

Title IX: Planning and Preparing for the Future

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Agenda

1. A Quick Primer
2. Where We've Been
3. Where We're At
4. Where We're Going
5. Getting Your College Prepared

A Quick Primer: Title IX of the Education Amendments of 1972

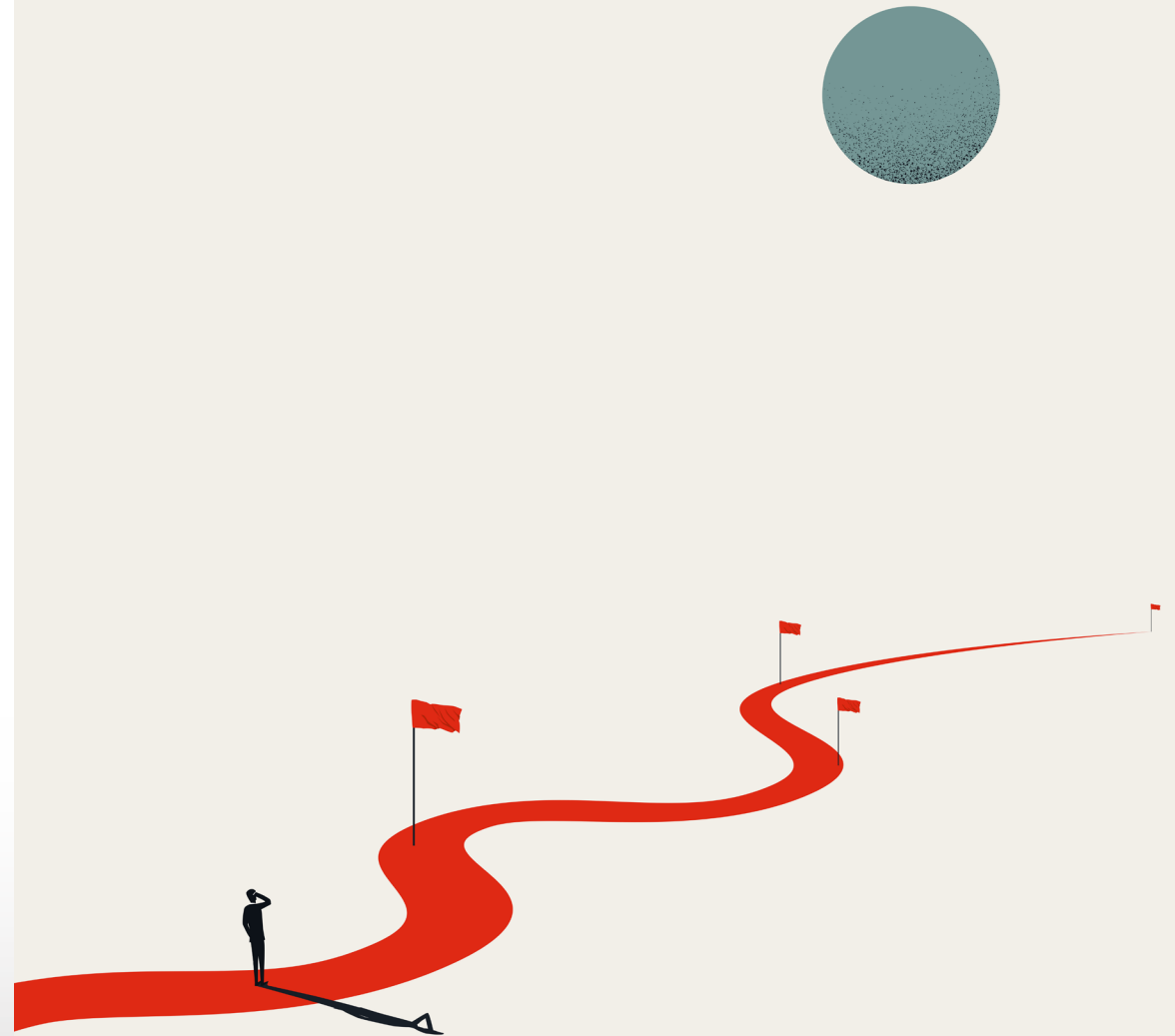
- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681

- Title IX covers a broad spectrum of sex-based discrimination:
 - Equal opportunity in athletics,
 - Equal opportunity in STEM courses and programs,
 - Pregnancy discrimination, and
 - Sex-based discrimination and harassment

