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**Buelow Vetter**  
Buikema Olson & Vliet, LLC

**Keeping up with New Legislation:  
How to be Proactive and Protect  
Yourself and the District**

2020 WASBO-WASPA School Personnel Academy  
December 3, 2020

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### Agenda for Today

- I. How to Keep Up with New Legislation
  - I. Staying informed about new legislation
  - II. Preparing your district for new legislation
  - III. Penalties for failure to keep up with new legislation
- II. Examples of Recent or Upcoming Legislative Changes
  - I. Unemployment Benefits during COVID-19
  - II. FFCRA
  - III. Legislative Update
  - IV. Mask Mandates and Executive Orders
  - V. Title IX

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### How to Stay Informed about New Legislation

- Be proactive to keep yourself and your district informed
- What resources are available to you?
  - Subscribe to relevant listservs (see next slides)
  - Set Google Alerts for topics of interest to your district
  - In-house legal counsel can become a member of the Council of School Attorneys (COSA) listserv
  - Ask to get on your legal counsel's legal update list
  - von Briesen Government Relations Team offers legislative monitoring

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### Listservs for New Legislation Updates

- State resources:
  - WASBO, WASPA, WASB, Wisconsin School Administrators Alliance
  - WI State Legislature - <https://legis.wisconsin.gov/>
    - Utilize notification service: <https://notify.legis.wisconsin.gov/login?ReturnUrl=%2f>
    - Assembly Committee on Education: <https://docs.legis.wisconsin.gov/2019/committees/assembly/1997>
    - Senate Committee on Education: <https://docs.legis.wisconsin.gov/2019/committees/senate/1947>
- Federal resources:
  - <https://www.congress.gov> (official U.S. federal legislative site)
    - Notification service and subscriptions: <https://www.loc.gov/subscribe/>
  - US Dept of Education, Student Privacy Policy Office -
    - <https://studentprivacy.ed.gov/join-student-privacy-listserv>

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### Additional Listserv Resources

- National School Boards Association (NSBA)
- <http://www.thewheelerreport.com/> (subscription for some content)
- <https://www.wispolitics.com/> (subscription for premium content and daily emails)
- <https://www.politico.com/newsletters/weekly-education>

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### How to Prepare for Changes in Legislation

Questions to ask when you become aware of new legislation:

1. **What is this new legislation, and how will it impact my district?**
  - State or federal law change?
  - What agency is making the change?
  - What area(s) of the district are impacted?
2. **What deadlines are there for implementation?**
  - Be aware of all deadlines
  - Plan a timeline for your district to be in compliance by mapping out the necessary steps with the necessary individuals

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How to Prepare for Changes in Legislation, cont.

- 3. Does the district need to create or change anything in response to the new legislation?
  - Update or create board policies or procedures
  - Change or create practices or procedures
- 4. Who are the district stakeholders that we need to communicate these changes to?
  - Parents and students
  - District stakeholders - administrators, teachers, board members, all staff
  - Community stakeholders
- 5. How to communicate these updates?
  - Electronically: email blast, social media, calls to families
  - Community listening sessions
  - Mailing information home

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Potential Liability for Failure to Keep Up with Legislative Changes

- Internal complaints
- Complaints filed with relevant state/federal agency
- Order for corrective action
- Loss of funding
- Other monetary penalties
- Lawsuit for noncompliance

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Examples of Recent or Upcoming Legislation Changes

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## Unemployment Benefits during COVID-19

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### Unemployment Benefits during COVID-19

- The Department of Workforce Development (DWD) recently released unemployment data from March 15 to October 31, 2020, revealing that 92.7% of the 7.75 million weekly Unemployment Insurance claims that have been filed since March 15, 2020, have been processed.
- Regular Unemployment Insurance Benefits, Pandemic Emergency Unemployment Compensation, and Pandemic Unemployment Assistance

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### COVID-19 and Unemployment Benefits

- What happens if the school shuts down due to the pandemic?
- Can an employee self-quarantine because of the coronavirus and receive unemployment insurance benefits?
- What about a mandatory quarantine because the employee may have contracted the coronavirus?
- Say for instance: An employee decides not to return to work when school reopens.

