

College & University Board Member's Guide to the 2024 Title IX Regulations

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Disclaimers



- We are not giving you legal advice. Consult with competent legal counsel regarding how best to address a specific situation.
- Use the chat function to ask general questions and hypotheticals, but recall that questions are part of the recording. Anonymous questions are acceptable.
- Yes, we will send out a copy of the slides and a link to the recording after this presentation to all who registered their email address.
- Feel free to share the slides and recording with your fellow Board members and others at your institution.

Agenda



- Themes in the Final Regulations
- Key areas where policy changes are likely needed
 - Understanding concerns through the eyes of your campus community
 - Identifying needed resources
- As a Board member, what do you need to be doing to fulfill your fiduciary duties and keep your campus on track?

Note: This presentation is kept at a very high level. If you are a practitioner and want more details, a recorded presentation is available at www.brickergraydon.com/titleix under "Key Resources"

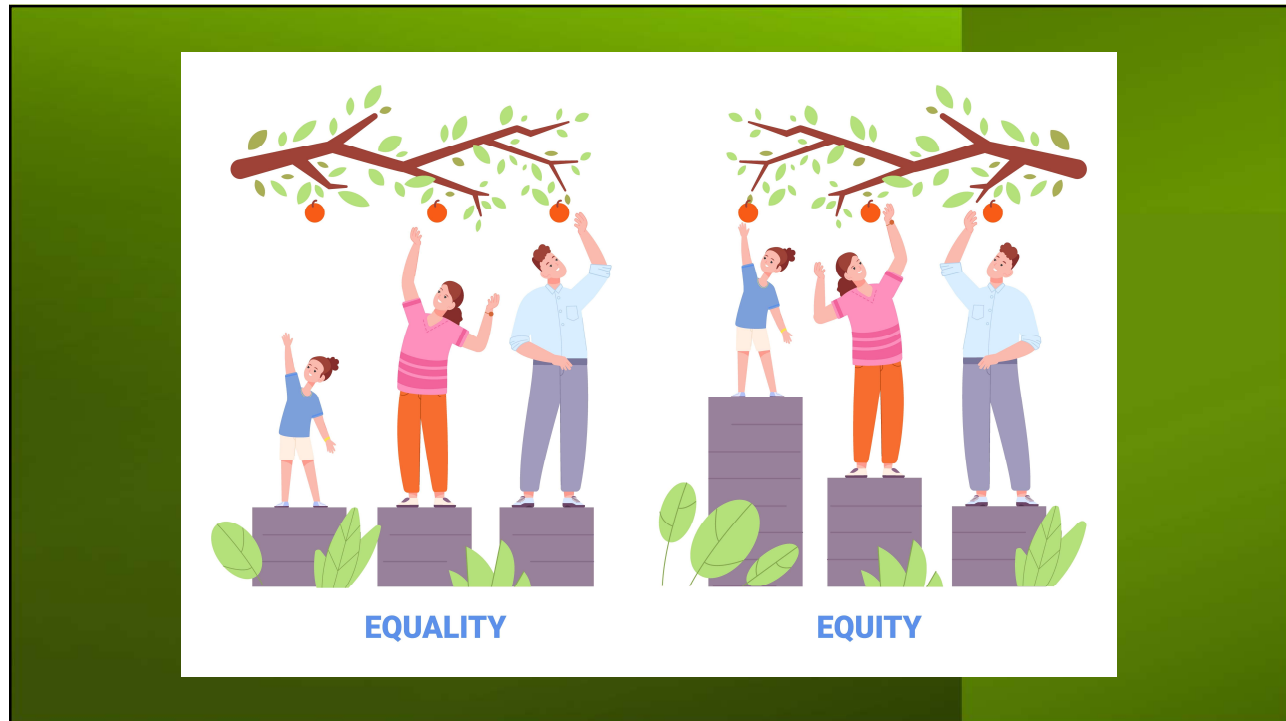
Text of Title IX Statute



"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..."

