THOMPSON COBURN LLP

Navigating the Current State of Title IX

Live Q&A Session

September 17, 2024

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- Full-service law firm with over 400 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, New York, Birmingham, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.

THOMPSON COBURN LLP

Presenter Profile

- Practice and Experience
  - Assists institutions of higher education to navigate challenging legal and regulatory matters.
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  - Represented independent school districts, charter schools, private schools, colleges, and universities in litigation and administrative matters involving employment disputes, Title IX sexual harassment, special education.
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Partner & Co-Chair
Higher Education Practice

Syllabus for this Session

Status of the New Title IX Rule

- Effective Date and Retroactivity
- Status of Litigation

Questions and Answers

- Responding to Pre-Submitted and Live Questions

Title IX Timeline & TC Extra Credit

- Title IX Timeline
- Resources Page, Training Series, Compliance Materials

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- If you desire legal advice for a particular situation, you should consult an attorney.

2024 Title IX Training Series

To assist institutions of higher education working to comply with the 2024 Title IX rule, Thompson Coburn's Higher Education Practice has created a free, online lecture series that provides foundational training for those individuals who will be administering the Title IX process.

Click here to access the slide decks for Thompson Coburn's 2024 Title IX Training Series

Click here to request downloadable video files of our 2024 Title IX Training Series Sessions.

TC Higher Education Resources Page

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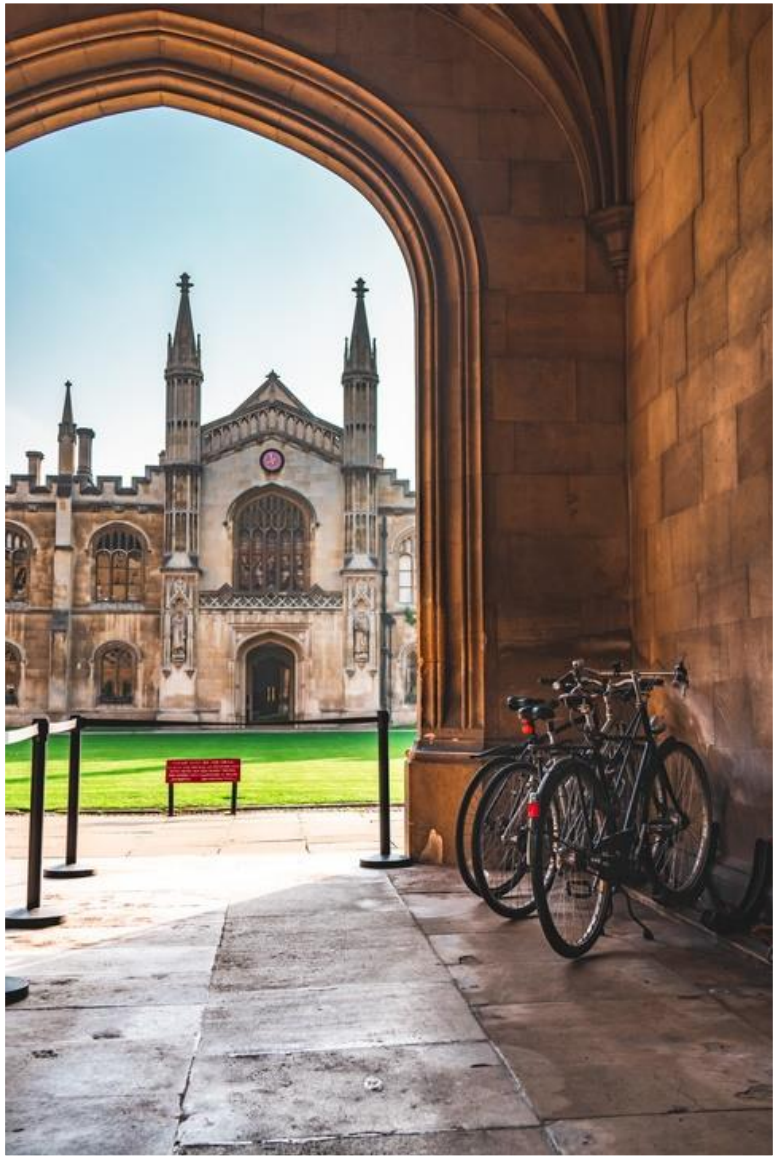
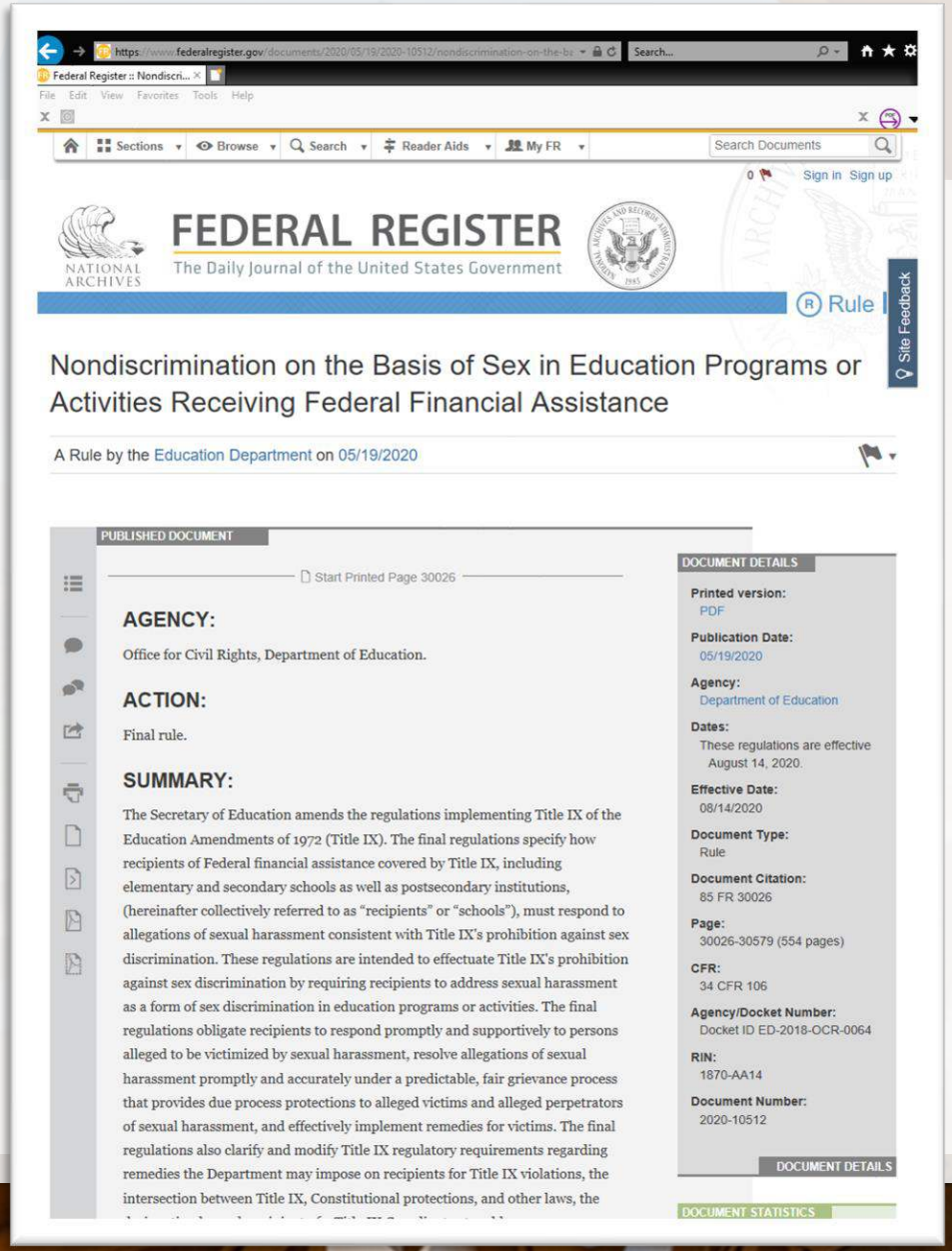