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### “New” UI Benefits Notice Requirement

- The Wisconsin Department of Workforce Development adopted an emergency rule by Gov. Evers to create DWD 120.02, which relates to providing notification of the availability of unemployment insurance to employees at the time of separation from employment.
- Therefore, as of November 2, 2020, Wisconsin employers must notify employees of the availability of unemployment insurance benefits at the time of separation of employment, but the notice does not guarantee that an employee will be eligible to receive unemployment insurance benefits.
- Separation of employment can include termination for misconduct, layoffs, and furloughs.

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### UI Benefits Notice Requirement (Cont.)

- According to the Department of Workforce Development notice can be accomplished by email, text message, letter, or providing a printed poster in person or by mail.
- It is recommended that an employer use a method that can easily show proof of notification to the employee.
- All employers covered by Wisconsin's UI law were already required to display posters in an area where employees could readily access UI Benefit information, but this new requirement provides an extra layer of notice to employees.

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### Families First Coronavirus Response Act (FFCRA)

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### Families First Coronavirus Response Act (FFCRA)

- Requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19.
- These provisions apply from the effective date through December 31, 2020.
- As the deadline nears, what will your District choose to do? Some considerations...

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### Legislative Update

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### Legislative Update

- Governor Evers' Proposed COVID-19 Relief Package:
  - On November 17, 2020, Evers released information regarding a proposed bill to provide relief due to the coronavirus pandemic
  - As it stands, the total package calls for \$541 Million in relief (the total includes \$75 million in tax breaks for businesses)
  - If adopted, Evers' plan would suspend for another year standardized testing and school report cards to adequately "measure the performance of schools"
  - Allow rehiring of retired teachers and reinstate their licenses to help alleviate shortages at K-12 schools
  - Waive in-person appearance requirements through the end of 2021.

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Legislative Update (cont.)

- Assembly Speaker Robin Vos and Assembly Republicans Relief Plan:
  - On December 1, 2020 Speaker Robin Vos and Assembly Republicans announced a package of initiatives to help the state address the public health crisis.
  - The legislative package builds off of Governor Evers' most recent proposals, provides emergency funding and creates a road map for the state to move through the pandemic.
  - What are some of the details of the package? Let's take a look....  
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Legislative Update (cont.)

- Establish limited liability for schools, businesses and local governments
- Re-establish personal electronic computing device grants for schools (\$9 million)
- Require "all hours of direct pupil instruction" to be "provided by a teacher who is physically located in a school building" by end of January, with some exceptions
- Require school board approval of virtual instruction by two-thirds vote of the board
- Provide payments to parents of \$371 (half of the per pupil aid increase for the year) for students who have had at least 50% virtual instruction since September, paid for by school districts

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Legislative Update (cont.)

- Prohibit local health officers from ordering closures and/or capacity restrictions on specific types of business unless restriction "applies to all types of businesses"
- Call on all executive branch employees excluding UW System employees to return to work in person by Jan. 31

Other information regarding the proposal can be viewed here:  
<https://legis.wisconsin.gov/assembly/63/vos/media/news-updates/representative-vos-assembly-gop-unveil-covid-19-legislation/>

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## Mask Mandates and Executive Orders

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### Mask Mandates and Executive Orders

- Executive Order #95 - New Public Health Emergency
- Emergency Order #1 - Face Coverings
- The “Mask Mandate” which was set to expire on November 21, 2020, was reissued by Gov. Evers on November 20, 2020, and is set to expire after 60 days or with a subsequent superseding order
- Legal Challenges?

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### Mask Mandates and Executive Orders (Cont.)

