
Out with the old, in with the new? An overview of the biggest changes in the Proposed Title IX Regulations

2023 ACSA Personnel Institute
September 27, 2023

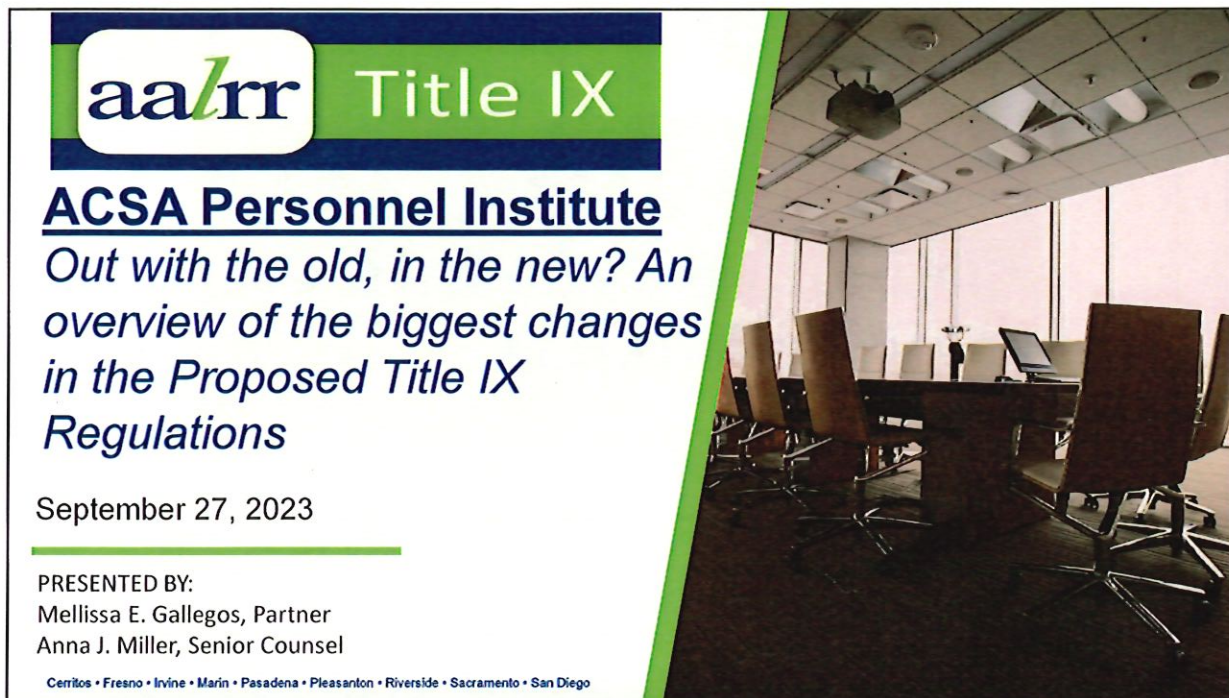


Presented by:

Melissa Gallegos, Partner
mgallegos@aalrr.com • (562) 653-3200

Anna Miller, Senior Counsel
amiller@aalrr.com • (916) 923-1200

aalrr Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation



aa/rr Title IX

ACSA Personnel Institute
Out with the old, in the new? An overview of the biggest changes in the Proposed Title IX Regulations

September 27, 2023


PRESENTED BY:
Melissa E. Gallegos, Partner
Anna J. Miller, Senior Counsel

Cerritos • Fresno • Irvine • Marin • Pasadena • Pleasanton • Riverside • Sacramento • San Diego

0



Agenda



- High Level Review of 2020 Title IX Regulations
- Timeline of Proposed Regulations
- Summary/Overview of Proposed Regulations
 - Title IX Grievance Process
 - Gender Identity in Athletics

aa/rr 1

1

The 2020 Title IX Regulations

1. Regulations and Guidance

- Text of regulations contained in **34 C.F.R. Part 106** have the full force and effect of law as of August 14, 2020

2. Overall Intent of Changes

- Strengthen/clarify Title IX protections for sexual misconduct Complainants & provide due process protections to Respondents facing accusations of sexual misconduct

3. Scope of 2020 Title IX Regulations

- Amended sexual harassment definitions, clarified jurisdiction & confirmed that Title IX sex discrimination includes sexual harassment and other sexual misconduct

Response to Sexual Harassment

According to **34 C.F.R. § 106.44(a)**: A recipient 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** (e.g., clearly unreasonable in light of the known circumstances).

- Actual knowledge for **K-12 Educational Institutions** occurs when *any employee* has notice of sexual harassment or allegations of sexual harassment.

Sexual Harassment Defined, Cont.

