

*School Law FYI*

## ***Department of Education Issues Amendments to Title IX Regulations: Considerations for School Districts***

RICK VERSTEGEN | 05.02.24

On April 19, 2024, the Department of Education (Department) released final regulations related to Title IX of the Education Amendments Act of 1972 (Title IX). Title IX is a federal law that prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance. The final regulations make significant changes to the existing Title IX regulations, which were previously amended in August 2020.

The final regulations become effective on **August 1, 2024**. Educational institutions will need to update or revise any notices and policies before that time. There are also significant annual training requirements under the new law, which includes training requirements not only for Title IX Coordinators and others involved in the Title IX process (e.g., investigators and decision-makers), but also for **all** employees. The training must include aspects of **sex discrimination**, including sex-based harassment. The attorneys at Boardman Clark will be working to assist districts by providing training that complies with the new regulations, in partnership with the Wisconsin Association of School Boards. Boardman Clark will also be developing policies consistent with the final regulations.

The final regulations have been anticipated for some time. When President Biden took office in January 2021, he stated that there may be potential changes to the Title IX regulations. The Department then issued proposed regulations in June 2022. This article will highlight some significant changes in the final regulations related to school districts. Additional changes were made for higher education institutions as well, but some of those changes are not highlighted here.

## SCOPE OF DISCRIMINATION ON THE BASIS OF SEX

The final regulations include a **new** provision related to the scope of discrimination on the basis of sex. This provision states that discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

## NEW DEFINITIONS RELATED TO HARASSMENT

The final regulations include a **new** definition of “sex-based harassment.” When compared to the existing regulations, the final regulations likely **broaden** the type of activity that falls within the scope of Title IX.

- The scope of “sex-based harassment” would also include harassment on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- “Sex-based harassment” includes “quid pro quo harassment.” Such harassment occurs when an employee, agent, or other persons with certain authorization explicitly or impliedly condition the provision of an aid, benefit, or service on a person’s participation in unwelcome sexual conduct.
- “Sex-based harassment” includes “hostile environment harassment.” Such harassment occurs when there is unwelcome conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate or benefit from the institution’s education program or activity. This definition also requires a fact-specific inquiry based on a number of factors, including the parties’ ages and previous interactions.
- “Sex-based harassment” also includes “specific offenses.” These specific offenses include sexual assault, dating violence, domestic violence, and stalking. The regulations include definitions of these categories.

## NOTICE AND RESPONSE

The final regulations also make significant changes concerning an educational institution’s notice and response related to sex discrimination (including sex-based harassment). Importantly, the final regulations **eliminate** the requirement for an institution to have **actual knowledge** of sexual harassment and to respond in a manner that is not **deliberately indifferent**. Instead, the final regulations state that an institution with **knowledge** of conduct that reasonably may constitute

**sex discrimination** in its education program or activity must respond **promptly and effectively** and must comply with Title IX to address such sex discrimination. In addition, employees (including generally all elementary and secondary school employees) must notify the Title IX Coordinator when the employee has **information** about conduct that reasonably may constitute sex discrimination (including sex-based harassment) under Title IX. When compared to the current regulations, these changes appear to place greater obligations on districts.

## RESPONSE BY TITLE IX COORDINATOR

A Title IX Coordinator must take certain steps under the final regulations upon being notified of conduct that reasonably may constitute **sex discrimination**. Such steps generally include notifying the complainant of the relevant grievance procedures and any informal resolution process, as well as offering and coordinating supportive measures, as appropriate, to the complainant. The Title IX Coordinator must also take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the institution's education program or activity.

The Title IX Coordinator must also, in response to a **complaint**, notify the respondent of the grievance procedures and any informal resolution process and must also initiate any applicable grievance procedures or any informal resolution process. Also, in the absence of a complaint or informal resolution process, a Title IX Coordinator must determine whether to initiate a complaint of sex discrimination using the grievance procedure by considering a number of factors, including the severity of the alleged sex discrimination.

