



TO: COSSBA

FROM: Robert Moran

DATE: August 12, 2022

RE: Summary of Title IX draft regulation issued by US Department of Education

***** Disclaimer:** This memo is not to be intended to be used as legal advice, but rather general information and as a summary of the proposed Title IX regulation. Entities reading this memo are highly encouraged to seek proper legal counsel in order to ensure compliance. ***

On July 12, 2022, the U.S. Department of Education (ED) issued a Notice of Proposed Rulemaking (NPRM) to update and rewrite the regulations implementing Title IX of the Education Amendments Act of 1972 (Title IX). When the law first passed in 1972, the Department of Health, Education and Welfare (the predecessor agency to ED and the U.S. Department of Health and Human Services) wrote the initial regulations implementing Title IX. These regulations were unchanged until the Trump Administration rewrote them in 2020. Previously, schools followed various sub-regulatory guidance issued by ED's Office of Civil Rights (OCR) that took the form of Dear Colleague Letters, publicly released letters to individual schools, monitoring ED enforcement actions, and numerous court cases to remain in compliance with the law.

Title IX requires schools to provide an education free from discrimination on the basis of sex. This means that a school must take prompt and effective action to end any sex discrimination that has occurred, prevent its recurrence, and remedy its effects. This typically involves a formal or informal investigation to determine events that occurred. If the investigation determines that an event of harassment or discrimination occurred, then the school typically conducts a grievance procedure in order to determine a remedy. However, remedies may occur outside of a grievance procedure. This is especially true when there is a pervasive culture influencing the educational environment.

ED held a week-long listening session in June of 2021 to receive feedback and comment on the 2020 regulations. In addition, OCR held listening sessions with a wide array of stakeholders later in 2021 followed by individual meetings in 2022. Stakeholders included students, parents, educators, state government representatives, advocates, lawyers, researchers, and representatives of elementary,



secondary, and postsecondary schools. These sessions and meetings informed the recently released NPRM.

Any school receiving “Federal financial assistance” must comply with Title IX and their corresponding regulations, or risk the loss of federal assistance. The NPRM notes that the definition of “Federal financial assistance” not only includes monetary assistance, but also any form of in-kind assistance. In addition, Title IX provides protections to students, teachers and employees in schools. In complying with the law, all school districts must have a Title IX coordinator.

In issuing the NPRM, ED highlighted that the proposed regulation would:

- Clearly protect students and employees from all forms of sex discrimination;
- Provide full protection from sex-based harassment;
- Protect the right of parents and guardians to support their elementary and secondary school children;
- Protect students and employees who are pregnant or have pregnancy-related conditions;
- Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities, and to prevent its recurrence and remedy its effects;
- Require schools to respond promptly to all complaints of sex discrimination with a fair and reliable process that includes trained, unbiased decision makers to evaluate all permissible evidence;
- Protect LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics;
- Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment;
- Clarify and confirm protection from retaliation for students, employees, and others who exercise their Title IX rights;
- Improve the adaptability of the regulations’ grievance procedure requirements so that all schools can implement Title IX’s promise of nondiscrimination fully and fairly in their educational environments; and
- Ensure that schools share their nondiscrimination policies with all students, employees, and other participants in their education programs or activities.

The following details highlight some of the more significant changes to the regulations from the NPRM. It is not an exhaustive explanation of all the responsibilities for schools, nor does it discuss every nuance in each category, but rather notes the most important details and changes made by the proposed regulations. Schools are encouraged to seek and consult with a lawyer in order to ensure compliance and for further details:

Definitions

ED is proposing to consolidate and alphabetically order all definitions into one section (proposed section 106.2) arguing that having them all in one place may reduce confusion. The following are the definitions that ED is either proposing as new or making some significant, non-technical changes:

