

U.S. Department of Education: Highly Anticipated Title IX Regulations Published, Compliance Required by August 1, 2024

Summary of Key Changes and Requirements, Including Required Training, Notice, and Policies

April 24, 2024

On April 19, 2024, the United States Department of Education's Office for Civil Rights ("DOE") issued its long-awaited and lengthy Final Title IX regulations (the "2024 Final Rule"). The 2024 Final Rule requires that all educational institutions that receive federal funds ("institutions" or "recipients") that have knowledge of conduct that reasonably may constitute sex discrimination in their educational programs or activities must respond promptly and effectively to address that conduct. The 2024 Final Rule sets forth procedures required in that response.

The 2024 Final Rule, which takes effect on August 1, 2024, includes significant changes from the 2020 regulations and feature largely the same core principles contained in the Department's 2022 draft rules (after having received more than 240,000 comments from the public during the interim rulemaking process). Key provisions and specific changes are summarized below, though many important provisions remain the same and thus will not be expressly addressed in this alert.

Definitions and Scope

The 2024 Final Rule adds and revises definitions, including definitions of complaint, complainant, respondent, and party; confidential employee; disciplinary sanctions; pregnancy or related conditions; relevant; remedies; retaliation and peer retaliation; sex-based harassment; and supportive measures. More specifically, the 2024 Final Rule:

- Updates a key definition, "sex-based harassment," to include quid pro quo harassment, hostile environment harassment, and other specific offenses including sexual assault, dating violence, and domestic violence.
- Defines "retaliation" to include intimidation, threats, coercion, or discrimination against an individual, by any person, for their participation in a Title IX investigation process.
- Confirms that "sex discrimination" includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Clarifies that a "complainant" or "respondent" may include a current or former student, employee, or third party and expands "complaint" to mean a written **or oral** request for investigation.
- Defines "relevant" to mean "related to the allegations of sex discrimination under investigation" and explains that questions are "relevant" if they "may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred."

Notably, the 2024 Final Rule more clearly describes an institution's obligations to review and investigate concerns of sex discrimination **and** sex harassment. Further, the 2024 Final Rule provides that, subject to a few notable exceptions (i.e., housing and athletics), an institution adopting a policy or engaging in a 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 on the basis of sex and may be sex harassment or discrimination.

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The scope of an institution's jurisdiction has been expanded such that the 2024 Final Rule now applies to conduct which has occurred in the context of an institution's program or activity **even when** some conduct occurred outside the institution's program or activities or outside the United States.

Effect on Other Legal Requirements

The 2024 Final Rule confirms that complying with Title IX's requirements shall supersede any conflict with state law or Family Educational Rights and Privacy Act ("FERPA"). The 2024 Final Rule also notes that it cannot and does not override any right of a parent, guardian, or legal representative to act on behalf of a party in a Title IX investigation.

Required Posting and Training of Policy and Procedures

All institutions must adopt a nondiscrimination policy and grievance procedures consistent with the 2024 Final Rule. Further, an institution must provide a notice of nondiscrimination to students; parents, guardians, or other authorized legal representatives of elementary school and secondary school students; employees; applicants for admission and employment; and all unions and professional organizations holding collective bargaining or professional agreements with the recipient.

This notice must include:

- A statement that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and the 2024 Final Rule, including in admission and employment;
- A statement that inquiries about the application of Title IX and the 2024 Final Rule to the recipient may be referred to the recipient's Title IX Coordinator, OCR, or both;
- The name or title, office address, email address, and telephone number of the recipient's Title IX Coordinator;
- How to locate the recipient's nondiscrimination policy and grievance procedures;
- How to report information about conduct that may constitute sex discrimination under Title IX and how to make a complaint of sex discrimination.

This notice must be posted on the institution's website and within all handbooks, bulletins, and announcements provided to the institution's community.

All employees must be trained on the nondiscrimination policy and procedures upon hiring or change of position (if duties are altered) **and annually thereafter**. Additional specific training must be provided to employees with specific roles in the grievance procedure. Such training must be available to members of the public upon request.

All training, complaint, and investigation records must be maintained for seven years.

Reporting Requirements

All employees who are not deemed "confidential employees" are required either to convey reports of potential sex harassment or discrimination that they receive or become aware of to the Title IX Coordinator or to provide contact information for the Title IX Coordinator to the person who has reported such concerns.