- Current and upcoming legal challenges
  - The Wisconsin Supreme Court is considering whether Gov. Tony Evers exceeded his authority by issuing a statewide mask mandate after his original public health emergency related to the pandemic had expired, which opponents of Evers' statewide mask mandate said was illegal. The Supreme Court held oral arguments on November 16, 2020 but will likely not have a ruling until weeks from now.
  - The Department of Justice, representing the Governor, argued that he can issue multiple health emergencies because of the changing threat caused by the pandemic.
  - However, those opposing the mask mandate, argue that Gov. Evers is only allowed to issue one 60-day health emergency for the same pandemic.
  - To date, Evers has issued and declared four public health emergencies and the mask mandate would extend into January 2021.

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## Mask Mandates and Executive Orders (Cont.)

- Current and upcoming legal challenges:
  - On November 23, 2020, a lawsuit was filed with the Wisconsin Supreme Court challenging Emergency Order #10 in Dane County, which put bans and restrictions on indoor mass gatherings with anyone outside of an individual's household and limits outdoor gathers to no more than 10 people.
  - A lawsuit, which was previously filed with the WI Supreme Court earlier this Fall, sought to limit the power of the local health officer of Madison and Dane County who ordered all Dane County schools begin the 2020 - 2021 school year virtually for students in grades 3-12 will see new life on December 8, 2020 as the Court will hear oral arguments.
    - The Supreme Court suspended the order, but many schools chose to start school virtually.
  - On October 13, 2020, a Sawyer County Judge issued a temporary restraining order against the enforcement of Executive Order #3, which limited gathers to 25% of occupancy at restaurants, taverns, and supper clubs. The lawsuit came by way of the Tavern League of Wisconsin, which sought to block the emergency order issued by the Wisconsin Department of Health Services.
    - Almost a week later, a Judge in Barron County unblocked the order.
    - This decision led to an appeal where the Wisconsin Appeals Court ruled the indoor gathering limits are "invalid and unenforceable."
    - The WI Supreme Court will be hearing oral arguments on this matter on December 14, 2020.

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## Title IX Updates

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## Title IX Updates

- On May 6, 2020, the Department of Education published the Final Rule implementing the new Title IX regulations
- School districts were required to have a policy, provide training to staff, and full compliance with the new rules as of August 14, 2020
- Title IX applies to students, employees, third parties and any complaints they may file
- Purpose of rule change is to hold schools accountable for failure to respond equitably and promptly to sexual misconduct incidents
- Publication of policy is required
  - Website
  - Handbooks

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### Training

- All Title IX personnel must be trained
- All staff must be trained
  - Definition of sexual harassment, the definition of actual knowledge, and how to report allegations of sexual harassment.
- Training materials must be published on the District's website for the public to access

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### Title IX Coordinator

- School districts are required to designate at least one employee to coordinate Title IX compliance in the district
- Title is important!
  - Title IX Coordinator vs. Compliance Officer
- Title IX coordinator (along with the contact info, nondiscrimination statement, and policy with grievance process) must be publicized
  - To students, parents/guardians, employees, applicants, and all unions holding collective bargaining agreements with the district.
    - Yes, really.

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### Other Title IX Participants

- Complainant
- Respondent
- Investigator(s)
  - May be a Title IX Coordinator
- Decision maker(s)
  - Cannot be a Title IX Coordinator
  - Cannot be investigator
- Appeals decision maker(s)
  - Cannot be a Title IX Coordinator
  - Cannot be investigator
  - Cannot be decision maker
- Informal resolution facilitators
- Title IX personnel cannot have conflict of interest or bias
- \*\*\* Should any of these participants be the Board of Education? \*\*\*

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### Sexual Harassment - The Definition

- **Quid Pro Quo** - An employee conditioning the provision of an aid, benefit, or service of on an individual's participation in unwelcome sexual conduct.
- **Hostile Environment** - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the education program or activity.
- Sexual assault, dating violence, domestic violence or stalking (as defined by law).

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### So, what constitutes sexual misconduct?

- Unwelcome sexual advances
- Sexual jokes, gossip regarding another's sex life, sexual orientation, or gender identity
- Leering, whistling, obscene gestures
- Sexual assault, violence, threats, stalking
- Insults or threats based on sex or gender
- Change of academic or employment responsibilities based on sex, gender identity or expression, or sexual orientation
- "This for that"

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### Who Does Title IX Protect?

