

# **Title IX Update**

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# 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
  - Broadens circumstances in which employees must report and schools must respond
  - 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
- Hostile environment and sex discrimination in study-abroad programs

# Definitions in the Title IX Rule (1 of 2)

- Discrimination on the basis of sex explicitly includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- 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.”
- Separate athletics rule also expected to follow

# Definitions in the Title IX Rule (2 of 2)

- 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
  - Dating violence
  - Domestic violence
  - Stalking

- Consent – No required definition

# A Complaint Under the Title IX Rule

- 1) Student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX; 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.
  - “Participating or attempting to participate”
  - Fact-specific, case-by-case analysis
  - Applies when conduct occurred, not when complaint was filed

# Filing a Complaint Under the Title IX Rule

- Who may file a complaint?
  - A complainant
  - A person who has a right to make a complaint on behalf of the complainant, i.e., parents or guardians
  - Title IX Coordinator
  - With respect to complaints of sex discrimination other than sex-based harassment, any student or employee; or third-party attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.
- Final Rule dispenses with “formal complaint” concept under 2020 final rule

# Responsibilities for Institutions, Title IX Coordinators & Others

- When to address sex discrimination:
  - “A [recipient] with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively.”
  - Drops “actual knowledge” standard from 2020 final rule
- Title IX Coordinator
  - Extensive responsibilities
  - Include filing of complaints
    - Intersection of FERPA and Title IX
    - Prohibition against retaliation



# Responsibilities for Other Employees, Including Confidential Employees

- Three Classes:
  - 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



# Grievance Procedures

# Basic Requirements for Grievance Procedures

- Separated into two categories: general procedures (§ 106.45) and sex-based harassment involving students (§ 106.46)
  - For student-employees, “fact-specific” determination which rules apply
- Continued presumption of non-responsibility
- Must still establish reasonably prompt timeframes—but now “for the major stages”
- Must still require objective evaluations of all evidence that is relevant and not otherwise impermissible
- Schools must use a preponderance of the evidence standard, with limited exceptions

# Basis for Dismissal

- Recipient “may” dismiss a complaint if:
  - Unable to identify the respondent
  - The respondent is not an employee or a participant in the recipient’s education program or activity
  - The complainant voluntarily withdraws allegations and the remaining conduct does not qualify as sex discrimination
    - Withdrawal must be in writing for sex-based harassment complaints involving students
  - The conduct, even if proven, would not constitute sex discrimination
- More discretion than 2020 regulations

# Steps After Dismissal

- Must provide parties with notice
- Must be appealable to a new decisionmaker
- Must still offer supportive measures “as appropriate”
- Must require Title IX coordinator to take “other appropriate prompt and effective steps” to prevent continuing or recurring discrimination

# Investigation

- Some themes continue from the 2020 regulations
  - Parties must have equal opportunity to present evidence and witnesses
  - Parties must have equal opportunity to access evidence and respond to the evidence
  - Investigator must review all evidence and determine relevance
- BUT:
  - Return of single investigator/decisionmaker model as an option
  - Recipient must “take reasonable steps to prevent” unauthorized disclosure of information

# Supportive Measures

- Overall, the Final Rule reflects a greater emphasis on supportive measures and contemplates more instances when they will be required
- Still must not be punitive, disciplinary, or unreasonably burdensome
- A few specific changes from 2020:
  - 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

# Informal Resolution

- Now permitted in almost any case for post-secondary institutions
  - Institutions have discretion whether and when to offer informal resolution
  - Still must be voluntary
- Recipient must provide notice of informal resolution procedures
  - Must include notice of right to withdraw and consequences of informal resolution
  - Must include notice of what information recipient will maintain and how that might be used if grievance is continued
  - Must include notice of potential terms
- Facilitator must not be the investigator or the decisionmaker and must be trained
- Title IX coordinator must still “take other appropriate prompt and effective steps” to prevent further discrimination



