KEEPING UP WITH THE REGULATORS:

A Training for Illinois College and University Colleagues

June 27, 2023

Jessica Nagle
Joseph Storch
PRESENTATION AGENDA

- Title IX Sexual Misconduct Regulations
- Title IX Athletics Regulations
- Title IX Expected Litigation Challenges
- VAWA Climate Survey Requirements
- Illinois Survey Requirements
- CHIPS and Science Reporting Requirements
- Pregnancy and parenting in light of Dobbs
WHEN DO WE EXPECT FINAL REGULATIONS?

IT’S GONNA BE MAY??

NARRATOR: It would in fact, not come out in May...
SEE YOU IN...OCTOBER?

Released unofficially June 23, 2022 – Happy Anniversary!

July 12 official publication

Published in the Federal Register July 12th.

Sept 12 – over 240,000 comments submitted!

October 00, 2023 Final Rule released?
MAJOR CHANGES

1. Scope Expansion
2. Obligation/reporting expansion
3. Adjudication options & more
4. What to do now, and next
Continue to follow current policies and procedures consistent with the 2020 final rule and state law until implementation.
SCOPE EXPANSION

2020 Title IX Final Rule (effective now)

- Narrow geographic scope
- Narrow set of violations
- Narrow concentration (sexual harassment/violence)
- Narrow required reporting and formal process
- More significant process
SCOPE EXPANSION: COVERED CONDUCT

Sex-Based Harassment (Proposed § 106.2) includes Discrimination on the Basis of Sex (Proposed § 106.10)

**Sex-Based Harassment**

- Quid pro quo
- Hostile environment: “Severe or pervasive”
- Specific Offenses, including sexual assault, dating violence, domestic violence, and stalking

**Discrimination on the Basis of Sex**

Discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
SCOPE EXPANSION: GEOGRAPHY AND JURISDICTION

- Expanded scope (Proposed § 106.11)
- "in the United States" (Current § 106.44(a))

“It also requires a recipient to respond to a hostile environment based on sex within its education program or activity in the United States, even if sex-based conduct contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.” (Proposed § 106.11)
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(PROPOSED) EXPANDED RESPONSIBILITY

EXPANDED STANDARD OF RESPONSIBILITY
“act promptly and effectively” versus deliberate indifference standard

Retaliation And Peer Retaliation

Pregnancy and related conditions
RESPONDING AND NOTIFICATION

Employees required to notify the TIXC (proposed § 106.44) are those who are not confidential, and:

- Have responsibility for administrative leadership, teaching, or advising
- Have authority to institute corrective measures
- All other employees who are not confidential employees*

“actual knowledge”

• “[R]equire a recipient to take a prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, to prevent its recurrence, and remedy its effects.” (Proposed § 106.44(a))
• Supportive measures
DOES AN EMPLOYEE HAVE TO TAKE ANY ACTION because of what they learned about conduct that may constitute sex discrimination under TIX to the TIXC?

**IS THE EMPLOYEE CONFIDENTIAL?**

<table>
<thead>
<tr>
<th>IF NO, does the employee have the authority to institute corrective measures?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>IF NO, TWO OPTIONS:</strong></td>
</tr>
<tr>
<td>1. Report to TIX, or</td>
</tr>
<tr>
<td>2. Provide the TIXC’s contact information and information about how to report sex discrimination to any person who provides the ‘ee with the information about conduct that may constitute sex discrimination under TIX.</td>
</tr>
</tbody>
</table>

**IF OTHER: NO:**

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</table>

**IF OTHER: YES:**

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<th>IF NO, is the information about an employee being subjected to conduct that may constitute sex discrimination under TIX?</th>
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ADJUDICATION CHANGES

- Informal resolution available without a formal complaint
- Live hearings optional*
- Advisor cross NOT required*
- Can use a different standard of evidence for students than employees
- Access to relevant evidence OR an investigative report accurately summarizing the evidence
“sex stereotypes, sex characteristics… sexual orientation, and gender identity.”

