The Proposed Changes to the Title IX Regulations

Agenda
- Where we are
  - Title IX overview
  - Regulatory process
- Where we are going
  - Proposed regulations
  - Notice and Comment period
- What should we do now?

The Proposed Regulations
- Just a draft
- Current rules STILL IN EFFECT
- Not about athletics and gender identity (coming later)
Regulatory Process

Notice of Proposed Rulemaking
- OIRA
- Dept of Justice
Published in Federal Register
Notice and Comment period
Finalization
Post-finalization

What is Prohibited?

Sex Discrimination
- sex stereotypes
- sex characteristics
- pregnancy or related conditions
- sexual orientation
- gender identity

Sex-based harassment
- Sexual harassment;
  - Quid pro quo
  - Hostile environment
  - Sexual assault, dating violence, domestic violence and stalking
  - Harassment based on sex discrimination (see above)

Sex-Based Harassment Defined

Quid pro quo
- when an employee or other person authorized by a recipient to provide an aid, benefit, or service explicitly or impliedly conditions that aid, benefit or service on a person's participation in unwelcome sexual conduct

Specific Offense
- sexual assault
- dating violence
- domestic violence
- stalking

Hostile environment
- unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity
Who Must Report

2001 Guidance

Responsible Employees: Employee with authority to take action, given duty of reporting misconduct; or student would reasonably believe has this authority.

2020 Regulations

Officials with Authority to institute corrective measures.

2022 Proposed Regulations

Employees with authority to take corrective action or, for incidents involving students, has responsibility for administrative leadership, teaching, or advising.

or all other employees...

Reporting Requirements (Post-Secondary)

<table>
<thead>
<tr>
<th>Employee Role</th>
<th>Involving</th>
<th>Notify T9</th>
<th>Provide T9 info</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confidential Employee</td>
<td>Student or Employee</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Employee with ability to institute corrective measures</td>
<td>Student or Employee</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Employee responsible for administrative leadership, teaching, or advising</td>
<td>Student</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Employee responsible for administrative leadership, teaching, or advising</td>
<td>Employee</td>
<td>Yes OR Yes</td>
<td></td>
</tr>
<tr>
<td>All other employees</td>
<td>Student or Employee</td>
<td>Yes OR Yes</td>
<td></td>
</tr>
</tbody>
</table>

Must report?

- Employee or student tells chaplain: NO
- Student tells Dean of Students who happens to be ordained minister? YES
- Student tells advisor to outdoor program: YES
- Student worker tells student working as a supervisor: YES
- Student living off campus tells friend that happens to be an RA: NO
- RA continues to be a CSA for Clery purposes
- Student tells neighbor who happens to be a professor: YES!
- Student tells housekeeper in building: YES to EITHER tell OR provide Title IX Coordinator contact information
- Employee tells colleague? YES, unless colleague is an administrator, teacher, or advisor and then can EITHER tell OR provide Title IX Coordinator contact information
- Employee tells any other employee: YES to EITHER tell OR provide contact information
Confidential Employees DEFINED

PRIVILEGED (IN ROLE)  DESIGNATED (WHEN PROVIDING SERVICES)  HUMAN-SUBJECTS RESEARCH ON SEX DISCRIMINATION

Notification Requirement

“Must notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.”

Jurisdictional of Location Changes

A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.

Outside the US?  Off campus?  Still includes student orgs
ADDITIONAL TIDBITS...

- Can have temporary Supportive Measures that “burden” a respondent (with some parameters)
- While different treatment is permissible, cannot cause more than “de minimis harm”
- Permissive dismissal (not mandatory dismissal)
- Complaint can be written or oral (and not formal)
- Informal is option without “formal” complaint

Two Grievance Procedures

Procedure A (106.45)
- Sex Discrimination
- Employee on Employee Harassment

Procedure B (106.46)
- Sexual Harassment involving students
- K-12 Sex Discrimination

Comparing Notice

<table>
<thead>
<tr>
<th>Requirement</th>
<th>NEW 106.45 (DOES NOT NEED TO BE IN WRITING)</th>
<th>NEW 106.46</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grievance Procedures</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>“Sufficient details” (parties, conduct, date, location)</td>
<td>YES “Sufficient information”</td>
<td>YES</td>
</tr>
<tr>
<td>Statement that retaliation prohibited</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>Respondent is presumed not responsible</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>Right to advisor of choice</td>
<td></td>
<td>YES</td>
</tr>
<tr>
<td>Right to inspect and review evidence</td>
<td>YES (Evidence OR summary in report with evidence by request)</td>
<td>YES</td>
</tr>
<tr>
<td>Prohibition on false statements*</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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New Proposed 106.45

1. Investigate
2. Determine relevant evidence
3. Provide "description" of evidence
4. Provide process to adequately evaluate
5. Make determination by evaluating evidence
6. Notify parties of outcome
7. If occurred, provide remedies and prevent future discrimination

New Proposed 106.46

1. Written notice of meetings and time to prepare
2. Can allow experts as long as equitable
3. Same opportunity for advisors
4. Reasonable extensions of time with written notice
5. To parties and advisors, provide evidence
6. Ability to respond (but may be at hearing)
7. Prevent unauthorized disclosure

New Proposed 106.46 – Process for evaluating allegations and assessing credibility

- No requirement for live hearing
- Decision-maker can ask questions at individual meetings or at live hearing
  - Ask parties and witnesses relevant questions and follow-up questions including questions challenging credibility
  - Allow each party to propose relevant questions and follow-up questions
- If allow live hearing with advisor questions...
  - No questioning by 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.
Procedural irregularity that would change the determination of whether sex-based harassment occurred

New evidence that would change the outcome of the matter and that was not reasonably available at the time the determination of whether sex-based harassment occurred or dismissal was made

Title IX Coordinator, investigator, or decision-maker had conflict of interest or bias that would change the outcome

Pregnancy and Parental Status Discrimination

- Sections applying to Employees and Students
- Lactation time and space
- Comparable treatment to temporary disabilities or conditions
- When employee informed of student pregnancy . . . promptly informs that person of how to notify the Title IX Coordinator
- When Title IX learns . . . must inform student
  - prohibit sex discrimination
  - reasonable modifications
  - Allow access to separate and comparable program or activity
  - Allow voluntary leave of absence
  - Lactation space
  - Grievance procedures

REMINDERS!

It’s a DRAFT
Nothing changes NOW
But...how do you address Sex DISCRIMINATION?
Directed Questions from OCR

- FERPA
  - Intersection between the proposed Title IX regulations and FERPA, any challenges, and any steps the Department might take to address those challenges

- Single Investigator
  - Experiences using that model and steps taken to ensure adequate, reliable, and impartial investigation (from parties and advisors)

- Standard of proof
  - Preponderance or Clear and Convincing?

WHAT SHOULD I DO NOW?

- What should I do now?
  - Consider the implications of the proposed Title IX regulations
  - Plan for the implementation of the new policies

- What should I do next?
  - Communicate with stakeholders
  - Seek legal advice

- What should I do if I disagree with the proposed regulations?
  - File a complaint
  - Seek alternative solutions