# Hearing

- In complaints not covered under § 106.46, no hearing is required (subject to jurisdiction-specific rules)
- For complaints under § 106.46, must either have a hearing or permit parties to ask questions through investigator
  - Decisionmaker must determine whether questions are relevant and permissible
  - Relevant and permissible questions must be allowed unless “unclear” or “harassing”
- If a school chooses not to have a hearing:
  - Parties must be able to propose questions to be asked by the investigator or decisionmaker
  - Parties must receive recordings or transcripts and have opportunity to propose follow-up questions
- If a school chooses to have a hearing:
  - Parties must be able to propose questions or have advisors ask questions
  - Recipient must conduct live hearing remotely if requested by a party

# 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
- Must offer an appeal (removes mandatory 10-day timeframe)
- For sex-based harassment determinations, institutions must allow appeal on the following grounds if they “would” change the outcome:
  - Procedural irregularity
  - New evidence that was not reasonably available previously
  - A conflict of interest by the Title IX coordinator, decisionmaker or investigator

# Pregnancy and New Procedures

# Context

- There has been a longstanding prohibition on discrimination based on “pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery” since the Title IX regulations were first promulgated in 1975.
- Department has been clear that recipients cannot discriminate based on these conditions.
- However, the new Title IX regulations provide new expanded definitions and procedures when dealing with pregnant students and employees.

# How Does the Final Rule Define “Pregnancy or Related Conditions”?

- Defines “pregnancy or **related conditions**” to include pregnancy, childbirth, termination of pregnancy, and lactation, and all related medical conditions and recovery
  - Should include the full spectrum of processes and events connected with pregnancy
  - Rules clarify the prohibition on discrimination against students and applicants for admission and employees or applicants for employment on the basis of current, “potential” (i.e., pregnancy or related conditions that are expected, likely, or have the capacity to occur), or past pregnancy or “related conditions”
  - Department provides some guidance on what it considers “**related conditions**”

# New Obligations Institutions Must Know

1. Affirmative obligations to provide Title IX Coordinator's contact information
2. Affirmative notice obligations
3. Reasonable modifications
4. Obligations regarding pregnant employees

# Obligations to Provide Title IX Coordinator Contact Information

# What Does the New Rule Require?

“A recipient must ensure that when a student, or a person who has a legal right to act on behalf of the student, informs any employee of the student’s pregnancy or related conditions, unless the employee reasonably believes that the Title IX Coordinator has been notified, **the employee [1] promptly provides that person with the Title IX Coordinator’s contact information and [2] informs that person 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.**” § 106.40(b)(2)



# What This Means for Educational Institutions

- Must share the Title IX Coordinator's contact information and information about the Title IX Coordinator's ability to take specific actions
- Doesn't mean that school employees must approach a student unprompted; employees must act in response to information from the student
- The employee would only provide this information if the employee reasonably believes that the Title IX Coordinator has not already been notified.

# But When is a School Employee “Informed”?

- A student or a person who has a legal right to act on behalf of the student “informs” an employee of a student’s pregnancy or related conditions when the student or such person **tells the employee** that the student is pregnant or experiencing pregnancy-related conditions, either verbally or in writing.
- **Example of bring informed:** if a student tells a teacher, “I am pregnant and will be late to class on Wednesday due to a doctor’s appointment,” the student has informed the teacher of the pregnancy
- **Example of not being informed:** the teacher merely overhears one student making the same statement to another
  - Why? The student has ***not directly*** informed the teacher, so the employee is not required to act under the provision

# Obligations to Provide Notice of Title IX Obligations

# Affirmative Notice of Title IX Obligations

- **What:** must inform the student, and the student's legal representative, as applicable, of the **recipient's obligations under §§ 106.40(b)(1)–(5) and 106.44(j)** and provide the recipient's notice of nondiscrimination under § 106.8(c)(1)
- The Department does not think that website or syllabi-type notifications, which are not directed at the individual student, are alone sufficient