- separate rule making for athletic eligibility standards
A new paragraph to address intersection of Federal disability laws, including Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504).
DEFINITIONS

Student

Complainant (includes 3rd Party Complainants)

Retaliation and Peer Retaliation

Pregnancy or related conditions

Confidential Employee
SUPPORTIVE MEASURES

- Definition expanded from the 2020 Final Rule
- “Upon being notified of conduct that **may** constitute sex discrimination under Title IX, a Title IX Coordinator must offer supportive measures, as appropriate, to the complainant or respondent to the extent necessary to restore or preserve that party’s access to the recipient’s education program or activity” (Proposed § 106.44(g))
- Supportive measures may include but are not limited to:
  - Increased security and monitoring of certain areas of the campus
  - Campus Escort Services
  - Counseling
  - Voluntary or involuntary changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative
  - Leaves Of Absence
  - Extensions of deadlines and other course-related adjustments;
  - Training and education programs related to sex-based harassment
  - Restrictions on contact between the parties
### Specific Obligations To Train

<table>
<thead>
<tr>
<th>Category</th>
<th>Details</th>
</tr>
</thead>
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<tr>
<td>Employees: Scope and obligations; responsible employee duties; pregnant/parenting</td>
<td>Investigators, decisionmakers, and other persons who are responsible for implementing the recipient’s grievance procedures or have the authority to modify or terminate supportive measures</td>
</tr>
<tr>
<td>Facilitators of informal resolutions</td>
<td>TIXC and designees</td>
</tr>
</tbody>
</table>
WHAT TO DO NOW...

- Identify stakeholders
- Create a Title IX implementation team
- Identify policies, procedures, trainings that may be impacted (not just Title IX policy...)
- Create a timeline – consider the potential implementation timeline, and who needs to approve (Board?) and how long that review and approval process will take
WHAT WE'RE DOING . . .

• Updating our trainings
• Creating template language, model forms
• Developing checklists
• Training our GRS investigators, hearing officers, coordinators, advisors, etc
• Planning free and more intensive live events, open and in River Connect
WHEN THE REGS DROP, GET STARTED

• First thing's first:
  • Message your community about your plans
  • Engage your stakeholders
  • Update your timeline

• Implement your plan!
  • Revise policies and procedures (and get the necessary approvals), templates, forms, letters, notices
  • Update your trainings
  • Draft updates for your website
  • Ensure the Title IX personnel receive updated training
WHEN THE REGS DROP, JOIN US!

Join GRS:

• Come to our free fast-turnaround summary session
• Visit River Connect for our forums, live events, and resources (with updated forms, templates)
• Attend training and send other folks to training pursuant to the new final rule and to understand the differences
• Engage experts to work with you on revisions
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

A Proposed Rule by the Education Department on 04/13/2023

The document has a comment period that ends in 32 days. (05/15/2023)

SUBMIT A FORMAL COMMENT

PUBLISHED DOCUMENT

AGENCY:
Office for Civil Rights, Department of Education.

ACTION:
Notice of proposed rulemaking (NPRM).
TL;DR

- Published in April 2023
- Date finalized TBD (October?)
- Received a lot of comments (156,000+)
- We expect litigation (and it is starting)
- What it says:
  - No blanket bans
  - Rebuttable Presumption
WHAT THE PROPOSED RULE CHANGES (ADDS)

(b) Separate teams.
(1) Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(2) If a recipient adopts or applies 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 harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.
THE CURRENT ATHLETICS REGULATIONS

106.41 is the section of the regulations regarding athletics
(a) General
(b) Separate teams
(c) Equal opportunity
(d) Adjustment period

[important: these apply to any interscholastic, intercollegiate, club, or intramural athletics of a recipient, k12 and higher ed]
WHY NOW?

• Different approaches among athletic organizations in the U.S. and internationally
• Varying state laws
• Litigation
• Inconsistency is harmful and unhelpful
IF YOU'RE APPLYING “SEX-RELATED” ELIGIBILITY CRITERIA...

• Do you have an important educational objective in separating athletic teams?

• Are the criteria substantially related to those identified important educational objectives?

• Are you minimizing harm to students whose opportunities will be limited or denied?
WHAT IS AN IMPORTANT EDUCATIONAL OBJECTIVE?

• Preventing injury

• Promoting fairness in competition

• And (the Department would love to know)?

• Still requires an analysis that’s specific to the sport and level of competition

• “Communicating or codifying disapproval of a student or student’s gender identity” is not an important educational objective
HOW DO YOU MINIMIZE HARM?

• Department has identified some harms.

