

# 2024 Title IX Regulations

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# Title IX Regulations: The Basics

- Title IX of the Educational Amendments Act of 1973
- Prohibits discrimination “on the basis of sex” in covered institutions’ education programs or activities.
- Spending Clause legislation

# Title IX Regulations: How did we get here?

- President Nixon signs Title IX into law in 1973
- SCOTUS decisions of late 1990s
- Dept. of Education's 2001 "Dear Colleague" Letter
- Dept. of Education's 2011 "Dear Colleague" Letter
- Trump-era 2020 Regulations
- Revised regulations proposed in July 2022
- New, final regulations issued on April 19, 2024
- Effective August 1, 2024

# Title IX Regulations: The Basics

- How are Title IX regulations enforced?
  - Office for Civil Rights (“OCR”) administrative process
  - Private right of action by private litigants
  - State laws
    - Anti-discrimination laws (e.g. PHRA)
    - Tort laws
    - Implied-in-Fact contract law

# New Regulations: Themes

- Expanded Protections
  - More protected categories
  - More conduct covered
- Expanded Responsibilities
  - More specific required responses (e.g., pregnancy)
  - More triggering events
  - More training required
- Increased Institutional Flexibility

# Expanded Protections

- Gender identity and sexual orientation (106.10, 106.31(a)(2))
  - Aligns Dept. of Education with *Bostock v. Clayton County* holding.
  - Prohibits discrimination that subjects a person to “more than *de minimis* harm” because of their gender identity.
  - “Adopting 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.”
    - “A recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than *de minimis* harm.”

# Expanded Protections

- Gender identity and sexual orientation (106.10, 106.31(a)(2))
  - Maintains exceptions for religious institutions, sex-specific fraternities, and sex-segregated housing assignments.
  - Does not address athletic participation, which will be addressed by a separate set of regulations.



# Expanded Protections

- Parental status, marital status, pregnancy or related conditions (106.21(c), 106.40, and 106.57).
- Definition of “pregnancy or related conditions” includes:
  - Pregnancy, childbirth, termination of pregnancy, or lactation
  - Related medical conditions
  - Recovery from pregnancy, childbirth, termination of pregnancy, or lactation.

# Expanded Protections

- Specific institutional responsibilities regarding pregnancy or related conditions (106.40(b)):
  - Any employee who learns of a student's pregnancy or related conditions must:
    - Provide Title IX Coordinator's contact information; and
    - Inform the student that the Title IX Coordinator can provide reasonable accommodations for the student.
  - Institutions will have to provide all employees with training about this.
  - Institutions would be wise to develop a form regarding this issue.

# Expanded Protections

- Specific institutional responsibilities regarding pregnancy or related conditions (106.40(b)):
  - Title IX Coordinator must implement reasonable accommodations:
    - Breaks to express breast milk
    - Eating, drinking, and restroom use
    - Intermittent absences to attend medical appointments
    - Access to online or homebound education, if necessary
    - Schedule changes (courses, tests, or examinations)
    - Sitting or standing permission
    - Counseling
    - Changes in physical space or supplies (e.g., larger desk or access to a footrest)
    - Elevator Access

# Expanded Protections

- Specific institutional responsibilities regarding pregnancy or related conditions (106.40(b)):
  - Title IX Coordinator must implement reasonable accommodations:
    - Lactation Space
      - Cannot be a bathroom
      - Must be clean and private
    - Voluntary access to separate and comparable portion of program or activity
    - Voluntary leave of absence
  - Must treat pregnancy the same as other temporary medical conditions.
  - Limitations on requests for supporting documentation

# Expanded Responsibilities

- Under 2020 regulations, institutions required to respond to sex discrimination only if they had “actual notice.”
- New regulations greatly expand institutions’ responsibility to respond to allegations of sex discrimination or sex-based harassment.

# Expanded Responsibilities

- Three-tiered approach to triggering institution's response (106.44(c)):
  - Tier One: administrative leadership, teaching or advising employees, or employees who have the authority to institute disciplinary action:
    - Must notify Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination.
  - Tier Two: all other employees who are not confidential reporters:
    - Must notify Title IX Coordinator or provide complainant with Title IX Coordinator's contact information and how to initiate grievance procedure.
  - Tier Three: Confidential Reporters
    - No reporting obligation
    - But must inform complainant regarding how to contact Title IX Coordinator and that Title IX Coordination may be able to offer supportive measures, informal resolution process, or investigation.

