

Title IX Regulations Notice of Proposed Rulemaking 2022: What K-12 Educators Need to Know

Western Educational Equity Assistance Center
Metropolitan State University of Denver
Jan Perry Evenstad, PhD
Holly Bell, MS



What is the WEEAC?

- One of 4 equity assistance centers in the country.
- The WEEAC works with K-12 schools, school districts, and state education departments at their request.
- The WEEAC provide training and technical assistance on educational issues related to race, sex, national origin, and religion.



Western Educational **EQUITY** Assistance Center

Session Disclaimer



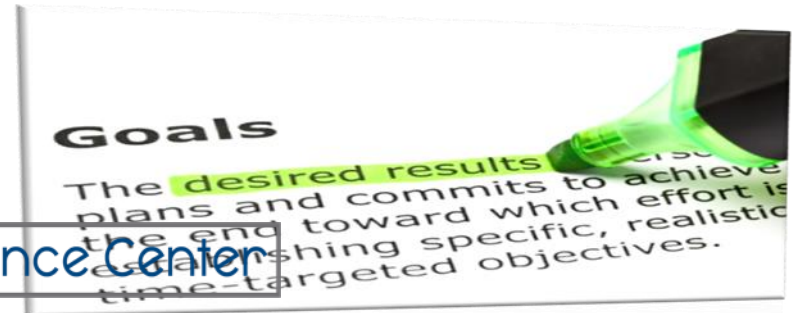
Information provided is an overview of the changes to the Title IX Regulations released July 12, 2022 in the Federal Register that K-12 educators need to know concerning changes to Title IX.

This is not legal advice as the presenters are not lawyers and you should consult with your school district's legal counsel as to how your district plans to implement the regulations.

Goals



- To know what Title IX covers,
- To discuss the proposed changes to the 2020 Title IX regulations



Title IX: 37 words



- "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 educational program or activity receiving Federal financial assistance."

Title IX: The Law



- Federal Civil Rights Law
- 2020 regulations compliance by August 14, 2020
- ANY Federally funded education programs and activities
- Prohibits discrimination on the basis of sex
- Includes sexual harassment & sexual violence

Areas of Sex Discrimination



- Admissions
- Financial Assistance
- Student Housing
- Counseling
- Employment Practices
- Access to Courses/Programs
- Athletics
- Student Rules and Policies (discipline)
- Pregnant/Parenting Students
- Sexual Harassment & Sexual Violence
- **** Title IX does pre-empt conflicting state laws (p. 57 § 106.6 (b))**

Requirements of Title IX



- Appointment of Responsible Person(s)
- Notification of Policy
- Development of Policy
- Grievance Procedure
- Training
- Self-Evaluation (best practice)

Policy Notification and Publication



Title IX requires that every recipient of federal funds publish a notification of a policy of non-discrimination on the basis of sex and the availability of a grievance procedure.

A recipient is **NOT** in compliance with the requirements of Title IX if it does not have both a policy and a grievance procedure in place regardless of whether or not discrimination has occurred.

Scope of Title IX New Regulations Proposed

- OCR listened to the feedback for a greater level of flexibility
- Resolution of complaints are quicker
- Less administrative burden more streamlined
- Restore vital protections for survivors of sexual assault
- supportive measures
- Strengthen protections for LGBTQI+ against discrimination based on sexual orientation and gender identity

Some Proposed Changes Title IX

Western Educational **EQUITY** Assistance Center



Still Need to have and do



- Policy of nondiscrimination (posted and transparent)
- Grievance Procedures (updated)
- Notice of nondiscrimination (posted)
- Training (still need to post materials)
 - All employees
 - Investigators, Decision-makers and other responsive for implementing the grievance procedures
 - Informal Resolution Facilitators

Scope of the Regulation

Discrimination on the basis of sex includes:

- Sex stereotypes
- Sex characteristics
- Pregnancy or related condition
- Sexual orientation
- Gender identity
- Sex based harassment
- Retaliation
 - Including peer retaliation

