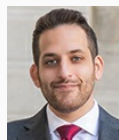


CEP Magazine – December 2023



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Navigating the next wave of Title IX regulations

By Ashley R. Lynam, Esq., and David I. Singh, Esq.

Since Title IX was enacted, the regulations surrounding it and how they are enforced have undergone a series of changes, often coinciding with changes in the presidential administration. We are now facing the next wave of changes, with the U.S. Department of Education expected to release the final version of the Biden administration's proposed amendments to the Title IX regulations in the coming months.^[1] It is also expected that the Department of Education's separately announced proposed "Athletics regulation" concerning the participation of transgender students in school athletics will also be finalized in the coming months.^[2] And like a wave that washes away what lies before it, these proposed regulations do away with many changes adopted under the Trump administration.

The Department of Education, through its Office for Civil Rights (OCR), first published a set of draft rules in July 2022. OCR originally stated that May 2023 was the deadline for the revised regulations, but when that deadline passed, a new goal was set for October 2023. Unfortunately, a realistic look at the regulations' timeline reveals that adherence to the October deadline was almost impossible. Much of this delay can be attributed to the more than 244,000 comments received from the public regarding the July 2022 draft that OCR is now considering while finalizing the latest Title IX regulations.

OCR also still needs to transmit a final draft to the Office for Management and Budget, specifically to the Office for Information and Regulatory Affairs (OIRA). OIRA is tasked with conducting meetings with representatives from affected agencies and other interested parties. OCR will then take the feedback and requested changes produced from these meetings and implement them into the final regulations, a process that took approximately two months with the 2020 rule changes. The OIRA review process is expected to last between 90 and 120 days.

Under the current circumstances, it is expected that publication of the new Title IX regulations will occur four to six months after the transmission date to OIRA. OCR typically gives schools 60 to 90 days from the date of publication to comply with the regulations before enforcement begins; however, there is no binding rule on the permitted time period. Thus, higher education institutions should anticipate the final regulations by spring 2024, with implementation extended to summer 2024 in order to provide schools with ample time to revise policies and procedures and train staff members with the new rules.

But even with the delay, institutions should already be assessing whether their own processes adhere to the proposed regulations. In this article, we explore how notable proposed regulations may impact and change the compliance efforts of educational institutions going forward.

Notable proposed changes

Jurisdiction

The proposed regulations expand the scope of Title IX compliance by allowing more third parties to file a complaint, removing certain geographical limitations, and more broadly defining the misconduct at issue.

For instance, the proposed regulations expand the rights of third parties to file complaints based on sex discrimination if they were participating or attempting to participate in the institution's education program or activity *when the alleged sex discrimination occurred*.^[3] This is unlike the current regulations, which consider the third-party complainant's participation in an education program or activity *at the time of filing the complaint*.^[4] This means that institutions must have plans and procedures in place to handle allegations of sexual discrimination from the likes of prospective students, visiting student-athletes, and even guest speakers or lecturers.

Similarly, the proposed regulations will require institutions to address a sex-based hostile environment under their education program or activity, even if the sex-based harassment contributing to such a claim occurred outside the United States.^[5] For example, if a student was assaulted by a peer while in an institution's study abroad program and alleges that a hostile environment exists when both students return to campus, the institution will need to consider the parties' previous interactions to fully address a hostile environment claim.^[6]

Additionally, the proposed regulations address a wider range of alleged misconduct. The proposed regulations would define hostile environment harassment as "unwelcome sex-based conduct that is sufficiently severe or pervasive," which "evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity."^[7] By comparison, the current regulations are stricter in that the "unwelcome conduct" must be "severe, pervasive, and objectively offensive."^[8]

Accordingly, institutions must be ready to meet the potential demand from an influx of new cases covered by the expanded scope of jurisdiction in the proposed regulations. To do that, institutions should assess whether they have enough staff and resources to meet such demands. Depending on the circumstances, an institution may want to consider engaging third parties to help them comply with their Title IX requirements, for example, by having them serve as investigators or decision-makers.

Investigation models and hearings

One of the most controversial changes in the proposed regulations is the elimination of live hearing and cross-examination requirements, as well as the allowance of the "single investigator model," which is where the same individual who investigates the complaint also determines responsibility.^[9] This means that an investigator can also serve as the decision-maker for a complaint. Similarly, a Title IX coordinator can serve as both the investigator and decision-maker. As a result, institutions must now determine what changes, if any, they will make to their investigation model or hearing procedures.

