

# STUDENT SERVICES LEGAL UPDATE

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February 5, 2025

WSSSC Winter Meeting

# OVERVIEW

- Vacation of 2024 Title IX Rule
  - Federal district court ruling
  - USDOE Dear Colleague Letters
  - Next steps for CTC Title IX rules
- Executive Orders – DEI and Sex/Gender
- New Federal Hazing Law
- First Amendment Auditors

## 2024 RULE VACATED

- 2024 Title IX Rule
  - New procedures for all gender-based discrimination, including sexual violence/pregnancy discrimination
  - Clarified Title IX protections extend to transgender employees and students
  - Authorized use of modified single investigator model
  - Removed formal written complaint requirement for sexual harassment/violence claims
  - Extended Title IX jurisdiction to off-campus locations unrelated to IHE sponsored activities and programs
- Vacated in entirety nationwide on January 9, 2025 - *Tennessee v. Cardona*
- After initial uncertainty, it appears ruling is final

## GUIDANCE FROM USDOE

- Revert to 2020 Title IX procedures - January 29, 2025 Dear Colleague Letter
- Active Title IX proceedings under 2024 Rule should be re-evaluated and proceed under 2020 Title IX procedures - February 4, 2025 Dear Colleague Letter
- Use binary definition of sex (male/female) as directed in new Executive Order - February 4, 2025 Dear Colleague Letter (*This will likely be subject to legal challenges – more to come*)

# SIGNIFICANT DIFFERENCES

## 2024 TITLE IX RULE

- Applied to off campus conduct
- Applied to all sexual discrimination
- Broader and more refined definitions for quid pro quo and hostile environment harassment
- No formal complaint required

## 2020 TITLE IX RULE

- Applies to conduct occurring within college programs and activities
- Only applies to sexual harassment/violence
- Narrow definitions for quid pro quo and hostile environment harassment
- Formal written complaint required

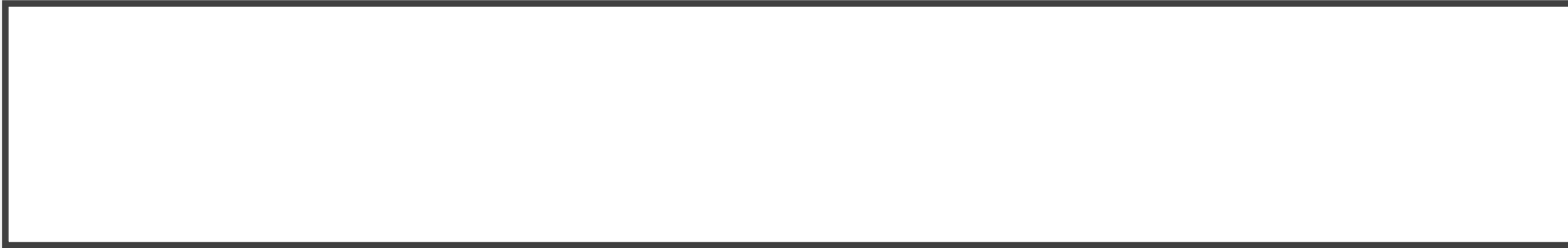
# TITLE IX – GOING FORWARD

## **2024 Title IX Code Finalized**

- Place notification on website indicating 2024 Title IX Rule has been vacated, 2024 Title IX Code no longer applicable, and 2020 Title IX Code will apply
- Initiate emergency rulemaking repealing 2024 Title IX Code and readopting 2020 Title IX Code
- Repeal 2024 Title IX Code and readopt 2020 Title IX Code through permanent rulemaking process
- Readopt 2020 Title IX investigation procedures and Employee hearing procedures

## **2024 Title IX Code in Process**

- Place notification on website indicating that 2024 Title IX Rule has been vacated, 2024 Title IX Code is no longer applicable, and 2020 Title IX Code will apply
- Rescind emergency rule and discontinue rulemaking for 2024 Title IX Code
- If rulemaking includes non-Title IX amendments, consider striking 2024 Title IX provisions and move forward with finalizing remaining non-Title IX provisions
- Readopt 2020 Title IX investigation procedures and Employee hearing procedures



# TITLE IX QUESTIONS?

## DEI EXECUTIVE ORDERS

### Ending Illegal Discrimination and Restoring Merit-based Opportunity – Executive Order 14173

- Targets “illegal” “sex- and race-based preferences under the guise of so-called ‘diversity, equity, and inclusion’”
- Sex- and race-based preferences (affirmative action) already illegal in Washington under I-200
- Claims that it does not prohibit IHEs from engaging in First Amendment-protected speech
- Additional guidance from USDOE due in 120 days



## DEI EXECUTIVE ORDER

- Prohibits **Illegal** DEI processes – Affirmative Action
- **Legal** DEI strategies include broadening search pools, training to ensure race/gender neutral hiring process, focusing on retention issues, and using gender/race neutral classifications (income, first in family, etc.)
- Many federal programs, like TRIO, AANAPISI, and Hispanic Serving Institutions, are legislatively enacted and arguably outside scope of EOs.