A Quick Primer: Title IX of the Education Amendments of 1972

- The Title IX regulations—originally prepared by the Department of Ed's predecessor, the Department of Health, Education and Welfare—clarify the Department's interpretation of Title IX and how the law will be implemented



Where We've Been: A Walk Down Title IX Memory Lane

- Since the regulations were implemented in the 1970's, most Title IX guidance has come by way of Department of Education "interpretations," "clarifications," and Dear Colleague letters, to which courts often deferred
- But then, in May of 2020, the U.S. Department of Education's Office for Civil Rights (OCR), under President Trump's administration, released new Title IX regulations
 - In the midst of the COVID-19 pandemic, Colleges and Universities were given about 90 days to implement the regulations, which required significant changes in policy, institutional practices, and personnel

Where We've Been: A Walk Down Title IX Memory Lane

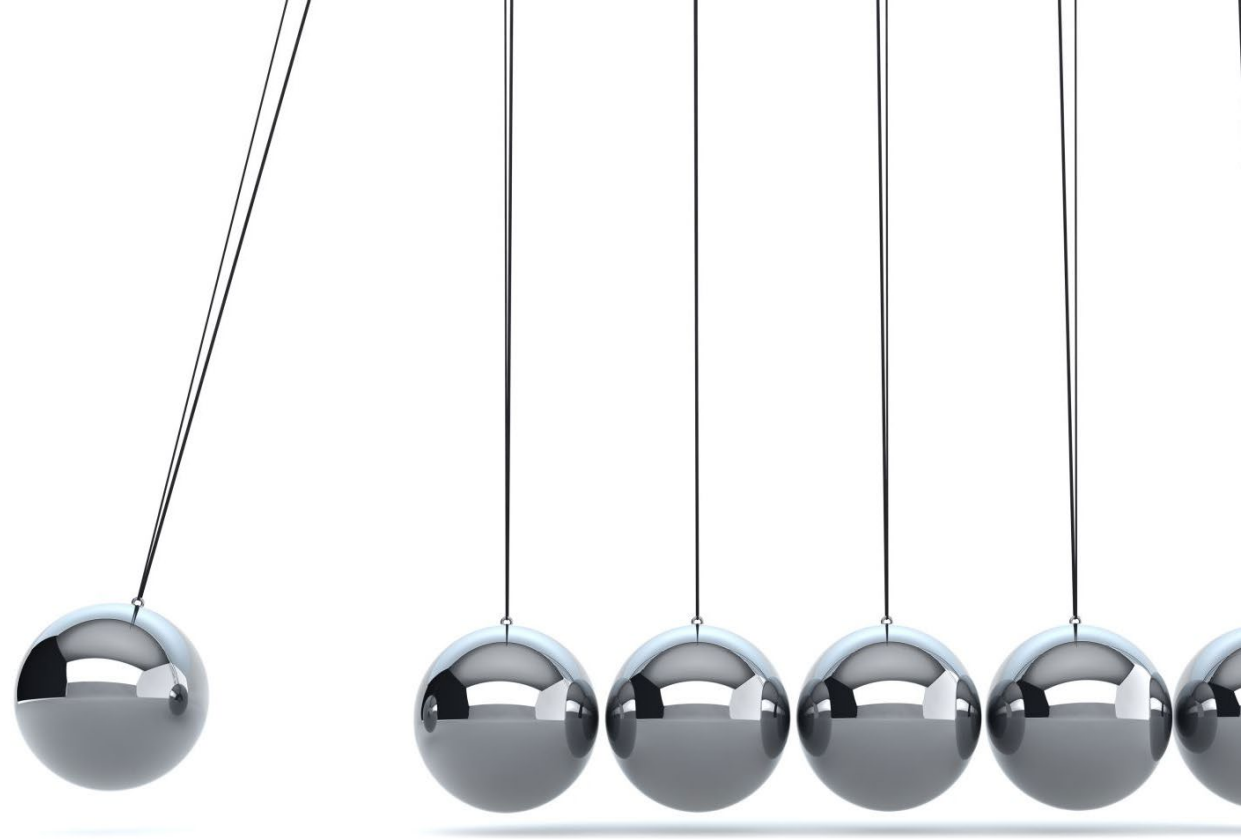
- Among the most significant changes resulting from the 2020 amendments to the regulations were:
 - Emphasis on actual knowledge and deliberate indifference
 - Narrowed definitions and scope
 - Hostile environment sexual harassment – "sufficiently severe *and* pervasive"
 - College's jurisdiction with regard to claims of sexual harassment
 - Requirement of formal complaint to trigger action beyond supportive services
 - Generally, rigid application at every level
 - Live hearings, cross-examinations, training requirements, and more!

