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Guidance on the Status of the Biden Administration's Title IX Changes in Massachusetts

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The Department of Education's new Title IX rule changes were scheduled to take effect on August 1st. However, multiple federal courts have found that the rules are likely illegal and have temporarily blocked enforcement of the rules in certain jurisdictions, leading to uncertainty among many school committees as to whether they are required to implement the rules. In addition, there has been some confusion about what the new rules would obligate school districts to do. The purpose of this document is to clear up that confusion and uncertainty for parents, teachers, and school committee members in Massachusetts. The following are answers to some of the most common questions about the new rule changes:

1. What is Title IX?

Title IX of the Education Amendments of 1972 is a federal law that prohibits discrimination on the basis of sex in educational settings. It applies to every school that receives federal financial assistance, which includes virtually all public schools nationwide. Title IX was originally enacted to promote equal opportunities for women and girls in public schools. The law is enforced by the federal Department of Education ("DOE"), which passes rules to implement it.

2. What would the new rules change?

The new rules would make a number of controversial changes to Title IX. Many of these changes involve weakening due process protections for students who are accused of sexual misconduct. Most prominently, however, the new rules would expand the definition of sex discrimination to now include discrimination

based on sexual orientation and gender identity.¹ DOE guidance² makes clear that this means that schools must allow biological males who identify as female to use female bathrooms, locker rooms, and showers. The rules would also prohibit teachers and students from using the “wrong pronouns” for students who identify as transgender. In addition, they may impact girls’ sports and overnight accommodations for field trips. Finally, they may put pressure on schools to hide students’ gender transitions from parents.

In some cases, Massachusetts law already imposes similar requirements on schools. But these new federal rules will further limit the ability of schools to develop their own policies on these important issues.

3. Are the new rules enforceable in Massachusetts school districts?

It depends on the district. Courts have temporarily enjoined, or blocked, enforcement of the rules in multiple states across the country, but these injunctions do not apply statewide in Massachusetts. However, **one injunction applies to all schools attended by the members of the groups Young America’s Foundation and Female Athletes United, and the schools attended by the children of members of Moms for Liberty.**³ This injunction also applies prospectively, meaning that members who join these organizations after the date of the injunction will still be covered by it. Since some schools in Massachusetts are attended by members of these organizations or their children, the injunction applies to those schools.⁴

Several lawsuits are still pending that could result in nationwide injunctions, which would also apply in Massachusetts. It is important to stay up to date on these issues due to the developing nature of the litigation.

Finally, even in the districts where the rules have not been enjoined, **the risk of choosing not to implement the rules at this time is likely minimal.** School committees should carefully weigh whether they want to implement the

¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, § 106.10, <https://www.federalregister.gov/documents/2024/04/29/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

² Unofficial Final Rule, <https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf>.

³ *State of Kansas v. Dept. of Education*, Case No. 24-4041-JWB, Preliminary Injunction Ruling, (D. Kan. July 2, 2024), <https://www.slfliberty.org/wp-content/uploads/sites/12/2024/07/20240702-Memorandum-and-Order-on-PI-Stay-Doc.-53.pdf>.

⁴ For an updated list of covered schools, see case documents at <https://www.slfliberty.org/case/moms-for-liberty-and-young-americas-foundation-et-al-v-u-s-department-of-education/>. It is important to note that according to the court order, **this injunction applies not only to schools that are on the list**, but also to any school that has been otherwise notified that members/children of members of the specified organizations attend that school.

new rules immediately or take a “wait and see” approach in light of the ongoing litigation. See point #5 below.

4. What is the effect of the recent U.S. Supreme Court decision to uphold injunctions against the rules?

On August 16, 2024, the Supreme Court weighed in for the first time on the new Title IX rules.⁵ The Court declined the federal government’s request to overturn temporary injunctions issued by two federal courts. The decision only addressed these temporary injunctions; the Court has not yet had an opportunity to rule on the merits as to whether the new Title IX rules are legal. However, this recent decision does seem to indicate that the Court is likely to overturn the rules when they are presented with the opportunity to do so.

5. What factors should a school committee consider as it decides whether to implement the new rules?

Because there is ongoing litigation to determine whether the new rules are legal, it is unlikely that DOE would take any enforcement action against a school district that chooses not to implement the rules at this time. Even if none of the current injunctions apply to them, many school districts may choose to take a “wait and see” approach to the implementation of these rules.

In theory, a school could lose federal funding for not complying with these rules. However, it should be noted that in the 52 years that Title IX has been in effect, no school has ever lost federal funding for non-compliance. Schools that are found to be out of compliance typically have the opportunity to voluntarily come into compliance before sanctions are implemented. In addition, investigations into Title IX violations typically last many months or even years.

It should also be noted that implementing the rules poses its own liability risks. The new rules raise significant issues regarding student privacy rights, safety risks, compelled speech, and parental rights. These risks should be weighed against the benefits of compliance at this stage. Many school districts may find it more prudent to hold off on enforcement unless and until the courts hold that the rules are legal and must be adopted.

Have additional questions? Contact us at contact@malibertylegal.org.

⁵ *Dept. of Education v. Louisiana*, 2024 U.S. LEXIS 2983 (August 16, 2024), https://www.supremecourt.gov/opinions/23pdf/24a78_f2ah.pdf.