• The Department is asking us to tell them how a school can minimize harms.
WHAT ELIGIBILITY CRITERIA ARE NOT SEX-RELATED?

• Attendance
• Academic standing
• Conduct/behavior
Supreme Court uses intermediate scrutiny in sex discrimination cases.

The Proposed is *not* a bright line rule.

Schools (and associations [and states]) cannot use blanket bans or one-size-fits-all tests.
THE CURRENT LANDSCAPE

- Title IX 1972 and 1975
- Non-Athletics Cases Start to Bubble Up
- Dueling DCL's
- Bostock v. Clayton County (2020)
- ED Notice of Interpretation, July 2021 (Enjoined)
- 2022 Proposed TIX Regulations
- 2023 Proposed TIX Athletics Regulations

Transgender students are prohibited by state law from participating in sports that align with their gender identity.

Transgender students are not prohibited by state law from participating in sports that align with their gender identity.
INTERMEDIATE SCRUTINY OR THE REBUTTABLE PRESUMPTION

• Difference between elementary (and immediately following) and secondary/post-secondary
• Intramural and Club Sports
• A presumption of inclusivity, to be (potentially) rebutted if meets both tests
IN THE COURTS

- Sexual Misconduct and Athletics Rule Litigation
- States are very divided on these issues
- West Virginia et al. v. Environmental Protection Agency (2022)
- Red Title IX and Blue Title IX
- Some thoughts...
EXPERIENCE DRIVES US
DATA DRIVES DECISIONS
THE ENVIRONMENT
OUR STUDENTS
DESERVE
THE PROBLEM

Climate Surveys Are:

• Lengthy
• Expensive
• Complex
• Challenging for Participants to Complete
• Lacking Practical Insights and Recommendations

Climate Surveys Should Be:

• High-Quality
• Affordable
• Accessible
• Actionable
A NATIONAL SURVEY?

As part of the **2022 Omnibus bill**, Congress will require the Department of Education to create and administer a survey of all students at all colleges and universities receiving federal funds.

- Institutions can customize
- Created with input from experts
- National and institution-specific reports
BUT THERE’S A PROBLEM

As part of the **2022 Omnibus bill**, Congress will require the Department of Education to create and administer a survey of all students at all colleges and universities receiving federal funds.

- Sexual and interpersonal violence and harassment cannot be measured in “restaurant sanitation grades” comparative safety.

ILLINOIS STATE REQUIREMENTS

- IL Senate Bill 1610 (2021-22)

- No required survey; Specific topics to be covered; Topics to be developed by a Task Force
  - Task force actually developing model questions (91 questions in 13 sections)

- Must be able to respond "prefer not to answer"
- Maintain privacy of responses
- Grand River Solutions Survey can include IL Panel or offer IL survey
THE ROAD TO CHANGE

What We Want
To help create safe and equitable work and educational environments

What We Need to Get There
Accessible, proven, and promising programs and approaches to create change

First We Need
High-Quality Data
A Community of Change Makers
WHAT'S INCLUDED?

Survey Instrument
The survey is created using standardized and custom questions

Survey Admin
Data is collected by anonymous links emailed via Qualtrics

Marketing Materials
Generate awareness through print and social media graphics

Report
Data is analyzed and translated into concise findings with actionable insights

Briefing
A presentation of the findings and Q&A is facilitated live
WHY GRAND RIVER SOLUTIONS?

Privacy & Security
We are committed to ethics, data security, and privacy

Purposeful
Our survey only asks questions that yield meaningful data

Clarity
Our report clearly summarizes the most important findings and provides practical insights

Mission-Driven
We are committed to helping institutions create meaningful change that improves safety and equity of communities nationwide

Accessible
Affordable and tailored to the specific needs and budgets of the institution
CHIPS AND SCIENCE ACT

• Current patchwork of reporting harassment to grantors
• Consolidates and conforms
• Surveys and Data
• Funding??

CURRENT REGULATIONS

DISCRIMINATION PROHIBITED
Do not exclude or treat differently students, employees, or applicants based on pregnancy

"PREGNANCY OR RELATED CONDITIONS"
"Childbirth, false pregnancy, termination of pregnancy, or recovery therefrom"

CONSIDER EXISTING POLICIES...
For temporary disabilities
For leave
Pregnancy and Post Pregnancy

Make up any missed work without penalty.