Status of the New Title IX Rule

The 2020 Title IX Rule

- In 2020, ED promulgated the first significant regulation addressing allegations of sexual misconduct on campus since 1975.
- The 2020 Title IX rule put into place a complex framework for managing such allegations on campus.



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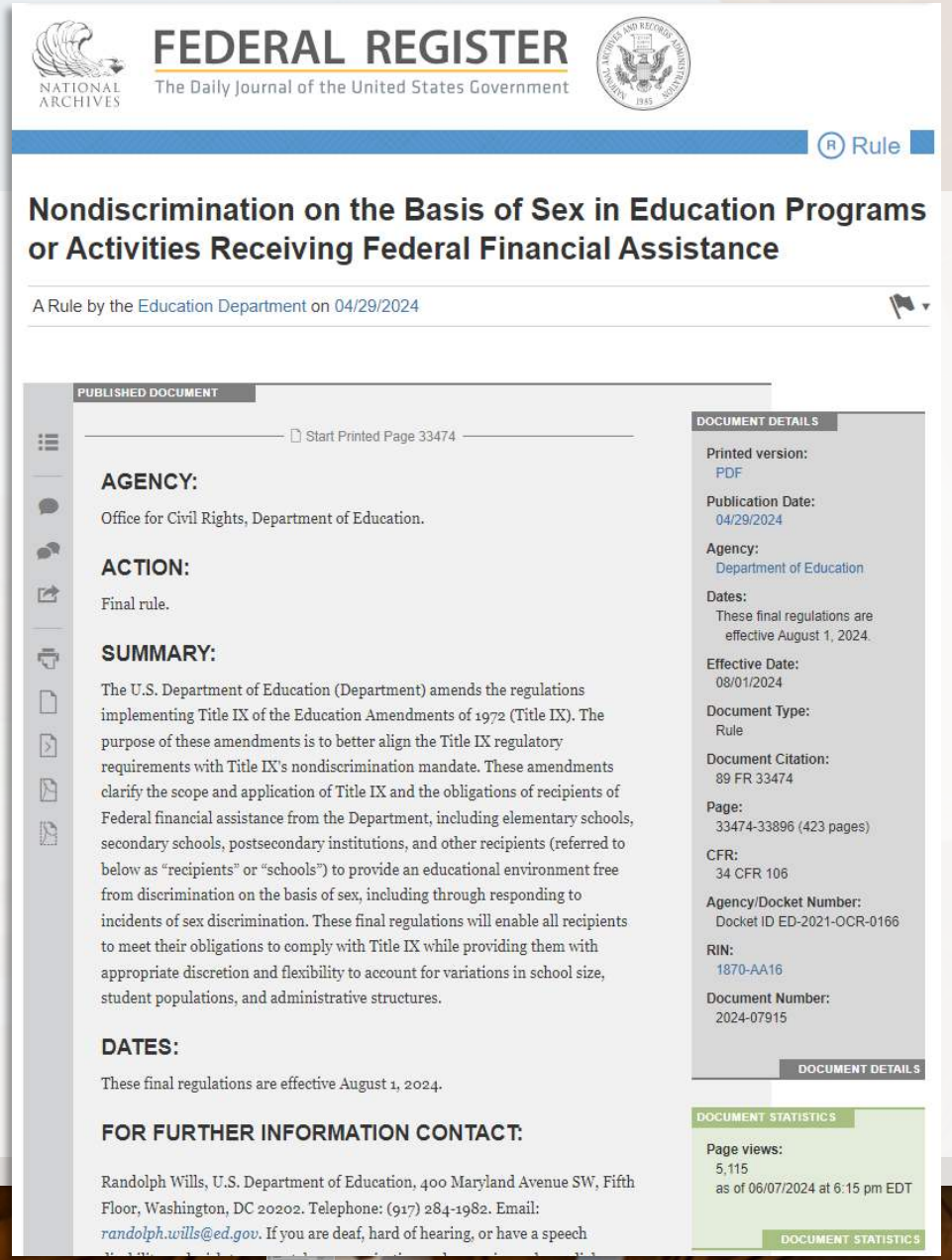
Title 2024 Title IX Rule

- On April 6, 2021, the Biden administration announced that it would be revising the 2020 Title IX rule.
- On July 12, 2022, ED published its proposed 2022 Title IX Rule, and received over 235,000 comments.
- On April 29, 2024, the final 2024 Title IX Rule was released (clocking in at 423 pages). It took effect August 1, 2024.



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 04/29/2024

PUBLISHED DOCUMENT

Start Printed Page 33474

AGENCY:

Office for Civil Rights, Department of Education.

ACTION:

Final rule.

