



Crystal River FSBIT Fall Meeting

October 18, 2023

Title IX: What is on the Horizon?

Robert J Sniffen

SNIFFEN &
SPELLMAN, P.A.

Our Firm

Sniffen & Spellman, P.A.

Tallahassee

123 North Monroe Street
Tallahassee, FL 32301

Pensacola

700 South Palafox Street,
Suite 95
Pensacola, FL 32502

West Palm Beach

605 North Olive Avenue,
Second Floor
West Palm Beach, FL 33401



Reminder

NOTHING IN THIS PRESENTATION IS DESIGNED TO RENDER ANY LEGAL OR OTHER PROFESSIONAL OPINION.

DUE TO THE RAPIDLY CHANGING NATURE OF THE LAW, INFORMATION CONTAINED IN THIS PRESENTATION MAY BECOME OUTDATED.

ANY INDIVIDUAL USING THIS PRESENTATION AS A REFERENCE SHOULD ALWAYS (1) RESEARCH ORIGINAL SOURCES OF AUTHORITY AND UPDATE INFORMATION TO ENSURE ACCURACY WHEN DEALING WITH A SPECIFIC PROBLEM OR ISSUE OR (2) CONSULT LEGAL COUNSEL TO RENDER A SPECIFIC OPINION AS TO A SPECIFIC ISSUE.



Topics Today

Overview of Proposed Title IX Regulations

Sexual Harassment/Discrimination

Equity in Athletics

Title IX Timeline of Amendments

- November of 2018 → Trump admin. proposes amendments to Title IX regulations
 - Received 124,000 comments
- May of 2020 → Trump admin. final rule proposed
- August of 2020 → Trump admin. final rule goes into effect (summer of COVID)
- June of 2023 → Biden admin. proposes amendments to Title IX regulations re: sexual harassment
 - Received 240,000 comments
- April of 2023 → Biden admin. proposes amendment to Title IX regulations for athletics
 - Received 150,000 comments

Where Are We Now? Where are we Going?

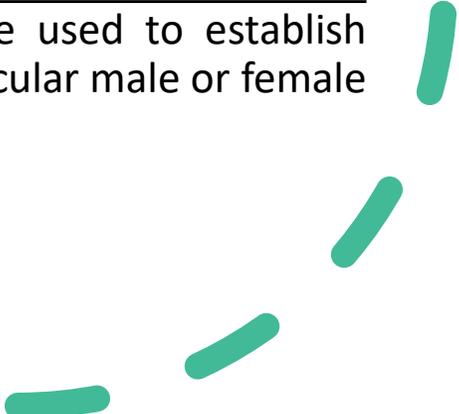


- Where are we now?
 - Trump admin. August of 2020 final rule still in effect.
- Where are we going?
 - US DOE signals that the proposed regulations “would strengthen protections for students who experience sexual harassment and assault at school, and they would help protect LGBTQI+ students from discrimination.”
 - US DOE is reviewing the 240,000 comments regarding the sexual harassment process and 150,000 comments regarding the proposed athletics regulations.
 - The anticipated date for the release of the final rule is October of 2023. It may be later which could result in mid-year policy changes. Approval of final rule will take 60 days – but it is likely there will be legal challenges.

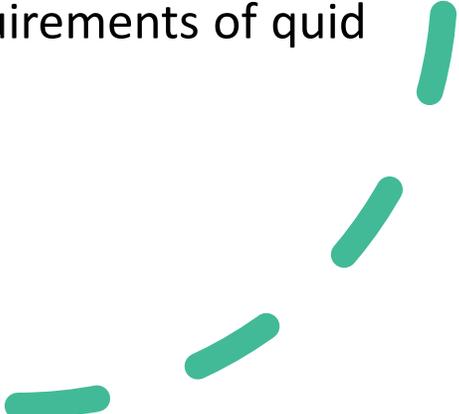
Major Changes to Sexual Harassment Process

- Applies to all sex-based discrimination – not just harassment.
- Hostile environment would be changed from “severe and pervasive” to “severe **or** pervasive”
- Potential changes regarding off-campus conduct
- Fewer explicit requirements for the grievance process (back to the old ways?)

