

Title IX 2024 Updates

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How we got here...

- USDOE Office for Civil Rights (OCR) released final rule amending Title IX Regulations on April 19, 2024
 - Unofficial rule is 1,577 pages, including preamble
- Effective August 1, 2024
- Allegations prior to August 1, 2024 – apply the current standards (or previous standards if before August 14, 2020)

Big Picture Overview

- Changes to the following areas:
 - Definition of Complaint- Oral or written request that can objectively be understood to be a request to investigate and prepare a decision regarding discrimination based on sex, including harassment
 - Definition of Sexual Harassment
 - sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
 - unwelcome sex-based conduct that, given the totality of the circumstances, is subjectively and objectively offensive and so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity
 - One person may now be both the investigator and decisionmaker, or the Title IX Coordinator and the decisionmaker

Big Picture Overview

- Changes to the following areas:
 - Conduct Outside of School/Educational Program or Activity
 - must address allegations of a sex-based hostile environment in its education program or activity, even if some of the alleged conduct occurred outside of the educational program or activity or outside the United States
 - Dismissal of Complaint
 - No more mandatory dismissal
 - Revised factors for discretionary dismissal
 - Dismissal may be appealed

Big Picture Overview

- Changes to the following areas:
 - District Initiated Complaints
 - The Title IX Coordinator must consider (1) the complainant's wishes; (2) the complainant's reasonable safety concerns; (3) risk of additional discrimination; (4) severity of the allegations, including whether they would justify removing the respondent; (5) age and relationship of the parties; (6) scope of the discrimination; (7) availability of evidence; and (8) whether the district can end the discrimination and prevent reoccurrence without a complaint.
 - Supportive Measures
 - Parties may appeal supportive measure decisions
 - Title IX Coordinator must coordinate with IEP and/or 504 team for students with disabilities
 - Emergency Removal
 - No longer limited to threats of physical safety
 - Imminent and serious threat to health or safety
 - Student must be given notice and opportunity to challenge
 - Paid administrative leave still available for employee respondent

Big Picture Overview

- Changes to the following areas:
 - Informal Resolution – may be offered before formal complaint
 - Evidence Review
 - Must provide “a reasonable opportunity to respond”
 - Must take reasonable steps to prevent the parties from unauthorized disclosure outside of the process
 - Appeals
 - Must provide an appeal process comparable to similar proceedings relating to other discrimination complaints

Big Picture Overview

- Changes to the following areas:
 - Obligation to Report - all non-confidential K-12 employees must notify the Title IX Coordinator when they have information about conduct that may reasonably constitute sex discrimination
 - Pregnancy or Related Conditions
 - Discrimination against students, employees, or applicants, based on pregnancy or related conditions is prohibited
 - Must provide reasonable modifications for students, reasonable break time for lactation for employees, and lactation space for students and employees.
 - Employees are required to promptly inform a pregnant student, or person who has a legal right to act on behalf of the student, of the Title IX Coordinator's contact information and inform them that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity

Big Picture Overview

- Changes to the following areas:
 - Training Requirements
 - All employees - obligation to address sex discrimination in its education program or activity, the scope of conduct that constitutes sex discrimination under Title IX, including the definition of “sex-based harassment,” and all applicable notification and information requirements
 - Investigators/Decision Makers/Other Employees Implementing Grievance Procedures - the recipient’s obligations under Title IX; the grievance procedures; how to serve impartially by avoiding prejudgment, conflicts of interest, and bias; understanding the meaning and application of the term “relevant” in relation to questions and evidence; and the types of evidence that are impermissible regardless of relevance
 - Facilitators of the informal resolution process - the rules and practices associated with the recipient’s informal resolution process and how to serve impartially, including avoiding conflicts of interest and bias
 - Title IX Coordinators and Designees - their specific responsibilities, the recipient’s recordkeeping system, and Title IX recordkeeping requirements, in addition to any other training necessary to coordinate the recipient’s compliance with Title IX.

Title IX Applicability

- Title IX applies to any educational program or activity that receives federal financial assistance.
 - Note: prohibition on discrimination applies to any person attempting to participate in the educational program or activity. Including parents, other students, visitors etc.
- In some situations, Title IX may permit treating individuals differently because of sex or separating them because of sex. This is only permitted when causing no more than minimal (“de minimis”) harm.
 - Note: Harm must be genuine and objectively non-trivial and assessed from the perspective of the reasonable person in the individual’s position.
 - Appearance and dress codes permissible only if they result in de minimis harm.
- Exceptions include: religious institutions, military, certain higher educational institutions, fraternities, sororities, sex-separate housing, sex-separate athletic teams etc.