SUMMARY:

The U.S. Department of Education (Department) amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The purpose of these amendments is to better align the Title IX regulatory requirements with Title IX's nondiscrimination mandate. These amendments clarify the scope and application of Title IX and the obligations of recipients of Federal financial assistance from the Department, including elementary schools, secondary schools, postsecondary institutions, and other recipients (referred to below as "recipients" or "schools") to provide an educational environment free from discrimination on the basis of sex, including through responding to incidents of sex discrimination. These final regulations will enable all recipients to meet their obligations to comply with Title IX while providing them with appropriate discretion and flexibility to account for variations in school size, student populations, and administrative structures.

DATES:

These final regulations are effective August 1, 2024.

FOR FURTHER INFORMATION CONTACT:

Randolph Wills, U.S. Department of Education, 400 Maryland Avenue SW, Fifth Floor, Washington, DC 20202. Telephone: (917) 284-1982. Email: randolph.wills@ed.gov. If you are deaf, hard of hearing, or have a speech

DOCUMENT DETAILS

Printed version: PDF
Publication Date: 04/29/2024
Agency: Department of Education
Dates: These final regulations are effective August 1, 2024.
Effective Date: 08/01/2024
Document Type: Rule
Document Citation: 89 FR 33474
Page: 33474-33896 (423 pages)
CFR: 34 CFR 106
Agency/Docket Number: Docket ID ED-2021-OCR-0166
RIN: 1870-AA16
Document Number: 2024-07915

DOCUMENT DETAILS

DOCUMENT STATISTICS

Page views: 5,115 as of 06/07/2024 at 6:15 pm EDT

DOCUMENT STATISTICS

Effective Date and Retroactivity

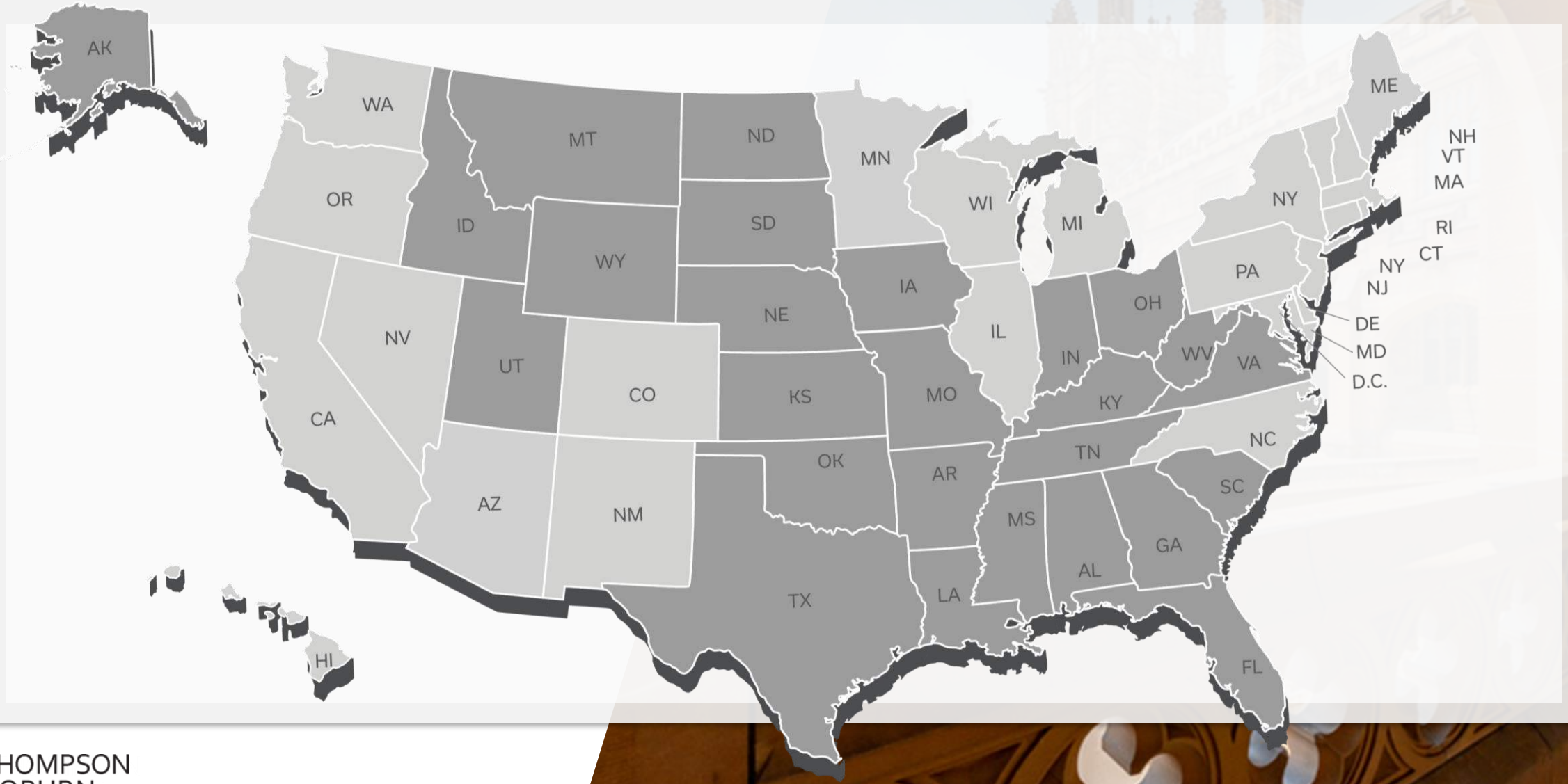
- The new regulations only apply to sex discrimination that allegedly occurred on or after August 1, 2024.
- With respect to prior conduct, “the Department will evaluate the recipient’s compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sex discrimination occurred” regardless of when the alleged sex discrimination was reported.
- This means certain conduct may be addressed under the 2020 regulations or the 2024 regulations.

89 Fed. Reg. 33474, 33841 (April 29, 2024).

Pending Legal Challenges

- Challenges to the new Title IX rule already have been brought by various states, school districts, and organizations, and several courts have issued injunctions, including in Texas, Kentucky, Louisiana, and Kansas.
  - The focus of the litigation most commonly is the new rule's interpretation of "on the basis of sex."
- The scope of the injunctions varies, but many states, and potentially hundreds of schools are impacted.

