



Book Policy Manual

Section For Board Review - Special Update Title IX

Title Legal Alert - Title IX Regulations

Code 1

Status

### **LEGAL ALERT**

**To:** Neola Clients

**From:** Renning, Lewis & Lacy, S.C.

**Re:** Title IX Regulations

**Date:** February 2025

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#### **Recommendations Regarding Title IX Policies**

As Neola has consistently stated, we have been monitoring developments regarding the evolution of Title IX regulations and grievance procedures requirements and providing updated policy-based recommendations as appropriate. The U.S. Department of Education ("USDOE") issued a "Dear Colleague" letter on Friday, January 31, 2025, stating that it was adopting the judicial vacatur of the rule, in effect invalidating the 2024 regulations. A revised "Dear Colleague" letter was issued on Tuesday, February 4, 2025, further detailed the USDOE's position concerning Title IX enforcement. It is clear from these letters that the Office of Civil Rights (OCR) will enforce Title IX pursuant to the 2020 regulations rather than the 2024 regulations.

One important thing to note, the revised letter tweaked one important sentence in stating that open Title IX investigations that were initiated under the 2024 Title IX Rule should be ***"immediately reevaluated to ensure consistency with the 2020 Title IX Rule and the preexisting regulations at 34 C.F.R. 106 et seq."*** The original letter stated that such investigations should be "immediately reoriented to comport fully" with the 2020 regulations.

Accordingly, school boards are advised to take action relative to policies adopted pursuant to the now invalidated regulations.

Based on the court decisions challenging the 2024 Title IX regulations that have been discussed over the past six months, and the current Department of Education's position on the matter, Districts are advised to rescind Policy 2264 - Nondiscrimination on the Basis of Sex In Education Programs or Activities to avoid confusion or to avoid adverse treatment by the Department of Education.

Given that the rule and thus the policy is being treated as invalid as of its inception, the policy can be treated as inactive automatically until such time as the Board is able to take formal action.

#### **Revisions to Policy 2266 – Nondiscrimination on the Basis of Sex in Education Programs or Activities**

With Policy 2264- Nondiscrimination on the Basis of Sex In Education Programs or Activities being invalid and subsequently rescinded, districts are still obligated to comply with the mandates of Title IX's prohibition against disparate treatment in programming on the basis of sex. The regulations adopted in 2020 will again govern investigations alleging violations of Title IX that involve "sexual harassment" as defined by the regulatory definition found in 34 CFR § 106.30(a). Policy 2266 -

Nondiscrimination on the Basis of Sex In Education Programs or Activities (The Board's Policy and Grievance Procedures for Responding to Sexual Harassment Alleged to Have Occurred Prior to 8/1/2024) was recently revised to insert a sunset provision based on the U.S. Department of Education's 2024 regulations, which continued to apply Policy 2266 only as to complaints involving conduct alleged to have occurred prior to August 1, 2024. ***That sunset provision has been removed from the policy template and should be removed from District policy, which Boards could opt to accomplish as a technical correction pursuant to Board Bylaw 0131.1 - Bylaws and Policies.***

It is important to note that the 2020 version of the regulations only applies to allegations involving sexual harassment and that any other type of sex discrimination complaint must be investigated under one of the District's nondiscrimination policies (i.e. Policy 2260 – Nondiscrimination and Access to Equal Educational Opportunity and Policy 1422/3122/4122 – Nondiscrimination and Equal Employment Opportunity). Likewise, Districts are reminded that state law and related policy prohibiting bullying does not depend on the subject matter of bullying-type behavior and still requires that complaints alleging bullying being investigated and resolved, even when gender identity or related concepts are the basis for the bullying behavior.

### **Reminder Regarding Wisconsin Applicable Law**

The Dear Colleague letter referenced above notes that the basis for invalidating the 2024 regulations is the definition of "on the basis of sex" contained within that regulation. Specifically, the various district court decisions and President Trump's executive order on the issue oppose the definition that covers gender identity, sex stereotypes, sex characteristics, and sexual orientation.

In Wisconsin, the definition of the term "sex" includes gender identity and sexual orientation in the context of equal employment opportunity under federal law, Title VII of the Civil Rights Act. See *Bostock v. Clayton County*, 590 U.S. 644 (2020). Sexual orientation is likewise expressly contained within the definition of "sex" in the Wisconsin Fair Employment Act. See Wis. Stat. § 111.36(d).

With respect to student rights, the federal circuit court (the federal court level above the district court level) that governs Wisconsin, the Seventh Circuit Court of Appeals, has previously decided that gender identity is a protected classification under Title IX. See, *Whitaker, ex. rel. Whitaker v. Kenosha Unified School District*; 858 F.3d 1034 (7th Cir. 2017); *A.C. by M.C. v. Martinsville*, 2025 WL 213090 (2020). Likewise, sexual orientation is explicitly covered by Wisconsin's pupil discrimination law, Wis. Stat. § 118.13.

Action by the federal executive branch, including by way of Executive Orders, direct the activities and priorities of federal agencies, such as the Department of Education, but those orders do NOT supersede federal or state statutes, and they do not reverse or invalidate decisions of the federal courts.

As a result, Wisconsin districts will need to (a) rescind Policy 2264 - Nondiscrimination on the Basis of Sex in Education Programs or Activities; (b) remove reference to the end date of the applicability of Policy 2266 - Nondiscrimination on the Basis of Sex In Education Programs or Activities (The Board's Policy and Grievance Procedures for Responding to Sexual Harassment Alleged to Have Occurred Prior to 8/1/2024); and (c) continue to investigate and resolve complaints involving gender identity and related considerations under the District's existing nondiscrimination policies to comply with state and federal law that has not been affected by executive order.

The policy revisions are required by yet another shift in Title IX regulations. Policy 2264 - Nondiscrimination on the Basis of Sex in Education Programs or Activities should be treated as inactive until formally rescinded, and the limiting language should be considered invalid immediately in Policy 2266 - Nondiscrimination on the Basis of Sex In Education Programs or Activities (The Board's Policy and Grievance Procedures for Responding to Sexual Harassment Alleged to Have Occurred Prior to 8/1/2024).