That said, institutions should not simply implement the single investigator model or no longer require live hearings and cross-examination just because the proposed regulations allow them to do so. Regulations usually set the minimal floor of what an institution must do. It also does not necessarily mean such conduct would be upheld when challenged in court. In fact, the department itself has acknowledged that courts in some jurisdictions "have held, in both public and private postsecondary settings, that some method of live cross-

examination is required by due process and basic fairness when a disciplinary charge rests on a witness's or complainant's credibility."^[10] Accordingly, for institutions under the jurisdiction of such courts, a decision to remove such requirements will likely result in future litigation challenging such actions.

Granted, the single investigator model without live hearings and cross-examination will greatly appeal to institutions that lack the resources to implement another model. In fact, that may be their only viable option to comply with Title IX. But for others, the benefits of reverting to the single investigator model or eliminating live hearings and cross-examination must be carefully weighed against the legal uncertainty—and potential litigation—that will likely come with these decisions.

Transgender student-athletes

The proposed athletics regulation concerning the participation of transgender students in athletics seeks to clarify when sex-related restrictions on participation in athletics are permissible under Title IX. Under the proposed regulation, schools would not be permitted to apply a one-size-fits-all policy that categorically bans transgender students from participating on teams consistent with their gender identity.^[11] But the regulation would allow institutions to limit participation if it is: (1) substantially related to the achievement of an important educational objective, like ensuring “fairness” in a competition, and (2) minimizes harm to the students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.^[12] And any such limitations must be based on a sport-by-sport analysis that considers multiple factors, including the grade levels of the students, the nature of the sport, and differing levels of skill and competition.^[13]

Accordingly, should an institution seek to limit a transgender student's ability to participate on a team consistent with their gender identity, engaging in an extensive multifactor assessment will be required before implementing any such policy.

Discretion and flexibility

A review of the foregoing proposed changes reveals two themes: discretion and flexibility. While this would seem to be a positive, there are some who consider the increased discretion and flexibility both a blessing and a curse.^[14] The increased discretion and flexibility will allow institutions to adapt policies to their own unique circumstances, but this may also lead to inconsistent enforcement between cases and potentially biased processes and outcomes.^[15]

Ultimately, it will be necessary for educational institutions to strike the right balance of discretion and flexibility going forward, which will hopefully prevent costly future litigation challenging their procedures and compliance with Title IX.

Takeaways

- Institutions should already be strategizing how they can implement the proposed regulations promptly and efficiently.
- Because the proposed regulations expand the scope of Title IX protections, institutions should assess if they have the resources required to deal with increased demands.
- Before adopting a single investigator model or not requiring live hearings and cross-examinations, an institution should carefully consider any legal implications that may result.

- Eligibility policies limiting transgender students from participating on sports teams should explain the “important educational objective” they achieve and how they cause the least harm.
- While institutions have discretion and flexibility under the proposed regulations, they should seek to ensure that their policies and procedures are not biased against any party.

1 Katherine Knott, “Students Press Biden Administration to Finalize New Title IX Rules,” *Inside Higher Ed*, September 12, 2023, <https://www.insidehighered.com/news/government/2023/09/12/new-title-ix-rules-likely-delayed-students-push-other-solutions>.

2 U.S. Department of Education, “A Timing Update on Title IX Rulemaking,” HOMEROOM (blog), May 26, 2023, <https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/>.

3 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390–41,407 (July 12, 2022) (to be codified at 34 C.F.R. § 106), <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

4 34 C.F.R. § 106.30(a).

5 87 Fed. Reg. at 41,397.

6 87 Fed. Reg. at 41,403.

7 87 Fed. Reg. at 41,410 (emphasis added).

8 34 C.F.R. § 106.30(a)(2).

9 87 Fed. Reg. at 41,467.

10 87 Fed. Reg. at 41,506.

11 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22,860–22873 (April 13, 2023) (to be codified at 34 C.F.R. § 106), <https://www.federalregister.gov/documents/2023/04/13/2023-07601/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

12 88 Fed. Reg. 22,860.

13 U.S. Department of Education, “FACT SHEET: U.S. Department of Education’s Proposed Change to its Title IX Regulations on Students’ Eligibility for Athletic Teams,” April 6, 2023, <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>.

14 Brett A. Sokolow, “More Flexible Title IX Regs Pose New Dilemmas,” *Inside Higher Ed*, July 11, 2022, <https://www.insidehighered.com/views/2022/07/12/flexibility-title-ix-reg-blessing-and-curse-opinion>.

15 Sokolow, “More Flexible Title IX Regs Pose New Dilemmas.”

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