

**FOCUS:
EDUCATION**



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On April 19, 2024, the U.S. Department of Education (the “Department”) published the unofficial version of its final Title IX regulations (the “2024 Final Rule”) governing how elementary schools, secondary schools, postsecondary institutions or other entities that operate education programs or activities and receive federal funds from the Department (collectively, “institutions”) must address allegations of sex discrimination in accordance with Title IX of the Education Amendments of 1972 (“Title IX”).¹ Along with the unofficial version of the 2024 Final Rule, the Department also published a Fact Sheet,² Summary of Major Provisions,³

The 2024 Title IX Regulations: An Overview and Analysis of Major Changes Effective August 1

and a Resource for Drafting Nondiscrimination Policies, Notices of Nondiscrimination, and Grievance Procedures⁴ to assist institutions in understanding their obligations under the 2024 Final Rule. The 2024 Final Rule amends the Title IX regulations found at 34 C.F.R. § 106.1 et seq. The 2024 Final Rule is effective August 1, 2024, and will apply to complaints of alleged sex discrimination that occurs on or after that date.

The 2024 Final Rule presents a significant departure from the Department’s 2020 amendments to the Title IX regulations (the “2020 Final Rule”), which only became effective August 1, 2020.⁵ The Department received and reviewed more than 240,000 comments from the public in response to the proposed regulations released in July 2022. The release of the 2024 Final Rule was delayed several times, which presented practical challenges to institutions in their efforts to plan for implementation.⁶

Expanded Protections

The 2024 Final Rule specifies that Title IX’s prohibition on sex discrimination includes “discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”⁷ This coincides with the Department’s newly expanded definition of “sex-based harassment,” which is “a form of sex discrimination” and includes harassment on the basis of sex (including sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity) that constitutes *quid pro quo harassment* or *hostile environment harassment*.⁸ The 2024 Final Rule also redefines *hostile environment harassment*, previously required to be “severe, pervasive, and objectively offensive,” under the 2020 Final Rule, to now include “unwelcome sex-based conduct that ... 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.”⁹ The specific offenses of sexual assault, dating violence, domestic violence, and stalking also continue to independently constitute sex-based harassment under the 2024 Final Rule.¹⁰

By expanding the definitions of sex discrimination and sex-based harassment, the Department clarified what conduct is encompassed within Title IX’s scope and, thus, what conduct is subject to the requirements of the 2024 Final Rule. This is a significant expansion, as institutions must now apply the grievance procedures outlined in 34 C.F.R. § 106.45 to all complaints of sex discrimination, whereas, previously, institutions were only required to apply Title IX grievance procedures to conduct which met the definition of “sexual harassment” under the 2020 Final Rule. Institutions that maintain separate policies and procedures for sexual misconduct and non-discrimination will likely need to revise both policies to comply with the 2024 Final Rule.

The 2024 Final Rule also expands protections for pregnant and parenting students. For example, 34 C.F.R. § 106.40 will now require that any employee that is informed of a student’s pregnancy or related condition promptly provide the student with the Title IX Coordinator’s contact information and notify the

student that the Title IX Coordinator “can coordinate specific actions to prevent sex discrimination and ensure the student’s equal access to the recipient’s education program or activity.”¹¹ Once notified, the institution must take “specific actions” to “promptly and effectively prevent sex discrimination and ensure equal access to the recipient’s education program or activity...”¹² These “specific actions” include providing specified information about the institution’s Title IX obligations and its notice of nondiscrimination, providing reasonable modifications to its policies, practices and procedures, providing voluntary access to separate and comparable portions of its program or activity, providing voluntary leaves of absence and providing lactation space.¹³ Institutions are also prohibited from requiring supportive documentation for these actions, unless it is “necessary and reasonable” to effectuate said actions.¹⁴

More Inclusive Protections

The 2024 Final Rule also adds significant protections for LGBTQI+ students, employees, and others who participate in an institution’s educational programs or activities. In doing so, the Department relies on the U.S. Supreme Court’s reasoning in *Bostock v. Clayton Cnty.*,¹⁵ which provided that sex discrimination—as prohibited by Title VII of the Civil Rights Act of 1964—encompasses discrimination based on sexual orientation and gender identity.

The 2024 Final Rule states that a recipient must not separate or treat any person differently based on sex in a manner that subjects them to “more than de minimis harm...”¹⁶ and, moreover, “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.”¹⁷ Preventing a student from participating in a recipient’s education program or activity consistent with their gender identity is, therefore, an express violation of Title IX.