§ 106.10; NPRM p. 666

§ 106.71; NPRM p. 700



Scope of the Regulation Definitions



Program or Activity p. 655

Relevant p. 656

Supportive Measures p. 659

Sex-Based Harassment p. 657

Quid Pro Quo p. 657

Hostile Environment pp 657-658 (severe or pervasive)

Sexual Assault, Dating Violence, Domestic Violence p 658 (remains)

Stalking p 659

No Sodomy, Sexual Assault with and object

No required consent definition

Definition of Sexual Harassment



Then

Sexual harassment was defined as “when submission to unwelcome sexual conduct explicitly or implicitly affects an individual’s employment. There are two types of unlawful sexual harassment:

1. **Quid Pro Quo**, when submitting to, or rejecting participation in sexual conduct affects employment decisions.
2. **Hostile Environment**, when severe or pervasive sexual conduct create(s) a work environment that a reasonable person would consider intimidating, hostile, or abusive.

2020 Regs

§106.30(a) the new definition refers to conduct on the basis of sex that fulfills one or more of the following categories.

1. Unwelcome “**quid pro quo**” sexual harassment by a school employee
2. Unwelcome conduct on the basis of sex that is so **severe, pervasive, and objectively offensive** that it denies a person equal access to their education.
3. An incident that meets the definition of “sexual assault”, “dating violence,” “domestic violence,” or “stalking” under the Clery Act and the Violence Against Women’s Act

2022 Regs

2022 Sexual Harassment §106.10 p. 657

1. **Quid Pro Quo** sexual harassment, an employee, agent or other person authorized 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 on a person’s participation in unwelcome sexual conduct.
2. **Hostile Environment**, unwelcome sex-based conduct that is sufficiently severe, or pervasive, that, based on the totality of circumstance and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment).

NPRM: Apply to Jurisdiction



- Education program or activity
- Now will include disciplinary authority to off campus jurisdiction
- In school effects of out of school conduct that is creating a hostile environment in school

Policies and practices that prevent participation in a program or activity not consistent with their gender identity thus creating harm on the basis of sex, Title IX applies. Address access to facilities, locker rooms, doesn't cover athletic participation

§ 106.11; NPRM p. 666

§ 106.31; NPRM p. 668

Jurisdiction



- Now covers programs and activities outside of the US (study abroad & trips to foreign countries)
- “It would also specify that a recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to that hostile environment occurred outside the recipient’s education program or activity or outside the United States”.

Grievance Process & Reporting



- When a school or district is on notice
- Confidential Employees
 - Confidential employees must explain what is their confidential status and provide information to the Title IX Coordinator when they know discrimination has occurred.
- § 106.44(c)(1), an elementary school or secondary school would be obligated to require any employee who is not a confidential employee to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.

Training to include:



- Obligation to address sex discrimination in education programs and activities
- The scope and conduct that constitutes sex discrimination, including the definition of sex-based harassment
- All applicable notification and information requirements under §§106.40(b)(2) & 106.44

Training Continued:



- District's Grievance Procedures
- How to serve impartially, avoiding prejudgment of the facts, conflicts of interest and bias
- The meaning and application of term relevant in relation to questions and evidence
- Rules and practices of the informal resolution process
- Recordkeeping (7 years) pp662-664

Retaliation

- Means intimidation, threats, coercion, or discrimination against any person by a student, employee, person authorized by the district to provide, aid, benefit or service under the education program or activity...
- This version of the regulations takes a stronger stance on peer retaliation



Upon Notice



- Treat parties equitably
- Notify Complainant of your district's grievance procedures and, in the event of a complaint, the Responded
- Coordinate supportive measures
- Initiate grievance procedures or informal resolution process
- Notice and complaints can be verbal or written
- TIXC may determine to initiate grievance procedures when circumstances call for it
- TIXC should “take other prompt and effective steps”

§106.44; NPRM pg. 675-76

Upon Notice



Restore and preserve access to program or activity

May burden a Respondent, only during grievance procedures
may not impose such measures for disciplinary or punitive
purposes