# Expanded Responsibilities

- Title IX Coordinator
  - Pregnancy or Pregnancy-Related Conditions
    - May also apply to employees, not just students.
    - Might require coordination with Human Resources
  - Training
    - All employees regarding their duty to report
    - Confidential reporters' expanded responsibilities
  - Identify and Address Barriers to Reporting (106.44(b))
    - Nothing specific
    - Technical guidance from OCR might be forthcoming

# Expanded Responsibilities

- Sex-based harassment defined (106.2)
  - Quid Pro Quo Harassment, same as 2020 regulations
- Hostile environment harassment, very different
  - 2020 = “Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively** offensive that it effectively denies a personal equal access to the recipient’s education program or activity.”
  - 2024 = “Unwelcome sex-based 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.”
    - Five factors to evaluate.



# Expanded Responsibilities

- Sex-based harassment defined (106.2)
  - Specific offenses
    - Sexual Assault
      - No required definition of “consent”
    - Dating Violence
    - Domestic Violence
    - Stalking

# Expanded Responsibilities

- Off Campus Conduct (106.11)
  - 2020 = covered only if the institution “exercised control over both the respondent and the context in which the conduct is alleged to have occurred”
  - 2024 = covered if conduct occurred “under education programs or activities”; co-extensive with broadest application of non-Title IX discipline
    - Does your Student Code of Conduct cover off campus conduct?
    - Conduct rules for athletic teams, clubs, or Greek life?
    - This is a subject about which institutions will have to make philosophical or culture-based decisions.

# Expanded Responsibilities

- Study Abroad Conduct (106.11)
  - 2020 regulations = protections apply only to conduct occurring within the United States.
  - 2024 regulations = protections apply “even when some conduct . . . occurred outside the recipient’s education program or activity or outside the United States.”
    - Conduct outside the U.S. can violate institution’s policy.
    - “Even conduct outside the institution’s education program or activity can violate policy, so long as it causes an effect within the institution’s education programs or activities.”

# Expanded Responsibilities

- Complaint (106.2)
  - To file a complaint, the complainant must have been “participating or attempting to participate in the [institution’s] education program or activity ***at the time of the alleged act of sex discrimination.***”
  - Under 2020 regulation, the complainant had to have been participating in or attempting to participate “***[a]t the time of filing a formal complaint. . . .***”

# Increased Institutional Flexibility

- Supportive Measures (106.2)
  - Under 2020 regulations, supportive measures could not “unreasonably burden” the other party at all.
  - Under 2024 regulations, supportive measures may be implemented, even if they burden another party, if:
    - To restore or preserve the party’s access to the institution’s education programs or services;
    - Designed to protect the safety of the party’s or the institution’s educational environment; or
    - To provide support during the grievance or informal resolution process.
  - But decision regarding supportive measures is subject to appeal by the other party. (106.44(g)(4)).
    - Which was not required by the 2020 regulations.

# Increased Institutional Flexibility

- Informal Resolution Process (106.44(k))
  - May be offered without filing of complaint
  - May be offered at any time before determination of whether sex discrimination has occurred
  - May be offered for any form of alleged sexual misconduct at an institution of higher education
    - 2020 regulations prohibited informal resolution of allegations that college employee had engaged in sex discrimination of college student.
  - Institution has the authority to decline to offer informal resolution when it determines that there is a future risk of harm to others.

# Increased Institutional Flexibility

- Complaint (no longer “Formal Complaint”) (106.2)
  - No longer required to be written and signed by the complainant.
  - “An oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged [sex] discrimination. . . .”
    - Can be made to any employee, not just Title IX Coordinator
      - Another training requirement

# Increased Institutional Flexibility

- Title IX Coordinator's Authority to Issue Complaint (106.44(f)(v)(A)(1-8)
  - 2020 regulations required if failure to do would be considered "deliberately indifferent"
  - 2024 regulations require fact specific analysis:
    - Complainant's request not to proceed;
    - Complainant's reasonable safety concerns related to initiation of complaint;
    - Risk that additional sex discrimination will occur without complaint;
    - Severity of allegations, including whether responsibility finding would require respondent's removal from campus;
    - Age and relationship of parties, and whether respondent is employee;
    - Ongoing conduct;
    - Availability of other evidence besides complainant's testimony.