- It is clarifying that the Administrative Law Judge is the person who resides over the hearing to determine a school's compliance with Title IX.
- A proposed new definition of a Confidential Employee that includes any employee whose communications are privileged under Federal or State law in the context of their job or an employee that has been designated by the school as a confidential resource for providing services to persons in connection with sex discrimination.
- Proposed definitions of Elementary School and Secondary School are to be defined separately, rather than the current inclusive definition, to 1) include public and private pre-schools in the definition of an elementary school, and 2) include an institution of vocational education. Both definitions continue to rely on section 8101 of the Elementary and Secondary Education Act definitions. ED believes that a separate definition for public or private pre-school is not necessary and that secondary students attending an institution of vocational education are not accounted for under current regulations.
- Student With a Disability is now defined by using the definition in the Rehabilitation Act or the Individuals with Disability Education Act (IDEA). In the NPRM, ED argues that it is important for schools to understand the intersection of their obligations under Title IX, IDEA, and the Rehabilitation Act.
- A new definition of Pregnancy or Related Conditions now includes pregnancy, childbirth, termination of pregnancy, or lactation and medical conditions or recovery from these conditions.
- A new/revised definition of Sex-Based Harassment (the current regulations use *Sexual Harassment*) that broadens the application and activity of harassment. The definition is broken into three categories: 1) *Quid pro quo harassment*, 2) *Hostile environment harassment*, and 3) *Specific offenses*.
 - Quid pro quo essentially follows the current regulatory structure of anyone employed, an agent of, or authorized by the school to provide an aid, benefit or service that conducts sexual harassment.
 - Hostile environment harassment is unwelcome sex-based conduct that creates a sufficiently severe or pervasive environment that denies or limits a person's ability to participate or benefit from the school's education program.

- *Specific Offenses* includes sex offenses defined under the uniform crime reporting system and are consistent with defined terms in other education law. They include:
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking

New Administrative Requirements

Designation of the Title IX Coordinator

Every school is required to assign at least one employee as the Title IX coordinator. This person is responsible for carrying out all Title IX compliance issues for the school. The proposed regulations would allow a school's Title IX coordinator to designate one or more designees to carry out some Title IX responsibilities; however, the Title IX coordinator must retain ultimate authority over all compliance actions. ED discusses that this will allow the Title IX coordinator for the school district to assign designees in each individual school, or a group of schools (i.e. all elementary schools) who might have the responsibility for training and ensuring grievance procedures are followed in a particular school. Another possibility is that the Title IX coordinator may appoint designees by compliance task. They may assign one individual to conduct training, another for pregnant and parenting students, or conducting grievance procedures.

A school must provide students with the contact information for the Title IX coordinator, how to report information that may be sex discrimination, how to make a complaint, and how to locate the school's grievance procedures.

Training

Currently, a school is only required to ensure that the Title IX coordinator, investigators, decision makers, and any person who facilitates an informal resolution process receive training on the definition of sexual harassment. ED's proposed regulations would require that ALL employees be trained on the school's obligations to address sex discrimination in its education program or activity, the scope of conduct that triggers sex discrimination, including the proposed definition of *sex-based harassment*, and all applicable notification and information requirements.

Investigators, decision makers, and other persons responsible for implementing the school's grievance procedure or who have the authority to modify or terminate supportive measures receive additional training, including how to be impartial and the meaning and application of the term "relevant." Finally, the Title IX coordinator must be trained on all matters related to the school's responsibilities, including their specific responsibilities on the school's recordkeeping system and any other item necessary to ensure a school or school district's compliance.

Students with Disabilities

ED is proposing a new section related to students with disabilities to ensure coordination of rights under Title IX and other education laws. Title IX coordinators must, therefore, consult with the IEP



team or the Section 504 team (from the Rehabilitation Act). ED notes that this will ensure that any supportive measures provided by the school may be tailored in ways that may not be obvious to the Title IX coordinator. Further, if the student with a disability is the respondent (one being accused of conducting sex-based harassment), the appropriate IEP or Section 504 team is involved in assuring the most appropriate outcome without infringing on the free and appropriate public education (FAPE) obligations provided that student under the IDEA or the Rehabilitation Act.

Recordkeeping

Schools are required to maintain certain records related to incidences of sexual harassment. The proposed regulations would broaden these record keeping requirements to better align with the proposed sex-based harassment definition. A school is required to maintain the following records for seven years:

- For each complaint, records documenting the informal resolution process or the grievance procedures and the final outcome.
- For each incident of conduct that may constitute sex discrimination of which the Title IX coordinator was notified, the records documenting the actions the school took to meet its Title IX obligations.
- All training material used. These documents must also be available on the school's website or available for public inspection if no website exists.
- All records documenting actions taken by the school to comply with pregnancy and related conditions requirements.