- Sex discrimination occurring against a person in the U.S.
  - Does not apply to student trips abroad; foreign exchange students
- A current student or student in process of enrolling (not former students)
- Covers any school event and any location where a school event was taking place (does not cover actions off campus and not school-related)
  - Includes virtual learning
  - A student sexually harassing a student online while off campus is not covered under the new rules- no requirement to investigate under Title IX
    - If the activity finds its way back to campus then there is an obligation to investigate
- If the respondent is no longer enrolled the school *may* end its investigation
- The complainant may withdraw the complaint and the school *may* end its investigation

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### Formal Complaint

- District is required to investigate any complaint
- A Title IX Coordinator may initiate a complaint
  - But should exercise caution in doing so
  - Advise Title IX Coordinators contact legal counsel prior initiating a formal complaint
- A complainant’s decision to withdraw a complaint must be respected

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### District Responsibility

- Compliance with Title IX and adoption of grievance procedures and process
- Response to a formal complaint is required where District has “actual knowledge” of sexual harassment allegations
- Prompt and equitable resolution of student and employee complaints
- District must prove it responded in a manner that is not “deliberately indifferent” to allegations of sexual harassment
  - A district is deliberately indifferent only if its response is clearly unreasonable in light of the known circumstances

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### What Constitutes “Actual Knowledge”?

- Since a response to a formal complaint is required when a District has “actual knowledge” of sexual harassment allegations, what constitutes “actual knowledge”?
- Allegations of sexual harassment made to:
  - Title IX Coordinator
  - Any employee
  - Any official/administrator with authority to institute corrective measures
- Actual notice is required - construction notice or imputed knowledge does not equate to “actual knowledge”
- What exactly does this mean?
  - Personal observation or put on notice

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### Title IX Coordinator

- Upon receipt of complaint, Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures
  - Includes consideration of complainant’s wishes with respect to supportive measures
  - Must coordinate and effectively implement supportive measures
- Explain the process for filing a formal complaint

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### Formal Complaint

- A document filed by the complainant or signed by the Title IX Coordinator: (1) alleging sexual harassment against a respondent and (2) requesting the institution investigate the allegation of sexual harassment
- Must contain complainant’s physical or digital signature, or otherwise indicate that the complainant is the person filing the formal complaint (may be submitted via paper or electronic means)

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### Grievance Process

- Language used in the new regulations creates confusion
- Grievance process is the District’s investigation and subsequent decision
- The regulations emphasize a process that is “fair, equitable, and without bias”
  - No conflict of interest/bias
  - Treat complainants and respondents equitably
- The District has the burden of fact finding - gathering evidence
  - Objective evaluation of evidence and credibility determinations
  - Presumption of “innocence”

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### Grievance Process

- Basic Components
- Provision of Notice
- Dismissal of Formal Complaint
- Informal Resolution
  - May be offered, but cannot be required, in lieu of investigation
- Investigation
- Determination Regarding Responsibility
- Appeal
- Records



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### Grievance Process - Basic Requirements

- Prompt, without delay, except for good cause
- Set forth the range of possible disciplinary sanctions and remedies
- State standard of evidence - preponderance of the evidence or clear and convincing evidence
  - Same standard used throughout policy
- Include the procedures and bases for appeal
- Set forth supportive measures available



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### Grievance Process

- Notice must be provided to the parties
  - Include allegations, that respondent is presumed not responsible for the allegations until a determination is made, inform of right to advisor, inform that false statements are prohibited, and must provide sufficient time for preparation of response prior to an initial interview.
- Notice of later discovered allegations must also be provided



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### Mandatory Complaint Dismissal

- The allegations would not constitute sexual harassment if proven
- That the conduct did not occur in the education program or activity
- That the conduct did not occur against a person in the U.S.

