

Alerts & Articles

U.S. Department of Education Issues Long-Awaited Final Title IX Regulations

04.24.2024

On Friday, April 19, 2024, the U.S. Department of Education (“Department”) released the highly anticipated Final Title IX Regulations. These Final Title IX Regulations come after the Department released the proposed regulations in July 2022. The new regulations (herein also referred to as the “2024 Title IX Regulations”) go into effect on August 1, 2024, and apply to complaints of sex discrimination regarding alleged conduct that occurs on or after that date.

As many recall, the 2020 Title IX regulations presented a dramatic overhaul to the Title IX grievance process, including significant changes to definitions and grievance process requirements. Now, the 2024 Final Title IX regulations retain many of the definitions and procedures introduced four years ago, although, as explained below, there are a number of significant changes applicable to both K-12 and postsecondary educational institutions. The following is a summary of some of these changes:

Changes to Definitions:

Complaint: A “complaint” is defined as an *oral or written* request that can objectively be understood to be a request to investigate and prepare a decision regarding discrimination based on sex, including harassment. Sex-based discrimination also now includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. Note, however, that comments shared at “public awareness events” at a postsecondary educational institution (“postsecondary institution”) do not constitute complaints.

ATTORNEYS



Mellissa E. Gallegos
Partner
mgallegos@aalrr.com
562-653-3200



Anna J. Miller
Partner
amiller@aalrr.com
916-923-1200

U.S. Department of Education Issues Long-Awaited Final Title IX Regulations

Hostile Environment Harassment: A hostile environment occurs when there is unwelcome sex-based conduct that, given the totality of the circumstances, is subjectively and objectively offensive and 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. Note that this definition of hostile environment harassment is a significant change from the 2020 regulations which required the unwelcome sex-based conduct to be severe, pervasive, and objectively offensive. Whether a hostile environment has been created remains a fact-specific inquiry that includes consideration of (1) the degree to which the conduct affected the complainant's ability to access the education program or activity; (2) the type, frequency, and duration of the conduct; (3) the parties' ages, roles, and other factors about each party that may be relevant to evaluating the effects of the conduct; (4) the location and context of the conduct; and (5) other sex-based harassment in the education program or activity.

Changes to the Grievance Process:

Single-Investigator Model: One person may now be both the investigator and decisionmaker, or the Title IX Coordinator and the decisionmaker. A local educational agency ("LEA") [1] may still choose to have a separate investigator and decisionmaker. If the investigator and decisionmaker are different individuals, the entity must develop a process that allows the decisionmaker to question the parties and all witnesses for the purpose of determining credibility when credibility is in dispute and relevant.

Conduct Outside of School/Educational Program or Activity: An LEA must address allegations of a sex-based hostile environment in its education program or activity, even if some of the alleged conduct occurred outside of the educational program or activity or outside the United States. However, consistent with the current Title IX regulations, an LEA is not required to investigate conduct that occurred solely outside the educational program or activity or outside the United States.

Dismissal of a Complaint: The regulations no longer have mandatory dismissal grounds for complaints. Rather, complaints *may* be dismissed if (1) the respondent is unidentifiable even after a reasonable attempt to identify the respondent; (2) the respondent is not



Georgelle C. Cuevas
Partner
gcuevas@aalrr.com
925-227-9200



Eve P. Fichtner
Partner
epeekfichtner@aalrr.com
916-923-1200



Gabriel A. Sandoval
Partner
gsandoval@aalrr.com
626-583-8600

U.S. Department of Education Issues Long-Awaited Final Title IX Regulations

participating in the educational program or activities or is not employed by the LEA; (3) the complainant voluntarily withdraws some or all of the allegations and any remaining allegations would not constitute discrimination under Title IX; or (4) the allegations, even if proven, would not violate Title IX after reasonable efforts have been made to clarify the allegations with the complainant. A dismissal may be appealed.