Conduct on the *basis of sex* under one of following:

3. Other Sexual Acts

- **Sexual assault** per 20 U.S.C. 1092(f)(6)(A)(v): Includes Forcible and Nonforcible Sex Offenses
- **Dating violence** per 34 U.S.C. 12291(a)(10)
- **Domestic violence** per 34 U.S.C. 12291(a)(8)
- **Stalking** per 34 U.S.C. 12291(a)(30)

Who's on the Title IX Team?

1. Title IX Coordinator, per § 106.8(a)
 2. Investigator(s)
 3. Decision Maker(s)
 4. Appeal Officer(s)
 5. Informal Resolution Process Facilitator(s)
- *All team members must be impartial, unbiased, and free from conflicts.*
 - *All team members must be trained in these Title IX Regulations.*

Grievance Process - 2020 Regulations

1. Basic Requirements
2. Notice of Allegations
3. Dismissal of Formal Complaint
4. Consolidation
5. Investigation
6. Written Questions Between Parties
7. Determination of Responsibility
8. Appeals
9. Informal Resolution
10. Recordkeeping

See 34 C.F.R. § 106.45(b)

**The Proposed Regulations
Coming Soon?...**

Title IX 2023 (?) Proposed Amendments

1. Prohibits All Forms of Sex Discrimination

- Current regulations only address/define “sexual harassment” (conduct on the basis of sex)
- Proposed regulations propose to prohibit all forms of sex discrimination, including
 - Discrimination based on sex stereotypes;
 - Sex characteristics;
 - Pregnancy or related conditions;
 - Sexual orientation; and
 - Gender identity.
- Proposed definition would clarify that the scope of sex-based harassment includes bases that were not expressly covered under the term “sexual harassment”
- Proposed regulations new definition of “sex-based harassment” covers: (1) Quid Pro Quo, (2) Hostile Environment, and (3) Sexual assault, dating violence, domestic violence, and stalking
(Proposed section 106.10)

Proposed Amendments, Cont.

2. Hostile Environment Definition

- Currently, a hostile environment is when the conduct is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity”
- Proposed regulations changes the definition to “conduct that is sufficiently severe or pervasive, that based on the totality of the circumstances and evaluated subjective and objectively, denies or limits a person’s ability to participate in or benefit from...”
- Proposed regulations provide the need for a fact-specific inquiry that includes consideration of: (i) degree to which the conduct affected complainant’s ability to access the recipient’s education program or activity; (ii) type, frequency, and duration of the conduct; (iii) parties’ ages, roles within education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct; (iv) location of the conduct, context in which the conduct occurred, and control the recipient has over the respondent; and (v) other sex-based harassment in the education program or activity

(Proposed section 106.2)

Proposed Amendments, Cont.

5. Formal Written Complaint Requirement

- Current regulations require a signed formal written complaint
- Proposed regulations would remove “formal complaint” requirement and define “complaint” as an oral or written request to initiate the grievance procedures for sex discrimination.



Proposed Amendments, Cont.

6. Supportive Measures

- Current definition of supportive measures would be maintained
- Proposed regulations would clarify that supportive measures can include temporary measures that burden a response during the pendency of a grievance procedure, but only when such measures are imposed for non-punitive and non-disciplinary reasons and are signed to protect the safety of the complainant or the educational environment or deter respondent from engaging sex-based harassment. Respondent would have the opportunity to seek modification or reversal of any temporarily burdensome measures that are imposed

(Proposed sections 106.2 and 106.44(g))

Proposed Amendments, Cont.

9. Allowing Complaints from Former Students or Employees

- Current regulations do not permit Title IX complaints from former students or employees who are not participating or attempting to participate in the District's education program or activity
- Proposed regulations remove some of these barriers to filing a complaint and allow complainants to file a complaint even if they have chosen to leave the District's education program or activity as a result of the discrimination or for other reasons.

(Proposed section 106.45(a)(2))



Proposed Amendments, Cont.

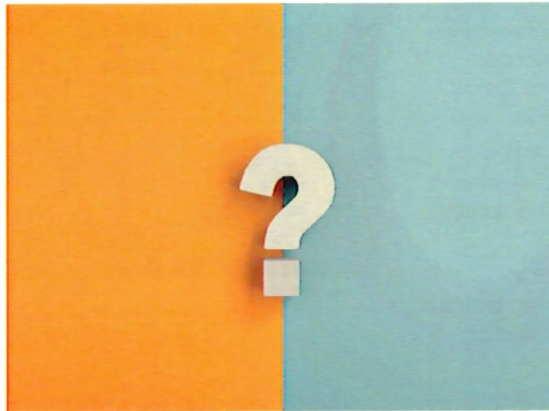
10. Informal Resolution

- Current regulations only allow informal resolution *after* a filed formal complaint
- Proposed regulations will allow informal resolution *before* a formal complaint is filed
- Proposed regulations would allow discretion to determine whether informal resolution is appropriate and to decline to offer informal resolution regardless of one or more of the parties' wishes
- Proposed regulations would require written notice to the parties explaining the informal resolution process, including but not limited to, precluding initiating or resuming grievance procedures from the same allegations, which records will be maintained and could be shared, as well as confidentiality of the informal resolution process. Additionally, the informal resolution facilitator cannot be the investigator or decision maker

(Proposed section 106.44(k))



Proposed Amendments, Cont.