20 U.S.C. 1681(a)

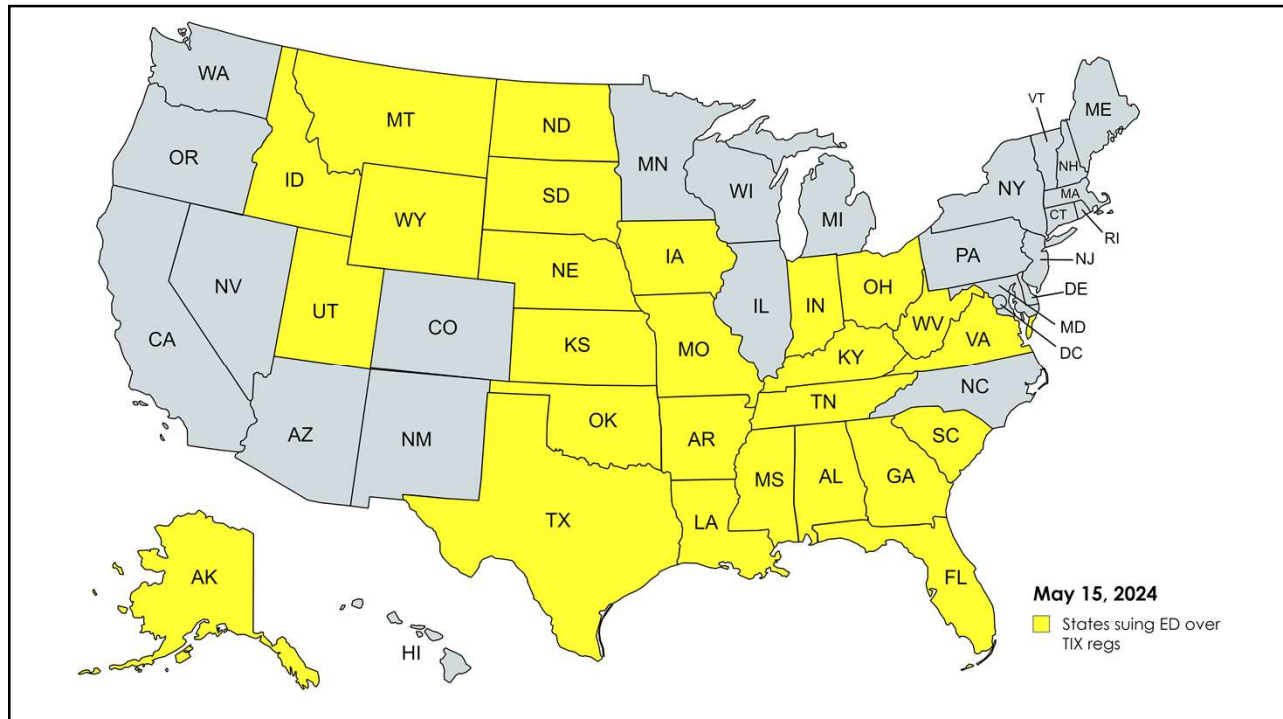
The text of the statute has not changed. The regulations that the U.S. Department of Education uses to enforce the statute have changed.



Basics



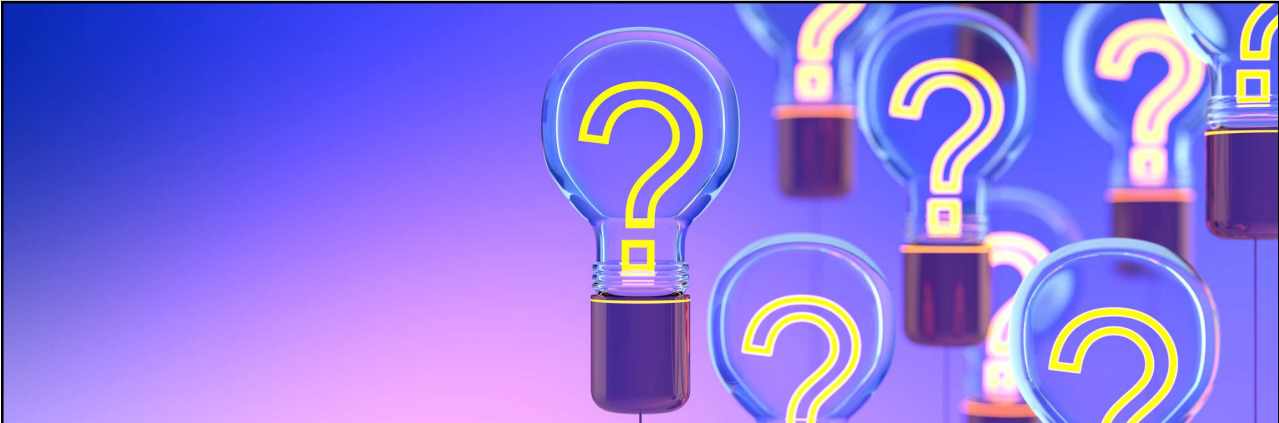
- Official version of the final regulations is 14 pages long – but the preamble that explains them is another 409 pages
- The regulations go into effect on August 1, 2024, which means you must have your new policy in place by then unless:
 - Congress vetoes the new regulations, or
 - A court issues a stay against the regulations going into effect.
- Where federal and state law conflict, federal law typically overrides state law, but this gets complicated.
- Several states have told their educational institutions that they are not to comply with the new Title IX regulations.