States with Current Title IX Injunctions



The Kansas Injunction

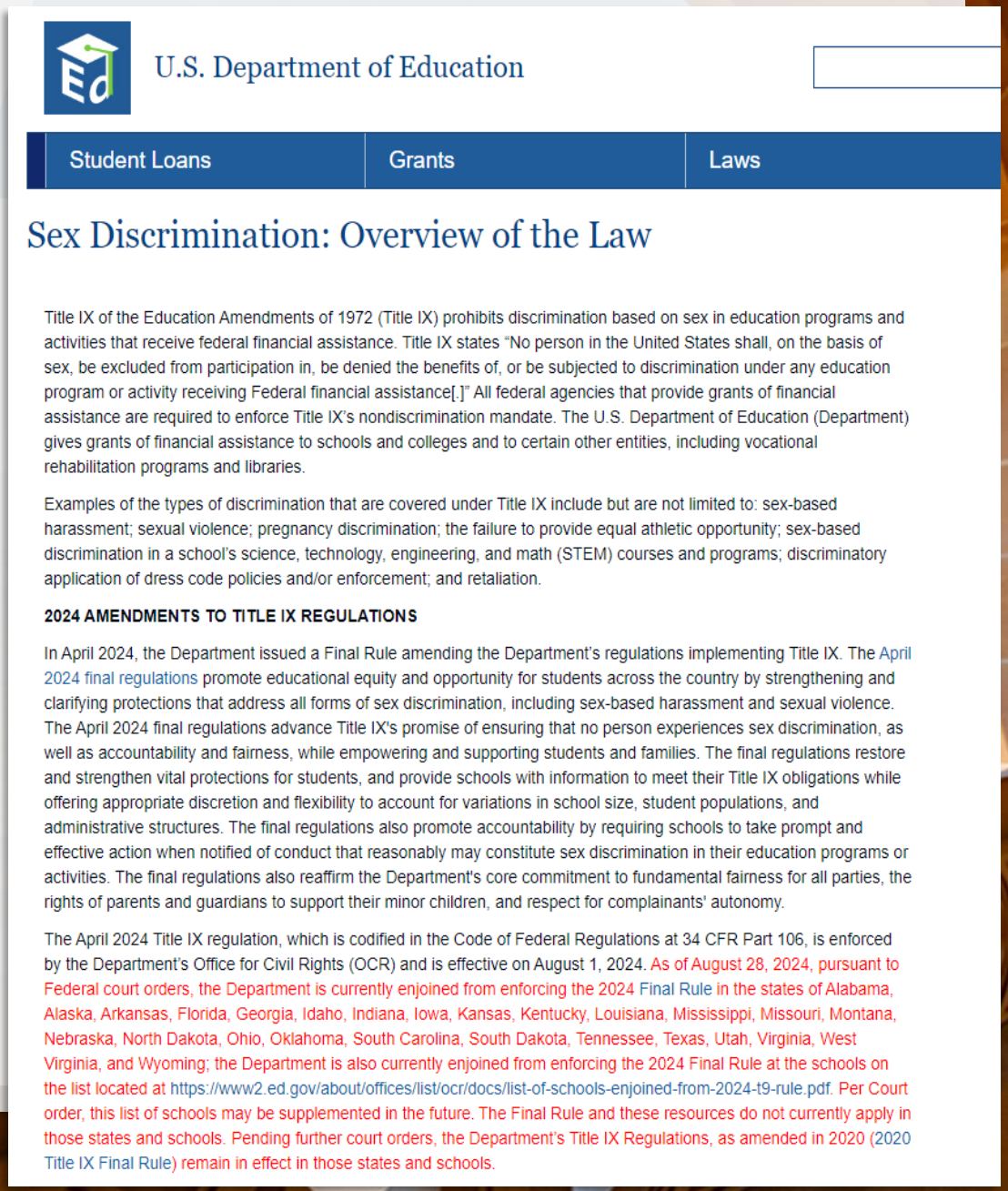
- A federal district court in Kansas enjoined the U.S. Department of Education's enforcement of the 2024 Title IX regulations against institutions nationwide
- The decision enjoined enforcement against any school attended by a member of Moms for Liberty, Young America's Foundation, and Female Athletes United or their children.
  - ***Per court order, this list of schools may be supplemented in the future.***
- Current list of affected schools is available here.
  - Hundreds of schools on the list as of September 17, 2024.

The Department's Response

- As of August 28, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at https://www2.ed.gov/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf. Per Court order, this list of schools may be supplemented in the future. The Final Rule and these resources do not currently apply in those states and schools. Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools.

Keeping Up with ED

- Updates on the 2024 Title IX Regulations will be posted to Sex Discrimination: Overview of the Law (ed.gov).
- We recommend institutions monitor this website for updates.



U.S. Department of Education

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Sex Discrimination: Overview of the Law

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination based on sex in education programs and activities that receive federal financial assistance. Title IX states "No person in the United States 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[.]" All federal agencies that provide grants of financial assistance are required to enforce Title IX's nondiscrimination mandate. The U.S. Department of Education (Department) gives grants of financial assistance to schools and colleges and to certain other entities, including vocational rehabilitation programs and libraries.

Examples of the types of discrimination that are covered under Title IX include but are not limited to: sex-based harassment; sexual violence; pregnancy discrimination; the failure to provide equal athletic opportunity; sex-based discrimination in a school's science, technology, engineering, and math (STEM) courses and programs; discriminatory application of dress code policies and/or enforcement; and retaliation.

2024 AMENDMENTS TO TITLE IX REGULATIONS

In April 2024, the Department issued a Final Rule amending the Department's regulations implementing Title IX. The April 2024 final regulations promote educational equity and opportunity for students across the country by strengthening and clarifying protections that address all forms of sex discrimination, including sex-based harassment and sexual violence. The April 2024 final regulations advance Title IX's promise of ensuring that no person experiences sex discrimination, as well as accountability and fairness, while empowering and supporting students and families. The final regulations restore and strengthen vital protections for students, and provide schools with information to meet their Title IX obligations while offering appropriate discretion and flexibility to account for variations in school size, student populations, and administrative structures. The final regulations also promote accountability by requiring schools to take prompt and effective action when notified of conduct that reasonably may constitute sex discrimination in their education programs or activities. The final regulations also reaffirm the Department's core commitment to fundamental fairness for all parties, the rights of parents and guardians to support their minor children, and respect for complainants' autonomy.

The April 2024 Title IX regulation, which is codified in the Code of Federal Regulations at 34 CFR Part 106, is enforced by the Department's Office for Civil Rights (OCR) and is effective on August 1, 2024. As of August 28, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at https://www2.ed.gov/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf. Per Court order, this list of schools may be supplemented in the future. The Final Rule and these resources do not currently apply in those states and schools. Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools.