Title IX Applicability – De Minimis Harm

“Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.”

- Note: schools must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de-minimis harm.
- Note: Schools can offer single occupancy facilities to any students who seek additional privacy for any reason.
- Note: Transgender students’ participation on single-sex athletic teams still uncertain under Title IX.

Title IX Coordinator

- Districts must designate **at least one** Title IX Coordinator, but can designate multiple Title IX Coordinators
 - **If multiple** Title IX Coordinators are designated, **at least one must retain ultimate oversight**
- Title IX Coordinator can designate designees, and is responsible for coordinating recipient's compliance with obligations under Title IX
- Boards must adopt, publish, and implement nondiscrimination policies and grievance procedures

Title IX Coordinator Requirements – Absence of Complaint or Withdrawal of Allegations

- Must make a fact-specific determination considering, at a minimum, the following:
 - Complainant's request not to proceed with initiation of complaint;
 - Complainant's reasonable safety concerns regarding initiation of complaint;
 - Risk that additional acts of sex discrimination would occur if a complaint is not initiated;
 - Severity of alleged sex discrimination, including whether the discrimination, if established, would require removal of respondent or imposition of another disciplinary sanction;
 - Age and relationship of the parties, including whether respondent is an employee of recipient;
 - Scope of alleged sex discrimination, including information suggesting a pattern of ongoing sex discrimination or sex discrimination alleged to have impacted multiple individuals;
 - Availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
 - Whether the district could end the alleged sex discrimination and prevent its recurrence without initiating the grievance procedures or informal resolution process

Title IX Coordinator Requirements – Absence of Complaint or Withdrawal of Allegations Cont.

- After considering factors, the Title IX Coordinator may initiate a complaint if s/he determines conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents recipient from ensuring equal access on the basis of sex in the education program or activity
 - Must notify complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or safety of others, including by providing supportive measures; and
 - Regardless of whether complaint is initiated, must take other appropriate, prompt, and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity

Nondiscrimination Policy and Grievance Procedures

- Must adopt a nondiscrimination policy stating that recipient does not discriminate on the basis of sex and prohibits discrimination in its education program or activity
- Must adopt grievance procedures consistent with these standards that provide for ***prompt and equitable resolution*** of complaints made by students, employees, ***or other individuals who are participating or attempting to participate in*** the recipient's education program or activity, or by the Title IX Coordinator, alleging violation of Title IX

Notice of Nondiscrimination

- The regulation addresses required notice, to whom notice must be provided, the content that must be included, and the manner in which notices must be published
- Must be provided to students, parents, guardians, or other authorized legal representatives of elementary and secondary school students, employees, applicants for admission and employment, and all unions and professional organizations holding a CBA or professional agreement with recipient

Publication of Notice

- Must be included on recipient's website and in each handbook, catalog, announcement, bulletin, and application form that recipient makes available to persons entitled to notice or which are otherwise used in connection with recruitment of students or employees
- Provides for short form option to accommodate format or size issues
 - *Statement that recipient prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator and providing the location of the full notice on the recipient's website*

Training

- Requires training related to an individual's duties under Title IX promptly upon hiring or change of position that alters their duties under Title IX and annually thereafter
- Requires training for all employees
- Training must not rely on sex stereotypes
- Training obligations depend on individual's role/involvement
- Must make training materials available upon request, but not required to post

Training – All Employees

- Recipient's obligation to address sex discrimination in its education program or activity;
- Scope of conduct that constitutes sex discrimination under Title IX, including definition of sex-based harassment;
- All applicable notification and information requirements under 106.40(b)(2) and 106.44

Training – Investigators, Decisionmakers, and Others

- Requirements apply to investigators, decisionmakers, and other persons responsible for implementing the grievance procedure or who have authority to modify or terminate supportive measures
- ***What's new:*** addition of individuals with authority to grant or deny supportive measures