# Reasonable Modifications

## New Rule on Modifications:

“The recipient must make **reasonable modifications to the recipient’s policies, practices, or procedures** as necessary to prevent sex discrimination and ensure equal access to the recipient’s education program or activity. Each reasonable modification must be based on the student’s individualized needs. In determining what modifications are required under this paragraph, the recipient must consult with the student. A modification that a recipient can demonstrate would **fundamentally alter** the nature of its education program or activity is not a reasonable modification.” § 106.40(b)(3)(ii)

# How Should Your Institution Implement Reasonable Modifications?

- Do not force a student to accept a particular modification
- Consult with the student before offering or implementing a particular modification
- If there are a range of reasonable modifications that are appropriate, the institution has discretion to offer a student the full range of options or to choose to offer one or more preferred options.
- If a student declines an offered reasonable modification, institution is not required to determine whether there are other reasonable modifications available, even if other reasonable modifications could be offered.
- **Standard: *fundamentally alter*** the nature of an education program or activity on the recipient

# What are Some Reasonable Modifications?

- May include, but are not limited to:
  - breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom;
  - intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence;
  - extensions of time for coursework and rescheduling of tests and examinations;
  - allowing a student to sit or stand, or carry or keep water nearby;
  - counseling;
  - changes in physical space or supplies (for example, access to a larger desk or a footrest);
  - elevator access; or
  - other changes to policies, practices, or procedures.
- Rule limits requests for documentation in some circumstances



# Pregnant Employees

# What Do the Rules Require Regarding Pregnant Employees?

- Similar obligations not to discriminate against any employee or applicant for employment on the basis of current, potential, or past pregnancy or related conditions.
- Must treat pregnancy or related conditions as any other temporary medical conditions for all job-related purposes.
- Institutions must provide reasonable break time to express breast milk or breastfeed as needed.
- Pregnancy or related conditions as a justification for a **protected voluntary leave of absence** without pay for a reasonable period of time

# How Long is a Voluntary Leave of Absence?

- Unfortunately, the answer is unclear (a “fact-specific inquiry that depends on the totality of the circumstances...”)
- Obligation to provide an employee a leave of absence applies only if the recipient (1) does not maintain a leave policy for its employees **or** (2) the employee has insufficient leave or accrued employment time to qualify for leave under the policy

# What Do These Requirements Mean for Existing Applicable Requirements Under the Federal Law?

Department disclaims that someone who is pregnant or experiencing pregnancy-related conditions may still be subject to other federal laws overlap and run in the background. These include:

- **Americans with Disabilities Act (ADA)**

- While pregnancy itself is not a disability under the ADA, some pregnant workers may have one or more impairments related to their pregnancy that qualify as a “disability” under the ADA.
- An employer may have to provide that worker with a reasonable accommodation for the pregnancy-related disability.

- **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.”
- The U.S. Equal Employment Opportunity Commission issued a final rule to implement the PWFA. (final rule issued on April 15, 2024, goes into effect on June 18, 2024)

# What Do These Requirements Mean for Existing Applicable Requirements Under the Federal Law?

- **PUMP for Nursing Mothers Act (“PUMP Act”)**
  - Already requires break time for pumping
  - Required to provide a reasonable amount of break time and a space to express milk as frequently as needed by the nursing employee, for up to one year following the birth of the employee’s child.
  - Space provided by the employer cannot be a bathroom + must be shielded from view and free from intrusion by coworkers or the public

# So What Does This Mean for Your Policies?

- Must not implement any policy, practice, or procedure—including pre-admission inquiries—concerning the parental, family, or marital status of a student or applicant that treats that person differently based on sex.
  - Department: “An applicant’s pregnancy or related conditions and sex-based distinctions regarding parental, family, or marital status **should not affect their chances of admission** to a recipient institution and emphasizes that pre-admission inquiries regarding the marital status of an applicant are not permitted under the Department’s Title IX regulations”
  - Specifically prohibits asking applicants to identify as “Miss” or “Mrs.”
- Must ensure that notice provisions are integrated into your Title IX policy
- Must include specific provisions on how your institutions will implement reasonable modifications

# Questions?

# Thank You!

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