District-Initiated Complaint: If the complainant fails to submit a complaint or withdraws all allegations in the complaint, the Title IX Coordinator must decide whether to initiate a complaint. Now, the Title IX Coordinator has several factors to consider when determining whether to initiate a complaint. The Title IX Coordinator must consider (1) the complainant's wishes; (2) the complainant's reasonable safety concerns; (3) risk of additional discrimination; (4) severity of the allegations, including whether they would justify removing the respondent; (5) age and relationship of the parties; (6) scope of the discrimination; (7) availability of evidence; and (8) whether the LEA can end the discrimination and prevent reoccurrence without a complaint. If the Title IX Coordinator initiates a complaint, the complainant must first be notified, and any safety concerns must be addressed.

Supportive Measures: Supportive measures must continue to be available to the complainant and respondent. However, parties may now appeal any decisions regarding supportive measures to an impartial employee. Additionally, if a student has a disability, Title IX Coordinators must coordinate with the Individualized Education Program ("IEP") or 504 plan team(s) to determine how to comply with IDEA (20 USC 1400 et seq.) and Section 504 (29 USC 794) requirements throughout the implementation of the Title IX grievance procedures, including, but not limited to, the implementation of supportive measures.

Emergency Removal: A student respondent may be removed from campus if the removal can be justified by determining through an individualized safety and risk analysis that there is an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations. A student respondent must be provided with notice and an opportunity to challenge the decision immediately following removal from campus. Note that removal is no longer limited to threats of *physical* safety.



Ashlee B. Reece-Walker
Senior Associate
Ashlee.Reece-Walker@aalrr.com
(562) 653-3200



Brooke E. Jimenez
Partner
bjimenez@aalrr.com
951-683-1122

U.S. Department of Education Issues Long-Awaited Final Title IX Regulations

Informal Resolution: The informal resolution provisions remain similar to what was permitted under the 2020 Title IX Regulations, but the 2024 Title IX Regulations now allow slightly more discretion. Additionally, informal resolution may now be offered *before* a formal complaint is filed, whereas previously the process could not be offered until a formal complaint had been filed.

Evidence Review: The LEA must continue to review all evidence and provide both parties with equal opportunity to review the relevant evidence or to review an accurate description of the evidence. If a description of the evidence is provided, the parties shall be notified of the right to review the evidence upon which the description was based. Current regulations require providing any evidence that is directly related to the allegations. The two evidence review periods in the 2020 Title IX Regulations were replaced with a requirement to provide the parties “a reasonable opportunity to respond” to the evidence or the accurate description of the evidence. LEAs must take reasonable steps to prevent the parties from unauthorized disclosure outside of the process.

Optional Live Hearing[2]: *Postsecondary institutions may, but are no longer required to, have a live hearing. If a postsecondary institution opts not to have a live hearing, it must still provide the decisionmaker with an opportunity to assess a party or witness’s credibility when credibility is in dispute and relevant. Decisionmakers or investigators may meet with parties separately, subsequently share a recording or transcript of that meeting with the other party(ies), solicit their follow-up questions, and then go back to another set of meetings to pose those questions, so long as they are relevant and/or address credibility.*

Appeals: In addition to the grounds for appeals established in the 2020 Title IX Regulations (procedural irregularity, new evidence, or a conflict of interest or bias), an LEA, at a minimum, must also provide an appeal process comparable to similar proceedings relating to other discrimination complaints. Examples for K-12 institutions include the appeal procedures under the UCP (BP/AR 1312.3) and the policies prohibiting discrimination in employment typically found in BP/AR 4030/4031. Appeal options for postsecondary institutions may include the appeal procedures found under an institution’s complaint policies which are compliant with Title 5 and SB 493.

Changes to Reporting Obligations:

Obligation to Report: The 2024 Title IX Regulations redefine which employees in the K-12 and postsecondary schools have an obligation to report. Under the 2024 Title IX Regulations, all non-confidential K-12 employees must notify the Title IX Coordinator when they have information about conduct that may reasonably constitute sex discrimination. In postsecondary institutions, non-confidential employees who (1) have the authority to take corrective action, (2) hold administrative leadership responsibilities, or (3) hold teaching or advising responsibilities must notify the Title IX Coordinator. All other non-confidential employees at postsecondary institutions have the option to either notify the Title IX Coordinator or to provide the potential complainant with the Title IX Coordinator’s contact information and how to file a complaint.[3]

