

TITLE IX FINAL RULE OUTLINE OF KEY PROVISIONS

On April 19, 2024, the U.S. Department of Education released its 2024 Title IX Final Rule (the “final rule”), which makes amendments to regulations found at 34 C.F.R. 106.1 et seq.

Effective Date

The final rule requires campuses to be in compliance by **August 1, 2024**.

Scope and Jurisdiction Changes

- Unlike the current regulations issued in 2020, the final rule imposes obligations related not just to sexual harassment but to *all sex-based discrimination*.
 - It defines sex-based discrimination to include discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Sexual harassment is now “sex-based harassment.” It continues to be comprised of:
 - Quid pro quo harassment,
 - Clery Crimes (sexual assault, stalking, dating violence, and domestic violence), and
 - Hostile environment harassment, which the final rule broadens to: “*Unwelcome sex-based 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 in or benefit from the recipient’s education program or activity.*” [Emphasis added.]
- An institution’s education programs and activities subject to Title IX continue to include “all operations,” including off-campus properties controlled by recognized student groups, but the final rule extends Title IX’s application to all conduct “that is subject to the recipient’s disciplinary authority.”
- A complaint can be brought by (1) a student (defined in the final rule as anyone who has “gained admission”), (2) an employee, or (3) a third party who was participating in the institution’s programs or activities *when the alleged conduct took place*, even after that person stops participating in the institution’s programs or activities. There is no time limitation on when a complaint may be brought.

Protections for Transgender Students; Athletics

- The final rule creates a new “*de minimis* harm” standard, which states it is discrimination on the basis of sex to treat individuals differently or separate them on the basis of sex, including on the basis of gender identity, when such treatment or separation causes “more than *de minimis* harm,” unless such different or separate treatment is permitted under a limited exception.
 - Exception: In circumstances where institutions are already permitted by Title IX to treat individuals differently or separate them on the basis of sex (such as sex-separate housing, Greek life, and similar), the *de minimis* harm standard does not apply.

- Preventing a person from participating in an activity consistent with that person’s gender identity definitionally subjects the person to “more than *de minimis* harm.”
- The final rule does not address transgender student participation in intercollegiate, club, or intramural athletics; the preamble makes clear that the section in the regulations pertaining generally to transgender participation in programs and activities **does not apply to athletics participation**.
 - Rulemaking regarding participation of transgender students in athletics is in process but delayed.

Change to the Standard for When the Institution Is on Notice

- An institution with “knowledge” of conduct that “may constitute sex discrimination” has an obligation to respond promptly and effectively by following the processes described in the regulations.
- Knowledge is imputed to the institution if *any employee* is aware of the conduct at issue.

Updated Reporting Obligations

- Institutions are allowed to use their discretion to designate confidential employees.
- All nonconfidential employees who have (1) authority to institute corrective measures or (2) responsibility for administrative leadership, teaching, or advising **must** notify the Title IX coordinator when the employee learns of conduct that “may constitute sex discrimination.”
- All other nonconfidential employees **must:**
 - Report known potential discrimination to the Title IX coordinator, **or**
 - Provide the contact information of the Title IX coordinator and information about how to make a complaint of sex discrimination.
 - Institutions may choose to require such employees to report, rather than refer.
- Reporting obligations apply to information about discrimination affecting students, employees, or third parties participating or attempting to participate in the institution’s programs or activities.

Major Changes to Investigations and Adjudications (the “Grievance” Process and Procedures)

- Holding a live hearing is now optional, as long as the institution provides a process that enables the decision-maker to question parties and witnesses and adequately assess their credibility (if in dispute and relevant).
 - In sex-based harassment cases with a student complainant or respondent, each party must have the opportunity to propose relevant and not otherwise impermissible questions and have them asked.
 - In a live hearing, questions may be asked by the decision-maker or a party’s advisor, in the discretion of the institution.
 - In the absence of a live hearing, the meetings at which such questions are posed by the decision-maker or investigator must be recorded or transcribed, with the recording or transcription provided to the parties for the purpose of posing follow-up questions, if any.