# Increased Institutional Flexibility

- Title IX Coordinator's Authority to Issue Complaint (106.44(f)(v)(A)(1-8))
  - Contact complainant before initiating complaint over complainant's objections.
    - Heightened supportive measures required.
    - Address "reasonable concerns about the complainant's safety or the safety of others. . . ."
  - No obligation to initiate complaint if the alleged conduct could not constitute sex discrimination.

# Increased Institutional Flexibility

- Emergency Removals (106.44(h))
  - 2020
    - Only permitted upon individualized safety and risk analysis.
    - And only upon determination of “an immediate threat to the physical health or safety of any student or other individual. . . .”
  - 2024
    - Individualized safety and risk analysis still required.
    - But now removal is permitted upon determination of “an imminent and serious threat to the health or safety of a complaint, or any students, employees or other persons. . . .”
- Administrative Leave
  - Unchanged

# Increased Institutional Flexibility

- Single Decision-Maker Model Permitted (106.45(b)(2))
  - Under 2020 regulations, investigation and decision-making had to be separated.
  - 2024 regulations, however, state: “The decisionmaker may be the same person as the Title IX Coordinator or investigator.”
    - Can be different people.
    - Single decision-maker model can be less expensive and faster.

# Increased Institutional Flexibility

- 106.45 (Sex Discrimination) vs. 106.46 (Sex-Based Harassment Involving a Student)
- This is where things get a little tricky.
- Procedural Requirements
  - Can be different based on type of allegation

# Increased Institutional Flexibility

- Sex Discrimination Procedural Requirements (106.45)
- This stuff applies to all grievance procedures.
- A lot is similar to 2020 regulations.

# Increased Institutional Flexibility

- Sex Discrimination Procedural Requirements (106.45)
  - Equitable treatment of complainants and respondents
  - No conflict of interest or bias by Title IX Coordinator, investigator, or decisionmaker
  - Trained decisionmaker, Title IX Coordinator, and investigators
  - Presumption of respondents' non-responsibility
  - Objective evaluation of relevant evidence only
  - Notice of allegations to parties
  - Burden on the institution, not the parties, to gather evidence
  - Equal opportunities to present fact witnesses and other evidence
  - Use of the preponderance of the evidence standard
  - Remedies designed to restore complainant's equal access

# Increased Institutional Flexibility

- What's different about sex discrimination procedural requirements (106.45)?
  - Reasonably prompt time frames for all major stages (106.45(b)(4))
    - Gone are the two required 10-day waiting periods.
  - Reasonable steps to protect privacy of parties and witnesses and unauthorized disclosure of investigative materials (106.45(b)(5))
    - But it appears strong non-disclosure agreements likely will not be enforceable and could violate 106.45(b)(5) if they would result in evidence not being disclosed.
    - Institutions should focus on technological techniques for preventing parties from disclosing evidence obtained solely from the institution's investigation.

# Increased Institutional Flexibility

- What's different about sex discrimination procedural requirements (106.45)?
  - Permitted dismissals (106.45(d))
    - If institution is unable to identify respondent after undertaking reasonable steps
    - If respondent is not participating in the institution's education program or activity or is not employed by the institution
    - If the complainant withdraws any or all of the allegations in the complaint and the Title IX Coordinator declines to initiate a complaint
    - If the institution determines that the allegations would not constitute sex discrimination under Title IX, even if the allegations were to be proven
  - No required dismissals!
    - Different from 2020 regulations.



# Increased Institutional Flexibility

- What's different about sex discrimination procedural requirements (106.45)?
  - Equal opportunity for the parties to access the relevant and not otherwise impermissible evidence (106.45(f)(4))
    - 2020 regulations required the disclosure of all “directly related evidence.”
    - 2024 regulations only require disclosure of “relevant evidence.”
      - Defined as “related to the allegations of sex discrimination under investigation” and “evidence . . . [that] may aid a decisionmaker in determining whether the alleged sex discrimination occurred.”
    - 2020 regulations arguably permitted disclosure of evidence subject to rape shield exclusion; 2024 regulations do not permit the disclosure of such evidence.
      - Same approach for treatment records, unless written consent is provided, and privileged documents.

