

Title IX

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Today's Presentation

- History of Title IX
- Key Proposed Changes
- Preparing for New Rule

HISTORY OF TITLE IX

Title IX Prohibits Sex Discrimination

No person in the United States shall on the basis of **sex**, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance

Enforcement

- Office of Civil Rights (OCR) investigates and resolves complaints
- OCR can:
 - enter into resolution agreements
 - require the school to make changes to policies and procedures and
 - take other actions to improve the campus climate
- Title IX contains a private right of action

Title IX Timeline

1972: Title IX becomes law



1980: OCR Formed & has responsibility for Title IX

1992: SCT allows private lawsuits under Title IX

1998: SCT finds schools liable only with actual knowledge and deliberate indifference to sexual harassment

2011, 2014: USDE Issues DCL re Sexual Harassment and Sexual Violence

2017: USDE Rescinds DCL guidance

2020: USDE issues Title IX Final Rule

2021: Executive Orders and Q&A

2022: NPRM

Biden Administration Executive Orders

- **January 20, 2021:** all persons should receive equal treatment regardless of their gender identity or sexual orientation
- **March 8, 2021:** students should be guaranteed an educational environment free from discrimination based on sex, *including sexual orientation or gender identity*
 - Directs the Secretary of Education to propose policy changes

Biden Administration

- April 6, 2021: Ltr from Acting Asst Secy for Civil Rights
 - OCR reviewing sex discrimination regulations, guidance and policies due to Biden Executive Order
 - OCR anticipates amending Title IX regulations

OCR Q&A

- July 2021 – Q&A to provide additional clarity on OCR’s interpretation of schools’ existing obligations
- 67 pages divided into 17 sections
- Includes an appendix with sample language schools can utilize (but are not required to) in creating a Title IX policy.

Notice of Proposed Rulemaking

- Released 7.12.22
- 60-day comment period from publication date – 9.12.22
- Dept announces delay of publication of new rule- 5.26.23
 - 240,000 comments for 7.12.22 NPRM (sex discrimination)
 - 150,000 comments for 4.12.23 NPRM (gender + athletics)
 - Anticipated release of Final Rule- 10.31.23

KEY PROPOSED CHANGES

Some Good News

- Much is the same
- Some increased flexibility
 - No live hearing
 - Single investigator permitted (except KY, MI, OH & TN)
- But also...
 - Expanded scope of coverage
 - More directive in some respects
 - Will require revised policies and training

Prohibits all forms of Sex Discrimination

- Sex-based harassment includes
 - Sex stereotypes
 - Sex characteristics
 - Pregnancy or related conditions
 - Sexual Orientation
 - Gender Identity

Hostile Environment Defined

- Unwelcome sex-based conduct that is sufficiently severe **or** pervasive enough that,
 - **based on the totality of the circumstances**
 - and evaluated both **subjectively** and objectively,
 - it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity.

→ alignment with Title VII

Hostile Environment

- Various factors are considered to determine if a hostile environment exists:
 - Degree to which the conduct affected the complainant's access to the education program or activity
 - Type, frequency and duration of the conduct
 - Parties' ages, roles, previous interactions and other relevant factors
 - Location of the conduct, context in which the conduct occurred, and the control the school has over the respondent
 - Other sex-based harassment in the school's education program or activity

Quid Pro Quo and Sexual Misconduct

- Expanded scope of coverage
 - Employees, **agent or other person** authorized to provide an aid, benefit or service under the education program or activity
 - Explicitly **or implicitly** conditions the provision of an aid, benefit, or service on a person's participation in unwelcome sexual conduct
- Sexual Assault, Dating Violence, Domestic Violence and Stalking

Definitions

- Modify definitions including:
 - Complainant
 - Respondent
 - Supportive Measures
 - Complaint
- New definitions:
 - Retaliation
 - Peer Retaliation
 - Disciplinary Sanctions
 - Remedies

Location: Education Program or Activity

- Off campus conduct now covered:
 - Includes locations controlled by affiliated organizations
 - Other locations are covered when the respondent is:
 - a representative of the institution or
 - engaged in conduct under the institution's disciplinary authority
- Address off-campus conduct when it creates a sex-based hostile environment
- Social media remains an unknown, but probably covered