Required Actions

In general a school is required to take prompt and effective action to address any allegation of sex-based harassment. Under current regulations, a school is not obligated to investigate a possible harassment or discrimination event unless a formal complaint is lodged. This does not prevent the school from taking action if it knows of a possible event without a formal complaint; however, it is not obligated to do anything under Title IX without the formal complaint.

The proposed regulations would change that obligation and require action regardless of a formal complaint. The proposal requires all employees of a school to report any information possessed by that employee about conduct that may constitute sex discrimination or harassment under Title IX to the Title IX coordinator for investigation. Employees that are deemed *confidential employees* (see definition section) are not required to report this activity. The Department points out that the requirement of all employees reporting an incident to the Title IX coordinator is consistent with many state laws that designate employees of elementary and secondary schools as mandatory reporters of child abuse.

The proposed regulations follow closely to current regulations that clarify an employee does not need to have factual evidence of a potential harassment or discrimination event, but rather the employee has enough information that could reasonably lead to a potential harassment or discrimination event.

ED further notes that the required training provided to employees will help them better recognize when they have sufficient information.

While ED or the proposed regulations do not require schools to monitor the online presence of its students, should an employee become aware of online conduct that may potentially be harassing or discriminatory and disrupt the environment of the educational program or activity of another student, they are required to report that activity to the Title IX coordinator.

Title IX Coordinator Requirements

Since the Title IX coordinator is ultimately the school's responsible employee to ensure compliance with Title IX law, ED has clarified the responsibilities of the coordinator that expands the current regulation. Under current regulation, the Title IX coordinator must promptly contact the complainant to discuss supportive measures and to explain the process of filing a formal complaint. Upon the filing of a formal complaint, the school must follow the grievance procedure that complies with current regulations overseen by the Title IX coordinator.

The proposed regulations clarify that the Title IX coordinator must treat the complainant and the respondent equitably; notify the complainant of the grievance procedure and, if a formal complaint is made, notify the respondent of the complaint procedure; offer and coordinate supportive measures, as appropriate to the complainant and respondent to ensure access to school's education program or activity; initiate grievance procedures or an informal resolution process upon receipt of a formal complaint; if no formal complaint is received, determine whether to start a complaint of sex discrimination and grievance procedures in order to address sex discrimination in the school's program or activity; and take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur.

The proposed regulations discuss possible circumstances or conditions where a Title IX coordinator may initiate grievance procedures in the absence of a formal complaint. ED suggests that if the risk of additional sex discrimination may continue, the severity of the alleged sex discrimination (i.e. violence, threat of violence or the use of weapons), the age and relationship of the parties, scope of alleged sex discrimination that suggests a pattern, ongoing sex discrimination or involved multiple individuals whose environment may have been effected are all generally good reasons for why a Title IX coordinator may initiate procedures without a formal complaint.

ED acknowledges in the NPRM that it may be difficult to ensure that discrimination or harassment does not continue to occur, but the school is obligated to provide an educational program or activity free from sex discrimination. As such, the Title IX coordinator is responsible to ensure that the school is taking appropriate steps toward this goal. According to ED's discussion, this includes the Title IX coordinator vigilantly reviewing school policies and procedures for all possible hurdles and weaknesses. The proposed regulations do not proscribe any particular actions to meet this effort; however, ED does discuss the Title IX coordinator reviewing whether provided training is sufficient

and effective, whether policies are being followed properly so as not to discourage reporting, and conducting climate surveys.

Supportive Measures

Supportive measures are accommodations provided to students in order to improve the environment and access to the educational program or activity being offered by the school. The proposed regulations do not impose any specific solution or require one measure or a set of measures for all situations as circumstances are unique to each situation and the individuals involved. However, Title IX coordinators, as discussed, are required to provide such measures to all involved individuals, as appropriate. Examples of supportive measures include change in class schedules, counseling, deadline extensions, and escorts. Supportive measures that inconvenience or burden the respondent may be taken, but are limited only to the period during which the grievance procedures are occurring and must end at the termination of that process, and are not to be imposed as punitive or disciplinary in nature.