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Notably, the 2024 Final Rule diverges from the 2020 regulations here, as the 2024 Final Rule requires a recipient “with knowledge of conduct” that reasonably may constitute sex discrimination in its education program or activity to respond promptly and effectively. The 2020 regulations required an institution to respond only when it had “actual knowledge” of allegations of “sexual harassment,” and only in a manner that is not deliberately indifferent. The 2020 regulations provided that postsecondary institutions had “actual knowledge” when the Title IX Coordinator and employees with authority to institute corrective measures had notice of allegations of sexual harassment, while elementary schools and secondary schools had “actual knowledge” when any employee had notice of such allegations.

Special Education Students

The 2024 Final Rule requires the Title IX Coordinator to consult with the individualized education program (IEP) team of a secondary education student with a disability, where that student is a party to an investigation. Similarly, in the higher education context, the Title IX Coordinator *may* consult with the office designated to provide support and services to individuals with disabilities.

Initiating an Investigation

A formal investigation may be initiated by a complainant or the Title IX Coordinator. In determining to move forward with a Title IX Coordinator-signed complaint, the following factors should be considered:

- The complainant’s request not to proceed with initiation of a complaint;
- The complainant’s reasonable safety concerns regarding initiation of a complaint;
- The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
- The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
- The age and relationship of the parties, including whether the respondent is an employee of the recipient;
- The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
- The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
- Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures.

The Title IX Coordinator may dismiss an investigation where they reasonably determine the conduct as alleged could not constitute sex discrimination under Title IX or the 2024 Final Rule after communication with the complainant. Further, dismissal is permitted where a respondent cannot be identified, a respondent is not participating in educational programs or activities or is not employed by the institution, or when a complainant voluntarily withdraws a complaint. Notice of any dismissal must be provided to all parties who have notice of the complaint at the time of dismissal, and an opportunity to appeal must be provided.

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Required Grievance Procedures for All Investigations

All educational institutions must implement procedures to review a complaint of sex discrimination, including complaints of sex harassment, which must:

- Treat complainants and respondents equitably;
- Ensure an investigation free of conflicts of interest and bias;
- Presume that the respondent is not responsible until a determination is made;
- Provide prompt timeframes for all major stages of investigation;
- Provide reasonable steps to protect the privacy of parties and witnesses during the grievance procedures, but not in a manner which would restrict the ability to obtain and present evidence;
- Evaluate relevant evidence and exclude impermissible evidence such as (a) evidence protected as privileged unless that privilege is waived voluntarily and in writing or (b) evidence of sexual interests or prior sexual conduct unless it is offered to prove consent.

At the start of an investigation, a notice of investigation must be provided to the parties whose identities are known. That notice must include the applicable policy and grievance process, sufficient information to allow the parties to respond to the allegations, a statement that retaliation is prohibited, and notice to the parties that they are entitled to an equal opportunity to assess any and all evidence deemed relevant. At the conclusion of the investigation, there must be an opportunity to appeal, and sanctions, if warranted, shall be imposed only where there is a finding of a violation of policy.

Required Additional Grievance Procedures for Sex Harassment Investigations

Notably, the 2024 Final Rule provides **additional** requirements and guidelines where the complaint is one of **sex harassment which relates to a student complainant or student respondent in the postsecondary education setting, only**. Accordingly, such additional requirements and guidelines are **not** required for complaints of sex discrimination that is not sex harassment, complaints of employee-on-employee conduct, or complaints in secondary institution settings.

In a sex harassment case that involves a postsecondary student, the following is also required:

- Written notice of the allegations, including an amended notice where additional allegations are uncovered during an investigation;
- The right to an advisor of the party's choice, who can be an attorney;
- A prohibition on false statements;
- Written notice of the date, time, location, participants, and purpose of all meetings with sufficient time to prepare and participate where an individual is expected to participate;
- Provision of reasonable extensions when a reason for delay is offered;
- Equal access to all relevant evidence or a report that summarizes relevant evidence (with the right to review the evidence upon request);

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- Equal right to review and respond to the evidence prior to any determination;
- Reasonable steps to prevent and address the unauthorized disclosure of information and evidence obtained through the grievance procedures; and
- A process to permit parties to question a party's or witness's credibility where it is in dispute, through either a live hearing or another procedure.

The decisionmaker must provide a written determination as to whether a violation of the policy occurred.

A notable change in the 2024 Final Rule is that it does not require a live hearing to address questions of credibility.

Another notable change in the 2024 Final Rule allows for a single investigator model, where the investigator can also be the decisionmaker that concludes an investigation.

The DOE has posted a fact sheet, summary of major changes, and resources for drafting Title IX policies and procedures.

If you have any questions about the Final Rule or need assistance concerning compliance, training requirements, or drafting policies, please do not hesitate to contact Miller Canfield's Higher Education and K-12 Education Team or the authors of this alert.