Questions & Answers

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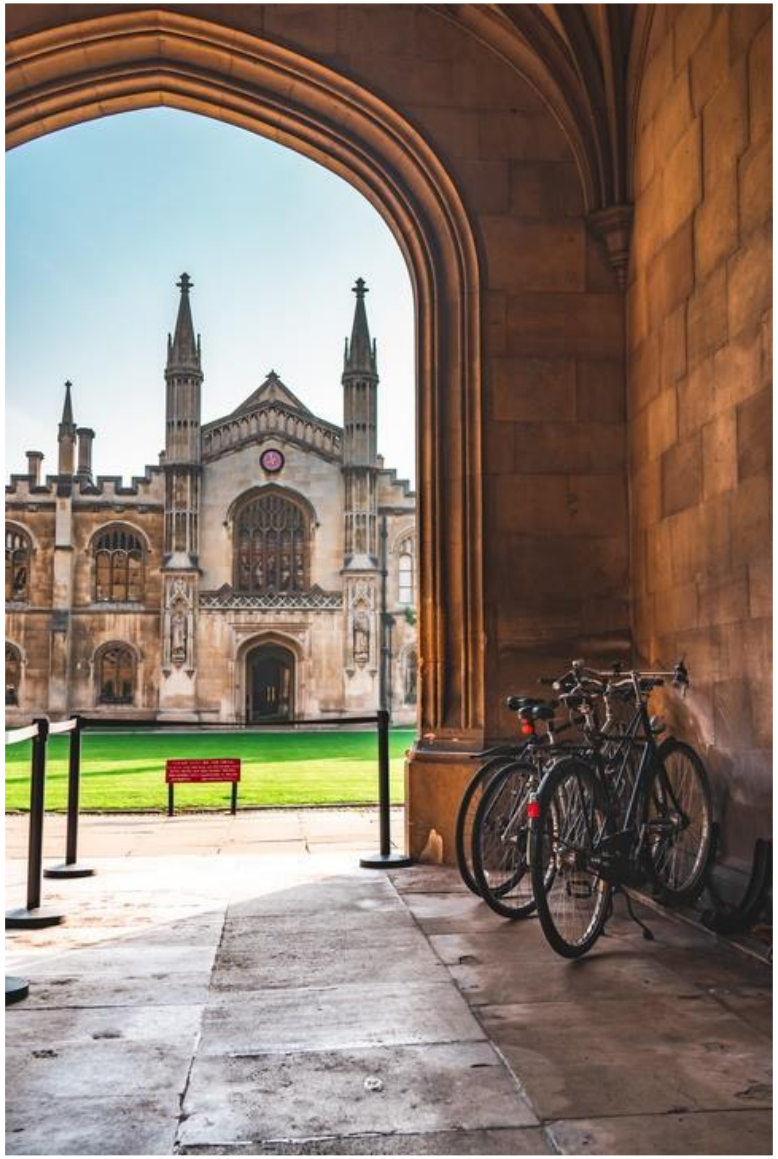

Title IX Timeline

Title IX Timeline

Date	Event
June 1972	Title IX of the Education Amendments of 1972
July 1975	ED publishes 34 CFR Part 106, which implements Title IX.
March 1997	ED publishes Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.
June 1998	Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998) (holding that an individual may only recover monetary damages under Title IX when a school official with authority to institute corrective measures has actual notice of the harassment but is deliberately indifferent to it; administrative requirements of Title IX not enforceable through a private right of action).
May 1999	Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999) (holding that a school can be liable under Title IX for student-on-student sexual harassment, but only if the school is deliberately indifferent to known sexual harassment, the respondent is under the school's disciplinary authority, and the behavior is **so severe, pervasive, and objectively offensive** that it denies access to the school's program and activities).

Title IX Timeline

Date	Event
Nov. 2000	ED updates Title IX rules to incorporate the Civil Rights Restoration Act's broadened definitions of "program or activity" and "program."
Jan. 2001	Following significant judicial activity, ED publishes Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties. ED draws distinction between standards for administrative enforcement and standards for private litigation for monetary damages.
Oct. 2006	ED updates Title IX rules to clarify and modify requirements regarding single-sex schools, classes, and extracurricular activities in elementary and secondary schools.
April 2011	ED publishes DCL with extensive guidance concerning school responsibilities for preventing and addressing sexual harassment and sexual violence.
April 2014	ED publishes Questions and Answers on Title IX and Sexual Violence, further clarifying guidance articulated in 2001 Guidance and 2011 DCL.

Title IX Timeline

Date	Event
Feb. 2017	ED publishes DCL rescinding May 2016 DCL regarding treatment of transgender students.
Sept. 2017	ED publishes DCL rescinding April 2011 DCL as well 2014 Q&A on Campus Sexual Misconduct.
Nov. 2018	ED publishes its proposed Title IX rule in the Federal Register. The first significant rule concerning sexual misconduct since 1975.
May 2020	ED publishes its final Title IX rule in the Federal Register.
June 2020	The Supreme Court in ***Bostock v. Clayton County***, concludes that discrimination based on sexual orientation or gender identity inherently involve treating individuals differently because of their sex, and thus is prohibited under Title VII of the Civil Rights Act of 1964.

Title IX Timeline

Date	Event
Aug. 2020	ED's new Title IX Rule takes effect on August 14.
April 2021	ED announces that it will be overhauling the Title IX regulations put into place by the Trump administration and releases Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021).
June 2021	OCR issues Notice of Interpretation stating that ED interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity, consistent with ***Bostock v. Clayton County***.
July 2022	ED publishes its proposed 2022 Title IX Rule, and receives over 235,000 comments.
April 2023	ED publishes proposed Title IX Athletics Rule, and received over 150,000 comments. Final Rule delayed/pending.
April 2024	ED publishes its final 2024 Title IX Rule, which took effect August 1, 2024.

