



Association of
Title IX Administrators

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Time with IX: Expanded Scope of Title IX

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Today's Presenters



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2024 Title IX Regulations Litigation

- Opponents of the 2024 Title IX Regulations sought, and were granted, **injunctions** to delay or halt implementation of the Regulations
 - **Injunction:** A court order requiring an individual or entity to either perform or stop performing a specific action
- Generally, courts granted injunctions based on questions around the validity of the gender identity provisions and the hostile environment definition
- If the 2024 Regulations are not enforceable as a result of an injunction, schools, districts, and institutions in those states should continue to follow the **2020 Regulations**
 - The 2024 Regulations also are not enforceable in some individual schools and institutions

2024 Title IX Regulations Litigation

- Implementation will be unsettled for the foreseeable future
 - Appeals will continue and, eventually, trials
 - Consult legal counsel to determine implementation plans and risk strategy
- **Note:** Some states also have “Do Not Implement” directives from state officials
 - Independent from any federal lawsuits or injunctions
- Track developments on ATIXA’s Regulations website, www.atixa.org/regs
 - State-by-state information on injunctions and Do Not Implement directives
 - Lists of individual schools or institutions impacted by the Kansas injunction

Retroactivity

- The 2024 Regulations apply **only** to sex discrimination alleged to have occurred **on or after** August 1, 2024
 - For conduct alleged to have occurred prior to August 1, 2024, the 2020 Regulations apply
- Recipients will need to maintain/update policies, procedures, and training that are compliant with the **2020** Regulations and **2024** Regulations
 - If your institution is not fully compliant with 2020, now is the time





What allegations and behaviors are subject to the 2024 Title IX Regulations?

Title IX: Scope

Sex-Based Discrimination

- Inequitable Treatment
 - Sex Characteristics
 - Sex Stereotypes
 - Pregnancy or Related Conditions
 - Sexual Orientation
 - Gender Identity
- Exclusion from Participation

Sex-Based Harassment

- Quid Pro Quo
- Hostile Environment Harassment
- Dating Violence
- Domestic Violence
- Stalking
- Sexual Assault
 - Rape
 - Sodomy*
 - Sexual Assault with an Object*
 - Fondling
 - Incest
 - Statutory Rape

Retaliation

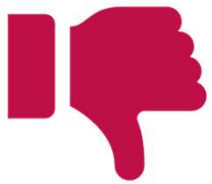
*ATIXA recommends removing these behaviors from policy, as they are covered by the Rape definition and are inconsistent with the Clery Act

Sex Discrimination

Sex Discrimination

- **Sex discrimination** encompasses discrimination based on:
 - Inequitable treatment based on sex or gender
 - Sex characteristics
 - Sex stereotypes
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity
 - Exclusion from participating on the basis of sex or gender identity
 - *De Minimis* harm

Common Types of Discrimination



Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliation or perception of affiliation with protected characteristic



Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups



Harassment

- Quid Pro Quo
- Hostile Environment



Retaliation

- Prohibited if engaged in protected activity
- Suffered adverse academic or employment action

***De Minimis* Harm**

- In the limited circumstances where Title IX permits different treatment or separation based on sex, an institution **must not** implement differential treatment by means that subjects a person to **more than *de minimis* harm**
- Adopting a policy or practice preventing someone from participating in a program/activity **consistent with their gender identity** violates the *de minimis* harm provision
- Notable exceptions:
 - Religious exemptions
 - Fraternities and sororities
 - Housing (but note state law may be broader)
 - Athletics

Sex-based Harassment

Sex-Based Harassment

- Subset of sex discrimination
- Includes (the “Big Six” offenses):
 - Quid Pro Quo (QPQ)
 - Hostile Environment Harassment
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking
- No consent definition provided
 - ATIXA recommends adopting a definition in institutional policy



Quid Pro Quo

- “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”
- If a **student** occupies a position as an “other person authorized by the Recipient...” then QPQ **could** apply
- Definition encompasses:
 - Extracurriculars and academics
 - Detriment or threat thereof
 - If an individual purports to have authority to provide some aid, benefit, or service, even if they are unable to do so

Hostile Environment Harassment

- Definition:
 - 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

Lower/broader standard than the 2020 Regulations, with First Amendment implications

Hostile Environment Harassment

- The Regulations provide factors for evaluating whether a hostile environment exists
 - Complainant's ability to access the education program or activity
 - Type, frequency, and duration of the conduct
 - Parties' ages, roles, and previous interactions
 - Location and context of the conduct
 - Institutional control over the Respondent
- These are **factors**, not requirements
 - There could be other factors to consider, too

Hostile Environment Harassment

- Districts and institutions should **not** construe this definition or act in a way that conflicts with the First Amendment
 - A transphobic statement alone is likely **not** enough to create a hostile environment that overcomes First Amendment protections
 - Likewise, one or a few instances of misgendering or deadnaming would likely **not** be enough to meet the threshold, though intent and context will matter
- Some forms of harassing speech are not protected by the First Amendment
 - Repeated misgendering or deadnaming done in a demeaning or taunting way
 - Teasing, name calling, and crude sexual gestures disparaging a student's perceived lack of masculinity
- The more the conduct is targeted or intended for personal harm, the less likely it will be protected

Retaliation

Retaliation

Defined as:

- Intimidation, threats, coercion, or discrimination against any person
- By the institution, a student, an employee, or other person authorized by school/district to provide aid, benefit, or service under education program or activity:
 - For the purpose of interfering with any right or privilege under Title IX, **OR**
 - Because the person has reported information, made a complaint, assisted, or participated or refused to participate in any manner in any part of a Title IX Resolution Process

- **Institutions may require** employees to participate as witnesses without it being retaliatory
- Cannot require students to participate as parties or witnesses
- Retaliation allegations should be resolved under the Title IX Resolution Process

Initiating Complaints

Complaints

Notably, the 2024 Title IX Regulations also permit some types of complaints from individuals who were not impacted by the alleged behavior, which could lead to more complaints

- Individuals who may make a complaint depends on the **nature** of the complaint:
 - **Sex-Based Harassment:**
 - A Complainant, or parent/guardian
 - Title IX Coordinator
 - **Sex Discrimination:**
 - A Complainant, or parent/guardian
 - Title IX Coordinator
 - Any student or employee
 - Any other person participating or attempting to participate in the institution's education program or activity at the time of the alleged sex discrimination

Takeaways

Takeaways

- Retraining employees to recognize and report sex discrimination
- Retraining investigators for sex discrimination and disparate treatment complaints
- Plan for increase in complaints
- Invest in Informal Resolution





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Questions?

Thank you!

We hope to see you at our next Time with IX!

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