



Title IX Training

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Title IX Training Goals

- Refresh Our Understanding of the Current Title IX Regulations
- Review the Proposed Title IX Amendments

Background

Background Overview

- What is Title IX?
 - Federal Civil Rights statute that prohibits discrimination on the basis of sex in education programs and activities that receive federal financial assistance.
- What are the objectives of Title IX?
 - 1) To avoid the use of federal resources to support discriminatory practices;
 - 2) To provide individual citizens effective protection against those practices.

Cannon v. University of Chicago, Supreme Court, 1979

The Final Regulations

- Once passed, the regulations have the full effect of law and override any past guidance.
 - Regulations are legally binding and therefore provide the mechanisms that schools must use to respond to allegations of sexual harassment.
- The regulations remained virtually untouched for over 40 years.

Recent Background

- August 14, 2020 – updated regulations took effect.
 - These updates contained many substantial and procedural changes including new definitions, mandated training for all Title IX officials, a formal grievance process, and multi-investigator models.
- June 23, 2022 - the U.S. Department of Education released new proposed regulations for public comment.
 - The comment period lasted 60 days.
 - The new regulations are expected to be released in October of 2023 and implemented at some point thereafter, perhaps partway through the school year.
 - The Department also announced a separate rulemaking to address Title IX's application to athletics.

Recent Background

- April 6, 2023 – the U.S. Department of Education released new proposed regulations on athletic eligibility under Title IX.
 - The comment period lasted 30 days from the date of publication in the Federal Register.

Current Regulations

Key Terms

- **Complainant** – individual who makes a complaint of a Title IX incident (formerly alleged victim)
- **Respondent** – individual who is accused of committing Title IX incident (formerly alleged perpetrator)
- **Recipient** – Recipient of federal funds who Title IX applies to; will be used interchangeably with “school” or “entity”

Discrimination on the Basis of Sex

- Sexual harassment is defined as:

(1) Quid Pro Quo Harassment: An employee of the School conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) 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 recipient's education program or activity;

(3) "Sexual assault" as defined in the 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)

Educational Program or Activity

- Only includes incidents that occur in the United States during district-owned or district-sponsored activities such as educational trips organized by the district.
- Includes locations, events, or circumstances over which the School exercised substantial control over both the respondent (alleged perpetrator) and the context in which the harassment occurred.

Title IX: Personnel

- Districts must utilize at least these three Title IX personnel in the grievance process:
 - Title IX Coordinator
 - Investigator
 - Decision-Maker
- These roles must be filled by different individuals.
- Designated Title IX Personnel dealing with a complaint must be free of conflicts of interest regarding parties to the complaint.

Response to Sexual Harassment

- A school with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.
- Once a school has actual knowledge of sexual harassment or a report of sexual harassment, the school must immediately respond.

Grievance Procedures

- Once a written formal complaint has been signed and given to the Title IX Coordinator, the recipient's grievance procedures are initiated.

An investigator must:

- Conduct an unbiased investigation
- Coordinate the exchange of evidence and accept responses to the evidence
- Draft an investigation report to be provided to the parties and the decisionmaker
 - Certain required elements of the investigation report
 - Timelines to be followed

Grievance Procedures

- A decisionmaker must:
 - Facilitate the exchange of written, relevant questions between the parties.
 - Draft a written decision no sooner than 10 days after the receipt of the investigation report.

- Allow appeals for specified reasons
 - Appoint an appeal authority if needed.

Prohibition Against Retaliation

- No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX or its implementing regulations.

Proposed Regulations

Overview

In 2021, the U.S. Department of Education conducted a review of the Title IX regulations and of information received during a week-long public hearing as well as numerous OCR listening sessions. The Department concluded that the current regulations do not best fulfill the requirement of Title IX to eliminate discrimination on the basis of sex in education programs or activities. The Department therefore proposed that the current regulations should be amended to:

- provide greater clarity regarding the scope of sex discrimination, including recipients' obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- better account for the variety of education programs or activities covered by Title IX, which include recipients' education programs or activities serving students in elementary schools, secondary schools, and postsecondary institutions.

