

New Mandates under Final Rule of Title IX Regulations effective 8/1/2024

On April 19, 2024, the U.S. Department of Education published the new rules to regarding the reach of Title IX. The new Regulations are effective August 1, 2024, and require new policies, administrative regulations and training.

The U.S. Department of Education also released a Fact Sheet <https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf> and a Summary of major provisions [Summary of Major Provisions of the Department of Education's Title IX Notice of Proposed Rulemaking \(PDF\)](#).

Impact of New Regulations

There are approximately 1,577 pages (Preamble and Regulations) associated with the publication of the new Regulations to the Title IX provisions by the Department of Education. Moving forward, this means that school districts will have to begin in the next few months to prepare for what is expected to be in place by August 1, 2024.

As before, Beard Legal Group PC and Levin Legal Group PC are collaborating to develop a comprehensive training module for school entities addressing the Final Rule to include the new changes that are going to go into effect starting August 1, 2024, almost 1 month prior to the start of the 2024-2025 school year.

There are sweeping changes that accompany the new Regulations. Key provisions that schools must consider in the 2024 Regulations include the following:

Definitions – Under the Definition section of the 2024 Regulations: Adds and revises definitions, including 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.

Recipient – Under the Regulations, “recipient” means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

Scope of sex discrimination – The 2024 Regulations: Clarifies that sex discrimination includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. (§ 106.10). The new Regulations also clarifies that sex-based harassment includes harassment on these bases and further clarifies when sex-based harassment creates a hostile environment.

Grievance procedures – Creates approximately 20 new bulleted areas that need to be reviewed and addressed as part of the new grievance process.

PRACTICE NOTE: We anticipate that PSBA will be once again looking at Policies 103 Discrimination/Title IX Sexual Harassment Affecting Students and Policy 104 Discrimination/Title IX Sexual Harassment Affecting Students as it relates to revising

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not only their policies but the various attachments or Administrative Regulations that would accompany same. This will be a major undertaking for school districts to get in place prior to the start of the 2024-2025 school year.

Defining sex-based harassment – The 2024 Regulations have once again addressed the issue by stating sex-based harassment is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, when it takes the form of:

- quid pro quo harassment (e.g., when an employee conditions a benefit on a person’s participation in unwelcome sexual conduct);
- specific offenses (e.g., sexual assault, dating violence, domestic violence, and stalking); and/or
- hostile environment harassment.

The big change comes in regard to the final regulations wherein they define “hostile environment harassment” as unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity. This new definition deviates from what was previously outlined in the 2020 Amendments.

The new Regulations provide “A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively. (§ 106.44(a)(1)).” Please recall the 2020 Amendments required a recipient to respond only when it has “actual knowledge” of allegations of “sexual harassment,” and only in a manner that is not deliberately indifferent. At first blush, it appears that the standard has been lowered that requires more timely action on the part of the school district to investigate and address claims.

Learning and Notice Requirements

The 2020 Amendments to the Title IX regulations required the recipient (school district) to respond only when it had actual allegations of sexual harassment and only in a manner that is not

deliberately indifferent. However, the new 2024 Final Regulations obligate a recipient to require certain employees to notify the Title IX Coordinator when the employees have information about conduct that reasonably may constitute sex discrimination.

According to the new Regulations, any non-confidential employee at an elementary school or secondary school is obligated to notify the Title IX Coordinator.

COMMENT: Interestingly, the new Regulations only define what a “confidential” employee means. In either respect, this is a new requirement that could possibly place an affirmative duty on all employees to report “conduct that reasonably may constitute sex discrimination in the recipient’s educational program or activity.”

NOTE: The Final Rules outline 8 factors for fact-specific determinations for Title IX Coordinators regarding initiating the complaint process in the absence of a complaint or the withdrawal of allegations. However, there is a possible carve-out or exemption if the Title IX Coordinator reasonably determines that the conduct as alleged could not constitute sex discrimination under Title IX.

The Final Regulations also require recipients to offer and coordinate supportive measures for the parties as appropriate to restore or preserve each person’s access to the recipient’s education program or activity or provide support during the recipient’s grievance procedures or during the informal resolution process. Supportive measures cannot be unreasonably burdensome to a party and cannot be imposed for punitive or disciplinary reasons.

Although the 2020 Amendments required recipients to treat Complainants and Respondents equitably by offering supportive measures to a Complainant and by following a grievance process that complies with §106.45 before imposing disciplinary sanctions or other actions that are not supportive measures against a respondent, this new provision could offer variations of what school districts have been used to in the past under the 2020 Amendments.