# SEX/GENDER EXECUTIVE ORDERS

## Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government – Executive Order 14168

- Declares “sex” to be an “immutable biological classification as either male or female.” Rejects “gender identity” as a protected subcategory of sex.
- Prohibits federal agencies and employees from using the term “gender” when administering and enforcing sex-based distinctions
- Disagrees with interpretation of Supreme Court precedent that allows transgender individuals to use single sex facilities based on their gender identity

## SEX/GENDER EXECUTIVE ORDERS

- Recent USDOE DCL opines that Title IX procedures should comply with EO – Likely to be subject of legal challenges
- EO conflicts with Ninth Circuit precedent holding that transgender individuals are protected under federal civil rights laws prohibiting discrimination on the basis of sex
- Washington Law Against Discrimination (WLAD) expressly prohibits gender identity discrimination
- IHEs should be sensitive to use of the term “gender” when communicating with federal authorities

# EXECUTIVE ORDERS

- AGO has working groups analyzing both Executive Orders
- Notify your assigned AAG immediately re: any of the following:
  - Withholding of federal funding
  - EO related terms and conditions in new federal grants or contracts
  - Amended terms and conditions to existing grants or contracts
  - Notices of investigation or inquiries about topics addressed in these orders
  - Inquiries from legislators, policy makers, members of the public, etc. regarding CTC's compliance with EOs or topics raised in EOs (e.g., sex, gender, transgender rights, DEI programming, affirmative action) **regardless of source**

# NEW FEDERAL HAZING LAW

Gathering statistics for reporting started on January 1, 2025

[Stop Campus Hazing Act \(SCHA\)](#) requires IHEs to:

- Compile and disclose statistics on hazing incidents reported to campus security authorities or local police in their Annual Security Report (Clery Act) using SCHA definition of hazing.
- Publish information related to hazing incidents (as defined by IHE policy) in a newly established Campus Hazing Transparency Report, and
- Publish specified information (as developed by IHE) related to anti-hazing policies and hazing prevention programs

# TWO DEFINITIONS OF HAZING

## STATE DEFINITION

"[A]ny act committed as part of a person's recruitment, initiation, pledging, admission into, or affiliation with a student organization, athletic team, or living group, or any pastime or amusement engaged in with respect to such an organization, athletic team, or living group that causes, or is likely to cause, bodily danger or physical harm, or serious psychological or emotional harm, to any student or other person attending a public or private institution of higher education or other postsecondary educational institution in this state, including causing, directing, coercing, or forcing a person to consume any food, liquid, alcohol, drug, or other substance which subjects the person to risk of such harm, regardless of the person's willingness to participate. 'Hazing' does not include customary athletic events or other similar contests or competitions."

Sam's Act, RCW 28B.10.900

## FEDERAL DEFINITION

- [A]ny intentional, knowing, or reckless act committed by a person (whether individually or in concert with other persons) against another person or persons regardless of the willingness of such other person or persons to participate, that—
- (I) is committed in the course of an initiation into, an affiliation with, or the maintenance of membership in, a student organization; and
- (II) causes or creates a risk, above the reasonable risk encountered in the course of participation in the institution of higher education or the organization (such as the physical preparation necessary for participation in an athletic team), of physical or psychological injury including ...

## FEDERAL DEFINITION EXAMPLES

- (aa) whipping, beating, striking, electronic shocking, placing of a harmful substance on someone's body, or similar activity;
- (bb) causing, coercing, or otherwise inducing sleep deprivation, exposure to the elements, confinement in a small space, extreme calisthenics, or other similar activity;
- (cc) causing, coercing, or otherwise inducing another person to consume food, liquid, alcohol, drugs, or other substances;
- (dd) causing, coercing, or otherwise inducing another person to perform sexual acts;
- (ee) any activity that places another person in reasonable fear of bodily harm through the use of threatening words or conduct;
- (ff) any activity against another person that includes a criminal violation of local, State, Tribal, or Federal law; and
- (gg) any activity that induces, causes, or requires another person to perform a duty or task that involves a criminal violation of local, State, Tribal, or Federal law.

## FEDERAL DEFINITION “STUDENT ORGANIZATION”

“The term ‘student organization’, for purposes of reporting under paragraph (I)(F)(iv) and paragraph (9)(A), means an organization at an institution of higher education (such as a club, society, association, varsity or junior varsity athletic team, club sports team, fraternity, sorority, band, or student government) in which two or more of the members are students enrolled at the institution of higher education, **whether or not the organization is established or recognized by the institution.**”



## COMPLIANCE DEADLINES

- January 1, 2025 – start collecting hazing statistics using federal hazing definition
- June 2025 - publish hazing policy using state definition
- December 2025 - publish a link to IHE's Stop Campus Hazing Transparency report containing violation findings using state definition
- 2026 – report hazing statistics in Clery Annual Security Report (ASR) using federal definition

# I<sup>ST</sup> AMENDMENT AUDITORS

- Auditors have been hitting CTCs along I-5 corridor
- Dramatic confrontations may get posted online and cause a flood of complaints and public records requests
- AGO has issued guidance on legal issues related to Public Records Index
- Slow things down, be helpful, be boring, minimize the drama
- Anticipate what Auditor may be seeking – latest issue: Public Records Indexes
- Recording in public spaces probably not violation of the law
- Identify and post signs for spaces accessible to employees/invitees only (and consistently follow policy)

# QUESTIONS?