Overview

Two overarching concerns were expressed by students, parents, recipients, advocates, and other concerned stakeholders:

- (1) there is a need for greater clarity on how to ensure that complaints of sex-based harassment are resolved in a prompt and equitable manner; and
- (2) the current regulations do not adequately clarify or specify the scope of sex discrimination prohibited by Title IX, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity.

Overview

- Six main categories of proposed changes:
 1. Changes to existing definitions and proposed new definitions
 2. Updates to the grievance procedures
 3. Clarifying that Title IX covers pregnancy or related conditions and family status for both students and employees
 4. Clarifying that Title IX covers sex discrimination based on sex stereotypes, sex characteristics, sexual orientation and gender identity.
 5. Revisions to the prohibition on retaliation
 6. Deletion of outdated regulatory provisions

Definitions

PROPOSED REGULATIONS

Defining Sex-Based Harassment

- The current regulations do not define sex-based harassment.
- The current regulations cover sexual harassment but do not address other forms of sex-based harassment.

- The proposed regulations define sex-based harassment as:
 - sexual harassment;
 - harassment and discrimination on the basis of sex including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity;
 - and other conduct on the basis of sex that is quid pro quo harassment or harassment that creates a hostile environment.

Sex-Based Harassment: New Standard

- The current regulations only prohibit sex-based conduct if it is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s educational program or activity.”

- The proposed regulations will cover unwelcome sex-based conduct that is sufficiently severe or pervasive that based, on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.

Unwelcome Conduct: Factors to Consider

1. The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
2. The type, frequency, and duration of the conduct;
3. The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the alleged unwelcome conduct;
4. The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
5. Other sex-based harassment in the recipient's education program or activity.

Addressing Off-Campus Conduct that Creates or Contributes to a Hostile Environment in a Recipient's Education Program or Activity

- The current regulations define an “education program or activity” to include locations, events, or circumstances over which the recipient exercised substantial control over **both** the respondent and the context in which the sexual harassment occurs.
 - The current regulations limit the geographic scope of a recipient's obligation to address sexual harassment to incidents that occurred against a person while that person was in the United States and require a recipient to dismiss a formal complaint of sexual harassment if the alleged conduct did not occur against a person while that person was in the United States.
- Under the proposed regulations, conduct that occurs in a recipient's education program or activity will include conduct that occurs off-campus when the respondent is a representative of the recipient or otherwise engaged in conduct under the recipient's disciplinary authority.
 - Under the proposed regulations, a recipient would be required to address a sex-based hostile environment in its education program or activity, including when sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

New Definitions

- Relevant
- Student with a disability
- Disciplinary sanctions
- Remedies

Grievance Procedures

PROPOSED REGULATIONS

Adoption and Publication of a Nondiscrimination Policy

- The current regulations do not explicitly provide that a recipient adopt such a policy.

- The proposed regulations would require adoption of a policy.
- The proposed regulations include additional clarification on who is to receive the policy – authorized legal representatives of elementary school and secondary school students.

Adoption and Publication of a Nondiscrimination Policy

- Under the proposed regulations, the following must be included in a notice of nondiscrimination:
 1. A statement that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates;
 2. A statement that inquires about the application of Title IX and the regulations to the recipient may be referred to the recipient's Title IX Coordinator, to the Office for Civil Rights, or to both;
 3. The name or title, office address, email address, and telephone number of the recipient's Title IX Coordinator;
 4. How to locate the recipient's nondiscrimination policy;
 5. How to report information about conduct that may constitute sex discrimination under Title IX, how to make a complaint of sex discrimination under the regulations, and how to locate the recipient's grievance procedures.

Complaints

- The current regulations require that a formal complaint be filed in writing with the Title IX Coordinator in order to initiate the grievance procedures.

- The proposed regulations would allow for a complaint of any violation of Title IX, not just sexual harassment. The complaint can be oral or written and does not have to be filed with the Title IX Coordinator or a specific employee.
- A complaint is not required for a recipient to offer an informal resolution.

Complaints

- The current regulations only permit an individual who is participating or attempting to participate in the recipient's education program at the time of filing to lodge a complaint.

- The proposed regulations would allow for third-party complaints where that party is participating in or attempting to participate in the recipient's education program or activity at the time the alleged sex discrimination occurred.