Where We're At: The Notice of Proposed Rulemaking

- In January of 2021, President Biden took office and priorities drastically shifted (again)
 - Under a directive from President Biden, beginning in March of 2021, the Department of Education undertook a comprehensive review of the 2020 Title IX regulations and sought public input from stakeholders
- In **June of 2022**, the Department of Education released its **proposed changes** to the Title IX regulations
 - The official version of the proposed changes was published on July 12, 2022

The Notice of Proposed Rulemaking: A Shift in Framework

- The proposed regulations take a more **flexible** approach:
 - They maintain and expand core requirements regarding notice and the opportunity to be heard
 - But also build in flexibility and many stages of the grievance process
 - Let's review some of the key anticipated changes



Overview of Key Changes

- **Definition of Sex-Based Harassment:**

- **"On the basis of sex"** – sex based discrimination would be expanded to include discrimination based on:
 - Sex stereotypes
 - Sex characteristics
 - Sexual orientation
 - Gender identity
 - Pregnancy or related conditions
 - Parental status, including:
 - Adoptive parents
 - Step-parents
 - Legal guardians

Overview of Key Changes

- **Definition of Sex-Based Harassment:**

- **"Hostile Environment Harassment":**

- Current definition: "Unwelcome sex-based conduct that is **so** severe, pervasive, **and** objectively offensive" that it effectively denies a person equal access to the college's education program or activity
 - Proposed definition: "Unwelcome sex-based conduct that is **sufficiently** severe **or** pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively" it effectively denies a person equal access to the college's education program or activity

Overview of Key Changes

- **Definition of Retaliation:**

- **Retaliation** would be defined as “intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in a university’s Title IX process”
- Both retaliation by the **College** (or College-actors) and retaliation by **peer students** would be prohibited

Overview of Key Changes

- **Notifying the Title IX Coordinator:**

- The proposed regulations create new classifications of employees with different reporting obligations:
 - **Confidential employees** – no obligation to notify the Title IX Coordinator about possible sex-based discrimination or harassment; instead only obligation is to provide the individual with the Title IX Coordinator's contact information and information about reporting
 - **Employees with authority to institute corrective measures** – must notify the Title IX Coordinator upon receiving information of conduct that may constitute sex-based discrimination or harassment

Overview of Key Changes

- **Notifying the Title IX Coordinator:**

- The proposed regulations create new classifications of employees with different reporting obligations:
 - **Employees with administrative, leadership, and teaching responsibilities** -
 - Upon receiving information of conduct that may constitute sex-based discrimination or harassment **against a student**, must notify the Title IX Coordinator
 - Upon receiving information of conduct that may constitute sex-based discrimination or harassment **against an employee**, must notify the Title IX Coordinator or inform the reporting party how to report sex discrimination
 - **All other employees** – upon receiving information of conduct that may constitute sex-based discrimination or harassment, must either:
 - Notify the Title IX Coordinator, or
 - Inform the reporting party how to report sex discrimination

Overview of Key Changes

- **Grievance Procedures**

- The proposed regulations specify numerous procedural requirements for **any** complaint of sex-based discrimination or harassment, with additional requirements for sex-based harassment complaints involving post-secondary students
- Let's review the top **8** grievance procedure changes

Overview of Key Changes

- **Grievance Procedures**

1. **Elimination of the "Formal Complaint" Requirement**

- Under the proposed regulations, a complainant would no longer be required to submit a formal, written complaint to initiate the grievance process
- Instead, the College would have an obligation to respond to **oral or written** requests to initiate the grievance process, which could be brought by:
 - The complainant,
 - An individual who wishes to make a complaint on behalf of a complainant,
 - The Title IX Coordinator,
 - Any student or employee, and
 - Any third party participating or attempting to participate in the College's education program or activity when the alleged sex discrimination occurred



Overview of Key Changes

- **Grievance Procedures**

- 2. **Return of the Single Investigator Model**

- The single investigator model—under which a single individual serves as investigator and decision-maker—would once again be permissible under the regulations, so long as the individual does not have a conflict of interest or bias
 - This change is intended to address feedback from many stakeholders about the burdensome requirement to have separate staff members investigate and adjudicate Title IX complaints (which often prolongs the grievance procedure)



