

Wallingford-Swarthmore School District Leadership Retreat

JULY 15, 2024

Title IX Update

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Background Information

Title IX

- “Title IX” refers to Title IX of the Education Amendments of 1972
- Statutory language: **“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...” 20 U.S.C. §1681**

Title IX

- Authority for regulations:
 - When Congress passed Title IX, it directed those federal departments that extend federal financial assistance to education programs to issue rules or regulations designed to help achieve the objective of eliminating discrimination on the basis of sex.

Title IX

- Consequences for non-compliance with Title IX:
 - Federal funding for the program that was found to be in noncompliance can be terminated
 - Possible investigation by the Office for Civil Rights in the U.S. Department of Ed.
 - Lawsuits filed by individuals who have been harmed due to noncompliance
 - University of Arizona - \$1.275 million settlement (2020)
 - Boulder Valley Sch. Dist. - \$1.26 million settlement (2022)
 - Loudon County Sch. Bd. - \$30 million lawsuit filed (2023)

Observations Re: 2020 Regs.

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- Increasing number of complaints every year from 2020 to 2024
- Schools that trained extensively saw increasing number of reports at the elementary and middle school grades
- Interaction with school discipline procedures
- Interaction with law enforcement investigations/prosecutions
- Prevalence of social media issues (more-recently, A.I. issues)

Observations Re: 2020 Regs.

- Examples of Title IX reports/complaints: (**biggest areas of growth**)
 - **Student on student physical touching/smacking/grabbing**
 - **Student on student verbal/written conduct**
 - Employee on student physical conduct
 - Employee on student verbal/written conduct
 - Employee on employee physical conduct
 - Employee on employee verbal/written conduct
 - Student on Employee conduct (physical, verbal, and/or written)

Analysis of Final Regulations

Analysis of Final Regulations

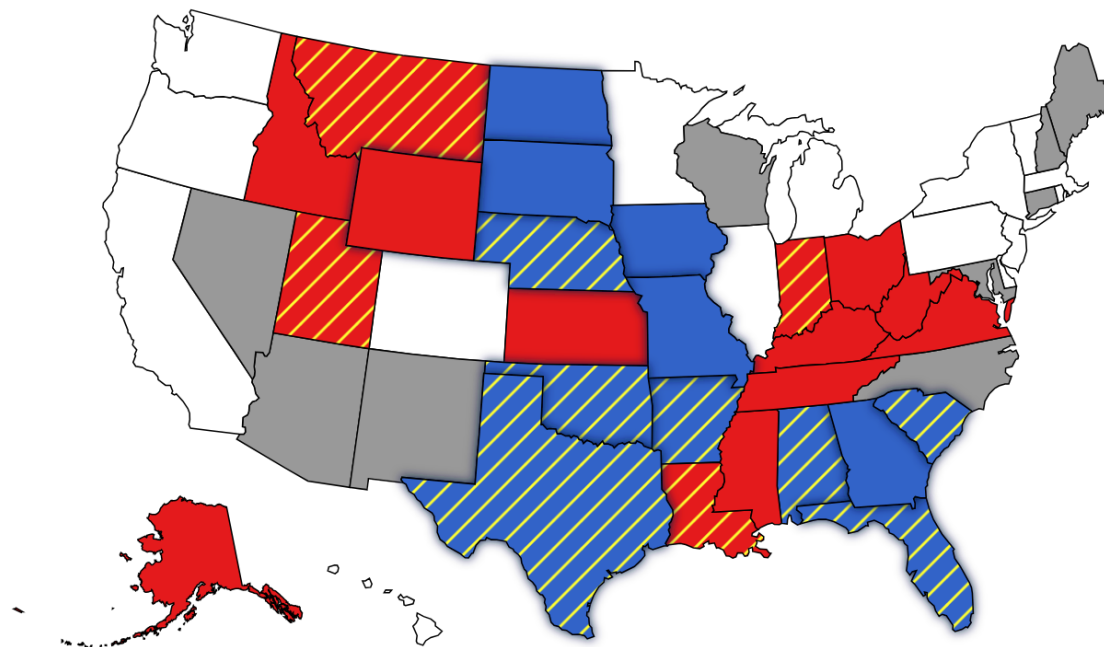
- 1504 pages (only about 60 pages are actual regulations)