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### Permissive Complaint Dismissal

- Complaint wishes to withdraw
- Respondent is no longer enrolled or employed
- Specific circumstances prevent the district from gathering evidence sufficient to reach a determination

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### Investigation

- Provide equal opportunity in fact finding
- Prior to completion of investigatory report, the parties must be provided with the evidence
- Parties have 10 days to submit a written response which the investigator must consider prior to completion of the investigatory report
- 10-days prior to a determination, the investigatory report must be submitted to the parties for review and written response
- Parties must be afforded the opportunity to submit written, relevant questions that the party wants asked of any party/witness, party must be provided with the answers, and additional, limited follow-up questions must be allowed.
- Determination must apply the selected evidence standard

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### Determination of Responsibility

- Must include identification of allegations, a description of investigatory steps taken (to include notifications, interviews, site visits, evidence gathering methods, etc.), finding of fact, conclusions as to application of the district's code of conduct to the facts discovered, rationale as to the results, disciplinary sanctions/remedies, and the appeal bases and procedures.

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### Appeal

- Either party may appeal
- Appeal decision maker must be different than prior Title IX personnel
- Give both parties opportunity to submit written statement
- Reasons for Appeal
  - Procedural irregularity
  - Newly discovered evidence
  - Conflict of interest or bias of Title IX personnel
- May wish to add an additional ground for appeal: the initial decision was substantively erroneous.
- Issue written decision to both parties with outcome and rationale

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### Evidence Shared with the Parties

- Both complainant and respondent are entitled to the evidence gathered as part of the District's investigation
- FERPA concern is overruled by the requirements of the regulations
- Best practice dictates careful fact finding and drafting of an investigatory report
  - Use initials and redact pupil names

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### Title IX Interplay with District Policies

- Title IX only requires that a district investigate under its specific Title IX grievance procedure if the conduct meets the definition of sexual harassment.
- If the allegations of a complaint do not rise to the level of sexual harassment, as defined in Title IX, the district must dismiss the complaint.
- A district may always investigate a complaint under other discrimination, harassment, and/or bullying policies (and in fact, you probably should).

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### Timeline for Processing Title IX Complaint

- New rules do not establish a timeline for completing an investigation
- Time for processing formal complaint must be reasonable
- Consider impact of Wisconsin Law
  - Wis. Admin. Code PI 9
    - Requires a determination of a complaint be made within 90 days of receipt of the written complaint unless the parties agree to an extension

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### Supportive Measures

- In place not just on an interim basis
- Must be offered without cost
- Complainant must be provided with supportive measures, such as schedule modification, counseling, etc., regardless of the investigation findings.
- Designed to preserve equal access to education and safety
- Note that supportive measures cannot be punitive
- A Respondent is “innocent until proven guilty” and thus, supportive measures cannot be disciplinary against the Respondent
  - Consider the ability of a school to apply WI law with respect to suspension/expulsion
- Must be provided confidentiality

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### Emergency Removal/Administrative Leave

- Respondent may be removed on an emergency basis
  - Must undertake an individualized safety and risk analysis, determine that immediate threat to health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provide the respondent with notice and opportunity to challenge following the removal.
  - Cannot modify rights under IDEA, Section 504, or the ADA.
- May utilize administrative leave for employee-respondent

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### Recordkeeping

- Maintain for 7 years
- Exhaustive requirements
  - All investigations, determinations, sanctions/remedies, appeals, informal resolutions, supportive measures, conclusions and the basis for conclusion, training materials, etc.

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### Retaliation

- The Title IX regulations prohibit retaliation
- Complainant, respondent, and witnesses are protected
- New rule recognizes a party's First Amendment right to free speech
  - Note this is counterintuitive
  - Be cautious regarding the emphasis placed on confidentiality

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## Training

- All Title IX personnel must be trained
- All staff must be trained
  - Definition of sexual harassment, the definition of actual knowledge, and how to report allegations of sexual harassment.
- Training materials must be published on the District's website for the public to access

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## SOS! SOS! We're Late to the Game. Send help!

- First time hearing about Title IX?
- Knee deep in the pandemic?
- What are our options?
  - Phone a friend
  - Access legal counsel

Bottom Line: Schools who have not yet implemented these Title IX updates are non-compliant and must take action immediately

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## Questions?



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