Overview of Key Changes

- **Grievance Procedures**

- 3. **Discretion—rather than requirements—to Dismiss Certain Matters**

- Conduct occurring outside of the U.S. or the College's education program or activity
 - Complaints involving a Respondent no longer participating in the College's education program/activity or employed by the College
 - Complaints withdrawn by the Complainant
 - Upon dismissing a complaint, several notification requirements would be triggered, including:
 - Notifying parties of their right to appeal
 - Notifying parties of supportive measures



Overview of Key Changes

- **Grievance Procedures**

- 4. **Preponderance of the Evidence Standard Required (unless...)**

- The preponderance of the evidence standard is **required** to determine whether sex-based discrimination occurred unless the clear and convincing standard is used in **all other comparable proceedings**, including proceedings relating to other discrimination complaints
 - But—based on stakeholder feedback—a different standard of proof can be used for employee-on-employee matters vs. matters involving students



Overview of Key Changes

- **Grievance Procedures**

- 5. **Live Hearings No Longer Required**

- Under the proposed regulations, colleges would no longer be required to conduct live hearings to determine whether sex-based discrimination occurred
 - However, colleges would still be required to provide a process where the decision-maker can evaluate the allegations and assess the credibility of the parties when required (more on that later)



Overview of Key Changes

- **Grievance Procedures**

- 6. **Fairness Requirements for Grievance Procedures for Complaints Involving Students**

- Equitable treatment of parties
- No conflict of interest or bias
 - Against respondents or complainants generally; against the particular parties involved
- Respondent not presumed responsible
- Privacy protections, provided they do not restrict the parties from obtaining and presenting evidence, preparing for a hearing, or otherwise defending themselves
- Exclusion of certain types of evidence
 - Privileged evidence
 - Treatment records without voluntary, written consent
 - Evidence of complainant's sexual interests or prior sexual conduct, unless to prove someone other than respondent committed alleged conduct or to prove consent
- Equitable access to evidence or written report summarizing evidence before determination
- Objective evaluation of relevant evidence by decision-maker



Overview of Key Changes

- **Grievance Procedures**

- 7. **Additional Grievance Procedures Required for Complaints Involving Students**

- Must follow all procedures in 106.45, as well as the following additional procedures (contained in 106.46), including:
 - Written notice of allegations, dismissal, delays, meetings, interviews, hearings, determinations
 - Opportunity to have an advisor (may be an attorney) plus one additional person present at any meeting or proceeding
 - Opportunity to present expert testimony
 - Opportunity to request reasonable extensions of time
 - Reasonable rules of decorum
 - Appeal opportunity
 - Withdrawal of complaint by Complainant must be in writing



Overview of Key Changes

- **Grievance Procedures**

- 8. **Credibility Assessments are Required for Complaints Involving Students**

- Colleges must provide a process that would permit questioning of the parties by the decision-maker during an individual meeting with the parties or by a party's advisor during a live hearing, if one is held, that would allow the decision-maker to assess the credibility of the parties and witnesses
 - This is required whenever credibility is in dispute and relevant to evaluating one or more of the allegations of sex-based harassment
 - In the absence of answers to such credibility questions:
 - The College should not rely on statements of a party that support that party's position,
 - But also, may not draw an inference regarding whether harassment occurred based solely on refusal to respond to such questions

Where We're Going: Publication of the Final Regulations

- The original target date for publishing the final rule was May of 2023
- After receiving nearly 250,000 public comments relating to the proposed rule, the Department decided more time was needed
- As a result, the Department of Education announced a new target date for publication of the final regulations of October 2023
 - That is the date still published on the Department of Education's website, but it is safe to say that it's not going to happen
 - Before the regulations can be finalized, they have to be approved by the Office of Information and Regulatory Affairs, and so far these regulations are not listed on their agenda for upcoming approvals
- Current best guess: January, at the earliest

Getting Your College Prepared

- The final content of the regulations is still unknown, but there are steps you can take now to best position your College to implement the regulations when they do become final:
 1. Select a point person to review your internal policy governance/approval processes
 2. Talk to those currently implementing your Title IX procedures – what are the strengths and challenges in the current practices
 3. Peruse the preamble to the proposed regulations

Getting Your College Prepared

4. Map out the differences between your current procedures and those anticipated and begin gathering input
 - Living hearing vs. single investigator
5. Identify the audiences who will be impacted by the potential changes
 - E.g., senior leadership, board members, Title IX Coordinator(s), student leaders, HR, campus security, counselors, etc.
6. Identify a point person (or persons) who will:
 - Lead the policy review and revisions process when the time comes,
 - Create a communications strategy
 - Oversee web content/visual aid changes
 - Ensure appropriate training
 - Identify necessary personnel/resource changes

Questions?



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Thank you!