## SUPPORTIVE MEASURES

The Title IX Coordinator must offer supportive measures in certain instances. When supportive measures are provided, an institution must **now** provide a complainant or respondent with a timely opportunity to seek, from an appropriate and **impartial** employee, **modification or reversal** of the institution's decision to provide, deny, modify, or terminate a supportive measure. The impartial employee must be someone other than the employee who made the decision being challenged and must have the authority to modify or reverse the decision, if appropriate.

In addition, under the final regulations, the Title IX Coordinator has certain responsibilities in the implementation of supportive measures for students with a **disability**. In particular, if the complainant or respondent is an elementary or

secondary student with a disability, the Title IX Coordinator must generally consult with the Individualized Education Program (IEP) team, if any, or the group of persons responsible for the student's placement decision (Section 504 team), if any, to help ensure the institution complies with the law in the implementation of supportive measures.

## COMPLAINT AND GRIEVANCE PROCEDURE

The final regulations require institutions to adopt, publish, and implement grievance procedures that provide for the prompt and equitable resolution of complaints alleging violations of Title IX. The grievance procedure must be in writing and include provisions that incorporate certain requirements under the regulations. The grievance procedure must include various basic requirements to resolve any complaints of **sex discrimination, including sex-based harassment**. Therefore, there will likely be more uniformity with grievance procedures in school districts for sex discrimination and sex-based harassment under Title IX.

Unlike the existing regulations, the final regulations do **not** include any reference to a "formal complaint." Instead, the final regulations include a definition of "**complaint**" to include an **oral or written** request to the institution to initiate the institution's applicable grievance procedure. As a result, this definition seems to broaden the type of matters that institutions may need to address. The final regulations, however, still place limits on the individuals who can file complaints under Title IX. The final regulations also state that, in lieu of resolving a complaint through the institution's grievance procedure, the parties may instead elect to participate in an informal resolution process. The informal resolution process includes certain requirements and exceptions, as set forth under the final regulations.

Significantly, unlike the current regulations, the final regulations require such notices and investigations under the grievance procedure for complaints of **sex discrimination and sex-based harassment**. Upon initiation of the grievance procedure for such complaints, the institution must provide notice of the allegations to the parties, along with other information. In some instances, the institution may dismiss the complaint, and if, so, the institution must notify the complainant that a dismissal may be appealed. Absent a dismissal, then the institution must provide for adequate, reliable, and impartial investigation of complaints.

The regulations generally eliminate certain requirements for investigations under the existing regulations. For example, unlike the current regulations, the new

regulations do not include any ten-day time period for the parties to submit written responses after an investigation report. Also, unlike the current regulations, the new regulations generally allow for one person to conduct the investigation and make the determination on sex discrimination or sex-based harassment. As a result, investigations under Title IX in school districts under the final regulations, especially for sex-based harassment, will likely require fewer individuals to be involved and take less time and procedural requirements.

## **GENERAL PROCEDURAL REQUIREMENTS**

The regulations also include various revisions to some overall procedural requirements for institutions, specifically related to the designation of the Title IX Coordinator, adoption and publication of the nondiscrimination policy and grievance procedures, training, and recordkeeping. As mentioned above, one significant change to these provisions is the requirement for **all** employees to be trained on the institution's obligation to address sex discrimination in its education program or activity, the scope of conduct that constitutes sex discrimination, and all applicable notification and information requirements. Additional training is also required for Title IX Coordinators, investigators, decision-makers, and facilitators of informal resolution processes.

## **PREGNANCY AND PARENTAL STATUS**

The regulations also include other important provisions related to protections for certain individuals based on their pregnancy and parental status. Such requirements include providing reasonable modifications for students, reasonable break time for employees for lactation, and a clean, private lactation space for both students and employees. The protections also include requirements for employees to take action to provide information to students if the employee is aware the student is pregnant. Such information includes the contact for the Title IX Coordinator and how the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access.

## ***Conclusion***

Our firm will continue to provide further guidance on these final regulations under Title IX. School districts in Wisconsin must also consider any requirements under state law related to discrimination based on sex and properly incorporate those protections into their policies and procedures. Please contact [attorneys in our School Law Practice Group](#) with any specific questions on these regulations.

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