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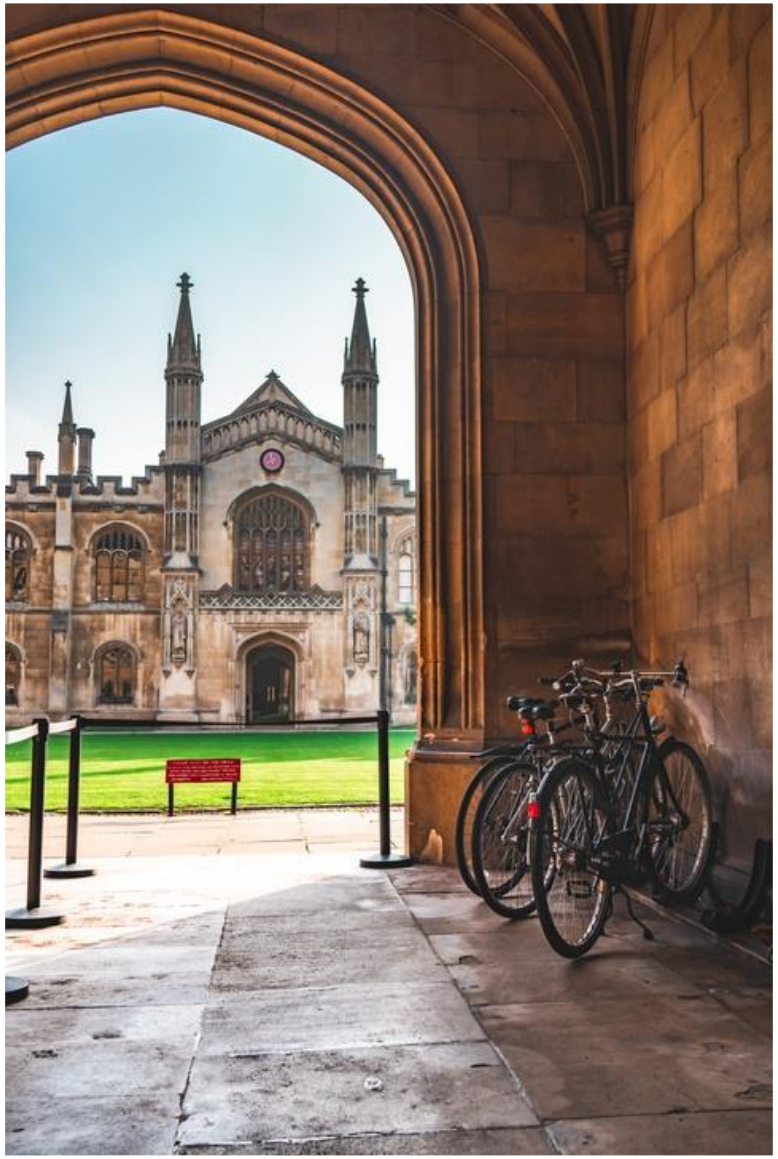

TC Extra Credit

TC Extra Credit | Resources Page

HIGHER EDUCATION RESOURCES

As part of our ongoing commitment to the postsecondary community, Thompson Coburn's higher education practice routinely creates complimentary resources designed to assist institutions with navigating the complexities of the higher education regulatory and policy environment. We have collected a number of these resources on this page, including our most recent webinars, training series, desk guides, whitepapers, and blog posts. We hope you find these resources helpful, and if you have any questions, please do not hesitate to contact us!

WEBINARS/TRAINING RESOURCES

THE BIDEN ADMINISTRATION'S NEW TITLE IX RULE

In this slide deck, Scott

SLIDE DECK: ED'S LATEST FINANCIAL VALUE TRANSPARENCY/GAINFUL EMPLOYMENT GUIDANCE

In this slide deck, Aaron Lacey

WEBINAR: ED'S EVOLVING STATE AUTHORIZATION AND PROFESSIONAL LICENSURE REQUIREMENTS

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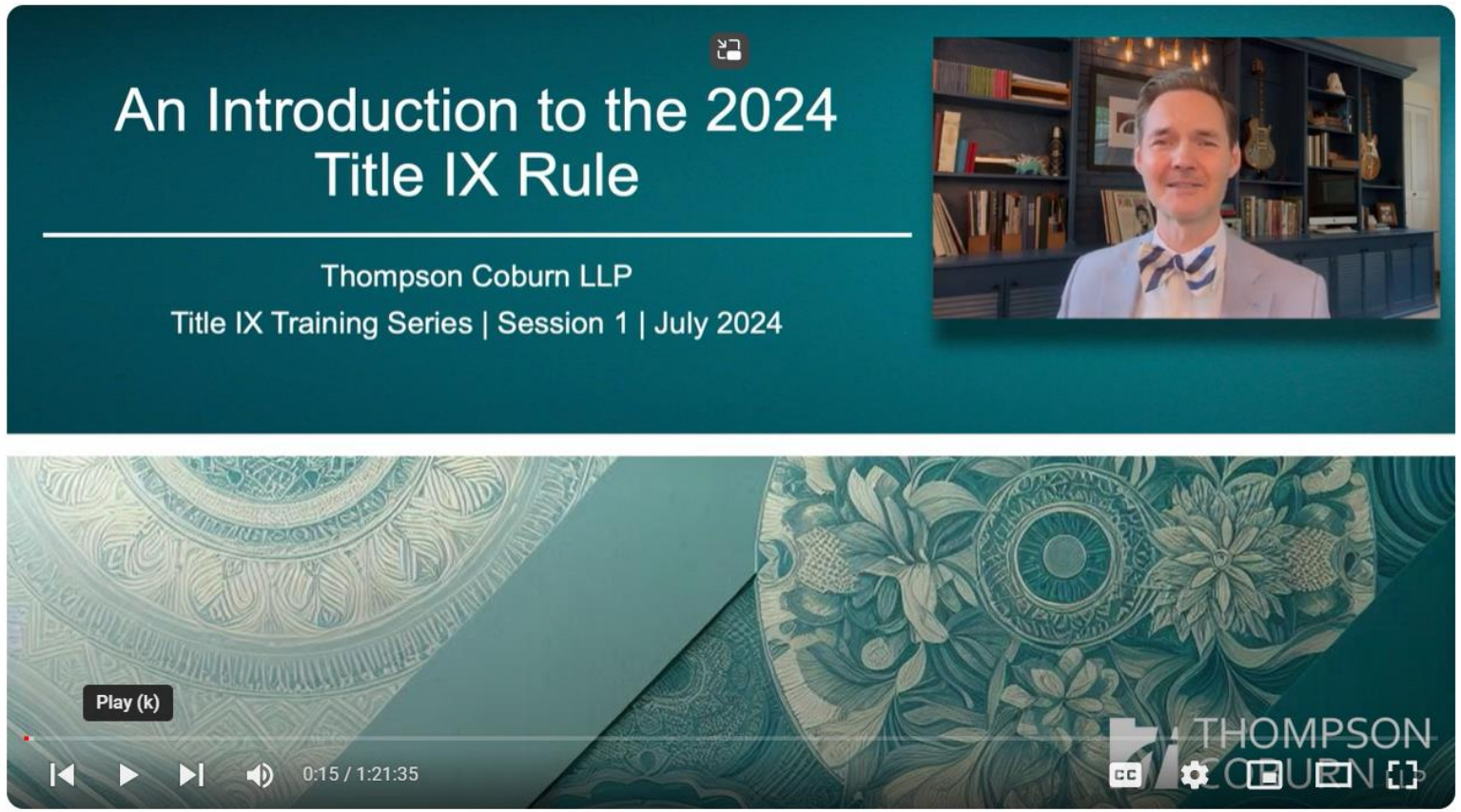
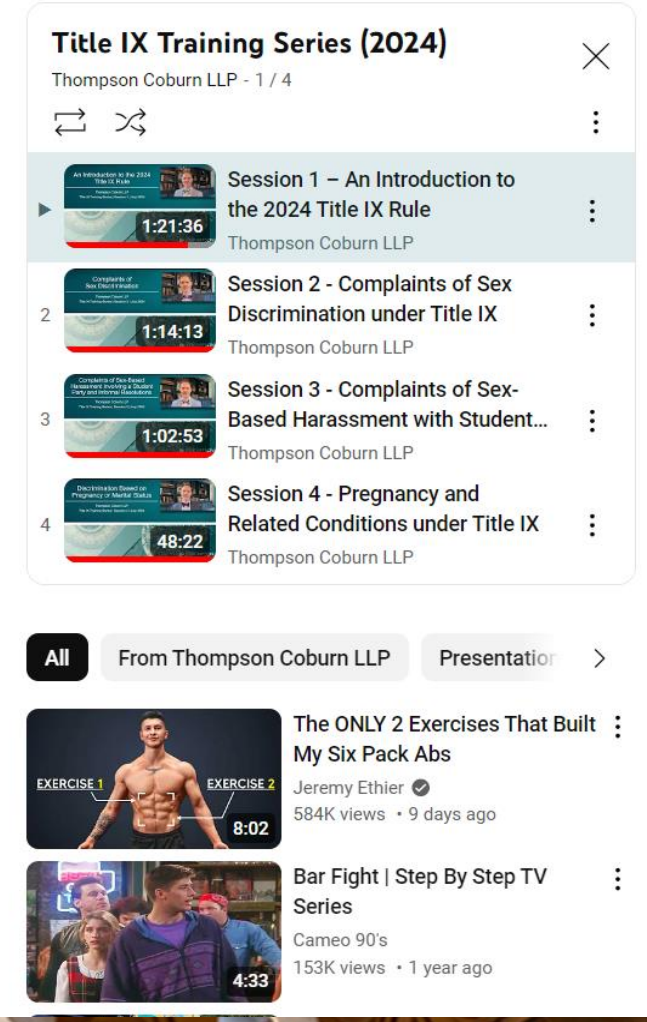
TC Extra Credit | Webinars & Training Series





