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MEMORANDUM

In light of continuing legal challenges to the proposed Title IX regulations, we have prepared this Memorandum and Policy Update to ensure schools are in compliance with the current state of the law.

Title IX: Background

Congress enacted Title IX in 1972. Over the past 52 years, Title IX has largely been discussed in the context of men's and women's athletics. However, Title IX is much broader than sports and prohibits discrimination against sex in "any education program or activity receiving Federal financial assistance . . ."¹ This prohibition on discrimination extends to public school districts that receive federal funds.

Title IX Regulations

At its inception, Congress broadly authorized federal agencies to develop rules and regulations to "effectuate the provisions" of Title IX.² Since then, the United States Department of Education has adopted and revised hundreds (if not thousands) of pages of regulations and guidance.

Unfortunately for school districts, the past few years have seen significant changes to the Title IX regulations. In particular, the recent trend has shown that new presidential administrations have taken widely different approaches than their predecessors. To this end, the Title IX regulations have been revised or interpreted very differently between the Obama Administration,³ Trump Administration,⁴ and now the Biden Administration.⁵ This ever-changing approach to the federal regulations could continue, depending on what happens at November's presidential election.

Although this Memorandum is not and should not be taken as taking any political position, the reality remains that the politics in Washington, D.C. have resulted in perpetual changes for schools to comply with their Title IX obligations.

¹ 20 U.S.C. § 1681(a).

² 20 U.S.C. § 1682.

³ See e.g., U.S. Department of Education's "Dear Colleague Letter," October 26, 2010.

⁴ See e.g., U.S. Department of Education's "Dear Colleague Letter," February 22, 2017.

⁵ See e.g., Executive Order, January 20, 2021.

The Latest Proposed Changes

On April 19, 2024, the US Department of Education announced new, proposed changes to the Title IX regulations. In fairness to the Department of Education, many of these new changes would benefit school districts in their investigation and handling of Title IX complaints. However, as with any new regulations, new rules usually mean new requirements. New requirements usually mean changes to policies and handbooks. And under the proposed Title IX regulations, the investigation process would look different (again) and every school staff member would need to be trained.⁶ These new regulations are set to become effective on August 1, 2024.

Since the April release, at least four federal courts have entered injunctions to prevent the new regulations from going into effect. The State of Nebraska has filed a similar lawsuit to block the regulations in our state, though the court has not ruled on that request as of the date of this Memorandum.⁷ Nonetheless, it seems likely that Nebraska's request will be granted, given the number of other judges who have already heard the same legal arguments and decided to prevent the regulations from moving forward.

Adding to this legal uncertainty, on June 28, 2024, the U.S. Supreme Court entered its decision in *Loper v. Raimondo*, ending the long-standing *Chevron* deference. The *Chevron* doctrine is based upon a prior Supreme Court decision that generally directed federal judges to defer to a federal agency in questions about statutory interpretation. The *Chevron* doctrine has been controversial since the case was decided decades ago, since legal scholars questioned why the federal judiciary could not render its own interpretation instead of deferring to the federal agencies. Nonetheless, *Chevron* has now been overturned. The full impact of the *Loper* decision is not yet apparent but, as a result, the U.S. Department of Education's perhaps strongest legal argument in support of its new regulations (deference under *Chevron*) is no longer available to them.

Recommended Steps Moving Forward

With that all that being said, as it stands today, the new federal regulations may or may not go into effect in Nebraska on August 1, 2024, which may or may not require schools to handle Title IX differently than they have in the past.

⁶ "U.S. Department of Education Releases Final Title IX Regulations, Providing Vital Protections Against Sex Discrimination;" April 19, 2024; available at: <https://www.ed.gov/news/press-releases/us-department-education-releases-final-title-ix-regulations-providing-vital-protections-against-sex-discrimination>

⁷ Attorney General Hilgers Joins Six-State Coalition in Title IX Suit; available at: <https://ago.nebraska.gov/news/attorney-general-hilgers-joins-six-state-coalition-title-ix-suit>

As noted above, the likelihood of the proposed Title IX regulations becoming effective on August 1 seems low, given the precedent of other judges who have already addressed the same issue in other states. Even if the regulations go into effect on August 1, there remains a likelihood that a court will enjoin them shortly thereafter. Even more, the end of *Chevron* deference could place the 2020 Title IX regulatory updates in legal jeopardy, though that type of challenge could take years and a new presidential administration could eventually change the regulations anyway.

In the end, the “back and forth” legal uncertainty continues to put schools in a bind that should not be as convoluted or challenging. Districts continue to have an obligation to comply with the Title IX statute as it was originally written: to prevent discrimination on the basis of sex. As a result, and to avoid needing the Board of Education to change (or rescind) Title IX policies and procedures moving forward, we recommend the following steps at your August Board Meeting:

1. Update Policy 1200 (Title IX) with the attached version to authorize the Superintendent to develop and distribute Title IX procedures; and
2. Rescind Policies 1220 and 1220z entirely.

Under this approach, the Board continues to have a Title IX Policy, but does not need to regularly update the Title IX formal grievance procedures based upon new administrative guidance or court decisions. Moving forward, the attached Procedures are sample procedures that the Superintendent can implement and follow. In our view, these Procedures comply with Title IX as the statute is drafted, maintain the essential and best elements of both the 2020 and 2024 regulations, and would be defensible in an OCR complaint or lawsuit. Once the Superintendent approves the Procedures, the Procedures should be posted somewhere on the school’s website. Any future updates to the Title IX interpretation or guidance could then be addressed via the Superintendent’s changes to these Procedures.

As for training, it remains “best practice” (as with any legal requirement) for your administration and Title IX Coordinator to be trained on your district’s obligations under Title IX. However, at this time, we do not believe it is necessary to train *all* staff by August 1, as contemplated by the proposed regulations. If the regulations are permitted to become effective on August 1, both a brief “on-demand” training (for all staff) and more robust “on-demand” Title IX Coordinator training will be available through the ESUCC. In-person trainings are also available through the NCSA. Finally, we are always available to help develop individualized training for your District.

Please let us know if you have any questions or concerns.