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This presentation does not constitute legal advice.
Yes, we are recording this.
Yes, we will send the slides out.
Watch for an email after this that will have links to the recording and the slides.
You will be able to find the recording at www.brickergraydon.com/titleix
Yes, you may post these slides. (But spoiler: you won't have to starting August 1st!)

**Bricker
Graydon**

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1,577 pages in the unofficial version (16 + 1,561)

The official version will be published in the Federal Register on April 29, 2024.

- o This version will be much shorter because of the formatting used.
- o It will be these page numbers that will be used from now on.

How do you read these?

- o Start on page 1521 (of the electronic version) where the new regulations start.
- o Read the new regulations.
- o Go back to the beginning and read the preamble.
- o Now read the regulations again.

Posting training materials (though they still must be available for inspection upon request)

Barring informal resolution in student vs. employee cases

Permitting advisors in the non-

Discrimination on the basis of sex includes discrimination on the basis of:

- o Sex stereotypes
- o Sex characteristics
- o Pregnancy or related conditions
- o Sexual orientation
- o Gender identity

A recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to **more than de minimis harm**, except as permitted by:

- o The exceptions laid out in 20 USC 1681 (a)(1) through (9) and 106.12 through 106.15
- o The exceptions in 20 USC 1686 and corresponding regulations 106.32(b)(1)

[Housing]

- o 106.41(b) [Athletics]

Adopting a policy 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** on the basis of sex.

Applies to all sex discrimination occurring under a recipient's education program or activity in the United States

Includes:

- o Conduct occurring in a building owned/controlled by recognized student organization; and
- o Conduct that is subject to the recipient's disciplinary authority

Recipient has an obligation to address a sex-based hostile environment





Under 2020 Title IX Regulations, notice to trigger "actual knowledge" for purposes of liability was limited to:

- o For K-12: any employee, except those deemed confidential (prior to the 2020 Title IX Regulations, "actual knowledge" had been limited to designated school employees).
- o For post-secondary institutions: the Title IX Coordinator any official who has the authority to institute corrective measures on behalf of a recipient (prior to the 2020 Title IX Regulations, "actual knowledge" extended to any employee)

Must require **all of its employees who are not confidential employees** to notify the Title IX Coordinator when employee has information about conduct that reasonably may constitute sex discrimination under Title IX (106.44(c)(1))

Extra-jurisdictional conduct can impact the elements in sex-based harassment (106.2 definition, addressed above):

1. The **degree** to which the **conduct affected the complainant's ability to access** the recipient's education program or activity;
2. The type, **frequency**, and **duration** of the conduct;
3. The parties' ages, roles within the recipient's education program or activity, **previous interactions**, and other factors about each party that may be relevant to evaluating the effects of the conduct;
4. The location of the conduct and the **context** in which the conduct occurred; and
5. Other sex-based harassment in the recipient's education program or activity.

Student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX

A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX **and** who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination

Student is "a person who has gained admission."

Admission is defined to include "selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient." (p. 208)

A person who is alleged to have violated the recipient's prohibition on sex discrimination

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 discrimination under Title IX

See pages 1-1577

Individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:

- o Restore or preserve that party's access to the recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment; or
- o Provide support during the recipient's grievance procedures or during the informal resolution process. [NOTE: specific discussion of Supportive Measures in 106.44 and 106.45]

Must have the ability to seek modification or reversal from an appropriate and impartial employee

Must undertake an individualized safety and risk analysis
Must determine that an "imminent and serious threat to the health or safety of a complaint or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal"
Must provide respondent with notice and an opportunity to challenge

Note: Institutions still have the right to put employee respondents on administrative leave. See 106.44(f)

Note: Reference to interaction with ADA/504

See also

A student who is an individual with a disability under Section 504, or a child with a disability as defined by the IDEA.

TIXC "may consult, as appropriate" with disability support services to help comply with Section 504. Such consultation = "legitimate educational interest."

Recipients must establish criteria in its annual notification of FERPA rights to permit its Title IX Coordinator to constitute a school official with legitimate educational interests when performing functions to carry out § 106.8(e)

"The rights of students with disabilities warrant the attention and concern demonstrated by the obligations set forth in § 106.8(e), and the inclusion of this provision in the final regulations will provide clarity for students with disabilities about what to expect from their educational institutions when they are involved in Title IX grievance procedures as complainants or respondents." (p. 284)

See

Formal complaint no longer required. IR is permitted when a recipient
Receives a formal complaint of sex discrimination, or
Receives information about conduct that reasonably may constitute
sex discrimination.

Expanded to higher education about 2019 (410(r)1)4

106.45 does not require nor prohibit advisors

Who?

1. "All employees"
2. Investigators, decisionmakers, and "other persons who are responsible for implementing the recipient's grievance procedures or have authority to modify or termination supportive measures."
3. "Facilitators of informal resolution process"
4. Title IX Coordinators or Designees.

When? Two periods of time:

1. "promptly upon hiring" or "change in position that alters duties under Title IX:
and
2. "Annually thereafter"

Title IX Coordinators and Designees have more training requirements:

- o Responsibilities to pregnant students
- o Responsibilities under the grievance process, including with regard to supportive measures
- o Recipient's recordkeeping system and Title IX recordkeeping requirements
- o "Any other training necessary to coordinate the recipient's compliance with Title IX"

Keep them for seven years
Must make them available for inspection upon request – no more required posting

See also

Establishing separate athletic teams under § 106.41(b) = not de minimis harm.

Preventing someone from participating in school including in sex-separate activities (athletics) consistent with their gender identity = de minimis harm?





The status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

- A biological parent;
- An adoptive parent;
- A foster parent;
- A stepparent;
- A legal custodian or guardian;
- In loco parentis with respect to such a person; or
- Actively seeking legal custody, guardianship, visitation, or adoption of such a person.

Pregnancy, childbirth, termination of pregnancy, or lactation;
Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

Admissions - 106.21(c)
Non-discrimination, notice, and **reasonable modifications** - 106.40
Voluntary leaves of absence - 106.40(b)(3)(iv)
Lactation space - 106.40(b)(3)(v)
Limitations on supporting documentation - 106.40(b)(3)(vi)
Comparable treatment to other temporary medical conditions - 106.40(b)(4)
Certification to participate - 106.40(b)(5)







Determine the process necessary to approve the policy by the deadline.

- o Does your Board need to approve? If so, can they schedule a meeting over the summer?
- o Does any other group on campus need to approve (e.g. Faculty Senate) based on your policy approval requirements? If so, what is the timeline?

Gather your stakeholders – Board members, faculty, staff, students, community members?

Get feedback on what choices might fit your community best

Make decisions about the options you will exercise in your policy.

Work with counsel to integrate your choices—and your ethic of care—into the policy.



Free Webinar: Title IX Litigation Update (Higher Education) - May 10th, 12ET

Free Webinar: What Higher Ed Board Members Need To Know About The New Title IX Regulations – May 15th, 12 ET

Policy Boot Camp – Coming soon via Zoom for your team!

If you want to join our newsletter to make sure you don't miss out on future trainings, go to www.brickergraydon.com/subscribe


