



Updates, updates, updates What's new with Title IX

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Agenda

- Title IX overview
- 2020 Regulation changes
- 2024 Regulation changes
- State governance/new administration
- Title IX & athletics
- Final tips & takeaways



Title IX

➤ Title IX is a Federal Civil Rights law stating:

“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 financial assistance.”

➤ 37 small words: huge impact.



History and purpose of TIX



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- ▶ **Congress recognized that**, in spite of the Civil Rights Act of 1964, women continued to received unequal treatment in schools.
- ▶ **How it started:** to remedy a “long and unfortunate history of sex discrimination”. *United States v. Virginia. 518 U.S. 515, 531 (1996) quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973).*
- ▶ **How it is going:** improved access to educational opportunities and providing “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *United States v. Virginia. 518 U.S. 515, 531 (1996)*

Scope of Title IX - Adopted in 1973

- Applies to institutions receiving federal financial assistance from the Department of Education, including state and local educational agencies.
 - ▶ Approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums.
 - ▶ Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories and possessions of the United States.

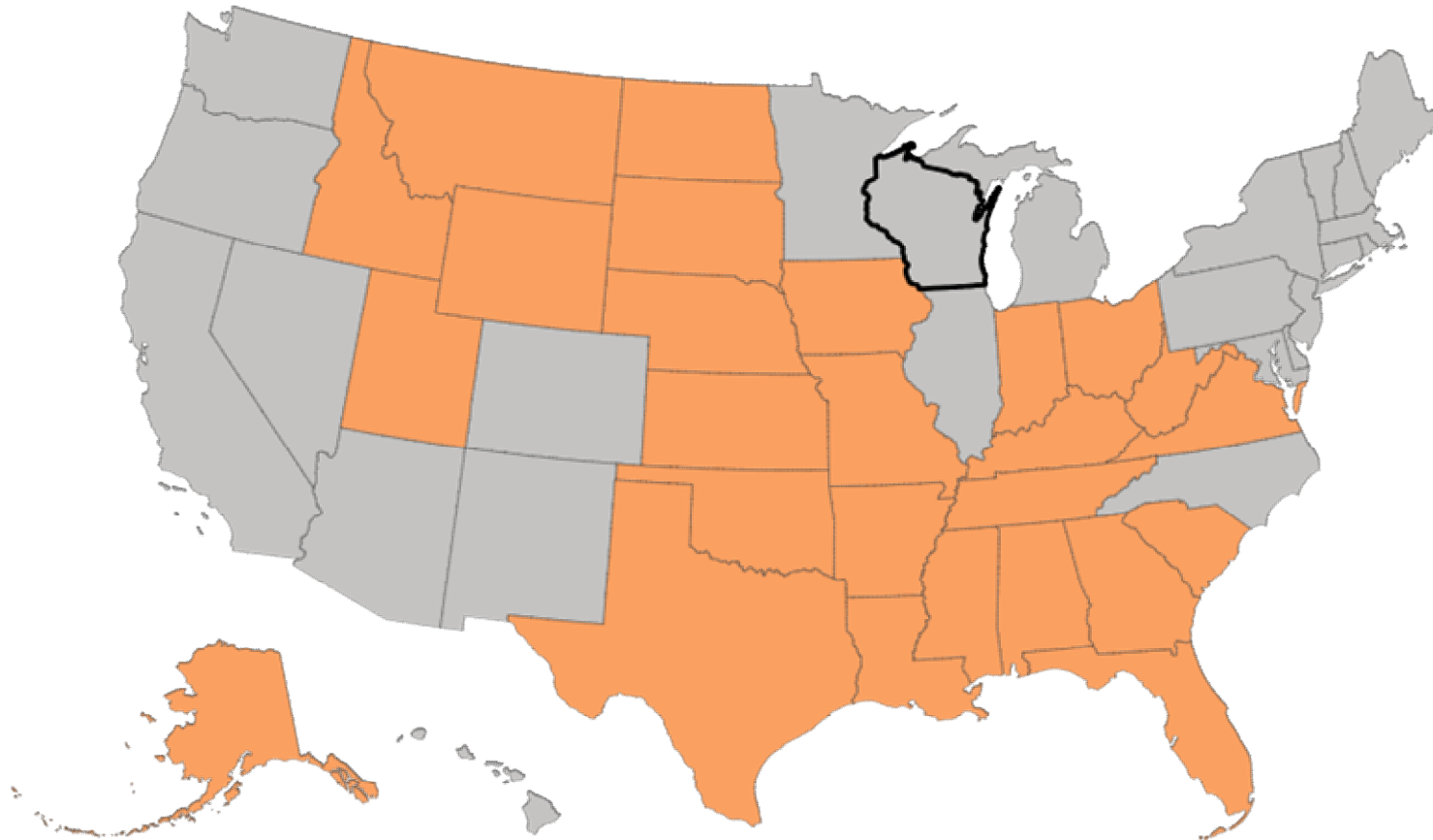


Who enforces Title IX?

- Title IX is a civil rights law and falls under the jurisdiction of the U.S. Department of Justice.
- DOJ enforces laws to ensure equal access to education, as well as the Equal Protection Clause of the 14th Amendment.
- DOJ coordinates enforcement of Title IX across agencies to include the Department of Education and Office of Civil Rights (OCR).



The OCR is Enforcing Title IX in the States in Gray
on this Map. Note: NM is in the enforcement zone



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2020 Title IX changes



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The **2020** Title IX Regulation Related to Sexual Harassment - Promulgated under the Trump Administration

Regulations - **effective beginning August 14, 2020**.

Changes include:

- ▶ New terminology, policy and notice requirements
- ▶ Limitations on jurisdiction
- ▶ Optional burdens of proof; must choose.
- ▶ Revised Title IX Coordinator responsibilities
- ▶ Revised investigation procedures
- ▶ Expanded hearing rights options for K-12 hearings
- ▶ New Requirements for Decision makers
- ▶ New rules for appeals