- The grievance procedures for sex discrimination cases more broadly (including sex-based harassment cases in which neither the complainant nor the respondent is a student) are separate and even less restrictive than those applicable to student-involved sex-based harassment cases.
 - In cases outside the context of student-involved sex-based harassment, institutions can also restrict the participation of advisors and provide an accurate description of the evidence rather than directly providing the evidence itself.
 - Overall, the regulations reflect a shift towards differentiating treatment of students and employees. Notably, the regulations explicitly permit institutions to require employees—but not students—to participate as a witness in, or otherwise assist with, an investigation or adjudication of sex discrimination (including student-involved sex-based harassment).
- There remains an obligation to provide an equal opportunity for parties to access *relevant* evidence, and evidence which is not otherwise impermissible (i.e., evidence which is privileged, or which is, with limited exception, related to a complainant’s sexual interests or prior sexual conduct), but parties no longer have a right to access the broader category of all *directly related* evidence.
- Informal resolution remains a robust alternative to investigation and adjudication, and it has been expanded as an option to cases of alleged sex-based harassment of a postsecondary student by an employee.

New Pregnancy-Related Provisions

- Discrimination on the basis of pregnancy or related conditions is explicitly prohibited.
 - “Pregnancy or related conditions” includes pregnancy, childbirth, termination of a pregnancy, or lactation or medical conditions or recovery related to these conditions.
- If a student discloses a pregnancy or related condition to an employee, unless the employee reasonably believes that the Title IX coordinator has already been notified, the employee must:
 - Promptly provide the student with the Title IX coordinator’s contact information, and
 - Inform the student that the Title IX coordinator can coordinate reasonable modifications to preserve their equal access to the institution’s education program or activity.
 - Modifications to accommodate pregnancy or related conditions are not reasonable if they fundamentally alter the nature of the education program or activity.
- Students have the right to access voluntary leaves of absence, with the student to be reinstated to the academic status they held before the leave began.
- Students also have the right to access a lactation space, which:
 - Cannot be a bathroom, and
 - Must be clean, shielded from view, and free from intrusion by others.
- Similar rights are provided to employees.

Training Requirements

- *All employees* must receive training at the time of hire and annually that addresses:

- The institution’s obligation to address sex-based discrimination;
 - The scope of conduct that constitutes sex-based discrimination (including the definition of sex-based harassment); and
 - The institution’s reporting requirements for employees (*see* “Updated Reporting Obligations,” above).
- Title IX coordinators, investigators, decision-makers, informal resolution facilitators, and others with (1) responsibility for implementing the institution’s grievance procedures, or (2) the authority to modify or terminate supportive measures must be trained annually on a variety of enumerated topics specific to their positions.
 - Institutions are no longer required to publicly post training materials, but they will need to have a process and protocol for enabling them to be reviewed upon request.

Expanded Title IX Coordinator Responsibilities

- Institutions are required to identify a single Title IX coordinator with ultimate responsibility for Title IX compliance but may delegate, or permit the Title IX coordinator to delegate, specific duties (for example, establishing a point of contact for the facilitation of accommodations for pregnancy or related conditions, or designating an individual with responsibilities to individual schools or campuses).
- Title IX coordinators are now formally required to (1) monitor the institution for barriers to reporting sex discrimination and (2) take steps reasonably calculated to address such barriers.
- Title IX coordinators are also now specifically tasked with preventing discrimination against, and coordinating accommodations to ensure access for, students who are pregnant or have related conditions.
- Enhanced training requirements include specific training on topics including the Title IX coordinator’s obligations to:
 - Respond promptly and effectively to any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects;
 - Support students who are pregnant or have related conditions;
 - Offer and coordinate supportive measures to students affected by sex discrimination, including sex-based harassment;
 - Satisfy recordkeeping requirements;
 - Treat complainants and respondents equitably;
 - Notify affected individuals of their rights; and
 - Initiate grievance procedures in response to complaints, including determining whether to initiate a complaint as Title IX coordinator.
 - A list of factors to consider in making such a determination is now provided.