

THE 2024 TITLE IX REGULATIONS

WHAT SUPERINTENDENTS NEED TO KNOW

Snapshot

The U.S. Department of Education released revisions to Title IX on April 19, 2024. The amended Title IX regulations, which will be effective on August 1, 2024, make several important changes to the protections for LGBTQ+ students, employees, and parents and the processes K-12 schools use to address reports of sex-based discrimination, including harassment and retaliation, under Title IX.

The rules, for the first time, codify protections for LGBTQ+ students, employees, and parents, against discrimination, including harassment, based on sexual orientation or gender identity. The rules do not make any changes to rules regarding athletics participation by transgender students, which may be addressed in later rulemaking, but do purport to apply to the use of intimate facilities such as bathrooms and locker rooms. We expect to see legal challenges soon because of the potential conflicts between these mandates and state laws.

The rules now cover not just sexual harassment but also all types of sex-based harassment and discrimination. With respect to “hostile environment sexual harassment,” the rules broaden the definition to include conduct that is severe but not pervasive or pervasive but not severe. The rules also now cover more off-campus conduct, although with some important limitations.

Significantly, the rules also remove many of the burdensome procedural requirements from the Title IX grievance process that districts have been required to use since 2020. As a result, districts may be able to return to a single, uniform grievance process to address all forms of discrimination and harassment, including conduct based on race, color, national origin, religion, and disability, rather than having a separate, more onerous process for “Title IX Sexual Harassment.”

What Conduct Is Covered by the New Title IX Rules?

Sex-Based Harassment

Since 2020, school districts have been required to address “Title IX Sexual Harassment” using the specific Title IX process outlined in the Title IX rules. One of the most significant changes in the new regulations is broadening the definition of conduct covered as “sexual harassment” under Title IX. Changes include:

- Requiring districts to use the Title IX Grievance Process to address any unwelcome conduct based on sex that is subjectively and objectively offensive and *severe or pervasive* enough to deny or limit an individual’s ability to participate in or benefit from the school’s education program or activity, not just conduct that is so “severe, pervasive **and** objectively offensive” that it **effectively denies equal access** to those programs or activities.
- Changing the vocabulary in the rules from sexual harassment to sex-based harassment to clarify that Title IX addresses harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity—not just harassment with an element of romantic or physical attraction.
- Requiring schools to use the Title IX grievance process to address “-quid pro quo” sex-based harassment by non-employees authorized to provide a service or aid of the educational institution, such as a volunteer advisor or coach.
- Explicitly protecting members of the school community from harassment based on sexual orientation or gender identity.

Other Sex-Based Discrimination

The Title IX rules now cover other types of discrimination than harassment. Examples include intentionally or unintentionally treating someone differently based on sex without a legitimate reason and retaliation.

Districts already address many of those types of complaints using other procedures, but must now be prepared to respond using the Title IX grievance process. Types of complaints that may now need to be addressed using the grievance process in the rules include those addressing retaliation, athletics equity, unequal discipline, discrimination against pregnant and parenting students, and gender-focused programs and scholarships.

Perhaps most significantly, the final rule includes protections for LGBTQ+ students, parents, and others against harassment and other discrimination in the school environment. The rule prohibits different treatment of such individuals if there is a more than a de minimis harm based on sex. The rule specifically states that “[a]dopting 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.” The preamble to the rule makes clear that the Department expects this limitation to apply to the use of intimate facilities such as bathrooms and locker rooms.

Ten states currently require transgender students to use bathrooms and locker rooms that align with their biological sex identified at birth, according to tracking by the Movement Advancement Project. Both situations might constitute violations of Title IX under the new regulation. Accordingly, the issue seems primed for legal challenges between the federal and state law.

Pregnant & Parenting Students

The new regulations, for the first time, explicitly require districts to provide accommodations for pregnant and parenting students. Among other requirements, they compel districts to treat students who are parenting or have related conditions the same as students with temporary medical conditions, including by using an interactive process to identify and provide reasonable modifications to policies, practices, or procedures for the student. The rules also require districts to offer voluntary leaves of absence for medical necessity and ensure students can access a clean and private lactation space other than a bathroom.

The rule also requires that when a student or legal guardian notifies any employee of a student’s pregnancy or related condition, the employee must promptly inform the student or their legal guardian about how to notify the Title IX Coordinator. The Title IX Coordinator then must reach out to the student to inform them of their rights. Districts must also now use the Title IX grievance process to address complaints from pregnant and parenting students that their rights were denied.

Where Must Conduct Occur to Be Covered by the New Title IX Rules? _____

The definition of “education program or activity” has also significantly changed, broadening the locations for which schools must use the Title IX process. Under the 2020 Title IX regulations, conduct was only in the education program or activity if the educational institution had substantial control over both the alleged harasser and the context of the harassment. Now, the rules will cover any conduct that is “subject to the recipient’s disciplinary authority.” For that reason, even if the conduct occurs off campus or outside of the United States, a K-12 school may be on the hook to address the conduct using its Title IX process if the location is covered by school disciplinary codes such as student or employee codes of conduct.

Even if conduct occurring off campus or outside of the country is not within a district's disciplinary authority, the new rules also make clear that a school district must address any hostile environment based on sex in its program or activity—even if some of the conduct alleged to be contributing to the hostile environment occurred outside of the education program or activity.

These changes may have significant implications for the interplay between Title IX processes and state laws. For example, if state law requires districts to discipline certain off-campus crimes, such as assault or cyberbullying, school districts will now be required to first use the Title IX grievance process to find the perpetrator responsible before taking disciplinary measures required by state law.

Grievance Process

The expanded scope and jurisdiction of the new regulations will undoubtedly increase the number of complaints that fall within the Title IX grievance process. However, particularly for K-12 schools, the new regulations dispense with many of the proscriptive elements that make the current Title IX grievance process so unwieldy. For example, investigators are no longer required to provide the parties with two separate ten-day review periods for the evidence and the report. Now, a school may provide a summary of the evidence if it allows the parties equal opportunity to access the evidence upon request. The parties need only be given a reasonable opportunity to respond to the summary of the evidence or the evidence itself thereafter.

The new grievance process also allows districts to return to using a “single investigator/decisionmaker” model. The new regulations also now only require a school to notify the parties in writing of the complaint's outcome—whether sex discrimination occurred—including the rationale for such determination, along with the procedures and permissible bases for the complainant and respondent to appeal. This is much less onerous than the “written determination on the merits” required under the 2020 rules.

Training

The new regulations expand the training requirements regarding Title IX. In addition to the training requirements for the “Title IX Team”—which look somewhat like those in the 2020 rules, with some additions—the new regulations require training for all employees. AASA will provide information to its members soon about training options to meet the requirements on these and other requirements of the new regulations.

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