Reporting

- Current Rule- school can designate who must report
- New Rule: vastly expanded
 - Employees who can implement corrective action
 - Administrative leadership, teaching or advising employees
 - All other employees (not confidential)
- Some nuance here based on whether the misconduct involves students or staff
- Bottom line– nearly all employees must report

Training

- Required for all employees
 - Must include:
 - College's obligation to address sex discrimination
 - Scope of conduct that constitutes sex discrimination
 - Applicable notification and information requirements
- Recommend doing this bi-annually and at orientation
- Keep it short and simple

Specialized Training for Specific Employees

- Investigators, Decisionmakers and others in Title IX process:
 - Obligation to respond
 - Grievance procedures
 - How to serve impartially
 - Relevancy
- Information Resolution Facilitators:
 - Process, impartiality and bias
- Title IX Coordinator:
 - Duties

Notification and Action

- Title IX Coordinator must act once notified of conduct that may constitute sex discrimination.
- No complaint needed

Required Responses

- Vary based on how the Title IX Coordinator learns of the harassment or discrimination
 - Notice of Harassment
 - Title IX Coordinator must conduct initial assessment and response even if no complaint received
 - Complaint
 - Grievance procedure initiated when complaint received
 - Some nuance if the complaint involves student sexual harassment complaint

Grievance Procedure

- Process is for employees and students, with some additional requirements for student sexual harassment complaints
- Complaint initiation
 - Must define a complaint to include “oral or written request” to initiate institution’s grievance procedures
 - Essentially anyone can make a complaint

Grievance Procedure

- Notice of Allegations
- Equitable Treatment
- Conflicts of Interest
 - Single investigator model permissible (including investigation)
- Presumption Against Responsibility
- Protection of Privacy
- Relevancy and Credibility
- Exclusion of Impermissible Evidence

Grievance Procedure

- **Must also:**
 - Describe range of supportive measures available to complainants and respondents
 - Describe the range of possible disciplinary sanctions and remedies that the school may impose following a determination

Supportive Measures

- Can be imposed only during grievance process
 - They can "burden" the respondent before a determination is made
 - Must not be more restrictive than necessary
 - Provide opportunity to seek modification or reversal

Investigation

- Policy must provide that the investigation will include:
 - Who carries the burden of investigation (institution)
 - Equal opportunity
 - Evidentiary determinations
 - Description of evidence
 - Creditability determinations

Determination

- The policy must contain the following for the determination:
 - Fairness to both parties
 - Evidentiary standard
 - Notification of determination
 - Remediation
 - Disciplinary actions
- No Live Hearing requirement!

Dismissal of Complaint

- No mandatory dismissals available
- Discretionary (notification required):
 - Unable to identify the respondent (reasonable effort)
 - Respondent not participating in education program or activity and not employed
 - Complainant voluntarily withdraws allegations (remaining allegations do not constitute sex discrimination)
 - School determines conduct would not constitute sex discrimination (even if proven)

Sex-Based Harassment (Students)

- All grievance requirements also apply
- Credibility: a process is required if credibility is in dispute and relevant (?!?)
- Individual meetings or live hearing
- Decisionmaker determines relevancy
- Written determination
- Appeal

Pregnancy & Related Condition Discrimination

- Based on reasonable belief that individual is pregnant
- Generally, cannot require a health certification to participate unless required of all students
- Provide students with information on how to contact Title IX Coordinator
- Affirmative steps to allow for equal access for pregnant students
 - Reasonable modifications, voluntary leave, lactation space

Preparing for a New Rule

- Review current policies and procedures
- Analyze current complaints against proposed definitions
- Plan for training
- Evaluate staffing of Title IX processes
- Practical takeaways
 - More investigations?
 - Simpler investigation and decision making process
 - More flexibility to resolve complaints



Certificate of Achievement

Presented to

Jason Mongan

for attending

Advanced Legal Workshop (3.5 Hours)

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Date