Chronology of Events

- **May 2020:** Trump Administration issues revised Title IX regulations, effective August 20, 2020
- **July 2022:** Biden Administration issues proposed revised regulations
 - Approximately 244,000 comments are submitted in response
 - Biden Administration announces final regulations anticipated to be issued in May 2023....then October 2023...then March 2024...
- **April 2024:** Biden Administration issues revised Title IX regulations, effective August 1, 2024

2024 Title IX Regulations Injunction Tracker

■ No Action ■ Amicus Brief ■ Complete Injunction ■ Do Not Implement (DNI) Directive
■ Current or Pending Litigation ■ Litigation & DNI ■ Injunction and DNI



Source, ATIXA injunction tracker (accessed 7/14)
<https://www.atixa.org/reg/#2024-Regulations>



As of July 2, 2024, the Department is currently enjoined by federal court orders from enforcing the 2024 Title IX regulations in the states of Alaska, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Tennessee, Utah, Virginia, West Virginia, and Wyoming, and the regulations and these resources therefore do not currently apply in those states.

Source – Regulations -

Injunctions Issued

USDOE Purpose for Issuing New Regulations

- To provide greater clarity regarding:

The definition of sex-based **discrimination,**

which includes sex-based **harassment.**

What is Sex-Based Discrimination?

§106.10 – sex discrimination includes, but is not limited to, discrimination based on:

1. sex stereotypes,
2. sex characteristics,
3. pregnancy or related conditions,
4. sexual orientation, and
5. gender identity

What is Sex-Based Harassment?

A form of sex discrimination. But, like in 2020, there are three specific definitions -

(1) Quid pro quo harassment – expansion from simply “employee”

*(2) Hostile environment –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.*

(3) Specific offenses

- Sexual assault
- Dating violence
- Domestic violence
- Stalking

See 106.2

Most Significant Revisions from Current Regulations

- Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
 - (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
 - (ii) The type, frequency, and duration of the conduct;
 - (iii) 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;
 - (iv) The location of the conduct and the context in which the conduct occurred; and
 - (v) Other sex-based harassment in the recipient's education program or activity
- **Takeaway:** how is this analysis performed in the absence of an investigation?

Who can Make a Complaint?

A sex-based harassment claim can be made by:

- A complainant, now more broadly defined (a student or employee who is **alleged to have been subjected to conduct** that could constitute Title IX sex discrimination)
- A parent, guardian, or other authorized legal representative with the legal right to act on behalf of the complainant;
- The Title IX Coordinator, in limited circumstances and after considering eight factors now set forth in §106.44(f)(1)(v)(A)(1)-(8).

A sex-based discrimination claim can only be made by:



AND

- Any student or employee; or any 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 sex discrimination.

Most Significant Revisions from Current Regulations

- Training Requirements
 - All employees must be trained on:
 - The obligation to address sex discrimination in the recipient's education program or activity
 - The scope of conduct that constitutes sex discrimination under Title IX, including the definition of sex-based harassment
 - All applicable notification and information requirements under the regulations
 - Training must occur “promptly upon hiring or change of position that alters their duties under Title IX” AND “annually thereafter”
 - **Takeaway:** will need to include Title IX training as part of new employee orientation and on an annual basis for all employees

Most Significant Revisions from Current Regulations

- Elimination of “formal complaint”
- A “complaint” is now defined as:
 - An oral **or** written request to the [school district] that objectively can be understood as a request for the [school district] to **investigate** and **make a determination about alleged discrimination under Title IX**.
- **Takeaway:** it is much easier for a student/parent/employee to file a complaint



Most Significant Revisions from Current Regulations

- Elimination of “mandatory dismissal” provisions
- **Takeaway:** difficult to dismiss complaints without some type of investigation

Most Significant Revisions from Current Regulations

- Clarified factors that must be considered for Coordinator-initiated complaints:
 - Complainant's request not to proceed with initiation of a complaint
 - Complainant's reasonable safety concerns
 - Risk of additional acts of sex discrimination if a complaint is not initiated
 - Severity of the alleged sex discrimination
 - Age and relationship of the parties, including whether respondent is an employee
 - Scope of alleged sex discrimination (pattern? other victims?)
 - Availability of evidence
 - Whether recipient could end the alleged discrimination without initiating the grievance procedures
- **Takeaway:** how is the consideration of these factors documented?