Training – Investigators, Decisionmakers, and Others

- All employee training content;
- Response obligations under 106.44;
- Grievance procedures under 106.45;
- How to serve impartially, including by avoiding prejudgment of facts at issue, conflicts of interest, and bias; and
- Meaning and application of the term “relevant” in relation to questions and evidence, and types of evidence impermissible regardless of relevance

Training – Facilitators of Informal Resolution

- All employee training content;
- Training on the rules and practices associate with the recipient’s informal resolution process; and
- Training on how to serve impartially, including by avoiding conflicts of interest and bias

Training – Title IX Coordinators and Designees

- All content from all employee training, investigator, decisionmaker, and other individuals training, and informal resolution training;
- Specific requirements under 106.40(b)(3), 106.44(f) and (g)
 - Requirements related to prevention of discrimination and provision of equal access **related to pregnancy and related conditions**
 - Title IX Coordinator requirements
 - Supportive measures
- Recordkeeping requirements
- Any other training necessary to coordinate Title IX compliance

Scope and more

Broadened Grievance Procedure Applicability

- **Sex-based harassment**
 - Quid Pro Quo
 - Hostile Environment
 - Specific offenses
- **Discrimination on the basis of sex**
 - Sex stereotypes
 - Sex characteristics
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity

Discrimination on the Basis of Sex

In addition to sex-based harassment complaints, these procedures will apply to all claims of discrimination based on sex, including based on:

- **Sex stereotypes**

- Note: fixed /generalized expectations regarding a person's aptitudes, behavior, self-presentation, or other attributes based on sex.

- **Sex characteristics**

- Note: this means physiological sex characteristics. Discrimination based on anatomy, hormones, chromosomes. E.g. intersex students.

Discrimination on the Basis of Sex Cont.

- **Pregnancy or related conditions**

- Note: this includes current, potential, or past pregnancy/conditions
- Note: this includes discrimination based on menstruation, perimenopause, or menopause.

- **Sexual orientation**

- **Gender identity**

Hostile Environment

- Previously, this was defined as unwelcome conduct determined by reasonable person to be so severe, pervasive, and objectively offensive that it effectively denied equal access to the education program or activity.
- Now the definition is broader: unwelcome sex-based conduct that, **based on the totality of the circumstances**, is **subjectively and objectively** offensive and is so severe or pervasive that it **limits** or denies ability to participate in/benefit from the educational program or activity

Hostile Environment Cont.

Whether this hostile environment exists is a question of fact that must include consideration of the following factors:

- 1) Degree to which the conduct affected complainant's ability to access the program or activity
- 2) Type, frequency, duration of conduct
- 3) Parties' ages, roles in the program, previous interactions and other factors relevant to evaluating the effects of the conduct
- 4) Location of conduct, context in which it occurred
- 5) Other sex-based harassment in the program or activity

Student with a Disability

Student with a disability means a student who is an individual with a disability as defined in the Rehabilitation Act of 1973, as amended, 29 U.S.C. 705(9)(B), (20)(B), or a child with a disability as defined in the Individuals with Disabilities Education Act, 20 U.S.C. 1401(3)

- Students who are eligible under Section 504 (even if found to not need a 504 Plan)
- Students who are eligible under IDEA (has an IEP)

Student with a Disability – 106(e) addition

Title IX Coordinator **must consult with one or more members** of the group of persons responsible for the student's placement decision, as appropriate, to ensure that the recipient complies with IDEA and Section 504 requirements during the grievance procedures.

- Always required when a student with a disability is a complainant or respondent
- Consultation intended to determine measures necessary to ensure compliance with both legal obligations
- Does not require a meeting
- Does not identify a particular individual within the 504 or IEP team

Student with a Disability – 106.8(e) cont.

- No specific decision-making process or at what stage of a grievance process consultation must occur
- Does not preclude convening additional team meetings or consulting with full team if necessary due to the particular circumstances
- Does not impact the rights and procedural safeguards for students with disabilities and their parents/guardians under Section 504 or IDEA
- Title IX Coordinator may delegate duty to another staff member to engage in the consultation if that responsibility has been assigned to a designee

Confidentiality (106.45)

- Must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the grievance procedures.