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TC Extra Credit | REGucation Blog

U.S. Department of Education Issues New Guidance on Implementation of Program Length Regulations

Roger Swartzwelder April 23, 2024

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On April 15, 2024, the U.S. Department of Education ("Department") issued new guidance regarding the implementation of the program length restrictions for Gainful Employment ("GE") programs. These restrictions are included in the Department's Financial Responsibility, Administrative Capability, Certification Procedures and Ability to Benefit Final Rule ("Final Rule") published in the *Federal Register* on October 31, 2023. The Final Rule takes effect on July 1, 2024.

The Final Rule impacts the operations of all types of schools, colleges and

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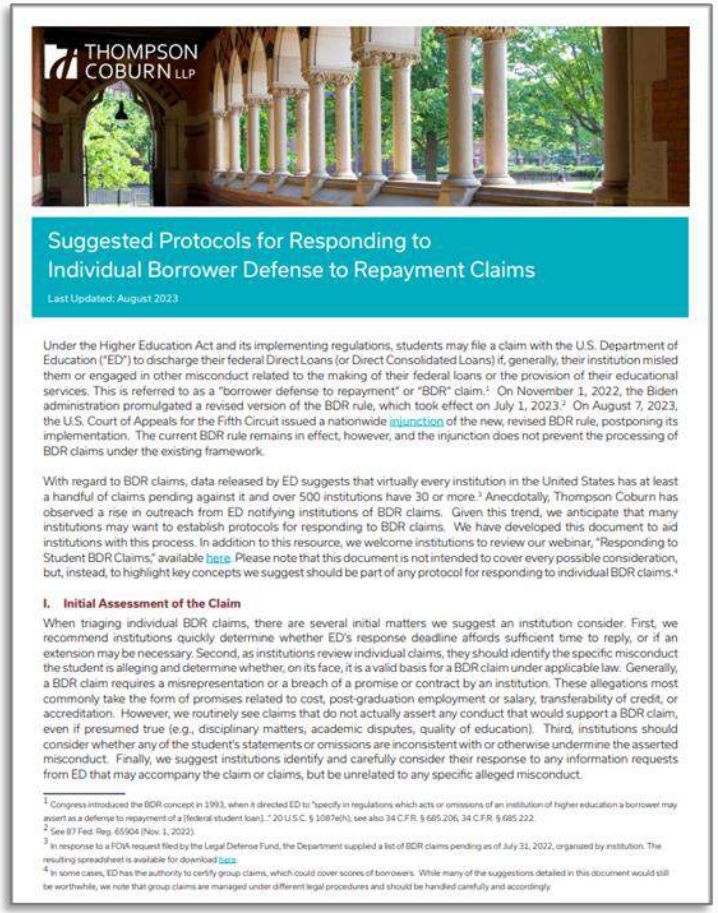
TC Extra Credit | Compliance Materials



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Suggested Protocols for Responding to Individual Borrower Defense to Repayment Claims

Last Updated: August 2023

Under the Higher Education Act and its implementing regulations, students may file a claim with the U.S. Department of Education ("ED") to discharge their federal Direct Loans (or Direct Consolidated Loans) if, generally, their institution misled them or engaged in other misconduct related to the making of their federal loans or the provision of their educational services. This is referred to as a "borrower defense to repayment" or "BDR" claim.[1] On November 1, 2022, the Biden administration promulgated a revised version of the BDR rule, which took effect on July 1, 2023.[2] On August 7, 2023, the U.S. Court of Appeals for the Fifth Circuit issued a nationwide injunction of the new, revised BDR rule, postponing its implementation. The current BDR rule remains in effect, however, and the injunction does not prevent the processing of BDR claims under the existing framework.

