regarding OCR's Interpretation of Title IX and Single Sex Scholarships, Clubs, and other Programs





2 Not Documenting  
the Negative

**NOT TOP 10**

# #2 Not Documenting the Negative

What does your documentation look like?

- ▶ When the Title IX Coordinator decides a report is not Title IX sexual harassment and sends it to another process
- ▶ When the Title IX Coordinator determines not to do an emergency removal
- ▶ When the Complainant decides not to file a complaint
- ▶ When the Complainant declines to meet with the Title IX Coordinator or declines supportive measures



# Documentation

Recordkeeping. (i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including

- any determination regarding responsibility
- any audio or audiovisual recording or transcript of a hearing
- any disciplinary sanctions imposed on the respondent
- any remedies provided to the complainant;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

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# Documentation

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

(ii) For each response to knowledge of sexual harassment, a recipient must create, and maintain for a period of seven years, records of any actions, including

- any supportive measures, or why not providing supportive measures was not clearly unreasonable in light of the known circumstances,
- the basis for the institution's conclusion that its response was not deliberately indifferent,
- measures designed to restore or preserve equal access to the recipient's education program or activity.

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**RULES**

# Document the Negative

- ▶ Complaints frequently arise when students/parents feel that the school did not respond or did not respond effectively
- ▶ Document decisions not to do something, including the reasons:
  - ▶ Written communication
  - ▶ Memo to file