There must be an opportunity to modify or reverse the
supportive measures

Dismissal of a Complaint



- Emergency removal/administrative leave still in place
- Permissive Dismissal (no mandatory dismissal) conditions of when:
 - Cannot identify Respondent
 - Respondent is not in the education program or activity
 - Complainant withdrew complaint
 - Conduct alleged in complaint, if proven would not constitute sex discrimination under TIX
- Notification of dismissal required
- Appeals

Investigations: Notice of Allegations



- Grievance procedures
- Options for an informal resolution
- Provide enough information to allow them to respond (alleged conduct, date, location, who was involved....)
- It is still important to inform the about the prohibition against retaliation
- Do not need an advisor, are allowed to have parent/guardian present
- If the student has an IEP, must consult the IEP team

§106.45; NPRM p 685

Informal Resolution



Still permitted

- No complaint required to initiate an informal resolution
- Voluntary
- TIX C agrees
- Notice is provided in advance to both parties
- Resolution Facilitator may not be the Investigator or Decision-Maker
- Consider your policy statements about in the informal resolution for subsequent investigation

NPRM Investigation



- Break in procedural K-12 §106.45 (applies to K-12)
- Process to be equitable and prompt (now 2-3 days)
- Privacy protected (counselors and privilege)
- Retains presumption that Respondent is not responsible
- Kept a focus on preventing conflicts of interest or bias
- Investigator can be the decision maker; can also be TIX C (recommended to have TIX C over see the process or each building)

No need to provide written allegation

Can have a meeting, interview, or hearing notice

Still have a notice of Outcome

Consent for Informal Resolution

Investigations



- Single investigator model can be used (the investigator can make the decision)
- Investigator is reliable and impartial
- Burden of proof on recipient
- Have to provide equal opportunity for parties to present inculpatory (to prove) and exculpatory (to disprove) evidence
- Parties have the right to share information but try to maintain certain levels of privacy

§106.45; NPRM p 688

Investigation

- Collect evidence and determine relevance
- Not relevant, not directly related
- NO Written Investigation REPORT Required no 10-day plus 10-day rule gone
- It would be in good practice to provide a written review or report to show the work that was done to reach the decision.

§106.45; NPRM p 688



Decision Making



- Shifted language to standard of proof
- Don't have to have a hearing need to provide the opportunity for parties to exchange written responses and questions
- Use **Preponderance of Evidence Standard**, unless district or union use Clear and Convincing Evidence Standard (can use different standard for students and employees)
- Notify parties of the outcome of the complaint
- Appeal optional
- TIX C provides and implements remedies

Bostock v. Clayton County



- No. 17–1618. Argued October 8, 2019—Decided June 15, 2020
- Does Title VII of the Civil Rights Act of 1964, which prohibits against employment discrimination “because of . . . sex” encompass discrimination based on an individual’s sexual orientation?

Bostock v. Clayton County



An employer who fires an individual employee merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964. Justice Neil Gorsuch authored the opinion for the 6-3 majority of the Court.

Biden's Executive Order



Federal courts generally interpret Title VII and Title IX in tandem, such that the prohibitions of discrimination on the basis of sex carry the same meaning in both statutes. However, the meaning of discrimination on the basis of sex, and whether it extends to discrimination on the basis of sexual orientation and gender identity, was an unsettled question until the Supreme Court decided *Bostock v. Clayton County* in 2020.

Biden's Executive Order Covers

- Employment (Title VII)
- Education (Title IX)
- Housing (Fair Housing Act)
- Health Care (Affordable Care Act)
- Credit (Equal Credit Opportunity Act)



Remember

- Still under 2020 Regulations
- Anticipate new ones Spring 2023
- Feedback on Regulations until September 12, 2022



Case Example: Principal Bill



Sam Kleeson has been the principal at West Middle School for five years. He has a staff of 40 people in his building that includes, counselors, social workers, teachers, support staff, transportation, food service and custodial. Myra a 6th grade English teacher started last fall. On a couple of occasions, he made seemingly innocent comments about how nicely she was dressed. During the pandemic she started receiving e-mails from principal Sam. At first the e-mails were strictly business, making sure she had the equipment to teach on-line and let her know he would allow faculty back into the building to retrieve materials they may need, and he would be sending out a schedule.