Grievance Procedures for Sex Discrimination Complaints under Title IX (§106.45)

Although the 2020 Amendments had provisions similar to this, there are going to be some changes in this area that all key personnel involved in the process will need to become intricately familiar with to be in compliance with new 2024 Regulations.

Retaliation (§106.2, §106.71)

The final regulations require a recipient to prohibit retaliation, including peer retaliation, and respond to information and complaints involving conduct that reasonably may constitute retaliation using the same procedures it uses for other forms of sex discrimination.

The new Regulations contain these new definitions that were not included in the 2020 Amendments.

Policy and Administrative Procedures

For those Districts that are part of the Pennsylvania School Board Association's (PSBA) Policy Services, you will be receiving a comprehensive revision along with administrative regulations to comply with the new requirements that are to be in effect on August 1, 2024.

Publication and Notice of Non-Discrimination § 106.8 Designation of coordinator;

(c)(2)(i) Publication of notice of nondiscrimination. Each recipient must prominently include all elements of its notice of nondiscrimination set out in paragraphs (c)(1)(i)(A) through (E) of this section on its website and in each handbook, catalog, announcement, bulletin, and application form that it makes available to persons entitled to notice under paragraph (c) of this section, or which are otherwise used in connection with the recruitment of students or employees.

§ 106.44 Recipient's response to sex discrimination.

(a) General. (1) A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively; and (2) A recipient must also comply with this section to address sex discrimination in its education program

or activity.

Informal Resolution

Under the new Regulations, there is discretion to offer informal resolution in some circumstances. According to the new Regulations, before initiation of an informal resolution process, the recipient must provide to the parties notice that explains:

- (i) The allegations;
- (ii) The requirements of the informal resolution process;
- (iii) That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures;
- (iv) That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;
- (v) The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and
- (vi) What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed.

Impact

The new 2024 Regulations will significantly alter the way public school entities address issues and/or complaints under Title IX. Once again major changes include, but are not limited to:

1. Modification to existing Policies and Administrative Regulations to address and incorporate the Final Rule, which we anticipate as an effort to be undertaken by PSBA.
2. School Districts will need to ensure these policy changes are timely adopted and disseminated to students, parents, faculty, administrators and Title IX Coordinators.
3. All staff will need to be provided in-service training and/or professional development on these changes.

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4. Faculty and student handbooks will need to be updated in accordance with applicable policy changes.
5. Title IX Coordinators, Administrators and other staff tasked with the responsibility of investigating complaints will need to receive updated training regarding the new changes in the law, meeting timelines, the requirements for conducting effective and legally compliant investigations and documenting the information that is uncovered as a result of such investigations.

Training

The new Title IX regulations specifically mandate training. The District/Recipient must ensure that specific individuals described in Section 106.8(d) receive training outlined in that Section related to their duties under Title IX promptly upon hiring or change of position that alters their duties under Title IX or this part.

When you go into the actual Regulations themselves, for purposes of this initial Education Law Report Update, the following will need to be trained:

1. All employees.
2. Investigators, decision makers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures.
3. Facilitators of informational resolution process.
4. Title IX Coordinator and designees

COMMENT: Please be aware that the regulations are very specific as to the training of each of the above identified areas and must be addressed prior to the start of the new 2024-2025 school year. In a perfect world this would be accomplished by August 1, 2024.

- Districts are cautioned that per the new Regulations, the training that is outlined within the new 2024 Regulations needs to be provided **ANNUALLY**.

PRACTICE NOTE: Districts also should consider for those who have outside service providers and/or

vendors likewise having their employees be part and parcel of some of the District trainings. This would include outside vendors/providers who are providing transportation services, food service and custodial and maintenance services as well. There have been many instances over the years where employees of outside vendors have been involved in issues that rise to the level of unlawful sexual harassment in the school setting, not only involving staff but students as well.

Other

Districts cannot begin early enough to prepare for these new and significant changes that they will be faced with to be implemented by August 1, 2024, and rolling into the 2024-2025 school year.

Training Opportunity

Beard Legal Group and the Levin Legal Group are available to provide training opportunities for Superintendents, Title IX Coordinators, Investigators, Decision Makers, Appeal Officers, Building Principals, Board Members, and employees as well as anyone else required under the new Title IX Regulations.

A flyer with more details regarding new Title IX training will be available shortly.

Beard Legal Group Education Law Report

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

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Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

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The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. Peggy Schooling mxs284@psu.edu or pschooling@psu.edu

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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