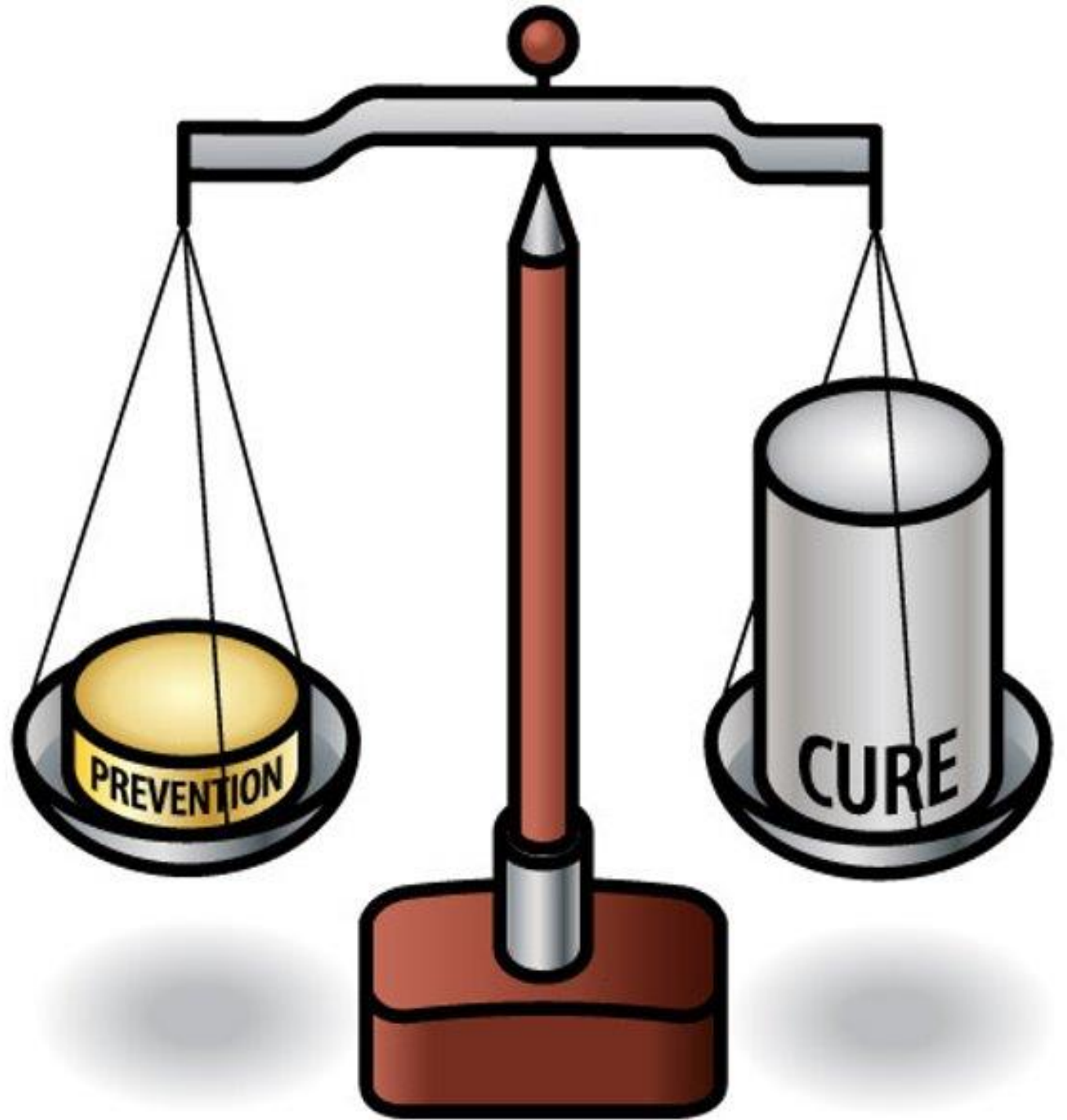


1

Not Taking  
Proactive Steps

**NOT TOP 10**

**#1 Reactive  
instead of  
proactive**



# Get Your “Title IX House” in Order

- ▶ All required training complete and documented
- ▶ All required notices in order
- ▶ Website compliant
- ▶ Policies & procedures compliant
- ▶ Adherence to recordkeeping requirements
- ▶ Documented reports/complaints
- ▶ Complete documentation of grievance process



# Required Training

- ▶ **Title IX Coordinators (and deputies or designees)**
- ▶ **Investigators**
- ▶ **(Initial and Appellate) Decision-makers, and**
- ▶ **Any person who facilitates an informal resolution process**

Must receive training on

- the definition of sexual harassment,
- the scope of the recipient's education program or activity,
- how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias...

Investigators must also receive training on issues of relevance

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# Recommended Training



**Students**



**All Employees**

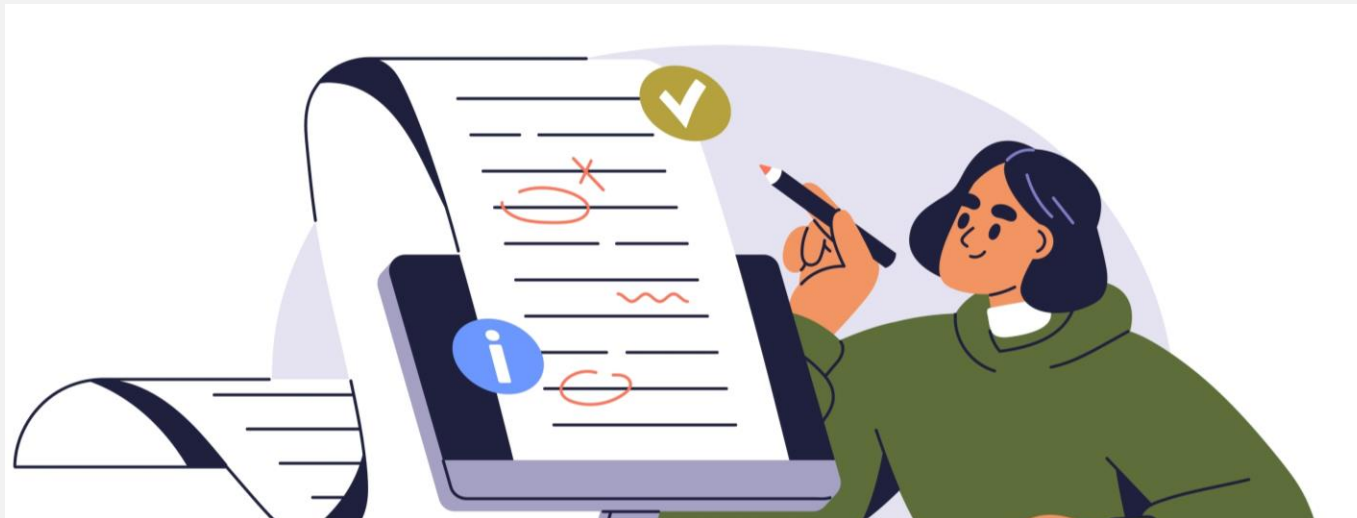


**Designated  
Personnel**

- Student Services/Student Affairs
- Human Resources
- Athletics
- Counselors, Nurses, & MH personnel

# Pro-Tip: Policies and Procedures

- ▶ Should be reviewed every year to implement changes learned from your grievance process and updates in law, regulations, legal cases, and OCR policies.
- ▶ Read standardized policies carefully, they often say you must do additional steps. Make sure to complete key definitions – including consent – and internal deadlines.
- ▶ Look at the interactions between Title IX policies and other policies (e.g., student and employee disciplinary policies and procedures).