This provision, amongst others, has invited significant controversy and criticism, as the issue of allowing transgender athletes to compete on sex-separate athletic teams continues to dominate headlines.¹⁸ The 2024 Final Rule’s Preamble includes a



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lengthy discussion on the preemption of laws which conflict with Title IX's nondiscriminatory mandate.¹⁹ The Department will issue a separate rule addressing Title IX's application to athletics at later date.

Requirement to Respond "Promptly and Effectively"

The 2020 Final Rule required an institution to respond when it had "actual knowledge" of allegations of "sexual harassment," and "only in a manner that is not deliberately indifferent." In doing so, the Department sought to align the Department's administrative enforcement of Title IX with the liability standards applied in Title IX litigation. The 2024 Final Rule, however, requires that an institution "respond promptly and effectively" whenever it has "knowledge of conduct that reasonably may constitute sex discrimination."²⁰ In the Preamble to the 2024 Final Rule, the Department stated, in explaining an institution's duty to address sex discrimination, "The Department has concluded that Title IX does not permit a recipient to act merely without deliberate indifference and otherwise allow sex discrimination to occur. Rather, in the administrative enforcement context, in which the Department is responsible for ensuring that its own Federal funds are not used to further discrimination, the Department expects recipients to fully effectuate Title IX."²¹

Returning the Keys to Institutions to Drive Their Own Grievance Procedures

The 2020 Final Rule took a one-size-fits-all approach to Title IX decision making by requiring processes with quasi-legal elements, particularly for post-secondary institutions. While well-intentioned and designed to ensure parties, mainly respondents, received adequate due process, oftentimes, meeting those quasi-legal elements presented challenges for institutions with limited resources.²²

Institutions can now channel their resources in a way that is most efficient and effective for their campus community which, for some, may be through a single investigator model (i.e., allowing a single individual to both investigate and adjudicate allegations of sexual misconduct).²³ Under the 2020 Final Rule, post-secondary institutions were required to utilize quasi-legal hearings to adjudicate Title IX matters.

Moving away from quasi-legal hearings, however, presents challenges. Institutions might find it difficult to explain to parties that their rights may be better protected by one well trained and experienced investigator, as opposed to a hearing panel of

well-intentioned, but inexperienced individuals. Effective communication will be key to garnering trust in any new processes.

Attempts to Block Implementation

Several states are suing the Department to, amongst other requests for relief, postpone the effective date of the 2024 Final Rule. In its Complaint, filed April 29, 2024, Texas alleged that the Department "has attempted to effect radical social change in our Nation's schools by purporting to 'interpret' Title IX...to prohibit discrimination based on sexual orientation and gender identity."²⁴ The same day, Alabama, Florida, Georgia and South Carolina filed a Complaint making similar arguments to those made by Texas.²⁵ Both lawsuits allege that the 2024 Final Rule violates the Administrative Procedure Act and impermissibly expands the reach of the U.S. Supreme Court's decision in *Bostock*. As of the date of this writing, neither court has granted the respective plaintiffs' requests to postpone the effective date of the 2024 Final Rule.

Other states have filed similar lawsuits to block the 2024 Final Rule's implementation.²⁶ More legal challenges are expected in the coming months; however, unless directed by a court of appropriate jurisdiction, institutions should prepare and plan to implement the 2024 Final Rule by August 1.

Looking Ahead

Institutions will have to race against the clock to make the necessary updates to their policies to ensure compliance with the 2024 Final Rule. Institutions must also update annual trainings provided to community members. It is imperative that institutions work closely with legal counsel and campus Title IX stakeholders to craft a plan for compliance well before the August 1 effective date. ⚡

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7. 34 C.F.R. § 106.10 (Effective Aug. 1, 2024).
8. 34 C.F.R. § 106.2 (Effective Aug. 1, 2024).
9. *Id.*
10. *Id.*
11. 34 C.F.R. § 106.40 (Effective Aug. 1, 2024).
12. 34 C.F.R. § 106.40(b)(3) (Effective Aug. 1, 2024).
13. *Id.*
14. 34 C.F.R. § 106.40(b)(3)(vi) (Effective Aug. 1, 2024).
15. *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).
16. 34 C.F.R. § 106.31(a)(2) (Effective Aug. 1, 2024).
17. *Id.*
18. Nassau County Bans Transgender Athletes from Some Teams, Events at County Facilities, News 12 Long Island, Feb. 22, 2024, <https://longisland.news12.com/nassau-county-bans-transgender-athletes-from-some-teams-events-at-county-facilities> (last accessed May 6, 2024).
19. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33542 (Apr. 29, 2024).
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