Each individual provided supportive measures must have the opportunity to appeal, modify, or terminate the measures and that appeal must be heard and decided by an impartial employee – someone who had not made the original decision. Any supportive measures being determined for a student with a disability, whether they are the complainant or respondent, must involve the appropriate IEP or Section 504 team to ensure the measures align with and are sensitive to the student’s individual needs and educational plans. The school is not to inform others of any supportive measures being taken other than the affected student except where it is necessary to ensure the measure is implemented appropriately.

Grievance Procedures

All schools must have a written grievance procedure that includes the following items:

- The treatment of the complainant and the respondent must be equitable;
- The Title IX coordinator, investigator, or decision maker do not have a conflict of interest in the matter;
- Include a presumption that the respondent is not responsible until an investigation and determination are made;
- Establish timeframes for the major stages of the process, which typically include evaluation (the school’s process for determining whether to dismiss or investigate), the investigation, determination and appeal;
- Take steps to protect the privacy of all parties involved;
- Require an objective evaluation of all relevant evidence;
- A discussion of types of excluded evidence;
- Allegation notice process;
- How a case may be dismissed;
- The investigation process;
- Any additional provisions (these must be equitable to all parties);



- The information resolution process; and
- A discussion of the range of supportive measures.

The proposed regulations provide a framework for how a school must notify the involved parties. Upon the initiation of the grievance procedure, the school must provide notice to all known parties. The notice must include the written grievance procedure and any informal resolution process; information related to the parties involved, the alleged conduct, the date and time of the alleged conduct, if known; and a statement that retaliation is prohibited.

The school must provide for an adequate, reliable and impartial investigation of complaints by ensuring the burden is on the school and not on the parties to conduct the investigation. The school must also provide equal opportunity for parties to present evidence and review that evidence to determine what is relevant and what is not. The school is to inform both parties of decisions made on the presented evidence and allow for response.

In determining whether sex discrimination occurred, the school must use the preponderance of the evidence standard to reach a final decision, unless the school uses the clear and convincing evidence standard for other comparable proceedings. (The Department does not further elaborate on what might constitute other comparable proceedings.) The school must notify the parties of the outcome and the Title IX coordinator is to take the appropriate remedial action if it was determined that discrimination did occur and ensure that it does not happen again. If it is determined that discrimination did NOT occur, no punitive actions may be taken toward the complainant.

The proposed regulations outline a similar process of grievance procedures for sex-based harassment to the above reference requirements for sex discrimination.

Pregnancy and Related Conditions

While schools have been required to ensure that students who become pregnant or taking care of an infant after birth are not to be discriminated against under Title IX, the proposed regulations and the accompanying discussion by ED spend a great deal of time on pregnancy, related conditions, and parental status. ED points out that the initial regulations issued by the Department of Health, Education, and Welfare back in the '70s protected students and employees who were pregnant. However, this part of the regulations has not been updated for nearly 50 years and over that time much has been learned about the standards and treatment of students and employees who are pregnant or have babies. As such, ED clarifies what is covered under pregnancy and related conditions by creating a new definition (see definition section) and updating the requirements on schools for students and employees.

With regard to related conditions, ED argues that medical conditions related to pregnancy, such as gestational diabetes, preeclampsia, severe nausea and vomiting, mastitis, and others, exposes students to the potential of further discrimination. As such, ED clarifies that Title IX protects related medical conditions.

ED also clarifies that schools must provide the student with the option of reasonable modifications to policies, practices, or procedures due to pregnancy or related conditions, allow voluntary leaves of absence beyond the medically necessary minimum, and ensure access to a private and sanitary lactation space that is not a bathroom.

LGBTQI+

While the proposed regulations provide a new definition of *sexual harassment* and change the term to *sex-based harassment*, the proposed section 106.10, entitled Scope, states:

“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.”

The proposed Title IX rules would clarify for the first time that “sex discrimination” under Title IX includes discrimination based on sexual orientation, gender identity, sex-related characteristics (including intersex traits), status as transgender or nonbinary, or sex stereotypes. This simply means that LGBTQI+ students must be allowed to participate fully in school—and when a school’s policy or practice stops students from participating because of their gender identity or transgender status, that is generally harmful and will violate Title IX. The proposed rules would make clear that while schools may generally maintain separate boys’ and girls’ or men’s and women’s restrooms, they may not deny students access to facilities that are consistent with their gender.

ED indicated that they will be issuing a separate proposed rule relating to athletics, implying that the current proposed regulations would not apply to extracurricular athletics.