Themes in the Final Regulations



- "Sex" has been expanded to include gender identity and sexual orientation, consistent with the Supreme Court's reading of Title VII in *Bostock*.
- "Sexual Harassment" has been broadened and redefined as "Sex-Based Harassment."
- Your institution's jurisdiction has been broadened. More conduct will now go through the Title IX process.
- There are now no prohibitions against informal resolution in any cases at the postsecondary level.
- Institutions have more choices on how to process cases, but this may not be as helpful as you think.



What is "Sex"?



Scope – 106.10

- Discrimination on the basis of sex includes discrimination on the basis of:
 - Sex stereotypes
 - Sex characteristics
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity

Where an Exception Applies... 106.31



- A recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to **more than *de minimis* harm**, except as permitted by:
 - The exceptions laid out in 20 USC 1681(a)(1) through (9) and 106.12 through 106.15
 - The exceptions in 20 USC 1686 and corresponding regulations 106.32(b)(1) [Housing]
 - 106.41(b) [Athletics]
- 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.

Bathrooms and Locker Rooms



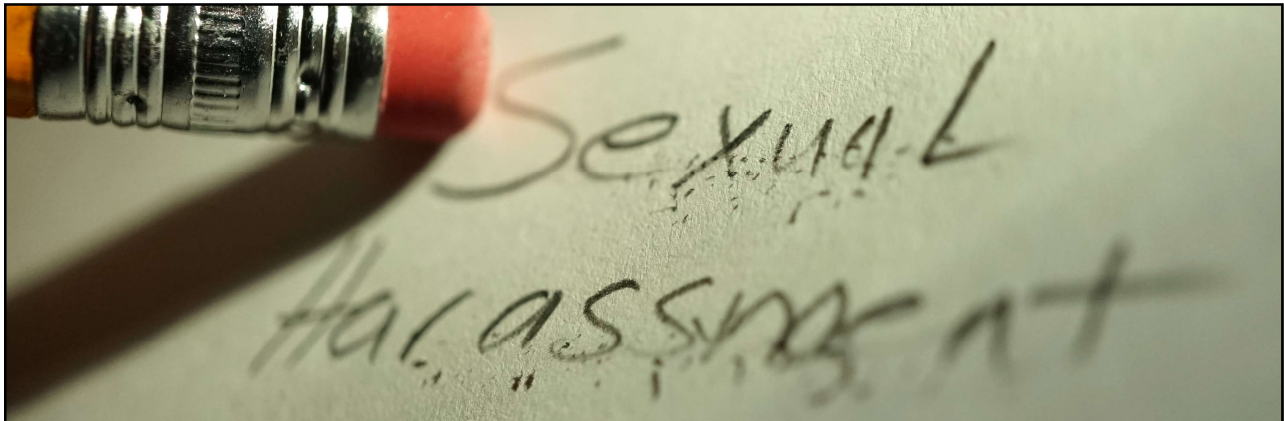
Preamble at 33818:

"The Department has determined... that sex separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination. However, when such separation imposes more than *de minimis* injury on a protected individual ... such as when it denies a transgender student access to a sex-separate facility or activity consistent with that student's gender identity, this would violate Title IX's general nondiscrimination mandate..."

Religious Exemptions



- This has not changed.
- Institutions may still claim exemptions where requirements of Title IX conflict with the tenets of their faith
- Exemptions are not required to be "requested" ahead of time from the U.S. Department of Education.
- We recommend that your institution make exemptions clear to the community to help ensure that people self-select in accordance with your beliefs.