# Pro-Tip: Title IX Audits



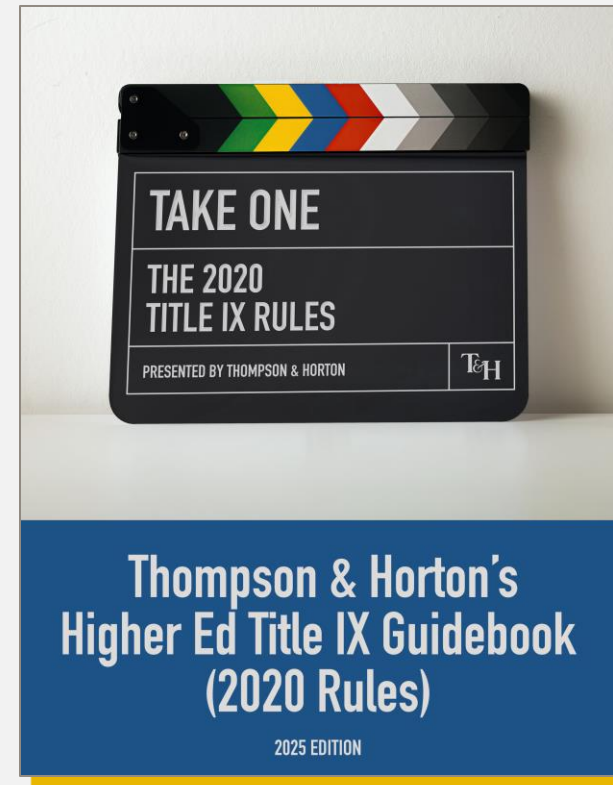
- ▶ Audits look at issues that might be raised in an internal, OCR, or court complaint *before* a complaint is actually raised
- ▶ Significantly cheaper than an actual complaint, and can often be protected by attorney-client privilege
- ▶ OCR guidance and other documents can provide good roadmaps (e.g., recent athletics guidance fact sheets)





**Title IX Administrators**

**T&H** Has You Covered



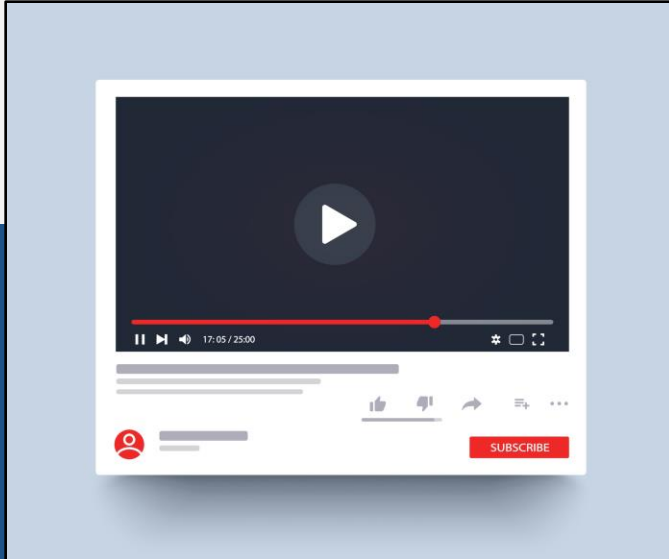
**Thompson & Horton's**

# 2020 Title IX Guidebooks

**(2025 Edition)**

**[titleix@thlaw.com](mailto:titleix@thlaw.com)**

## Video Training



## Virtual Training



## In-Person Training



**Thompson & Horton's**

# Title IX Training

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# Title IX Leadership Alliances

## K-12

**4<sup>th</sup> Tuesday** of the month

- ▶ Register at [thlaw.com/k12alliance](https://thlaw.com/k12alliance)
- ▶ Email [titleix@thlaw.com](mailto:titleix@thlaw.com)
- ▶ Use the QR code



## Higher Ed

**4<sup>th</sup> Wednesday** of the month

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# TacTIX 2026

FEBRUARY 18

MAY 6

SEPTEMBER 9

NOVEMBER 18

THOMPSON

THOMPSON

THOMPSON

THOMPSON

HORTON

HORTON

HORTON

HORTON

# Thank you!



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