



The Proposed Title IX Regulations: An Overview of Key Changes

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Our Objectives Today

- Examine major proposed changes to the Title IX regulations
- Consider potential issues in implementing the proposed regulations
- Identify ways of helping campus communities to understand the proposals better

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Quick Disclaimer

- We can't cover it all, so I'm going to try and hit what I consider to be the most interesting changes.
- These regulations are proposed and are not yet (and may never be) finalized.
- If they are finalized as is, they may still be subject to legal challenge before they are implemented.
- Bottom line: Do not change your policies on the basis of what we discuss today!

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Audience Poll #1

What is your role?

- A. Title IX Coordinator
- B. Other Title IX Team Member
- C. Administrator
- D. Faculty
- E. Other

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Audience Poll #2

What is your familiarity with the proposed regulations?

- A. I read all 190 pages (commentary plus regulations)
- B. I read the proposed regulations only (last twelve pages)
- C. I have read some articles or been to a webinar, but have not read anything yet
- D. First time I'm digging in!

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Big Proposed Changes!

- Sex discrimination claims would have specific grievance procedure requirements
- Live hearings not required (but may be required for other reasons); single investigator model possible
- Formalizing the 2013 pregnancy parenting/guidance into the regulations
- Supportive measures can burden Respondent?

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Definitions – 106.2

- “Sex based-harassment”
 - Harassment on the basis of sex, sex stereotypes, sex characteristics, pregnancy/related conditions, sexual orientation, and gender identity
 - Quid pro quo harassment
 - Hostile environment harassment
 - Specific offenses – sexual assault, dating/domestic violence, stalking

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Quid Pro Quo – 106.2

- Quid pro quo harassment – An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct

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Hostile Environment Harassment – 106.2

- Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).

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Hostile Environment Harassment – Factors to consider

- Degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- The type, frequency, and duration of the conduct;
- 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 alleged unwelcome conduct;
- The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
- Other sex-based harassment in the recipient's education program or activity.

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Specific Offenses – 106.2

- Same list of Clery crimes
- Definition provided for domestic violence is not consistent with VAWA.
- Refers to UCR instead of SRS (which was discontinued) for purposes of sexual assault definition

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Retaliation – 106.2

- **Intimidation, threats, coercion, or discrimination** against any person by a **student, employee, person authorized by the recipient to provide aid, benefit, or service** under the recipient's education program or activity, or recipient for the purpose of interfering with any right or privilege secured by Title IX or the regulations, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the Title IX regulations, including in an informal resolution process, grievance procedures, and in any other appropriate steps taken by a recipient in response to sex discrimination.

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Peer Retaliation – 106.2

- Retaliation by a student against another student.
- Not: retaliation by an employee against another employee?

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Training – 106.8(d)

- Still requires Title IX team members to be trained, but requirements are more specific depending on role
- All employees must be trained on the recipient's obligation to address sex discrimination in its education program or activity, the scope of the conduct that constitutes sex discrimination, and applicable notification and information requirements
- No requirement to train students? (But see Clery Act for some of it)

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Off-Campus Behavior – 106.11

- The regulations apply to sex discrimination that occurs:
 - In your education program or activity in the United States (same)
 - In a building owned or controlled by a student organization that is officially recognized by your institution (same)
 - Subject to your disciplinary authority
- If you address student misconduct off-campus, you must also address off-campus sex discrimination and sex-based harassment
- An institution is obligated to address sex-based hostile environment that occurs in its education program of activity, even if the harassment occurred outside the program or outside the United States

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Gender Identity Protections – 106.31(a)(2)

- If the regulations permit different treatment or separation on the basis of sex, cannot subject a person to more than de minimis harm.
- Adopting a policy/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 based on sex.
- Note: ED expects to propose regulations on athletic participation, so stay tuned.

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Pregnancy/Parenting in Admissions – 106.21

- Institutions cannot discriminate against any person on the basis of current, potential, or past pregnancy or related conditions
- Institutions cannot adopt any policy, practice, or procedure concerning the current, potential, or past parental, family, or marital status of a student or applicant that treats person differently on the basis of sex
- Pre-admission inquiries: Cannot ask whether someone is “Miss” or “Mrs.” (identifies marital status)
- May ask to self-identify sex if asked of all applicants, but cannot use the response as a basis for sex discrimination

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Pre-Employment Inquiries – 106.60

- Cannot ask whether an applicant is “Miss” or “Mrs.”
- May ask to self-identify sex if asked of all applicants, but cannot use the response as a basis for sex discrimination

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Pregnancy/Parenting in Admissions – 106.40