Training

- The current regulations require a recipient to ensure that its Title IX Coordinator, investigators, decisionmakers, and any person who facilitates an informal resolution process receives training.
- They also require a recipient to ensure that decisionmakers receive training on additional training on certain issues.

- The proposed regulations would require that all employees be trained on the recipient's obligation to address sex discrimination in its education program or activity, the scope of conduct that constitutes sex discrimination, including the proposed definition of "sex-based harassment," and all applicable notification and information requirements.
- Additional training related to their proposed responsibilities is required for investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures.

Ensuring Recipients Learn of Possible Sex Discrimination

- The current regulations define “actual knowledge” as notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school recipient.

- The proposed regulations require that an elementary school or secondary school recipient would be obligated to require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.

Responding to Sex Discrimination

- The current regulations only require a recipient to respond to possible sexual harassment when it has “actual knowledge” of the harassment – i.e. notice of sexual harassment or alleged sexual harassment.
- A recipient that has actual knowledge must respond only in a matter that is not deliberately indifferent.

- The proposed regulations would require a recipient to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.

Title IX Coordinator Response to Sex Discrimination

- The current regulations require only that a recipient treat the complainant and respondent equitably by:
 - (1) providing remedies to a complainant when it has determined that sexual harassment has occurred; and
 - (2) by following a grievance process before imposing disciplinary sanctions or other actions on a respondent.
- The current regulations require that a Title IX Coordinator contact the complainant to discuss supportive measures.

- The proposed regulations would require a Title IX Coordinator to take certain steps upon being notified of conduct that may constitute sex-based discrimination under Title IX.
- The proposed regulations require recipients to offer supportive measures as appropriate to the complainant and/or respondent to the extent necessary to restore or preserve that person's access to the recipient's education program or activity.

Grievance Procedures for All Sex Discrimination Complaints Under Title IX

Under the proposed regulations, all recipients would be required to adopt grievance procedures in writing that incorporate proposed requirements including the following:

General requirements:

- Equitable treatment of complainants and respondents.
- Title IX Coordinator, investigators, and decisionmakers must not have conflicts of interest or bias.
- Decisionmaker may be the same person as the Title IX Coordinator or investigator.
- A presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance procedures.
- Reasonably prompt timeframes for all major stages.
- Reasonable steps to protect privacy of parties and witnesses.
- Objective evaluation of relevant and not otherwise impermissible evidence.

Grievance Procedures for All Sex Discrimination Complaints Under Title IX

- Notice of the allegations to the parties.
- Dismissals permitted in certain circumstances, but not required.
- Consolidation permitted for complaints arising out of the same facts or circumstances.
- Investigation requirements:
 - Burden is on the recipient to gather sufficient evidence.
 - Equal opportunity for all parties to present relevant fact witnesses and other evidence.
 - Determination by the decisionmaker of what evidence is relevant and what evidence is impermissible.
 - A description provided to the parties by the recipient of the relevant and not otherwise impermissible evidence, as well as a reasonable opportunity to respond.
- A process that enables the decisionmaker to assess the credibility of the parties and witnesses when credibility is in dispute and relevant

Grievance Procedures for All Sex Discrimination Complaints Under Title IX

- Clear processes for the determination of whether sex discrimination occurred, including:
 - Determining whether sex discrimination occurred using the **preponderance of the evidence standard of proof**, unless the clear and convincing evidence standard is used in all other comparable proceedings, including other discrimination complaints, in which case that standard may be used in determining whether sex discrimination occurred.
 - Notifying parties of the outcome of the complaint and any opportunity to appeal.
 - When there is a determination that sex discrimination occurred, the Title IX Coordinator provides and implements remedies for the complainant or others whose access to the recipient's education program or activity has been limited or denied by sex discrimination and takes other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur.
 - The grievance procedures are completed before imposing any sanctions.
- Parties are permitted to choose to participate in an informal resolution process if one is provided by the recipient.
- Grievance procedures must describe the range of possible supportive measures and a range or list of disciplinary sanctions and remedies for sex-based harassment complaints.
- A recipient may add provisions to its grievance procedures as long as the provisions apply equally to the parties.