U.S. Department of Education Issues Long-Awaited Final Title IX Regulations

Pregnancy or related conditions: The 2024 Title IX Regulations prohibit discrimination against students, employees, or applicants, based on pregnancy or related conditions. The regulations further require LEAs to take actions to prevent sex discrimination and ensure equal access to its education program or activity, such as by providing reasonable modifications for students, reasonable break time for lactation for employees, and lactation space for students and employees. LEAs are prohibited from requiring documentation from students to obtain reasonable modifications unless documentation is necessary and reasonable. Additionally, employees are required to promptly inform a pregnant student, or person who has a legal right to act on behalf of the student, of the Title IX Coordinator's contact information and inform them that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity. This obligation to provide the information arises when a student, or a person who has a legal right to act on behalf of the student, first informs that same employee of that student's pregnancy or related conditions, and when the employee reasonably believes the Title IX Coordinator has not already been notified.

Changes to Training Requirements:

All Employees: The 2024 Title IX Regulations require all employees to be trained on the LEA's obligation to address sex discrimination in its education program or activity, the scope of conduct that constitutes sex discrimination under Title IX, including the definition of "sex-based harassment," and all applicable notification and information requirements.

Investigators/Decisionmakers/Other Employees Implementing Grievance Procedures: Additionally, the 2024 Title IX Regulations require training for all investigators, decisionmakers, and other persons responsible for implementing the Title IX grievance procedures or who have the authority to modify or terminate supportive measures on the following items: the recipient's obligations under Title IX; the grievance procedures; how to serve impartially by avoiding prejudgment, conflicts of interest, and bias; understanding 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.

Informal Resolution Process Facilitators: Facilitators of the informal resolution process must also be trained on the rules and practices associated with the recipient's informal resolution process and how to serve impartially, including avoiding conflicts of interest and bias.

Title IX Coordinators: Title IX Coordinators and their designees must also be trained on their specific responsibilities, the recipient's recordkeeping system, and Title IX recordkeeping requirements, in addition to any other training necessary to coordinate the recipient's compliance with Title IX.

Previous 2020 Requirements that Remain in Effect:

- Regulations still apply to sexual assault, dating violence, domestic violence, and stalking based on sex;

U.S. Department of Education Issues Long-Awaited Final Title IX Regulations

- The notice of allegation requirements remain the same;
- Employee respondents may still be placed on paid administrative leave in accordance with state law and district policy during the investigation;
- All records must be maintained for seven years; and
- The grievance policy still must be in writing.

Recommendations:

In light of these significant changes, we recommend educational entities review the 2024 Title IX Regulations and existing institutional policies to determine what policies and practices should be amended to ensure compliance with the 2024 Title IX Regulations by August 1, 2024. Adherence to the various requirements under the new regulations will require laser focus and diligent work with your educational institution's Superintendent/President, Title IX Coordinators, student services administrators, special education administrators, board policy subcommittees, and/or legal counsel to determine how to effectively implement the 2024 Title IX Regulations with the goal of ensuring full compliance by your educational institution.

Please contact AALRR if you need training or assistance in complying with the 2024 Title IX regulations and other federal and state laws governing educational institutions' mandate to address sex discrimination.

AALRR will be hosting a webinar to provide an overview of the new Title IX Regulations the week of April 29, 2024. [Click here](#) for more information.

^[1] LEA refers to both K-12 and postsecondary institutions.

^[2] Note: for Postsecondary institutions the holding from *Doe v. Keegan Allee* (30 Cal.App.5th 1036 (2019)) may be applicable, as well as the requirements of SB 493 as set forth in Education Code sections 66281.8 and 67385.7.

^[3] Note: In California SB 493 made changes to Education Code section 66281.8 which provides a list of "responsible employee[s]," who have the authority to take action to redress sexual harassment, provide supportive measures to students, or the duty to report sexual harassment.

This AALRR publication is intended for informational purposes only and should not be relied upon in reaching a conclusion in a particular area of law. Applicability of the legal principles discussed may differ substantially in individual situations. Receipt of this or any other AALRR publication does not create an attorney-client relationship. The Firm is not responsible for inadvertent errors that may occur in the publishing process.

U.S. Department of Education Issues Long-Awaited Final Title IX Regulations

© 2024 Atkinson, Andelson, Loya, Ruud & Romo