Myra was scheduled to start school August 21 and made her way to her classroom. While in her classroom principal Sam stops by and offers to help Myra in unpacking some boxes to. Sam's hand in reaching for a box, touches Myra's hand and lingers longer than what would be an acceptable accident. He comments on how soft her skin is. She quickly let's go of the box acting like it was an accident and starts to unpack up other materials. Sam moves the box to Myra's work table and returns for more.

Later that evening when Myra was checking her e-mails, she saw one from principal Sam. In the e-mail Sam mentioned that he knows the new superintendent and that there are some exciting opportunities coming up with prominent staff assignments that involve prestige, the opportunity for leadership skill development, promotions, and pay raises. Principal Sam asked Myra if she wanted to be "close friends" with him and meet at the school to discuss these exciting opportunities in more detail, when things were quiet in the building so they could focus. Myra was very uncomfortable with this invitation and knew what it meant. She declined to meet with Sam under these circumstances and responded to that effect in an e-mail.

Two weeks later, Principal Sam gave prominent staff assignment to one of Myra's colleagues. He avoided contact with Myra for the next month, until it was time for formal classroom observations. In the past, Myra almost always received very positive reviews from Sam and other administrators, but this time it was different. The review pointed out the need for change in several areas, and she was threatened with being put on an improvement plan. Myra tried to get a job in another school but was not able to get interviewed.

Estate of Asher Brown et al. v. Dr. John Ogletree et al. (2012)



The mother of a middle schooler with autism contended that she repeatedly complained that classmates frequently and severely bullied the student, who was socially awkward, short for his age, spoke with a lisp, and walked with a slight "sashay" due to being pigeon-toed. Male students allegedly called him "queer," and similar names, simulated sex acts with him, and at one point pushed him down stairs. The parent claimed the district ignored her complaints, although it had adopted policies to address bullying and harassment as required by state law. After two years at the school, the student died by suicide. The student's mother sued the district on behalf of the student's estate for disability discrimination. The district sought dismissal. The parent alleged that the district paid "lip service" to its anti-bullying policies, while failing to train its staff to implement them and rebuffing her pleas for help, leading to the student's death. The parent also stated that the district was deliberately indifferent to sexual-perception based harassment. Nearly every alleged incident of harassment was overtly sexual or involved sexual innuendo and based on students' view that the victim was gay. She alleged that the district violated Title IX by depriving the student of his constitutional right to bodily integrity.

Case examples



- **Arnold v. Barbers Hill Independent School District (2021)** The District disciplined two black boys when they refused to cut their locs to conform to the District's hair length policy.
- **J.L. v. Mohawk Central School District (2010)** A 15-year-old student failed to conform to gender stereotypes in both behavior and appearance. He exhibited feminine mannerisms, dyed his hair, wore makeup and nail polish, and maintained predominantly female friendships. The student experienced severe and pervasive student-on-student harassment from derogatory name-calling to physical threats and violence. The District had knowledge of the harassment but did not take timely, corrective action.