- Assignments, exams, labs, attendance and participation points
- Clinical assignments

When a student returns to school, they must be allowed to return to the same academic and extracurricular status as before their medical leave began.

Must provide reasonable adjustments, like a larger desk, elevator access, or allowing frequent trips to the restroom.
"TEMPORARY DISABILITY?"

Treat disabilities related to pregnancy, etc, in the same manner and under the same policies as any other temporary disability or physical condition.

Applicants for admission, students, and employees.

Do you have a student leave policy?
RULES ON STATUS

WHAT IT SAYS

A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

34 CFR 106.40

WHAT IT MEANS

You can't require married women or mothers to drop out but allow married men or fathers to stay enrolled. That's different treatment on the basis of sex concerning parental, family, or marital status.
WHAT ABOUT "PARENTS" AND "PARENTING?"

Cannot apply a rule about the actual or potential parental or marital status of a student, applicant, or employee that treats people differently based on sex.

These are from 1975!
NEW TITLE IX RULES***

**DEFINITIONS**
New definition for pregnancy and related conditions; parental status

**MODIFY**
Reasonable modifications to policies, practices

**NOTIFY**
Employee obligations; notice to pregnant students about rights

**SPACE**
Lactation space, adjustments to physical space and supplies
Discrimination on the basis of pregnancy and related conditions is prohibited

"Pregnancy and related conditions" =

(1) Pregnancy, childbirth, termination of pregnancy, or lactation;

(2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation;

(3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.
Definition includes parents (bio, adoptive, step, foster), legal guardians, and those actively seeking such custody or guardianship.

Still is about sex discrimination based on parental status, not parental status generally.
PROPOSED REGULATIONS: NOTIFY

Let pregnant students know about the school’s obligations:

• Prohibit sex discrimination, including sex-based harassment;
• Provide the student with the option of reasonable modifications;
• Allow access, on a voluntary basis, to any separate and comparable portion of the education program or activity;
• Allow a voluntary leave of absence;
• Ensure the availability of lactation space;
• Maintain grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination.
PROPOSED REGULATIONS: SPACE (& TIME)

For expressing breastmilk or breastfeeding as needed

- Break time for employees
- "Reasonable modifications" for students may include time here
- Clean space that is not a bathroom
- Private: shielded from view, free from intrusion by others
In states that criminalize abortion, consider the risks of . . .

- Complying with Title IX obligation to report pregnancies to the Coordinator
- Providing students with information about options, including nearby abortion providers
- Supporting students financially to travel to a state that permits abortion
- Data privacy; records retention
RECENT ED RESOLUTIONS & GUIDANCE

- June 2022
  - Salt Lake Community College Resolution Agreement

- October 2022
  - Pregnancy and Parenting Resource

- January 2023
  - Troy University Resolution Agreement
LESSONS LEARNED

- Make reasonable responsive adjustments
- Provide accessible information for pregnant students
- Designate a central contact to centralize response
- Respond promptly to pregnancy discrimination complaints
- Engage in the interactive process
- Consider whether there is a temporary disability
- Train employees on your rules and process
WHY IS THIS IMPORTANT?
POVERTY RATES BY EDUCATION LEVEL AND PARENT STATUS AMONG WOMEN

Poverty Rates by Education Level and Marital and Parent Status among Women Aged 25 and Older, 2015

- Less than high school: 62% (Single mothers), 42% (High school diploma)
- Some college: 34% ( Married mothers), 25% (Single women, no children)
- Bachelor's degree: 13% (Married women, no children), 8% (Single mothers)
- Graduate degree
IMPLEMENTATION

- Review or create leave policy
- Update community trainings to include pregnancy+
- Create resources for pregnant students for the web, handbooks
- Remember student-employees
- Review policies to ensure inclusion of pregnancy+
- Outreach and collaboration with stakeholders
- Identify lactation space
- Get feedback from students with experience
- Coordinate with accessibility office
THE RIVER CONNECT

THE RIVER CONNECT is a virtual community of experts and colleagues gathered together to help each other process the complexities of the work.

Complimentary subscription until Oct. 15th.

A place to
communicate
share
educate
learn

for HIGHER EDUCATION PROFESSIONALS working in
Title IX, Equity & Clery
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WE LOVE FEEDBACK
Your Opinion Is Invaluable!