- ▶ Expanded training requirements and record keeping

2020 Definition of Sexual Harassment

“Sexual Harassment” means conduct on the basis of sex that satisfies at least one of the following:

- ▶ A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or
- ▶ Unwelcome conduct that a reasonable person would determine is so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the school's education program or activity; or
- ▶ Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).



Protection for Gender Identity and Sexual Orientation

- ▶ Protections for individuals on the basis of gender identity and sexual orientation based on case law in 2020.
- ▶ Protections codified in 2024 regulations.
- ▶ These protections are also found for employees in Title VII and for schools in the NM Human Rights Act.



Sex Discrimination ≡ Gender Discrimination?

- *J.L v. Mohawk Consolidated SD (2010)*
- *Pratt v. Indian River CSD (2010)*
- *Putnam v. Somerset ISD (2010)*
- Dept. of Ed negotiated settlement agreements.
- Title IX prohibits discrimination against a student whose appearance/behavior does not conform to gender stereotypes.
- Title IX protects students who are harassed due to actual or perceived sexual orientation.
- Premise is that sexual orientation is about sex and notions of gender and protected by Title IX.



2020 Regulations
were legally
challenged.
Almost nothing
changed.



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The
Regulatory
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News | Education | May 20, 2020

The Trump Administration's New Title IX Rule

Meghan Downey

ACLU Comment on Department of Education's Final Title IX Rule on Sexual Harassment

Case: KNOW YOUR IX, a project of Advocates for Youth; COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.; GIRLS FOR GENDER EQUITY; and STOP SEXUAL ASSAULT IN SCHOOLS V. DEVOS

May 6, 2020 5:15 pm

2024 Title IX changes



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RESEARCH

Reactions to the Biden administration's proposed Title IX changes from education law scholars

Suzanne Eckes, R. Shep Melnick, and Kimberly J. Robinson
June 30, 2022

On June 23, 2022, the U.S. Department of Education released its [proposed changes](#) to Title IX regulations for public comment. The Biden administration says the changes would restore protections from sexual harassment and assault, as well as sex-based discrimination, including for LGBTQI+ students who confront discrimination based on their sexual orientation or gender identity. Its proposed amendments would reverse many changes made by the Trump administration.