Most Significant Revisions from Current Regulations

- Notification Requirements
 - An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX
 - Employees who are informed by a student of that student's pregnancy must provide that student with the contact information for the Title IX Coordinator and inform the student that the Coordinator can take action to prevent discrimination and ensure equal access
 - **Takeaway:** Title IX Coordinator will likely need to carry out duties on a daily basis. Regulations permit more than one Title IX Coordinator, but one must “retain ultimate oversight over those responsibilities.”

Most Significant Revisions from Current Regulations

- Grievance Process Roles
 - “The decisionmaker may be the same person as the Title IX Coordinator or investigator”
 - **Takeaway:** may be difficult for a Title IX Coordinator to separate out things that were learned during the initial reporting phase and facts gathered during the investigation. Having investigator and decisionmaker be the same person will likely make the most sense for a majority of school entities.

Most Significant Revisions from Current Regulations

- Standard of Proof
 - Must use “preponderance of the evidence” standard unless “clear and convincing evidence” standard is used in all other comparable proceedings
 - **Takeaway:** increases the likelihood that the determination will conclude that sexual harassment has occurred.

Most Significant Revisions from Current Regulations

- Disciplinary Consequences
 - “May not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the recipient’s grievance procedures that the respondent engaged in prohibited sex discrimination”
 - **Takeaway:** arguably more of an ability to discipline for conduct covered by other policies

Most Significant Revisions from Current Regulations

- Confidentiality
 - School entity must “take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient’s grievance procedures, provided that the steps do not restrict the ability of the parties to: obtain and present evidence, including by speaking to witnesses; consult with their family members, confidential resources or advisors; or otherwise prepare for or participate in the grievance procedures”
 - **Takeaway:** might be able to require confidentiality from employees, but what authority exists over parents/guardians of complainants.

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Title IX In the News...

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- *Parents of 5-Year-Old Red Lion Student Accuse School District of Failing to Report Sexual Assault on School Bus (2-8-2024)*
 - York County, Pa. Lawsuit alleges that:
 - 5-year-old was sexually assaulted by another student on a school bus
 - The student accused of assaulting the victim had previously assaulted at least one other student in the past
 - Bus driver failed to report behavior and took no action to separate students
 - District failed to adequately staff the school bus with monitors when they knew of a student with a history of sexual assault
 - The school district's response: "we vehemently deny the salacious allegations"
 - **Takeaway:** Title IX is not just a secondary ed. issue. How to address transportation issues?

Title IX In the News...

- *Mom Sues Pa. School District on behalf of Transgender Teen Who Killed Herself (10-4-2023)*
 - Lawsuit against Wyoming Valley Sch. Dist. alleges that:
 - 15-year-old heard anti-gay and anti-trans slurs every day in classrooms and hallways, sometimes in the presence of school officials
 - Five teachers refused to call her by her chosen name during roll call
 - One teacher had emailed the principal three times about the student being bullied
- **Takeaway:** Title IX applicability to gender identity-related bullying

Title IX In the News...

- *Family's Fight Over Equality in High School Sports Gears Up in Phoenixville: "We Want to Inspire Them" (1-5-2024)*
 - Father of two students filed a Title IX complaint with the U.S. Department of Ed.'s Office for Civil Rights alleging:
 - Inequities between boys' baseball and girls' softball facilities (dugouts, field quality)
 - Special celebrations/recognitions for boys' sports team
- **Takeaway:** Title IX extends beyond just harassment-based conduct

Questions?