14. Written Relevant Questions

- Current regulations require the decision-maker(s) to afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party
- Proposed regulations do not have this requirement, and only require that the parties have an opportunity to respond to the description of the evidence


Pregnancy and Pregnancy-Related Discrimination



- District's must protect students and employees from discrimination based on pregnancy or related conditions:
 - Reasonable modifications for students
 - Reasonable breaks times for employees
 - Lactation space for students and employees
- Under the proposed regulations District must provide pregnant students (when informed of a pregnancy) with information on how to contact the Title IX Coordinator for assistance
- Title IX Coordinator would work with the student to provide individualized, reasonable modifications, equal access, voluntary leaves of absences options and location for lactation

What Should School Districts Be Doing Now?

- Continue to implement the current Title IX Regulations
- Monitor finalization of the proposed Title IX Regulations
- Be prepared to pivot next school year (2023-2024)
 - Training
 - Updating BPs and ARs
 - Updating templates



aa/rr 32

32

Question & Answer Session

33

Melissa E. Gallegos

Partner

562-653-3200

mgallegos@aalrr.com



Melissa Gallegos represents and advises California school districts, community college districts, and county offices of education in all education and employment law matters, including employee evaluation, discipline and dismissal, reasonable accommodation, interactive meetings, and restraining orders. She also assists with California Public Records Act responses; collective bargaining issues; and defending employers against allegations of discrimination with the Civil Rights Department and the Equal Employment Opportunity Commission. Ms. Gallegos' state-wide practice also includes conducting prompt and effective investigations, including complaints of discrimination, harassment and retaliation, including Uniform Complaints, Office of Civil Rights, Title 5, and Title IX investigations for both K-12 school districts and higher education institutions. She also serves as a hearing officer for Title IX hearings.

Ms. Gallegos is the Co-Chair of the AALRR's Women's Leadership Committee. She regularly presents at conferences for state-wide educational organizations, including the California School Board Association (CSBA), the California Latino School Boards Association (CLSBA), the California Association of Latino Superintendents and Administrators (CALSA), the Association of Chief Human Resource Officers/Equal Employment Officers (ACHRO/EEO), and the Community Colleague League of California (CCLC).

Events & Speaking Engagements

Ms. Gallegos has co-presented on topics such as sexual harassment, mandated reporting, and workplace investigations. She has spoken before an audience of over 400 staff and administrators at a district-wide meeting and has presented at ACSA (Association of California School

OFFICE

12800 Center Court Drive
Suite 300
Cerritos, CA 90703

INDUSTRIES

Technology

EDUCATION

J.D., Loyola Law School
B.A., University of California, Los Angeles

CLERKSHIPS

California Department of Justice,
Office of the Attorney General
Equal Employment Opportunity
Commission
Legal Aid Foundation of Los Angeles

ADMISSIONS

2015, California
U.S. District Court, Central District of California

PRACTICE AREAS

Education

LANGUAGES

Ms. Gallegos is proficient in Spanish.

Anna J. Miller

Senior Counsel
916-923-1200
amiller@aalrr.com



Anna Miller represents public school districts and California community college districts in all areas of general education law; labor relations; employment matters such as discrimination, dismissal and harassment; student issues such as fraudulent receipt of federally issued financial aid, grade disputes, student discipline and harassment charges; and First Amendment rights. She is active in the firm's Title IX group, conducting Title IX investigations and giving presentations on Title IX issues.

Ms. Miller conducts complex workplace investigations for both public and private sector entities, including universities and colleges, school districts, public safety entities, counties and cities; and provides legal counsel on matters involving safety, campus police and human resources. In addition, she has a wealth of experience representing clients in court, arbitration proceedings and administrative hearings.

Events & Speaking Engagements

Ms. Miller frequently gives presentations about Title IX, employment issues, student matters, and other legal topics.

Publications

Ms. Miller has co-authored several American Bar Association publications. She is an active contributor to the firm's Blog Posts, Alerts & articles.

Community & Professional

- Sacramento County Bar Association, Member
- American Bar Association, Labor and Employment Section, Member
- California Council of School Attorneys, Member
- Women Lawyers of Sacramento, Member

OFFICE

2151 River Plaza Drive
Suite 300
Sacramento, CA 95833

EDUCATION

J.D., University of California, Hastings
College of Law
M.S., University of Wisconsin, Madison
B.S., Syracuse University

ADMISSIONS

2008, California
U.S. District Courts, Central and Northern
Districts of California

PRACTICE AREAS

Education
Student Discipline