FERPA – 106.6(e)

- FERPA is part of General Education Provisions Act (GEPA)
- The Department emphasizes that a recipient must fulfill its obligations under both Title IX and FERPA unless there is a direct conflict that precludes compliance with both laws and their corresponding regulation
- The GEPA override, which is statutorily mandated by GEPA, 20 U.S.C. 1221(d), requires that Title IX override FERPA when there is a direct conflict

FERPA and Evidentiary Disclosures

- In the context of Title IX grievance procedures, there is no direct conflict between Title IX and FERPA regarding the recipient's disclosure of information contained in one student's education records to another student to whom that information is also directly related.
- If the Title IX process requires disclosure of personally identifiable information from education records to the parties (or their parents, guardians, authorized legal representatives, or advisors) that directly conflicts with FERPA (*e.g.*, disclosure of a student complainant's education records to an employee respondent as part of investigating an allegation of sex-based harassment), Title IX trumps and such disclosure is required.
- FERPA does not override the due process rights of the parties, including, at minimum, the right to an explanation of the evidence and a meaningful opportunity to be heard.

Reasonable Steps to Protect Privacy

This is a **new provision** that requires recipients to:

- Take **reasonable steps** to protect parties' & witnesses' privacy during the Title IX process, provided these steps don't limit parties from:
 - Obtaining and presenting evidence
 - Consulting with family members, confidential resources, advisors
 - Preparing for/participating in process
- Notes: Any steps infringing on **constitutional rights** or **due process** are not reasonable. Parameters are unclear and yet to be determined, e.g. social media restrictions.

Reasonable Steps to Protect Privacy - Redaction

In considering redaction of information before providing to other parties, there are three categories to consider:

- **Cannot redact:** Information or evidence relevant to allegations of sex discrimination, unless confidential as below. FERPA takes a backseat here.
- **May Redact:** Information not relevant to allegations
- **Must Redact:** Information protected by a privilege or provided to confidential employee, medical or psych. Records, evidence abt. Complainant's sexual interests or prior sexual conduct.

FERPA and Students with Disabilities

- “[t]ypically, a school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.” – parental consent not necessary for the Title IX Coordinator to consult with a member of the 504 team or IEP team as now required
- Districts must establish criteria in its annual notification of FERPA rights to permit its Title IX Coordinator to constitute a school official with legitimate educational interests when performing functions to carry out § 106.8(e).

Definitions

Definitions – What Isn't Changing

- Employee
- Federal Financial Assistance
- Program or Activity
- Recipient
- Student
- Party
- Sex Discrimination – examples in sections, such as 106.31
- Sexual Assault, Dating Violence, Domestic Violence, Stalking – now explicit in regs but not new definitions

Actual Knowledge

- Expands from 2020 standard – When any employee (who are not confidential employees) **have knowledge** of conduct that **could reasonably be considered** sex-based harassment or sex-based discrimination (106.44(a))
 - *Confidential employee* means:
 - (1) An employee of a recipient whose communications are privileged or confidential under Federal or State law. The employee’s confidential status, for purposes of this part, is only with respect to information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies;
 - (2) An employee of a recipient whom the recipient has designated as confidential under this part for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those services, the employee’s confidential status is only with respect to information received about sex discrimination in connection with providing those services;

Complainant

- (1) A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; or
- (2) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination

Jurisdiction (in program and activity) 106.11

- Obligation to address a sex-based hostile environment under its education program or activity in the United States, ***even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States***
 - Still an obligation to address in-program effects

Jurisdiction - Conduct Under a Recipient's Disciplinary Authority

- Covers conduct that is subject to schools' disciplinary authority
 - If code of conduct addresses, such as off-campus – then apply Title IX
 - Example - Teacher's sexual harassment likely to constitute sexual harassment in the program of the recipient even if the harassment occurs off campus or off school grounds and outside a school-sponsored activity ... if recipient has disciplinary authority

Basic Requirements for Grievance Procedures

No Conflict or Bias

- As previously, Title IX Coordinator, investigator, and decision maker cannot have a conflict of interest or a bias:
 - For or against this specific complainant/respondent
 - For or against complainants/respondents generally.
- New: Decision-maker can be the same person as the Title IX Coordinator or investigator!

Reasonably Prompt Timeframes

- **Major stages must have reasonably prompt timeframes**
 - Evaluation
 - Investigation
 - Determination
 - Appeal
- **Policy must allow for reasonable extension**
 - Case by case basis
 - Good cause
 - Notice to parties that includes reason for delay

Reasonably Prompt Timeframes Cont.