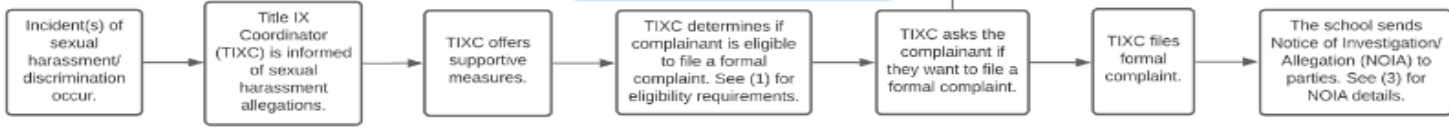
Legal Cases Sexual Harassment



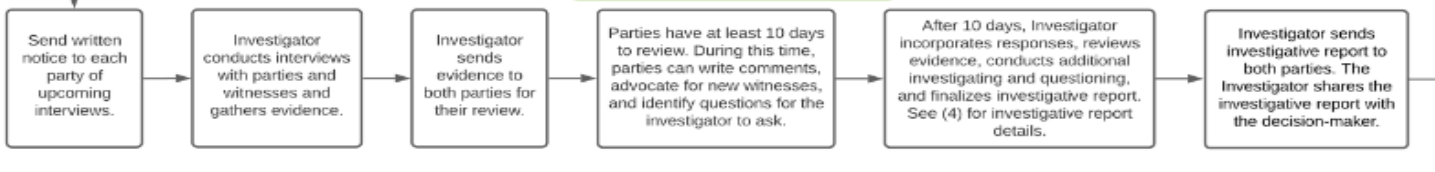
- 1991 Lyle v. Independent School District # 709 (Duluth, MN)
- 1992 Franklin v. Gwinnett County Public Schools
- 1993 Mutziger v. Independent School District #272, 1992; also cited as Eden Prairie School District #272
- 1996 Nabozny v. Podlesny (Bullied Video by Teaching Tolerance)
- 1997 Krengel v. Santa Clara Unified School District, aka The Teddie Bears
- 1997 Gebser v. Largo Vista Independent School District, also known as Doe v. Largo Vista Independent School District
- 1999 Davis v. Monroe County Board of Education

Title IX Grievance Procedure Flowchart

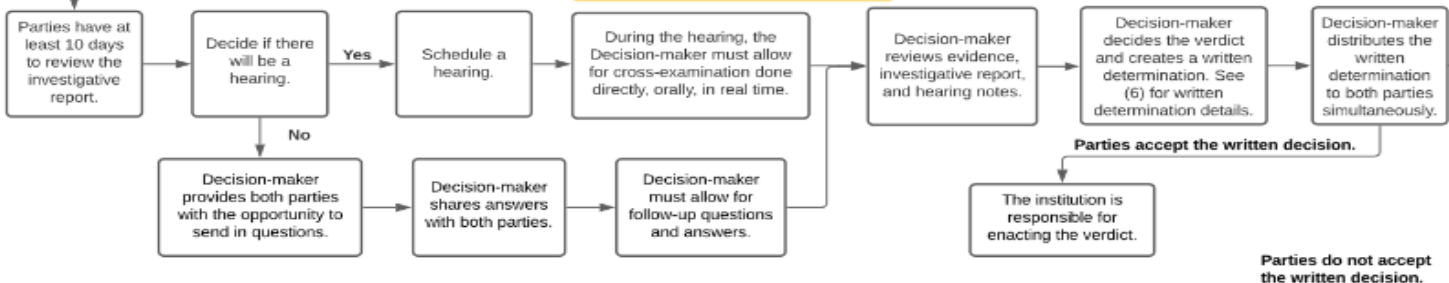
FORMAL COMPLAINT PROCESS



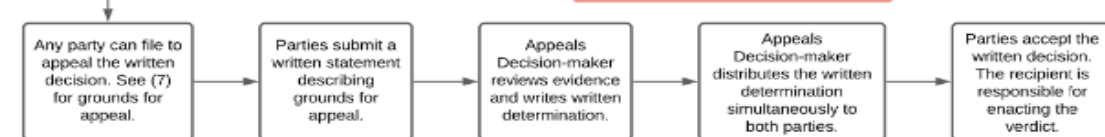
INVESTIGATION PROCESS



DECISION-MAKING PROCESS



APPEALS PROCESS



References Used

ATIXA K-12 Focus on the 2022 Proposed Regulations (NPRM)

Regulations, May 11, 2020

Institutional Compliance Solutions, webinar New Title IX Regulations, May 12, 2020

WEEAC Title IX PowerPoint

<https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>

<https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf>

Western Educational **EQUITY** Assistance Center



Evaluation

- <https://survey.alchemer.com/s3/6750308/Utah-New-Proposed-Title-IX-Change-9-29-22>



USBE Google Form



Submit by October 19th
to receive 4.0 relicensure
points



Western Educational Equity Assistance Center



Jan Perry Evenstad, PhD

Executive Director

evenstad@msudenver.edu

Holly Bell, MS

Utah State Office of Education