Relevancy

- Although relevancy is referenced several times in the current regulations, it is not defined.
- The proposed regulations add a definition of relevant.
 - Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred.
 - Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

Informal Resolution

- The current regulations permit informal resolution only if a formal complaint alleging sexual harassment has been filed.

- The proposed regulations would permit a recipient to offer an informal resolution process if appropriate whenever it receives a complaint of sex discrimination or has information about conduct that may constitute sex discrimination under Title IX in its education program or activity.
 - Participation in informal resolution must be voluntary.
 - Informal resolution is not permitted in situations in which an employee is accused of sex discrimination against a student.

Coverage of All Forms of Sex Discrimination

PROPOSED REGULATIONS

Prohibiting All Forms of Sex Discrimination

- The proposed regulations would articulate the Department of Education's understanding that sex discrimination includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

Discrimination Based on Pregnancy or Related Conditions

- The current regulations prohibit discrimination against students, employees, and applicant based on pregnancy, childbirth, and recovery. The current regulations also prohibit recipients from adopting rules that treat parents different on the basis of sex.

- Under the proposed regulations, a recipient would be required to ensure that when a student (or a student's parent, guardian, or authorized legal representative) tells a recipient's employee of the student's pregnancy or related conditions, the employee must provide information on how to contact the Title IX Coordinator for further assistance.
- Once a student or the student's representative notifies the Title IX Coordinator, the Title IX Coordinator must:
 - Provide the student with the option of individualized, reasonable modifications as needed to prevent discrimination and ensure equal access to the recipient's education program or activity.
 - Allow the student a voluntary leave of absence for medical reasons and reinstatement upon return.
 - Provide the student a clean, private space for lactation.
- A recipient would be required to provide its employees with reasonable break time for lactation, as well as a clean and private lactation space.

Discrimination Based on Sexual Orientation, Gender Identity, and Sex Characteristics

- The proposed regulations would address discrimination based on sexual orientation, gender identity, and sex characteristics by:
 - Prohibiting recipients from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm (unless otherwise permitted by Title IX).
 - This includes policies and practices that prevent a student from participating in a recipient's education program or activity consistent with their gender identity.
 - This rule would not apply in contexts in which a particular practice is otherwise permitted by Title IX, such as admissions practices of traditionally single-sex postsecondary institutions or when permitted by a religious exemption.

Reminder

- Neither the current nor the proposed regulations limit a school from addressing conduct outside of the previous definitions.
- A school can and should ensure that even when an incident does not meet the definition of sex-based harassment under Title IX, there are no other laws or school policies/student handbook violations.
 - Bullying
 - Other Level 1, 2, 3 etc. offense
 - Misconduct

Miscellaneous

PROPOSED REGULATIONS

Retaliation

- The current regulations prohibit retaliation, but they do not include definitions of either “retaliation” or “peer retaliation.”

- The proposed regulations would clarify that Title IX protects a person from retaliation, including peer retaliation.
 - Retaliation would be defined as intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in a recipient’s Title IX process.
 - A recipient would be prohibited from taking action against a student or employee under its code of conduct for the purpose of intimidating, threatening, coercing, or discriminating against someone because they provided information or made a complaint regarding sex discrimination.
 - Peer retaliation, which would be defined as retaliation by one student against another student, would also be prohibited.

Monitoring

- The proposed regulations would require that a recipient require its Title IX Coordinator to monitor barriers in the recipient's education program or activity to reporting and then take steps reasonably calculated to address these barriers.

Title IX & Athletics

MISCELLANEOUS

Equal Athletic Opportunities for All

- Since 1975, the Title IX regulations have required that schools provide equal athletic opportunities for all students, regardless of sex.
- Nothing in the proposed requirements would change the longstanding requirements – equivalent levels of coaching, facilities access, fields and equipment, and financial assistance.
- Proposed regulations affirm that schools can offer separate men's and boys' and women's and girls' sports teams in certain circumstances.

New Proposed Regulation

- If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:
 - (i) be substantially related to the achievement of an important educational objective, and
 - (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

No Categorical Ban

- Schools would not be permitted to adopt or apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity.

Additional Questions

Additional questions:

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