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Title IX Rules Are Coming (Sometime Soon): Things to Consider Now

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Regulatory Update: What's happening?

- June 23, 2022: Unofficial version published (50th anniversary of Title IX)
 - 50 pages of proposed regulations, coupled with 650 pages of comments and discussion
- July 12, 2022: Published in Federal Register
 - Over 240,000 public comments received during 60-day comment period
- May 26, 2023: ED announces new anticipated date of October 2023 for final rule
- October 2023: No final rule yet, and there are hurdles to clear!



Reminder: Key Themes from the NPRM

- NPRM demonstrates enforcement and departmental priorities
 - ED has signaled the direction in which they are planning to head.
- Expands universe of triggers for response
 - Jurisdiction, definitions, notice
- Includes procedural options (*with jurisdiction-based exceptions!*)



Triggers for a response

When must the institution act?



Triggers for response

Recipients have an obligation to respond appropriately to notice of sex discrimination in its programs and activities.



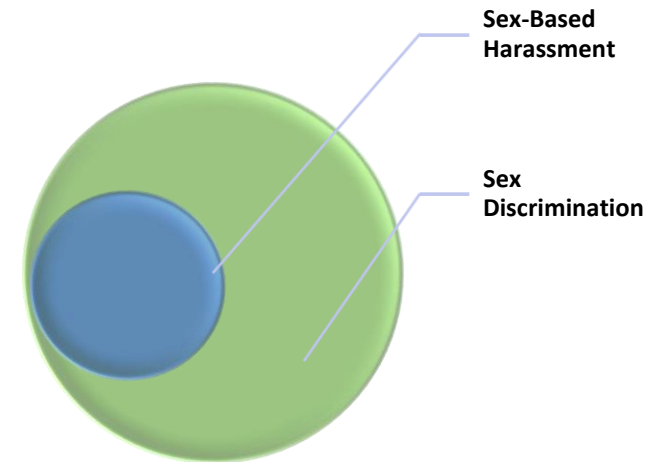
Triggers for Response: Conduct

Sex Discrimination

- Sex stereotypes
- Sex characteristics
- Sexual orientation
- Gender identity
- Pregnancy/parental status

Sex-Based Harassment

- Quid pro quo
- Hostile environment
- Clergy crimes



Triggers for Response: Jurisdiction

- Program or activity = “all operations”
- Conduct that occurs in a recipient’s education program or activity includes but is not limited to:
 - Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and
 - ****Conduct that is subject to the recipient’s disciplinary authority****

Consider:

Brown v. State of Arizona (9th Cir.) – off-campus conduct

Hall v. Millersville University (3d Cir.) – conduct of third-parties



Triggers for Response: Notice

- ~~Actual knowledge~~
- Notice to employees *[more than your “officials with authority”!]*
- Reporting obligations for employees:
 - Differ based on whether the conduct involves a student or employee complainant
 - **All employees**, including confidential employees, must provide the contact information of the Title IX Coordinator and information about how to report sex discrimination
 - Explicitly incorporates **faculty** as employees with the responsibility to report sex discrimination



Reporting Responsibilities

Report to TIXC or Provide Information to Complainant

- Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity *when the complainant is an employee*
- All other employees

Report to Title IX Coordinator

- Any employee who has authority to institute corrective measures on behalf of the recipient
- Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity *when the complainant is a student*



Response Obligations

You're on notice, now what?



Title IX Coordinator Responsibilities

Must

- § 106.8 - Retain ultimate oversight over compliance responsibilities
- § 106.8(d) – Be trained
- § 106.8(f) - Maintain records
- § 106.40 – Take specified actions following notice of student’s pregnancy or related condition
- § 106.44(b) - Monitor for, and reasonably address, barriers to reporting
- § 106.44(f) – Take specified actions after notice of sex discrimination

May

- § 106.8(e) - Consult with disability support
- § 106.44(e) - Public awareness events*
- § 106.45(b)(2) - Be the decision maker in grievance process



Initiating The Grievance Process

2020 Regulations

- Formal Complaint -- Signed, written, formal request



2022 NPRM

- Complaint -- Oral or written request.



Initiating The Grievance Process

- Who is a complainant?
 - Anyone who has experienced sex discrimination can be a complainant, including students, employees, or third parties.
 - **Third-parties** must be participating in or attempting to participate in the institution's education program or activity when the alleged **sex discrimination** occurred.

NPRM §106.2



Initiating The Grievance Process (Unwilling Complainant)

- A complaint generally should be initiated when there is:
 - An immediate and serious threat to the health and safety of any community member; or
 - Corroborating evidence available.
- Factors to consider:
 - Risk of additional sex discrimination;
 - Seriousness of alleged sex discrimination;
 - Age and relationship of parties;
 - Scope of alleged sex discrimination;
 - Availability of evidence; and
 - Disciplinary sanction



Two Procedures (or Two Layers)

“[P]roposed § 106.45 contains specific requirements for grievance procedures that would apply to all complaints of sex discrimination at any recipient and . . .

a new proposed § 106.46 contains additional requirements that would apply only to complaints of sex-based harassment involving a student complainant or student respondent at a postsecondary institution.”



Proposed § 106.45: Sex Discrimination

- Establish timeframes for major stages
 - (evaluation/dismissal; investigation; determination; appeal)
- Eliminates mandatory dismissal
- Investigator provides *description* of and opportunity to respond to relevant evidence
- Requires process that enables the decisionmaker to *adequately assess the credibility* of the parties and witnesses (to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination).