# Increased Institutional Flexibility

- What's different about sex discrimination procedural requirements (106.45)?
  - Written Decisions
    - 2020 Regulations
      - Identification of allegations potentially constituting sex discrimination
      - Description of the procedural steps from formal complaint through to the live hearing
      - Findings of fact supporting the determination of the decisionmaker
      - Conclusions regarding the application of the facts to the policy requirements
      - Statement of the rationale regarding responsibility determination and any sanction imposed
      - Description of the basis and procedure for appealing
      - Written decision provided to the parties simultaneously

# Increased Institutional Flexibility

- What's different about sex discrimination procedural requirements (106.45)?
  - Written Decisions (106.45(h)(2))
    - 2024 Regulations
      - Written decision still required
      - Determination of the decisionmaker
      - Statement of the rationale regarding responsibility determination
        - But not sanction
      - Description of the basis and procedure for appealing
      - Provided to all parties (might not have to be simultaneous)
    - You can, and maybe should consider, sticking to 2020 regulations' more detailed requirements.
    - Remember, we're only talking about general sex discrimination requirements.
    - More relaxed rules don't apply to sex-based harassment cases involving a student.

# Increased Institutional Flexibility

- What's different about sex discrimination procedural requirements (106.45)?
  - Live Hearings (106.45(g))
    - 2020 Regulations
      - All cases required a live hearing at colleges and universities
    - 2024 Regulations
      - No live hearings required.
      - But institution must “provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party’s or witness’s credibility is in dispute and relevant to evaluating one or more allegations of sex discrimination.”
        - Can be in writing.
      - Institutions looking for uniformity will have to consider whether to match the 106.45 (general sex discrimination) process to their 106.46 (sex-based harassment involving a student) process.
      - Consider involving legal counsel in the 106.45 decision-making process.

# Increased Institutional Flexibility

- What's different about sex discrimination procedural requirements (106.45)?
  - Supportive Measures and Remedies (106.45(I))
    - 2020 regulations required Title IX policy to list potential remedies.
    - 2024 regulations
      - For allegations of sex-based harassment (quid pro quo, hostile environment, sexual assault, dating violence, domestic violence, and sex-based stalking) that do not involve a student:
        - Grievance policy must describe supportive measures available to complainants and respondents.
        - Grievance policy must list, or describe the range of, possible disciplinary sanctions and other remedies that could be imposed.

# Increased Institutional Flexibility

- 106.46 Resolution Process
  - Special procedure for allegations of (1) sex-based harassment, that (2) involve a student
    - Sex-Based Harassment
      - Quid Pro Quo Harassment
      - Hostile Environment
      - Sexual Assault
      - Dating Violence
      - Domestic Violence
      - Stalking
    - Involving a student
      - Either as a complainant or a respondent (but not as a mere witness)
      - Student employees? Look to the “primary relationship” and consider context of allegations (106.46(b))

# Increased Institutional Flexibility

- 106.46 Resolution Process
  - Some requirements will sound pretty familiar:
    - Written notice informing the parties of the allegations, dismissal process, delays, meetings, and proceedings (106.46(c), (d), (e)(1), and (e)(5))
    - Equal opportunity to have advisor at any meetings (106.46(e)(2))
    - Equal opportunity for the parties to have a non-advisor, if any, present at meetings of proceedings (106.46(e)(3))
    - Written decision (106.46(h)), provided to the parties simultaneously, which includes:
      - Description of the allegations
      - Lists relevant policies and procedures
      - Contains evaluation of the relevant evidence
      - Contains determination
      - If responsible, description of the sanctions
      - Description of appeal rights and procedure

# Increased Institutional Flexibility

- 106.46 Resolution Process
  - Some matters are fairly different from what the 2020 process required:
    - Permit, but don't require, expert witnesses (106.46(e)(4))
    - Reasonable extensions of time on a case-by-case basis with written notice to all parties including the reason for the delay (106.46(e)(5))
    - Equal opportunity for each party to access relevant evidence or a written report describing relevant evidence and to respond to that evidence (106.46(e)(6))
      - 2020 = “directly related”; 2024 = “relevant and not otherwise impermissible”
      - Written report can be provided initially in lieu of evidence disclosure.
        - But access to evidence is required upon request of any party.
      - Reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through grievance process.
        - Warning
        - Technological steps



# Increased Institutional Flexibility

- 106.46 Resolution Process
- What about the live hearing?
- **INSTITUTIONS ARE NOT REQUIRED TO HAVE A LIVE HEARING!!!**
  - Although live hearings are permitted.