119 Organizations On Record as Opposed to Biden Title IX Plan, Cite Numerous Concerns

WASHINGTON / July 18, 2022 – A growing number of organizations – 119 at last count — have gone on record in opposition to the Biden Title IX regulation, which was issued on June 23 (1). The opposing groups include public policy organizations, public interest law firms, religious groups, and local grass-roots entities. The complete listing of groups is included at the bottom of this press release (2).



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Definition Change

34 C.F.R. Section 106.2 “**sex-based harassment** is a form of sex discrimination, and include both sexual harassment, which is conduct of a sexual nature, as well as other forms of harassment that are not necessarily “sexual” but are based on a person’s sex, such as pregnancy harassment, gender identity, or sex-based stereotypes.”



Currently going on....

August 01, 2024

How Biden's Title IX Reform Became a Legal Morass

Conservatives have partly stymied the administration's efforts to overhaul Title IX, getting the new regulations temporarily blocked in 26 states over objections to expanded rights for LGBTQ+ students. Here's how the last 100 days have unfolded.

By [Katherine Knott](#)

'What Is Certain Is Uncertainty': Patchwork Title IX Rules Face Expected Changes in Second Trump Administration

"Educational institutions are expending so many resources putting systems in place, training their employees, educating their student bodies, and then having to do it all over again in a short period of time when regulations change as much as they have in 2020 and now 2024," said Patricia Hamill, a member with Clark Hill.

November 08, 2024 at 03:59 PM

Different School of Thought: 15 States Sue to Challenge 2024 Title IX Regulations

May 8, 2024

By [Amanda T. Quan](#), [Lisa Karen Atkins](#), and [Elizabeth T. Jozsi](#)



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The **2024** Title IX Regulation Changes Related to Sexual Harassment: Highlights

- Removal of Geographic limitations
34 CFR §106.11
- Title IX recipient should not focus on whether the alleged misconduct happened on or off campus, “but rather on whether the recipient has disciplinary authority over the respondent’s conduct in the context in which it occurred.”
- There is no distinction between discrimination that occurs in person and that which occurs online, and the **final regulations permit schools to exercise their authority under the law to consider some conduct that occurs outside an institution’s educational boundaries.**



The 2024 Title IX Regulation Related to Sexual Harassment(K-12) Cont.: Highlights



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- Broader definition of sexual harassment: Includes conduct that is "sufficiently severe **or** pervasive".
- Clarification on special education interaction with Title IX.
- Training requirements.
- Clarification of prohibition on discrimination based on pregnancy: Includes current, potential, or past pregnancy or related conditions
- Support for LGBTQ+ students: Confirms protections for LGBTQ+ students

The 2024 Title IX Regulation Related to Sexual Harassment(K-12) Cont.: Highlights Cont.

- Improved reporting process: Makes it easier for complainants to report sexual harassment
- Support for parents and guardians: Supports the rights of parents and guardians to file a Title IX complaint on behalf of a minor student.
- Clear communication of nondiscrimination policies: Requires schools to clearly inform key people of their nondiscrimination policies and procedures
- Prohibition of sharing personal information: Prohibits schools from sharing confidential personal information during the TIX process, except as allowed by law.