- No specific timeline set or recommended.
- No statute of limitations
- Can delay for police investigation but this is not always considered good cause. Flexibility allowed but supportive measures must still be in place
- No definition of prompt, good cause, or reasonable

Notice of Allegations

- Notice no longer has to be written
- Notice can be provided when the process starts, not when complaint received
- The new regulations provide additional details about what must be in the initial notice

Notice of Allegations

Notice must include:

- **Copy of policy** and any informal resolution process
- **Sufficient information to respond to allegations.** This includes, to the extent available:
 - Identities of parties
 - Conduct alleged to constitute sex discrimination
 - Dates and locations of alleged incidents
- **Statement prohibiting retaliation**
- **Statement that parties are entitled to equal opportunity to access relevant evidence.** Alternatively, the notice can include an accurate description of the evidence.

Supportive Measures

Supportive Measures

- Depend on what recipient deems reasonably available and must not be punitive or disciplinary
- For allegations of sex discrimination other than sex-based harassment or retaliation, recipient's provision of supportive measures does not require recipient, its employee, or any other person authorized to provide aid, benefit or service on recipient's behalf to alter the alleged discriminatory conduct for the purpose of providing a supportive measure
- Regulation addresses examples of supportive measures
 - Counseling, escort services, extension of deadlines and course-related adjustments, increased security and monitoring, **restrictions on contact applied to one or more parties**, change in classes, work, **extracurricular or other activities, regardless of whether there is or is not a comparable alternative, training and education programs related to sex-based harassment**

Supportive Measures Cont.

- Must not disclose information about supportive measures to person other than person to whom they apply, unless
 - Necessary to provide the measure or restore or preserve a party's access to the education program or activity
 - To provide support during the grievance procedure or information resolution
- If a student with a disability, Title IX Coordinator must consult with one or more members, as appropriate, of the student's IEP or 504 team, in ensuring compliance and determining implementation of supportive measures

Supportive Measures Cont.

- Recipient may, as appropriate, modify or terminate supportive measures at conclusion of grievance procedure or informal resolution, or may continue beyond that point
- Must provide complainant or respondent timely opportunity to seek modification or reversal of recipient decision to provide, deny, modify, or terminate supportive measures applicable to them from an appropriate and impartial employee
 - Impartial employee must be someone other than the employee who made the challenged decision and must have authority to modify or reverse decision if determine the initial decision was inconsistent with the definition of supportive measure
- Must provide a party the opportunity to seek additional modification or termination of supportive measure applicable to them if circumstances change materially

Emergency Removal

Emergency Removal and Administrative Leave

- Requires individualized **safety and risk analysis** to determine whether an **imminent and serious threat to the health or safety** of a complainant or any students, employees, or other persons arising from the allegation of sex discrimination justifies removal
 - No longer requires threat to “physical” health or safety
- Still requires providing Respondent notice and opportunity to challenge
- Consider supportive measures v. emergency removal
- Still permits paid administrative leave for employees

Dismissal and Consolidation of Complaints

- Clarifies previously-accepted reasons for dismissal and adds a few new ones
- Dismissal is now permissive and not mandatory
- Emphasizes that appeals are permitted for dismissed complaints

Dismissing Complaints

A complaint **may** be dismissed **only** if:

- School cannot identify respondent after taking reasonable steps to do so.
- Respondent is not participating in educational program and is not employee.
- Complainant withdraws any or all allegations AND Title IX Coordinator declines to initiate complaint AND the remaining conduct would not constitute sex discrimination if proven.
- Alleged conduct – if proven- would not constitute sex discrimination. Must make reasonable efforts to clarify allegations with complainant.

Dismissing Complaints Cont.

- **After dismissal, the school must:**

- Notify complainant of basis for dismissal and appellate options.
- Notify respondent of same, **if respondent was already notified of allegations.**
Timing: promptly after complainant is notified if orally or simultaneously if in writing.
- Offer supportive measures to complainant and respondent, if notified of allegations.
- Require Title IX Coordinator to take other appropriate prompt and effective steps to ensure sex discrimination does not continue or recur.