- Can offer a separate but comparable program for pregnant students
- If an employee becomes aware of a student’s pregnancy, the employee must either (1) tell the Title IX Coordinator or (2) inform the student of how that person may notify the Title IX Coordinator.
- Pregnant students may request reasonable modifications that are individualized and on a voluntary basis to ensure equal access
- Voluntary leave of absence available under same conditions for other students
- Lactation space must be made available

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Pregnancy/Parenting in Employment – 106.57

- Cannot make employment decisions based on familial status or who is the “breadwinner”
- Cannot discriminate on the basis of current, potential, or past pregnancy or related conditions
- Treat pregnancy as a temporary disability

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Employee Reporting Requirements – 106.44

- Administration, Teaching, Advising – MUST report to Coordinator
- Every other employee must do one of the following:
 - Report to Coordinator OR
 - Provide the contact information of the Coordinator to the person telling the employee about potential sex discrimination
- Student employee – when must they report?
 - Look at primary relationship and whether they were performing employment-related work
- Complainant/Employee – no report required (autonomy)

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Burdensome Supportive Measures – 106.44

- Supportive measures that burden a respondent may be imposed only during the pendency of grievance proceedings and must be terminated at the end of those proceedings
 - Must be “no more restrictive than is necessary to restore or preserve the complainant’s access to the recipient’s education program or activity”
 - May not be imposed for punitive or disciplinary reasons
- Parties may seek modification of supportive measures through a sort of appeal process to an impartial employee

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Emergency Removal – 106.44

- May remove a Respondent after:
 - Individualized safety and risk analysis
 - Determines an immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sex discrimination justifies removal and
 - Provides Respondent with notice and opportunity to challenge immediately following the removal

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Informal Resolution – 106.44

- Cannot offer if an employee is alleged to have engaged in sex discrimination toward a student
- Cannot offer if such a process would conflict with Federal, State, or local law
- As part of notification to parties to obtain consent, must explain “the potential terms that may be requested or offered in an informal resolution agreement”

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Grievance Procedure Depends on Conduct/Party

Type of Conduct Alleged	Student As Party?	Grievance Procedure
Sex-Based Harassment	Y	106.45 + 106.46
Sex-Based Harassment	N	106.45 only
All other Sex Discrimination	Doesn't matter	106.45 only
Retaliation	Doesn't matter	106.45 only

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Jurisdictional Requirements

- No more “formal complaint” requirement
- No more “mandatory dismissal”
- Discretionary dismissals may be appealed

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Procedures Under 106.45

- Complainant for sex discrimination now includes: any student, employee, or third party participating/attempting to participate in institution's education program or activity when the alleged sex discrimination occurred may file a complaint
- Decision-maker may be the same person as the Coordinator or Investigator
- Character witnesses not required to be permitted
- Not required to provide parties with access to evidence, just a "description of the evidence"

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Procedures Under 106.45 (continued)

- No advisor requirement
- No hearing requirement
- Recipient must provide a "process that enable the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination"
- Preponderance of the evidence standard applies unless institution uses clear and convincing for all other comparable proceedings

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Procedures Under 106.46 – SBH + Student Party

- May have an advisor of choice – can restrict participation role
- Parties receive access to either the relevant evidence or to an investigation report
 - Reasonable opportunity to review and respond
 - No 10 day review/report/10 day review requirement
- May delay notice to the parties to address safety concerns
- May choose to allow support persons during meetings/proceedings
- May choose whether to allow expert witnesses
- Must take reasonable steps to prevent and address party/advisor unauthorized disclosure of information

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Procedures Under 106.46 – Addressing Credibility

- No hearing required, but must have an assessment of credibility by decisionmaker
 - Decisionmaker could ask the parties and witnesses questions during individual meetings or at a live hearing
 - If a hearing is conducted, must allow the party's advisor to ask questions of parties/witnesses
 - If a hearing is conducted and a party doesn't have an advisor, the institution must provide one
- Keeps the relevancy determination requirement

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Procedures Under 106.46 – Exclusionary Rule

- “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.”

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Retaliation – 106.71

- Retaliation is handled under 106.45 grievance procedures.
- Prohibited retaliation includes initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX or the regs
- Peer retaliation is prohibited.

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Takeaways

- Comment period is open until September 12, 2022.
- Comments are all public, so consider your statements wisely before submitting.
- There are definitely comments to be made. These aren't perfect, which is why the notice and comment period exists.
- In the end, we want clarity, fairness, and workable procedures so that we can treat all parties equitably and meet the promises inherent in Title IX – which is ultimately an access statute.

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