Clarification of Pregnancy-Related Protections & Inclusion of Lactation Issues

- Title IX recipients must protect students, employees, and applicants from discrimination based on **pregnancy, childbirth, termination of pregnancy, lactation, related medical conditions, or recovery** (§ 106.2)
- Providing reasonable modifications for students (including Section 106.40(b)'s requirement to provide a pregnant student with the Title IX coordinator's contact information)
- **Reasonable break time for employees for lactation** (§ 106.57(e)(1)).
- Clean, private lactation space for both students and employees (§§ 106.40(b)(3)(v) and 106.57(e)(2)).
- Sections 106.40(b)(3)(v) and 106.57(e) of the final regulations require Title IX recipients to **assure students and employees have access to a lactation space**, “which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others,”



2024 Definition Changes - Policy Changes Required

- ▶ 34 C.F.R. Section 106.2 “**sex-based harassment** is a form of sex discrimination, and include both sexual harassment, which is conduct of a sexual nature, as well as other forms of harassment that are not necessarily “sexual” but are based on a person’s sex, such as pregnancy harassment, gender identity, or sex-based stereotypes.”
- ▶ **Revised definition**: Sex-based 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 your education program or activity.
- ▶ **Retaliation** definition changes now clarifies that nothing in that definition prohibits institutions from requiring employees to participate as a witness in, or otherwise assist with, a Title IX investigation, proceeding, or hearing. 34 C.F.R. Section 106.2
- ▶ *Remember - sexual harassment is evaluated on the manner it was received, not the manner in which it was intended.*



Hostile Environment Analysis under 2024 TIX Regulations

- Unwelcome conduct determined by
 - a reasonable person, placed in a substantially similar situation,
 - to be so severe or pervasive, and objectively offensive that
 - it effectively denies a person equal access to the recipient's education program or activity.



Social Media and AI –Included in Harassment

- ▶ A recipient's obligation is to address all forms of sex discrimination, including sex-based harassment that occurs within the recipient's education program or activity, whether the conduct takes place online, in person, or both.
- ▶ Online harassment can include, but is not limited to,
 - ▶ unwelcome conduct on social media platforms, such as
 - ▶ sex-based derogatory name-calling,
 - ▶ the nonconsensual distribution of intimate images (including authentic images and images that have been altered or generated by artificial intelligence (AI) technologies),
 - ▶ cyberstalking,
 - ▶ sending sex-based pictures or cartoons
- ▶ A recipient must evaluate **online** conduct with the same factors that are used to determine whether in-person conduct creates a hostile environment.

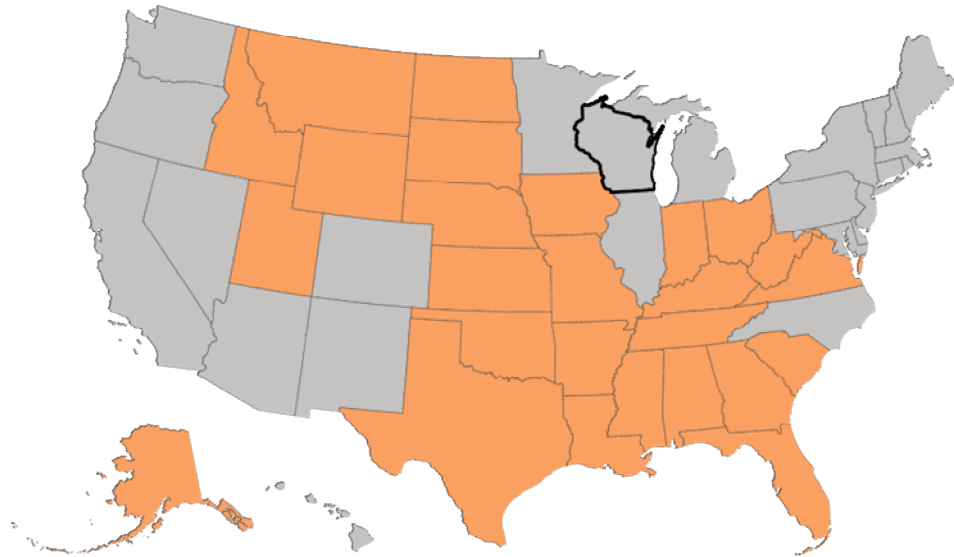


Special Education & Title IX

- ▶ Section 106.8(e) clarifies that the Title IX Coordinator is *not* required to consult with a student's *full* IEP team or Section 504 team.
- ▶ However, Section 106.8(e) does provide the recipient must require that the Title IX Coordinator consult with one or more members of a student's IEP team or Section 504 team, as appropriate.
- ▶ The purpose of the consultation is to determine how the recipient can comply with relevant special education laws while carrying out the recipient's obligation under Title IX
 - ▶ **Think Section 504 for parties who are employees.**