Proposed § 106.46: Sex-Based Harassment

- Grievance procedures for complaints of sex-based harassment that involve a student (complainant *or* respondent) must adhere to requirements set forth in proposed §§ 106.45 **and** 106.46.
 - When a party is *both* a student and employee, make a fact-specific inquiry to determine whether the party's primary relationship is to receive an education and whether the alleged harassment occurred while the party was performing employment-related work.
- Incorporates requirements from current § 106.45 with modifications to afford protections appropriate to the age, maturity, independence, needs, and context of postsecondary students.



Proposed §106.46: Investigation

- Discretion re: expert witnesses
 - Permit experts; forbid experts; hire your own
 - The Department's view is that a postsecondary institution is in the best position to identify if a particular case would benefit from expert witnesses and should consider whether an expert witness would impede a prompt resolution.
- Discretion to decide whether to provide access to the relevant and not otherwise impermissible evidence *or* to provide an investigative report that accurately summarizes the same, and then provide access to the evidence if requested by one or more parties.
 - Allows more flexibility than current regulations in the manner of presenting evidence.
 - The requirement of equitable access to evidence extends to the mode of delivery (i.e., electronic, paper, etc.).
 - No specific timeframes; permits flexibility to set reasonable timeframes for ensuring that parties have a reasonable opportunity to review and respond to evidence.
- Requires “reasonable steps” to prevent unauthorized disclosures of information, but does not include any specific steps that an institution must take.



Proposed §106.46: Hearing Options

Credibility Assessments and Cross Examination: “A postsecondary institution must provide a process as specified in this subpart that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment.” -NPRM §106.46(f)(1)

Option 1

Decisionmaker asks the parties and witnesses relevant and not otherwise impermissible questions during individual meetings or at a live hearing.
NPRM §106.46(f)(1)(i)

Option 2

If institution proceeds with a live hearing, then it *must* allow the party’s **advisor** to ask any parties or witnesses all relevant and not otherwise impermissible questions. NPRM §106.46(f)(1)(ii)



Proposed § 106.46(g): Live hearings?

- Eliminates requirement of a live hearing with cross-examination.
 - Requires process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is in dispute and relevant.
 - Can be accomplished through a live hearing *or* individual meetings with the parties.
- If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position.
 - Prohibits the decisionmaker from drawing an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to questions relating to credibility.
- Clarifies that questions that are unclear or harassing of the party being questioned must be prohibited.
- Permits a postsecondary institution to impose other reasonable rules regarding decorum.



So, What Process Is Due?

- Proposed rule would lower the floor with respect to process prior to reaching a finding on sex-based misconduct/sanctioning.
- Sole-investigator/adjudicator model permitted.
- **This will have different effects regionally because different Circuit Courts have set different procedural due process floors.**

Consider Cross-Examination:

- Live adversarial cross-examination (Sixth & Third Circuits)
- Impartial questioning by a hearing panel (First Circuit)



Employment

- Proposed rule continues requirement that cases involving employees are subject to Title IX processes.
- Expands need for specialized processes to sex-based *discrimination* matters.
 - EE-on-EE cases would use a less stringent but still prescribed resolution process;
 - EE-on-student/student-on-EE sex-based harassment cases use a more heightened prescribed resolution process.
- **Final rule processes will need to be reconciled with collective bargaining agreements and faculty handbooks.**



Pregnancy

Response to notification of student's pregnancy (or related condition)



Pregnancy & Pregnancy-Related Conditions

- TIX Coordinator must implement, coordinate, and **document** all reasonable modifications made on behalf of pregnant students.
- When the Title IX coordinator is notified of a student's pregnancy, the Title IX coordinator must:
 - “promptly” inform the students regarding the institution's obligations in a number of areas
 - allow the student to take a voluntary leave of absence to cover, at a minimum, the period of time deemed medically necessary by the student's physician.
- When any employee is notified of a student's pregnancy, they must promptly inform the student how to notify the Title IX Coordinator



Training

All employees + individuals with Title IX responsibilities



Training

- **All employees** must be trained on:
 - the recipient’s obligation to address sex discrimination in its education program or activity,
 - the scope of conduct that constitutes sex discrimination (including the proposed definition of “sex-based harassment”), and
 - all applicable notification and information requirements under proposed §§ 106.40(b)(2) and 106.44
 - Issues related to pregnancy and parenting



Training

- **Investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures** must be trained on:
 - the topics on the prior slide;
 - institutional obligations and grievance procedures (conducting an investigation, hearings, appeals, and informal resolution process);
 - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
 - 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



Training

- **Facilitators of an informal resolution process** must be trained on:
 - the topics listed two slides ago;
 - the rules and practices associated with the recipient's informal resolution process; and
 - how to serve impartially, including by avoiding conflicts of interest and bias



Training

- **Title IX Coordinator and any designees** must be trained on:
 - all of the topics listed three slides ago;
 - their specific responsibilities;
 - recordkeeping requirements, and
 - “[a]ny other training necessary to coordinate the recipient’s compliance with Title IX”

Training materials continue to be required to be publicly posted on recipients' websites.



What should we be doing now?

- Define areas of change (and no change) and decision points
 - *Are there changes you might adopt now?*
- Identify limits (or opportunities) unique to your jurisdiction

