Title IX 2.0: Navigating the New Terrain

Christine Galdston, JD, LL.M.
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Navigating IX: Where Are We?

- Current Regulations (8/2020) in full force & effect
  - *Cardona* struck “exclusionary” rule
- New Administration-January 2021
  - Significant focus-LGBTQ+ protections
- Title IX NPRM-June 2022/Athletics Rule NPRM-April 2023
  - Originally promised in May, delayed to October…..now?
- State Law/Court Decisions
  - Continued litigation of Title IX disputes
  - Don’t forget state law
  - New Rule will likely face legal challenges
Significant Developments

• *Bostock*
  • Supreme Court case establishing protections for LGBTQ employees from discrimination under Title VII
  • ED issued position that *Bostock* extends to Title IX
• *Tenn v. Department of Ed*
  • OCR enjoined from enforcing its extension/interpretation of *Bostock* in 20 states with conflicting laws
State of Tenn v. US Dept of Education

• 20 States challenged ED guidance/position extending *Bostock* to Title IX context
• Guidance conflicts with state laws limiting athletic team participation based on sex assigned at birth & access to bathroom/locker rooms
• Unclear what will happen after rule becomes final as likely additional challenges await
• Pursuant to a Federal court order, the Department has been preliminarily “enjoined and restrained from implementing” this document against the states of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, South Dakota, and West Virginia. See State of Tenn., et al. v. U.S. Dep’t of Educ., No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022).
Proposed Title IX Rule
Highlights

Scope & Application
Sex-Based Discrimination
Sex-Based Harassment
Notice, Reporting & Monitoring
Pregnancy & Related Conditions
Supportive Measures
Grievance Procedures
Informal Resolution
Training
Sex-based Discrimination

“On the Basis of Sex”
- Sex characteristics
- Sex stereotypes
- Pregnancy or related conditions
- Sexual Orientation
- Gender ID
Applicability/Jurisdiction

• Includes all sex discrimination
• Educational program or activity (EPA)
• Geographical limits removed/outside US & EPA
  • Under school’s disciplinary authority
  • *Contributes* to hostile environment in Education Program or Activity
Sex-based Harassment

• One of Three Prongs
• Hostile Environment
• Unwelcome sex-based conduct:
  • Severe OR
  • Pervasive
  • Objectively AND subjectively offensive
  • Denies OR limits
  • Totality of the circumstances/five factor fact-specific inquiry
Sex-based Harassment: Totality of the Circumstances

Five factor fact-specific inquiry:
1. Degree to which conduct affected complainant’s ability to access EPA
2. Type, frequency duration
3. Parties ages, roles, previous interactions and other relevant factors
4. Location, context and control over recipient
5. Other harassment in EPA
Notice & Reporting

• Actual Knowledge is removed
• K-12 all employees mandated reporters
• All employees have obligation to either:
  • Provide T9C info to reporting party, or
  • Report information to T9C
  • Exception for confidential employees
• Monitoring barriers to reporting
Supportive Measures & Emergency Removals

• Reviewable/appealable
• Allow burdening respondent during pendency of grievance process
  • Must allow review prior to imposition if possible
  • Must be removed at conclusion of grievance process
  • Must be no more restrictive than necessary to restore/preserve complainant’s access
  • May not be punitive/disciplinary
• K-12 must coordinate with IEP team
• Emergency Removals
  • Justified if immediate and serious threat exists that arises from the allegations
  • Not limited to “physical threat”
Grievance Procedure (General) § 106.45

• Applies to All complaints
• Seven overarching “basic” requirements
• No “Formal Complaint” requirement
  • Complaints may be verbal or written
• Less Prescriptive
• No Live Hearing
• No Cross-Examination
Grievance Procedure Basic Requirements
§ 106.45

1. Treat parties equitably
2. No conflict of interest or bias
   • T9C and/or Investigator may be decision-maker
3. Statement of non responsibility
4. Reasonably prompt timeframes for major stages
5. Reasonable steps to protect privacy
6. Objective evaluation of all relevant evidence
7. Exclude privileged/protected evidence
What’s Not in §106.45 Grievance Procedures?

• No requirement for a formal complaint
  • Greater potential for Informal Resolution options
• No written notice requirements
• No requirement for a live hearing
• No requirement for cross-examination
• No requirement to provide written investigative report
• No requirement to provide 10-day review periods for review of evidence
Grievance Procedure §106.46

• Sex-based Harassment involving a student at Postsecondary institution
• Everything in General PLUS
• Additional Due Process protections (similar to current)
  • Written notice with sufficient time to prepare
  • Live hearings and cross-exam optional
    • If offered, similar to current rules
  • Must have method of testing credibility
    • Decision-maker may ask during live hearing or in individual meetings
• Right to an Advisor
Pregnancy & Related Conditions

• All employees must provide T9C contact info
• Recipient’s Obligations
  • Provide notice of rights
  • Voluntary reasonable modifications
  • Allow voluntary access to separate/comparable portion of program
• Voluntary LOA
• Lactation space
Informal Resolution § 106.44(k)

• If deemed appropriate by T9C
• Not permitted in Student v. Employee matters
• No formal complaint/may be offered at any time
• Both parties voluntarily agree
• Facilitator must be trained
• Facilitator may not be Investigator or Decision-maker
• Process is confidential (information may not be used in grievance process)
If a recipient adopts or applies a sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:

(i) be substantially related to the achievement of an important educational objective, and

(ii) minimize the harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.
Training

• ALL employees must be trained
• Specific training for specific employees
  • T9 Team
  • Anyone Implementing Grievance Procedure OR with Authority to Modify/Terminate Supportive Measures
  • Facilitators of Informal Resolution
• Training must be posted on institutional website
<table>
<thead>
<tr>
<th>Current Rule</th>
<th>Proposed Rule</th>
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<tr>
<td>• No Single Model Investigator</td>
<td>• Investigator Can Make Decision</td>
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<td>• Sexual Harassment: Severe, Pervasive, Objectively Offensive</td>
<td>• Sex-based Harassment: Severe or Pervasive</td>
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<tr>
<td>• Grievance Process After Formal Complaint of Sex Harassment</td>
<td>• Grievance Process for All Reports of Discrimination</td>
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<td>• Live Hearing &amp; Cross Exam</td>
<td>• Hearing &amp; Cross Exam Optional</td>
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<td>• Training for T9 Team</td>
<td>• Training for All Employees</td>
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<td>• Scope limited to educational program &amp; activity</td>
<td>• “Impact” within EPA</td>
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<tr>
<td>• In the US</td>
<td>• Not limited to US</td>
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Key Take-Aways & Closing Thoughts

• New Rules delayed from October/effective date TBD
• Overlap with existing law
  • State law, judicial decisions, VAWA/Clery, Title VII, etc
• Expect more workload: think about staffing
• Plan on expanded training requirements
• Review pregnancy related policies/ensure sufficient lactation space
• Consider developing informal resolution options if not already in place
Christine@T9Now.com

www.T9Now.com

Thank you!