What does this mean for New Mexico?
The 2024 Regulations are being enforced
in NM.



Employees already Protected under Title VII on the basis of gender identity and sexual orientation

- ▶ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020)
- ▶ construes the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C.



Supreme Court Decision June 2020

- ▶ Opinion by Gorsuch and joined by four justices.
- ▶ SCOTUS found in favor of Plaintiffs.
- ▶ Three cases in front of the court:
 - ▶ Two cases involved employees who alleged they were fired because they are gay.
 - ▶ One of them was fired after working for six years as a male funeral director and fired two weeks after telling her boss that she was transgender and would be coming to work as a woman.



Landmark Supreme Court Decision

Cont.

- ▶ Landmark case rules that the Civil Rights Act of 1964 prohibits employment discrimination on the basis of **sexual orientation and gender identity**.
- ▶ Rectified the lop-sidedness of the legality of same-sex marriage (2015) with the right to be fired for being gay.
- ▶ Title VII of the Civil Rights Act of 1964, which bars employment discrimination based on **race, religion, national origin and sex**, was in question in this case.
- ▶ The question for the court: Whether discrimination “because of sex” — applies to gay and transgender workers?



Federal Laws Prohibiting Discrimination

- ▶ Title VII of the Civil Rights Act of 1964 made it illegal to discriminate against a person on the basis of **race, color, religion, sex, or national origin (employment settings)**.
- ▶ Now includes **sexual orientation and gender identity (since 2020 *Boystock* case)**.



The New Mexico Human Rights Act

Protected categories:

race, color, religion, national origin, ancestry, sex, sexual orientation, gender, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, physical or mental disability or serious medical condition NMSA 1978, § 28-1-7



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Title IX & Athletics



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Badis and Troup v. James Campbell High School, Oahu Interscholastic Association, Hawaii Department of Education



- ▶ Ashley Badis and Tatiana Troup were student athletes at James Campbell High School.
- ▶ Alleged “widespread failure to ensure gender equity in school athletics”.
- ▶ As female athletes they were subjected to inequity in the form of:
 - ▶ No stand alone locker rooms, including women’s track and field teams required to change in the bleachers
 - ▶ Disparities in game scheduling, travel opportunities, publicity, and access to facilities and coaches.
 - ▶ girls’ teams had games regularly scheduled on Tuesdays and Thursdays, while three-quarters of Friday night slots were reserved for boys’ sports
 - ▶ Boys’ basketball and football teams could hold additional practices at will that displaced the girls’ volleyball and track-and-field teams
 - ▶ Failed to hire girls coaches and did not pay girls assistant coaches
 - ▶ After the lawsuit was filed, the school retaliated by threatening cancellation of the girls water polo team
- ▶ Badis - In July 2023, ESPN awarded her the Billie Jean King Youth Leadership Award for leading the lawsuit.

Three Prong Test for Title IX

THREE PRONG TEST FOR TITLE IX

PRONG 1:
PROPORTIONALITY

1

PRONG 2:
EXPANSION

2

PRONG 3:
ACCOMMODATING
INTERESTS

3



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#1 - Proportionality

- ▶ Proportionality evaluates whether the number of male and female student-athletes is proportional to the overall male and female student enrollment in the institution.
- ▶ If the proportion of **female student-athletes is significantly lower than the proportion of female students in the school**, this prong is not satisfied.
- ▶ To determine proportionality, schools typically calculate it using both "unduplicated" and "duplicated" measures.
- ▶ The unduplicated measure counts student-athletes once, regardless of their participation in multiple sports.
- ▶ The duplicated measure accounts for multiple-sport athletes to reflect the actual number of participation slots available.
- ▶ Typically, a **difference of less than five percent between the proportion of female athletes and female enrollment is considered within the "safe harbor"** of proportionality.