Definition of Sex-Based Harassment



Definition of Sex-Based Harassment – 106.2



Sex-based harassment prohibited by this part 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, that is:

- Quid pro quo harassment
- Hostile environment harassment
- Specific offenses
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking

Definition of Quid Pro Quo – 106.2



- An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct

Definition of Hostile Environment – 106.2



- 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 (i.e., creates a hostile environment).
- Title VII standard, for reference: "must be so severe or pervasive" with reasonable-person standard for charging party

Definition of Hostile Environment – 106.2



- Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
 - The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
 - The type, frequency, and duration of the conduct;
 - The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
 - The location of the conduct and the context in which the conduct occurred; and
 - Other sex-based harassment in the recipient's education' program or activity

Specific Offenses

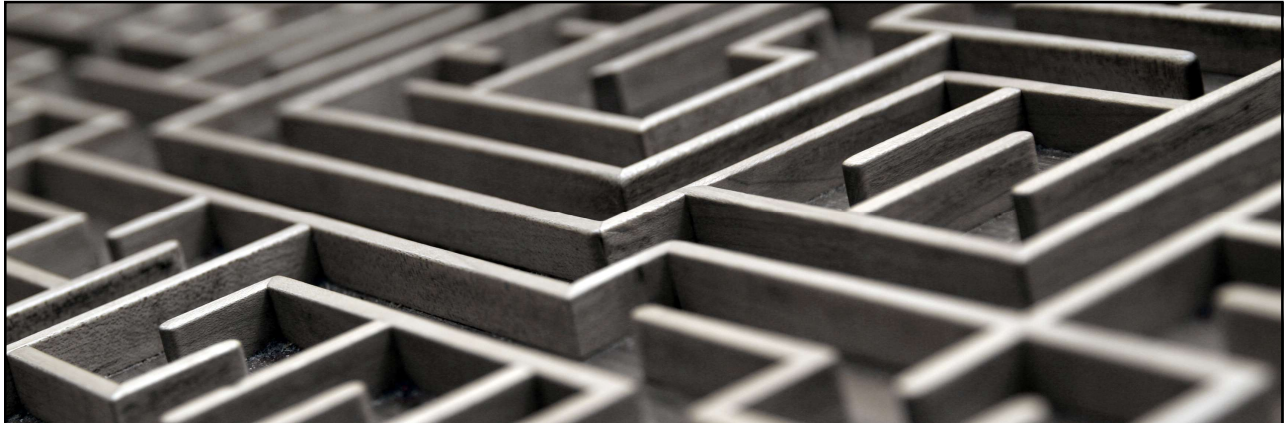


- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

Things to Note



- Quid Pro Quo now recognizes power differentials that do not involve an employee respondent
- Hostile environment definition is not identical to, but is equivalent with, the Title VII standard



Jurisdiction and Reporting



Jurisdiction



- Your institution must address sex discrimination & sex-based harassment that occurs:
 - In your education program or activity in the United States;
 - At an off-campus location owned or controlled by an officially recognized student organization;
 - Subject to your disciplinary authority (which may include off-campus behavior depending on your institution); and
 - Outside your education program or activity, if it creates a sex-based hostile environment under your education program or activity (even if some of this conduct is outside the United States)

Reporting Requirements



Duties	Must Report to Title IX Coordinator	Either Report to Coordinator or Provide Coordinator's Contact Info
Authority to institute corrective measures	X	
Administrators	X	
Faculty	X	
Advisors	X	
Non-confidential other employees		X
Confidential employees		X (with required explanation)
Student employees	Institution makes reasonable determination as to what applies	

