



McGuireWoods

Navigating the New Title IX Regulations

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Agenda

- Key Questions to Consider
- Overview
 - Nondiscrimination Notice
 - Nondiscrimination Policy
 - Reporting
 - Supportive Measures
 - Grievance Procedures
 - Informal Resolution?
 - Sex Discrimination
 - Sex-Based Harassment Involving Student Complainant or Respondent
- Pregnancy

Key Questions to Consider

- Where are we publishing our Notice of Nondiscrimination and what does it cover?
- What policies do we have? Three? Two? One?
- What are our reporting obligations and how are we training the community?
- Are we allowing for informal resolution?
- What is our investigatory model?
- Will we have a live hearing? If so, for what?
- What is our format for questioning of the parties?
- What are my obligations to students who are pregnant? What about employees?

The Basics of the 2024 Title IX Rule

- Published: April 19, 2024
- Effective Date: August 1, 2024
- No Retroactive Application
- Expands the 2020 rule in several ways, including:
 - Scope/definitions of discrimination and harassment
 - New framework for reporting obligations
 - Increased discretion in grievance procedures

Coverage of the Title IX Rule

- Title IX affects conduct that occurs under “a recipient’s education program or activity”
 - Final Rule interprets this phrase broadly
 - Significant change from 2020 Final Rule
- Includes conduct in off-campus settings. Examples cited:
 - Field trips
 - Online classes
 - Athletic programs
 - Study abroad programs

Definitions in the Title IX Rule

- Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Separate athletics rule also expected to follow
- 34 CFR 106.31(a)(2):
 - “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.”

Definitions in the Title IX Rule

■ Sex-based Harassment

- A form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the basis described in § 106.10, that is:
 - *Quid pro quo* harassment
 - Hostile environment harassment
 - Specific Offenses
 - Sexual assault
 - No specific definition of consent
 - Dating violence
 - Domestic violence
 - Stalking

Definitions in the Title IX Rule

- Quid Pro Quo
 - An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct

Definitions in the Title IX Rule

- Hostile Environment
- 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 a person's ability to participate in or benefit from the recipient's education program or activity
- Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
 - The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
 - The type, frequency, and duration of the conduct;
 - 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 effects of the conduct;
 - The location of the conduct and the context in which the conduct occurred; and
 - Other sex-based harassment in the recipient's education program or activity

Complaints

- Who may file a complaint of sex discrimination, including sex-based harassment?
 - A complainant (specifically defined)
 - A person who has a right to make a complaint on behalf of the complainant, *i.e.*, parents or guardians
 - Title IX Coordinator
- Final Rule dispenses with “formal complaint” concept under 2020 final rule

Complaints

- Who is considered a complainant?
 - A student or employee who is ***alleged to have been subjected*** to conduct that could constitute sex discrimination under Title IX
 - 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 ***at a time when*** that individual was participating or attempting to participate in the school's education program / activity (for example, a former student)
 - For sex discrimination *other* than sex-based harassment, there are additional people who can be a "complainant":
 - Any student or employee, even if not directly impacted
 - Any person other than a student or employee who was participating or attempting to participate in the school's education program or activity at the time of the alleged sex discrimination

- **For sex-based harassment, a complainant must be the person who experienced the conduct**

Reporting Obligations

- Three Groups (but could be two):
 - Employee (not Confidential Employee) who either has authority to institute corrective measures or has responsibility for leadership, teaching, or advising: notify Title IX coordinator
 - All other employees (not Confidential Employee): either notify Title IX coordinator or provide contact info and complaint info
 - Confidential Employee: explain status; provide contact info; explain complaint process; explain Title IX Coordinator's role
- Institutions must decide how student-employees will be treated
- All employees must be trained annually

Supportive Measures

- Emphasis on supportive measures and more instances when they will be required
- Still must not be punitive, disciplinary, or unreasonably burdensome
- Changes:
 - Class schedule changes are specifically allowed
 - Mutual no-contact orders no longer the default - may apply to "one or more parties"
 - Rule provides factors to be considered for no-contact orders
- Parties must have an opportunity to seek “modification or reversal” of a decision to deny, modify, or terminate supportive measures by an impartial employee
- Supportive measures must be confidential (except as necessary to implement)
- Must still be offered even if complaint is dismissed

Grievance Procedures

Informal Resolution

- Schools have discretion whether to offer (now allowed in all cases for postsecondary institutions)
- Make sure informal resolution is (1) consistent with policy, (2) voluntary, and (3) well documented
- Proper documentation:
 - Get consent in writing
 - Notice must meet regulatory requirements
 - Any agreement reached should be documented and signed by all parties
 - Consider written confidentiality agreements
- Title IX Coordinator must still “take other appropriate prompt and effective steps” to prevent further discrimination

Basic Requirements for Grievance Procedures

- Separated into two categories: general procedures (§ 106.45) and sex-based harassment involving students (§ 106.46)
 - § 106.46 rules apply to allegations of employees sexually harassing students
 - For student-employees, “fact-specific” determination which rules apply
- Must still establish reasonably prompt timeframes—but now “for the major stages” (initial evaluation, investigation, determination, and appeal)
- For most schools, a preponderance of the evidence standard will apply
- Schools have discretion in how to separate procedures (or combine them)
 - Have a plan for how these procedures will interact with other student disciplinary processes