#2 - Expansion

- ▶ If a school fails to satisfy the first prong, it may still comply with Title IX by meeting the requirements of the second prong, which focuses on program expansion.
- ▶ The school must demonstrate a **history and continuing practice of expanding athletic opportunities** for female students to align with their interests.
- ▶ By **actively working toward proportional representation** in its athletics program, even if it hasn't achieved it yet, the school can fulfill Title IX requirements.
- ▶ This prong considers the **efforts made by the school in recent years to add participation opportunities** for female students.
- ▶ It is important to note that schools cannot eliminate or downsize sports programs for girls while claiming compliance with the second prong.



#3 - Accommodating Interests

- ▶ Schools must effectively accommodate the athletic interests of both male and female students by providing opportunities for participation in sports that align with their individual preferences and abilities.
- ▶ Determining individual preferences and abilities includes:
 - ▶ **conducting surveys, such as participation rates at the middle school, youth, and recreational league levels.**
 - ▶ engaging in dialogue, and
 - ▶ **monitoring participation trends** to gain insights into the sports preferences of students.
 - ▶ By understanding their interests, schools can design athletic programs that cater to a diverse range of sports options and create an inclusive environment where students feel encouraged and supported to pursue their chosen sports.
 - ▶ **The aim is to determine whether all the athletic interests of female students are being sufficiently addressed.**



Ollier v. Sweetwater Union School District

- ▶ The dispute centered around facility inequities between softball and baseball facilities at a California high school.
- ▶ The case underwent a Title IX investigation by the Office for Civil Rights (OCR) and later led to a federal court proceeding.
- ▶ The Court referenced data that had been collected to assess compliance with Component I of the Title IX Compliance Framework.
 - ▶ Female enrollment at the school was found to be 45.4 percent
 - ▶ While only 38.7 percent of sports participation opportunities belonged to girls, according to the duplicated measure of proportionality.
 - ▶ This resulted in a 6.7 percent difference, indicating a failure to meet the first prong of the three-prong test.
- ▶ The school was unable to demonstrate compliance with the second prong, which required a history and ongoing pattern of program expansion to provide equal athletic opportunities for girls.
- ▶ To fulfill the third prong, the school was unable to produce surveys and other indicators to assess that the athletic interests of female students are being met.
- ▶ The school lost their case.



Considerations for Your District:

- ▶ **Analyze data on expenditures for female and male sports, including travel, hotel accommodations, uniforms and equipment.**
- ▶ **Analyze data on athletic participation by gender, as compared to student population?**
 - ▶ These numbers are reported to the NMPED – are you reviewing them in District?
- ▶ **Audit your athletic facilities.**
 - ▶ Are your facilities equitable in size and condition for male and female sports?
 - ▶ Are there equitable facilities for sports in which both males and females compete?
 - ▶ i.e. wrestling rooms? Softball and baseball fields, dugouts, locker rooms



Take Aways:

- ▶ The 2024 regulations are currently being enforced by the OCR.
- ▶ Any changes, based on the current TIX litigation, will likely be minor.
- ▶ Any changes, based on the current TIX litigation, will not impact protection for certain protected categories in New Mexico.
- ▶ Focus on solid implementation.
- ▶ Focus on equity.



Disclaimer

- This presentation is intended to provide a broad overview and general information about the topics covered, and not legal advice applicable to any particular case. Where laws are summarized, information not necessary for a broad overview may be omitted. Seek additional information or consult your attorney with any issues that arise and do not rely solely on the information presented here.



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