With regard to BDR claims, data released by ED suggests that virtually every institution in the United States has at least a handful of claims pending against it and over 500 institutions have 30 or more.[3] Anecdotally, Thompson Coburn has observed a rise in outreach from ED notifying institutions of BDR claims. Given this trend, we anticipate that many institutions may want to establish protocols for responding to BDR claims. We have developed this document to aid institutions with this process. In addition to this resource, we welcome institutions to review our webinar, "Responding to Student BDR Claims," available here. Please note that this document is not intended to cover every possible consideration, but, instead, to highlight key concepts we suggest should be part of any protocol for responding to individual BDR claims.[4]

I. Initial Assessment of the Claim

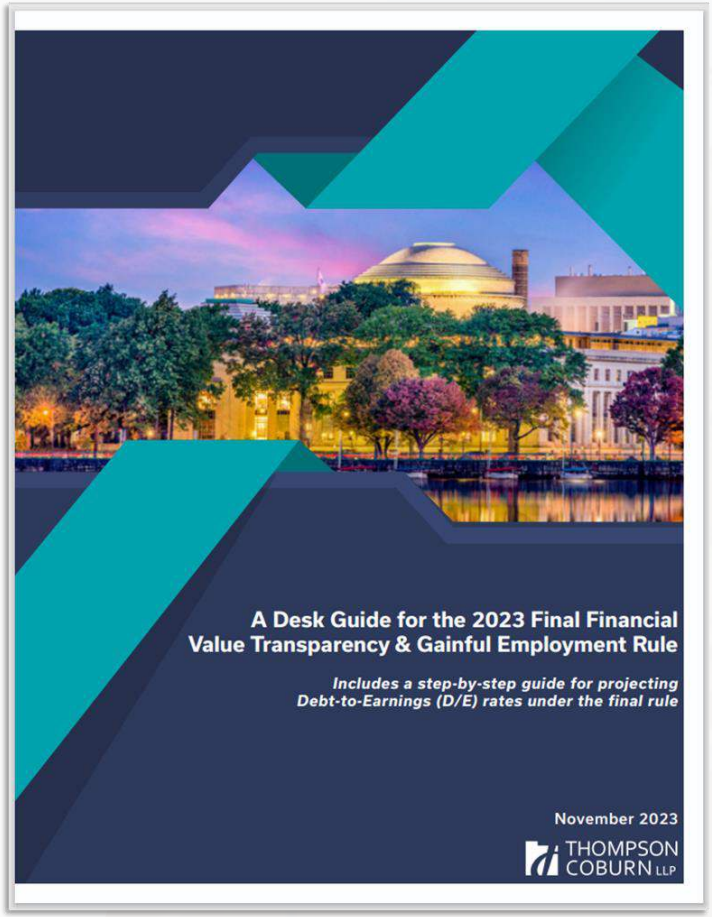
When triaging individual BDR claims, there are several initial matters we suggest an institution consider. First, we recommend institutions quickly determine whether ED's response deadline affords sufficient time to reply, or if an extension may be necessary. Second, as institutions review individual claims, they should identify the specific misconduct the student is alleging and determine whether, on its face, it is a valid basis for a BDR claim under applicable law. Generally, a BDR claim requires a misrepresentation or a breach of a promise or contract by an institution. These allegations most commonly take the form of promises related to cost, post-graduation employment or salary, transferability of credit, or accreditation. However, we routinely see claims that do not actually assert any conduct that would support a BDR claim, even if presumed true (e.g., disciplinary matters, academic disputes, quality of education). Third, institutions should consider whether any of the student's statements or omissions are inconsistent with or otherwise undermine the asserted misconduct. Finally, we suggest institutions identify and carefully consider their response to any information requests from ED that may accompany the claim or claims, but be unrelated to any specific alleged misconduct.

[1] Congress introduced the BDR concept in 1993, when it directed ED to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student loan]…." 20 U.S.C. § 1087e(h); see also 34 C.F.R. § 685.206, 34 C.F.R. § 685.222.

[2] See 87 Fed. Reg. 65904 (Nov. 1, 2022).

[3] In response to a FOIA request filed by the Legal Defense Fund, the Department supplied a list of BDR claims pending as of July 31, 2022, organized by institution. The resulting spreadsheet is available for download here.

[4] In some cases, ED has the authority to certify group claims, which could cover scores of borrowers. While many of the suggestions detailed in this document would still be worthwhile, we note that group claims are managed under different legal procedures and should be handled carefully and accordingly.



A Desk Guide for the 2023 Final Financial Value Transparency & Gainful Employment Rule

Includes a step-by-step guide for projecting Debt-to-Earnings (D/E) rates under the final rule

November 2023

THOMPSON COBURN LLP

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COMPLIANCE

Maintaining Compliance with the Evolving 90/10 Rule

Last Updated: April 2021

On March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 (the "Act"), a $1.9 trillion stimulus package containing emergency pandemic relief and a number of provisions important to the higher education sector. Of particular significance to proprietary institutions is Section 2013 of the Act, which amends the longstanding and controversial "90/10 rule." Under the current 90/10 rule, to remain eligible to participate in the federal student aid programs, a proprietary institution must "derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds."[1] Section 2013 amends this language, requiring instead that covered institutions derive at least 10 percent of their revenue from sources other than "Federal education assistance funds." Federal education assistance funds are defined as "[f]ederal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution."

Pursuant to the Act, the earliest this revision to the 90/10 rule may take effect is for institutional fiscal years beginning on or after January 1, 2023. Congress has directed the U.S. Department of Education ("ED") to engage in a negotiated rulemaking before it implements the revision. It presently is unclear which federal funding programs will be deemed "Federal education assistance funds." However, we anticipate that during the negotiated rulemaking, the current administration will propose a broad interpretation, which will include GI Bill benefits for veterans, Military Tuition Assistance benefits for active military, and Trade Adjustment Assistance for workers, among others.

Given this imminent change to the 90/10 rule, and the challenge we expect it will create for many proprietary institutions, we determined to create this compilation of strategies we have seen used in the past for managing 90/10 rule compliance, and to include thoughts and considerations, as appropriate. We strongly emphasize that the compliance strategies detailed below should not be viewed as recommendations, and may not be appropriate for every institution. Each institution should consult its own legal advisors, accountants, and other trusted professionals to determine whether to employ any particular strategy for complying with the 90/10 rule.

1. 34 C.F.R. §668.14(a)(16); see also 20 U.S.C. §1094(a)(24).