Definition of "Complaint" - 106.2



- An oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX

Takeaways



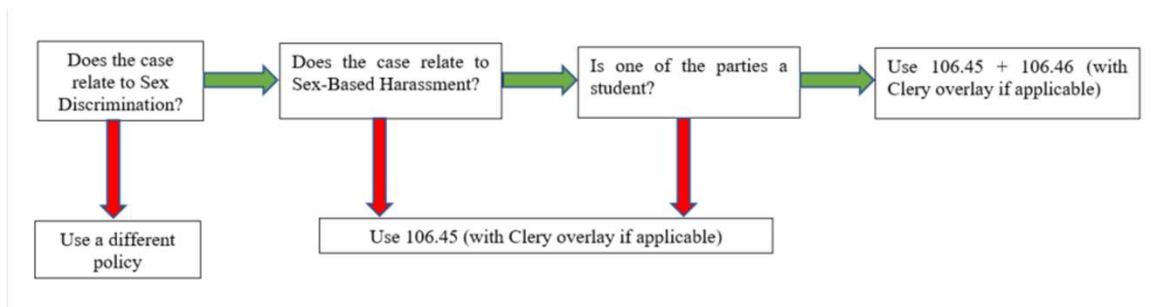
- Because the jurisdiction is broader, OCR may be interested in more things than they were before.
- Because complaints can be made orally under the new regulations, it will be very important for your Title IX team to have a way of documenting those complaints, and for your employees to ensure such complaints get passed along to the Title IX office



Grievance Procedures



Which Procedures Apply?



Notable Differences



- 106.45 allows for a single investigator model, where an individual conducts interviews and makes a determination as to whether the policy was violated
- 106.46 requires some form of hearing:
 - Asynchronous hearing – parties propose questions, interviews are recorded, parties propose follow-up questions, interviews are recorded
 - Live hearing
 - Questions submitted by parties to hearing officer
 - Questions asked by advisors and hearing officer
- Under 106.45 (and Clery), the institution must permit parties to have advisors

Informal Resolution



- Informal resolution is no longer prohibited in any scenario
- A formal complaint is no longer required to initiate informal resolution
- Title IX Coordinators have discretion to deny informal resolution in appropriate circumstances
- Institutions still cannot pressure parties into agreeing to informal resolution

What might your community say?



- Complainants: Hearings are a barrier to reporting. I don't want to have to retell my story again with the Respondent watching me.
- Respondents: Without a hearing, this process doesn't protect my rights. I want a full and fair chance to defend myself.
- Title IX Coordinators: None of the hearing options look logistically easy to implement, they all take resources, and no matter what path we choose, someone will likely be unhappy with that choice.
- Board members: How can we reduce liability and expenses?



What is best for our campus?



Engaging Stakeholders



- Support your campus administrators in obtaining engagement from the community when making decisions
 - Identify stakeholders and cast a wide net
 - Identify your Title IX team
 - Consider various touchpoints across your institution

Policy Logistics



- How are policies and procedures updated at your institution?
- Does the Board need to approve your policy?
 - Will summer board meetings be necessary?

Questions to Consider



- Has your institution communicated to your community about the plan to address the new regulations?
- Has your Board received information from your Title IX Coordinator about when a new policy is expected to be put into place (including whether your Board will need to approve it)?
- Does your Board have talking points if they are asked questions about the changes by alumni, donors, and campus community members?
 - Note: It is never a bad strategy to refer everyone to the Title IX Coordinator.
- Does your Title IX team need resources or help from your Board to prepare policies and procedures?

Fiduciary Duties



- Remember, in the exercise of your fiduciary duties, you are permitted to rely on experts:
 - Your Title IX Coordinator
 - Your senior staff
 - Your competent legal counsel
 - Etc.

What You Can Do



- Support your Title IX Coordinator with resources and understanding.
- Defer to administrators when official statements are sought, unless your statements are otherwise authorized by your Board.
- Watch the news for information about legal challenges to the regulations – but make sure that you will make federal deadlines.

Final Thoughts



- The process is complicated and will increase litigation risk. Seeking competent legal counsel is important.
- We need a process that is equitable, transparent, and compliant, and we must also be transparent in adopting new policies and procedures.
- Have your Board lead by example and be trained immediately under the new policy!

Upcoming Webinars – BrickerGraydon.com/Events



- May 17th – Title IX Conference at Cleveland State University!
- May 30th – **Ohio** Higher Education Institutions Only – ODHE Title IX Policy Drafting Bootcamp (free)
- June 20th – **Ohio** Higher Education Institutions Only – ODHE Title IX Policy Drafting Bootcamp (free)
- August 29th, 1:00 ET – Trauma-Informed Resolution Process (free)

We are currently preparing to launch virtual Policy Bootcamps, as well as at least one on-site bootcamps. Subscribe to our Higher Education Insights newsletter to get more information: www.brickergraydon.com/subscribe

Thank You

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