Initial Evaluation & Possible Dismissal

- Recipient “may” dismiss a complaint if:
 - Unable to identify the respondent
 - The respondent is not an employee or a participant in the education program or activity
 - The complainant voluntarily withdraws allegations and the remaining conduct does not qualify as sex discrimination (in writing for sex-based harassment complaints involving students)
 - The conduct, even if proven, would not constitute sex discrimination
- Even after dismissal, must:
 - Provide parties with notice
 - Allow appeal to a new decisionmaker
 - Offer supportive measures “as appropriate”
 - Require Title IX coordinator to take “other appropriate prompt and effective steps” to prevent continuing or recurring discrimination

Investigation

- Several decision points under the final rule:
 - Consider whether to return to a single investigator/decisionmaker model
 - Consider who will do investigations
 - Consider whether procedures will provide for creation of investigative reports in some or all cases and, if so, whether it will be shared with the parties (no longer required)
 - Consider how parties will be permitted to respond to evidence (especially in cases that do not involve sex-based harassment of students)
 - Consider how much time is reasonable
- Note:
 - Procedure should include “reasonable steps to prevent” unauthorized disclosure of information

Determination

- In complaints not covered under § 106.46, no hearing is required (subject to jurisdiction-specific rules)
- For complaints under § 106.46, institution has the *option* to have a hearing
 - Weakens due process complaints and often provides a strong defense in litigation
 - Eliminates need for follow-up meetings and questions (required if no hearing is held)
 - Permits parties, advisors, and decisionmakers to evaluate witness credibility in real time
- Consider whether questioning will be conducted by decision-maker or advisors (cross-examination no longer required)
- Consider using pre-hearing meetings to clarify logistics and allowable and impermissible evidence and behavior
 - Parties can be invited to submit questions in advance
 - Any agreements should be reduced to writing

Decision Making and Appeals

- Parties must still be notified in writing of the determination and the rationale
 - More detailed content requirements for complaints under § 106.46
- Title IX coordinator should coordinate discipline as appropriate
- For sex-based harassment determinations, institutions must allow appeal on certain grounds if they “would” change the outcome (be careful of judging in advance)
 - Procedural irregularity
 - New evidence that was not reasonably available previously
 - A conflict of interest by the Title IX coordinator, decisionmaker or investigator
- Consider what appeals, if any, will be offered for other complaints

Pregnancy and New Procedures

General Rule

- Final Rule prohibits discrimination based on “pregnancy or related conditions,” including specifically with regard to admissions and employment
- Rule defines “pregnancy or related conditions” to include pregnancy, childbirth, termination of pregnancy, and lactation, and all related medical conditions and recovery
 - “Related conditions” do not have to meet the definition of a disability under the ADA

Obligations To Students

- When a student informs *any employee* that the student is pregnant, the employee must provide information about the Title IX Coordinator and available services
 - Employees should *not* proactively approach students
 - Should be covered in training for all employees
 - Institution must then inform the student of its obligations under the Final Rule and provide its notice of nondiscrimination

Obligations to Students (Continued)

- Institution must make “reasonable modifications” to ensure equal access
 - These may include:
 - Eating, drinking, or using the restroom;
 - Intermittent absences for medical appointments;
 - Access to online or homebound education;
 - Schedule changes;
 - Extensions of time for coursework or tests;
 - Changes to physical space or supplies
 - Should be an interactive discussion with the student
 - Requests for supporting documentation should be narrowly tailored
 - Self-confirmation should be sufficient in at least some cases

Obligations to Students (Continued)

- Lactation space
- Voluntary leaves of absence
 - Includes admitted students
 - Must be, *at a minimum*, the “period of time deemed medically necessary by the student’s healthcare provider”
 - Additional leave may still be a “reasonable modification”
 - Must allow reinstatement upon return for both academic and extracurricular purposes (“as practicable”)
 - Consider:
 - Will you offer any leave voluntarily?
 - What about requests from male parents?
 - What will “reinstatement” look like, depending on when the student starts leave?

Obligations to Employees

- Reasonable break time for lactation and lactation space
 - Under some state laws, these breaks must be paid
- Voluntary leaves of absence:
 - Required in the absence of another applicable leave policy, *including* if the employee has not yet qualified for FMLA leave *or* has “insufficient leave” under existing policy
 - Requires leave for a “reasonable period of time”
 - Reinstatement at the end of leave

Interaction with Existing Employment Laws

- These obligations likely overlap with existing requirements, including under:
 - Americans with Disabilities Act (ADA)
 - Pregnant Workers Fairness Act (PWFA)
 - Requires a covered employer to provide a “reasonable accommodation” to a qualified employee’s or applicant’s known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”
 - Family Medical Leave Act (FMLA)
 - PUMP Act

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Questions?

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Thank You!

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