- **Bases for appeal remain the same**

- Procedural irregularity that would change outcome
- New evidence that would change outcome AND was not reasonably available when determination /dismissal made
- Conflict of interest or bias of Coordinator, Investigator, or Decision Maker

Dismissing Complaints – Appeal of Dismissal

- **If dismissal is appealed, school must:**

- Notify parties of appeal (and notice of allegations if not previously provided)
- Implement appellate procedures equally for parties.
- Decision maker for appeal cannot have been involved in investigation or dismissal.
- Decision maker for appeal must have been trained.
- Provide parties reasonable and equal opportunity to make a statement in support of or challenging the outcome.
- Notify parties of result of appeal and rationale for decision

Dismissing Complaints – Appeal of Dismissal

- Note: notification of appellate results and rationale does not have to be in writing
- Note: appeal process for dismissals is mandatory, whereas appeal process for determinations may not be mandatory depending on what your district offers for other discrimination complaints
- Note: upon appeal, respondent now needs to be notified, even if s/he did not receive notice previously

Consolidating Complaints

- Recipients may consolidate complaints against more than one respondent or by more than one complainant when the discrimination arises out of the same facts or circumstances.
- Note: FERPA takes precedence over consolidation, so remember that you cannot disclose allegations about someone else that they are not entitled to, just because you consolidated several complaints.

Investigation

The new investigation process is greatly simplified, and requires only opportunity to access evidence and respond to it.

Investigating Complaints

- As previously, burden is on school to conduct an investigation that gathers sufficient evidence to make a decision about whether sex discrimination occurred.
- As previously, school must provide equal opportunity to parties to present fact witnesses and relevant evidence.
- School must review all evidence, determine what is relevant and what evidence is impermissible.
- School must provide each party with equal opportunity to access relevant (but not impermissible) evidence.

Investigating Complaints Cont.

Equal opportunity to access relevant (but not impermissible) evidence:

- Provide equal opportunity to access evidence OR accurate description of evidence. If latter, upon request of any party, must provide equal opportunity to access that evidence.
 - Note: description of evidence can be verbal, an option appropriate for younger students or those facing less severe consequences. But keep record of this step.
 - Note: Access does not require physical or electronic copy of evidence but must be same for both parties.
 - Note: Providing access to evidence overrides FERPA concerns.
- Provide reasonable opportunity to respond to the evidence or accurate description.

Investigating Complaints Cont.

- Take reasonable steps to prevent and address unauthorized disclosure of information and evidence obtained solely through the Title IX process.
 - Note: No specific steps required. Examples include informing parties of the district's expectations about safeguarding evidence and consequences for unauthorized disclosure and software restricting further distribution.
 - Note: disclosure for litigation and administrative proceedings (e.g. OCR complaint) are authorized.

Questioning Parties and Witnesses

This section replaces the requirement of written questions and follow up questions or optional hearings.

Questioning Parties & Witnesses

- The decisionmaker must be able to question parties and witnesses to adequately assess credibility to the extent credibility is disputed and relevant.
- Note: No requirement to allow parties to ask questions as previously.
- Note: Districts may decide to afford additional processes here if needed for due process.
- Note: Credibility cannot just be assessed via review of evidence.

Determination

This section mostly remained the same, but some requirements have been removed.

Determination

Following investigation & evaluation of relevant evidence, school must:

- Use preponderance of evidence to determine whether sex discrimination occurred. If school uses “clear and convincing” standard for all other similar proceedings, it can use this one here too.
 - Note: requirement that standard be same as used for employees is removed.
- If the decision maker is not persuaded by the evidence that sex discrimination occurred, the determination must be that it did not occur.
- Notify parties of the determination **in writing**, including rationale, procedures, and permissible bases for appeal.

Appeals

Appeals are now required only to the extent that they are offered for similar complaints

Appeals

- School must offer appellate process that is the same as what it offers in all other comparable proceedings, like other discrimination complaints
- Note: Appellate process not mandatory if you do not have appeals for other discrimination complaints
- Note: School can limit bases on which to allow appeals, but presumably these would need to be applicable to other comparable proceedings as well

Informal Resolution & Miscellaneous Provisions

Informal Resolution

- Informal resolution remains an option
- A complaint is not required prior to the informal resolution process being offered
- Facilitator for informal resolution cannot be the same person as the investigator or decisionmaker in the recipient's grievance procedures
- Must have received informal resolution facilitator training and be free from conflict or bias
- Parties cannot be required to participate in the informal resolution process, and certain notice must be provided to the parties prior to its initiation