# Increased Institutional Flexibility

- 106.46 Resolution Process
  - If no live hearing, institution still needs a process for questioning parties and witnesses when credibility is in dispute and relevant (106.46(f)(1)(i)):
    - Allow investigator or decisionmaker to ask relevant and not otherwise impermissible questions during individual meetings with witnesses or parties.
    - Allow each party to propose relevant and not otherwise impermissible questions that the party wants asked of any party or witness and have those questions asked by decisionmaker or investigator during individual meetings, including follow-up meetings.
    - Provide each party with an audio or audiovisual recording or transcript of any individual meetings with enough time to propose follow up questions.

# Increased Institutional Flexibility

- 106.46 Resolution Process
  - If live hearing used, institution still needs a process for questioning parties and witnesses when credibility is in dispute and relevant (106.46(f)(1)(ii)):
    - Establish a process for asking relevant and not otherwise impermissible questions during individual meetings.
    - Allow each party to propose relevant and not otherwise impermissible questions that the party wants asked of any party or witness and have those questions asked by decisionmaker or investigator during the live hearing; or
    - Allow advisors for parties to ask questions during live hearing.
      - But if you allow advisors to ask the questions, then the institution must make sure each party has an advisor.
      - If party doesn't have one, institution must appoint one free of charge.

# Increased Institutional Flexibility

- Appeal Process
  - Same for 106.45 and 106.46 procedures
  - Mostly the same appeal basis as required under 2020 regulations:
    - Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias.
    - New evidence that was not reasonably available when the determination was made
    - Procedural irregularity
  - “Harmless error” is not enough. Error must have affected determination outcome, even more so now.
    - 2020 = “could have affected the outcome”
    - 2024 = “would change the outcome”

# Final Considerations

- Most Significant Practical Consequences of New Regulations
  - Institutions' responsibility to respond extends far beyond what we currently think of when we say, "Title IX."
  - HR procedures can usually be applied to employee-only allegations.
    - But institution must put in policy which procedures apply to which contexts.
  - Single investigator/decisionmaker model is permitted.
  - No live hearings required.
  - No cross examination by parties' advisor is required.
  - No required appointment of advisors for parties (potentially).
  - You can (mostly) keep your Title IX policy the way it is, but you can make significant changes to speed up the process and cut down on the costs.

# Final Considerations

- August 1, 2024 effective date.
- No Retroactive Application
  - “The final regulations apply only to sex discrimination that allegedly occurred on or after August 1, 2024.”
  - “With respect to sex discrimination that allegedly occurred prior to August 1, 2024, regardless of when the sex discrimination was reported, the Department will evaluate the recipient’s compliance against the Title IX statute and Title IX regulations in place at the time that the alleged sex discrimination occurred.”
- So, if the event occurred before August 1, 2024, apply the 2020 regulations. If after, apply the 2024 regulations.

# Final Considerations

- Court challenges?
  - Texas Governor Gregg Abbott has already filed suit in the U.S. District Court for the Northern District of Texas challenging LGBTQ protections.
  - Other entities likely will challenge procedural aspects.
  - Plus, SCOTUS is about to decide *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce*
    - Addressing *Chevron* Deference

# Resources

- Department of Education's summary of regulatory provisions: [Summary of Major Provisions of the Department of Education's Title IX Notice of Proposed Rulemaking \(PDF\)](#)
- Department of Education's resource page for assistance drafting compliant policies: [Resource for Drafting Nondiscrimination Policies, Notices of Nondiscrimination, and Grievance Procedures under 2024 Amendments to the U.S. Department of Education's Title IX Regulations](#)
- But please make sure to work with your legal counsel.



Questions?



Thank you!

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