JULY 15, 2024

Title IX –Investigator & Decision-Maker Training

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Training requirements under section 106.8(d)

- All **investigators, decisionmakers**, and other persons responsible for implementing the recipient's grievance procedures or who have the authority to modify or terminate supportive measures must be trained on:
 - the recipient's obligations under Title IX
 - The recipient's grievance procedure
 - How to serve impartially
 - The meaning and application of the term "relevant" in relation to questions and evidence
 - The types of evidence that are impermissible regardless of relevance

The Recipient's obligations under Title IX & Grievance Procedure

- Should receive training on these items
- Grievance procedure –
 - Option to revert to single investigator model
 - Check with coordinator and regulations and/or policy
- Don't be afraid to ask questions at the start of an assignment!

Basic Requirements for Grievance Procedure

Treat complainants and respondents equitably;

Title IX Coordinator, investigator, or decisionmaker does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

Include a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the recipient's grievance procedures

Establish reasonably prompt timeframes for the major stages of the grievance procedures

Require the recipient to take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures,

provided that the steps do not restrict the ability of the parties to: obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures;

Require an objective evaluation of all evidence that is relevant ...including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness;

How to Serve Impartially

Required to Not Have

- **A Prejudgment of the facts at issue**
 - Do not assume that report occurred (respondent is presumed not responsible at the start)
 - Go in with an open mind
 - Cannot form prejudgments based on a person's status as complainant or respondent
- **Conflicts of interest**
 - “a conflict between the private interests and the official responsibilities of a person in a position of trust.” (Merriam Webster)
- **Bias**
 - “inclination; prejudice” (Black's Law Dictionary)

The Meaning and Application of the term “relevant” in relation to Questions and Evidence

Definition of Relevance –

“*Relevant* means related to the allegations of sex discrimination.... Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.”

Commentary: The definition of “relevant” is sufficiently broad in that it allows for the inclusion of all evidence that is related to an allegation of sex discrimination and will aid the decisionmaker in determining whether alleged sex discrimination occurred.

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Types of Evidence that are Impermissible Regardless of Relevance

Requirement to exclude the following types of evidence,

- (i) Evidence that is protected under a privilege as recognized by Federal or State law, unless waived
- (ii) medical records, unless a party provides consent
- (iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct,
 - unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct **OR** is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment.
 - **The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred*

Initial Procedural Requirements

Notice of Allegations must go to all parties and must include “sufficient information available at the time to allow the parties to respond to the allegations”, including

- Identities
 - Conduct alleged to have violated Title IX
 - Location of conduct
 - Overview of grievance procedure
 - Notice that retaliation is prohibited
 - Notice that parties are entitled to an equal opportunity access the evidence OR a description of the evidence
-
- *If additional allegations come to light, the notice needs to be revised

Investigation Requirements

Investigation must be adequate, reliable, and impartial and the investigator must

- Ensure burden is on the recipient, not the parties to gather sufficient evidence
- Provide an opportunity to parties to present fact witnesses and other inculpatory and exculpatory evidence
- Review all evidence gathered and determine what evidence is relevant and/or impermissible
- Provide parties with equal opportunities to access evidence
 - Descriptions / summaries, but parties can request to review evidence
- Provide a “reasonable opportunity to respond” to the evidence

Disclosures

“A recipient must take reasonable steps to prevent and address the parties’ unauthorized disclosure of information and evidence obtained solely through the grievance procedures....Disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized.”

Questioning Parties and Witnesses to Aid in Evaluating Allegations & Assessing Credibility

A recipient must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

Takeaway: Interviews Required?

Determination of Whether Sex Discrimination Occurred

Following an investigation and evaluation of evidence, a decision-maker must

1. Use the preponderance of evidence standard (unless clear and convincing is used in comparable proceedings)
2. If the decision-maker is not persuaded under the applicable standard of evidence (regardless of the quantity of evidence), the decision-maker must not determine that sex discrimination occurred.
3. Notify the parties in writing of the determination
 - Include the rationale for such determination
 - Include the procedures for an appeal (if appeals are applicable)

If There's a Determination that Sex Discrimination Occurred

Title IX Coordinator must

- Coordinate the provision and implementation of
 - remedies to complainant and others
 - disciplinary sanctions on the respondent.
- Provide notification of disciplinary action to parties, including to complainant
- Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur

*Reminder – “A recipient **may not** discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the recipient’s grievance procedures that the respondent engaged in prohibited sex discrimination..”*

Questions?