Pregnancy or Related Conditions, Parental, Family, or Marital Status

- Title IX has long prohibited discrimination based on pregnancy and family status
- Revisions to the regulations clarify what falls within the scope of these terms and expands a recipient's obligations toward these groups

Pregnancy or Related Conditions

- § 106.10 expressly provides that sex discrimination includes discrimination based on pregnancy or related conditions.
 - Note: this includes menstruation, perimenopause, and menopause
 - Does not have to otherwise qualify as a disability under the ADA to implicate Title IX
- § 106.2 pregnancy or related conditions means:
 - (1) pregnancy, childbirth, termination of pregnancy, or lactation;
 - (2) medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
 - (3) recovery from pregnancy, childbirth, termination of pregnancy, lactation or related medical conditions.

Note about Related Conditions

The Department declined to include an exhaustive list of everything that could fall under “related medical conditions,” but in the Comments they explain that related conditions can include:

- Fatigue, dehydration, nausea, increased body temperature, anemia, bladder dysfunction; gestational diabetes; preeclampsia; hyperemesis gravidarum; hypertension; infertility; recovery; ectopic pregnancy; depression; swelling

Parental Status

- Title IX regulations have previously prohibited sex-based distinctions based on parental, family, or marital status, but the term “parental status” was never defined

Parental Status Cont.

Now defined under §106.2: the status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability is:

- (1) A biological parent;
- (2) An adoptive parent;
- (3) A foster parent;
- (4) A stepparent;
- (5) A legal custodian or guardian;
- (6) In loco parentis with respect to such a person; or
- (7) Actively seeking legal custody, guardianship, visitation, or adoption of such a person

Note about Parental Status

- Interaction with state law
- In loco parentis
- “Family status”

Common Responsibilities of Recipient Toward Students and Employees

- Comparable treatment for pregnancy as for other temporary medical conditions for purposes of leave;
- Must provide a reasonable break time for employees and students to express breast milk or breastfeed as needed; and
- Must provide a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others

Student-Specific Responsibilities – § 106.40(b)(1)-(5)

- Generally, nondiscrimination for pregnancy or related conditions (current, past, or potential)
- Responsibility to provide Title IX Coordinator contact information, and advise of ability to coordinate specific actions and ensure equal access
- Reasonable modifications, with student discretion to accept or decline
- Voluntary access to separate and comparable portion of program or activity
- Voluntarily leave of absence with return to academic and extracurricular status
- Limit on supporting documentation for modifications/leave
- No certification to participate

Affirmative Obligations

Upon notification of pregnancy by the student or a person with legal right to act on student's behalf, there is an affirmative duty on the school to:

- (1) Provide the student the Title IX Coordinator contact information and notice of recipient's obligations under Title IX, and
- (2) If student acts on notification, Title IX Coordinator must inquire into the need for and implement reasonable modifications

What is notice to an employee? § 106.40(b)(2)

Student/Legal Rep:
"I'm/She's
Pregnant"

A student/legal rep "informs" an employee of pregnancy or related condition when the student or person tells the employee that the student is pregnant or experiencing pregnancy-related conditions, verbally or in writing

Employee:
Provides Title IX
Coordinator
Contact
Information and
Notice of Title IX
Rights

Notice to Student - 106.40(b)(3)(i) “Responsibility to provide information about recipient’s obligations”

1. Recipient’s obligations under 106.40(b)(1)-(5);
2. Confidentiality -- 106.44(j) (protection of personal identifiers); and
3. Notice of nondiscrimination under 106.8(c)(1)

What is a Reasonable Modification?

- The regulation gives several examples:
 - Breaks, eating, drinking, use of restroom; intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time on assignments/tests; sit/stand; keep water nearby; counseling; changes in physical space or supplies; elevator access
- Modification that fundamentally alters the nature of the education program or activity not required, but recipient must offer an alternative
 - Examples of fundamental alteration: waiving program requirements or required clinical component or examinations
- Recipient bears the burden to establish that modification fundamentally alters the nature of the program

Implementation of Reasonable Modifications

- Requires consultation with student; if student accepts the modification, recipient must implement it
- Recipient can delegate who is responsible for implementing and coordinating modifications, and it can be, but need not be, the Title IX Coordinator
- If recipient designates someone other than Title IX Coordinator, Title IX Coordinator maintains ultimate oversight regarding compliance

Prohibitions

- In determining reasonable modifications, the recipient cannot require supporting documentation unless necessary and reasonable to determine reasonable modifications
 - Examples where not necessary: bigger uniform; previously provided documentation; ability to keep water nearby, use of bigger desk, sit or stand, breaks, or lactation needs, or for modifications that are otherwise available to students who are not pregnant without submitting supporting documentation
- Cannot require pregnant student to provide certification from a healthcare provider that the student is physically able to participate, unless certified level of physical ability or health is necessary for participation; certification is required for all students; and certification is not used as a basis for discrimination.

Employee-specific Responsibilities

- Recipient must not adopt or implement any policy, practice, or procedure, or take any employment action, on the basis of sex:
 - Concerning current, potential, or past parental, family, or marital status, which treats persons differently; or
 - That is based upon status as head of household or principal wage earner in the family unit
- Recipient must treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held before the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or another right or privilege of employment
- Cannot make pre-employment inquiry as to marital status, including whether applicant is Miss or Mrs.
- Self-identification of sex is permissible, but only if asked of all applicants and not used as basis for discrimination

Lactation Space - § 106.40(b)(3)(v) and 106.57(e)

- Space other than bathroom, clean, shielded from view, free from intrusion from others, may be used for a student/employee for expressing breast milk or breastfeeding as needed
- No requirement that lactation space be a particular size or shape or include particular structural features
- Employees and students can use the same lactation space
- Recipient has discretion on where space is located, number of spaces, administration of space, scheduling system, etc., but must reasonably accessible

Retaliation - § 106.71

Under § 106.71, a recipient must prohibit retaliation, including peer retaliation, in its education program or activity. When a recipient has information about conduct that reasonably may constitute retaliation under Title IX or this part, the recipient is obligated to comply with § 106.44. Upon receiving a complaint alleging retaliation, a recipient must initiate its grievance procedures under § 106.45, or, as appropriate, an informal resolution process under § 106.44(k).

Retaliation – Newly Defined

Retaliation means intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process under § 106.44(k), in grievance procedures under 106.45, and if applicable 106.46, and in any other actions taken by a recipient under 106.44(f)(1). Nothing in this definition or this part precludes a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service under the recipient's education program or activity to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.

Examples of Retaliation

- Adverse assessment or hiring and promotional decisions
- Lowering of a student's grades
- Making threats or disclosing confidential information on social media
- Excluding someone from an education program
- Peer-to-peer: vandalizing a student's locker
- Special note about First Amendment rights: criticizing another student's decision to participate in a Title IX grievance procedure does not alone constitute peer retaliation

Retaliation – The “Who”

- Who can make a retaliation complaint:
 - Complainant, parent, guardian, legal representative
 - Title IX Coordinator
 - Any student, employee, or person other than a student or employee who was participating or attempting to participate in the recipient’s education program or activity at the time of the alleged retaliation
 - Anyone who has participated in the Title IX process

- Who can be disciplined for engaging in retaliation:
 - Anyone, including the complainant

What Triggers an Investigation

- Anytime the recipient “has” information that “reasonably may constitute retaliation under Title IX or this part”
 - i.e., this does not require a report of retaliation to trigger the requirement to investigation if the recipient has evidence to suggest there was retaliation
- Retaliation complaints can also be resolved using an informal resolution process

Note about Peer-to-Peer Retaliation

- Recipient must respond only to conduct that “reasonably may” meet the definition of sex discrimination
- USDOE does NOT expect the recipient to monitor students’ interactions on social media platforms, BUT, if recipient has such information, recipient must respond

So, what now?

Challenges to the Changes

- Court action by states challenging the new Title IX Regulations, seeking preliminary injunction to prevent implementation in August during pendency of matters
- Ohio joined Tennessee, along with West Virginia, Indiana, Kentucky, and Virginia... in Eastern District of Kentucky
- Challenges focus on expansion of Title IX to include discrimination based on sexual orientation or gender identity, and potential impact regarding transgender students

Next Steps...

- Policy updates
 - Work with counsel to ensure sample language doesn't create challenges
 - Keep in mind standard Board reading practices when considering timing
- Training for various positions
 - Inservice training for all staff in the fall
 - Specific training for individuals tasked with roles under the grievance procedure
 - Watch for announcements about training being offered
- Plans for ongoing training needs
- Continued operation under 2020 regulations until August 1, 2024

Questions?



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