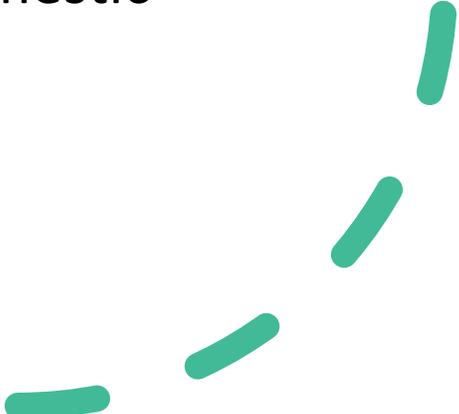
Prohibitions on all Forms of Sex Discrimination

- Proposed Rule §106.10
 - Prohibits all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
 - What does this mean?
 - Prohibits recipients from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm.
 - Includes prohibiting policies and practices that prevent a student from participating in program or activity consistent with gender identity.
 - *Separate rulemaking for application to Title IX in context of athletics will address criteria that may be used to establish students' eligibility to participate on a particular male or female athletic team .
- 

Defining Sex-Based Harassment

- Proposed regulations define sex-based harassment as including:
 - Sexual harassment
 - Harassment/Discrimination based on sex stereotypes
 - Harassment/Discrimination based on sex characteristics
 - Harassment/Discrimination based on pregnancy or related conditions
 - Harassment/Discrimination based on sexual orientation
 - Harassment/Discrimination based on gender identity
 - Other sex-based conduct that meets requirements of quid pro quo or hostile environment
- 

Defining Sex- Based Harassment (Quid pro quo)

- Proposed regulations would continue as is:
 - When an employee or other person authorized by a recipient to provide aid, benefit, or service explicitly or impliedly conditions that aid, benefit or service on a person's participation in unwelcome sexual conduct, and incidents of sexual assault, dating violence, domestic violence, and stalking.
- 

Defining Sex-Based Harassment (Hostile Environment)

Current Regulations

Prohibits unwelcome sex-based conduct only if it is “so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipients education program or activity.

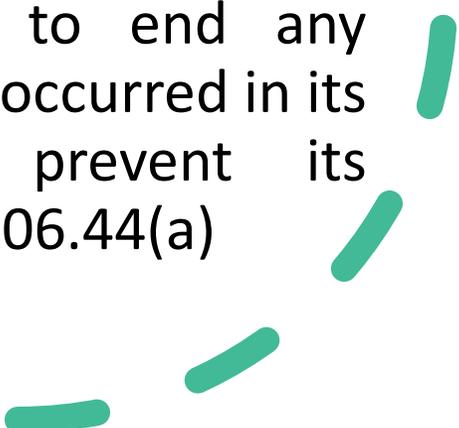
Proposed Regulations

Prohibits unwelcome sex-based conduct that is sufficiently severe **or** pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.

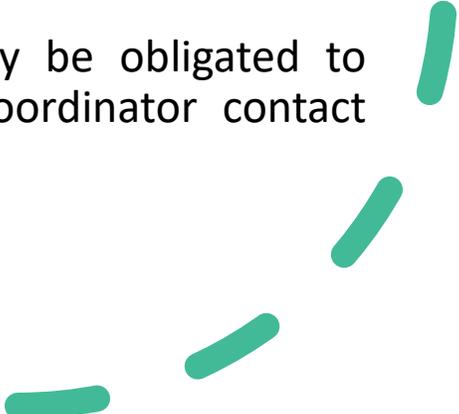
Off Campus Conduct that Creates or Contributes to a Hostile Environment

- Current regulations do not require recipient to address sex-based hostile environment if the hostile environment results from sex-based harassment that happened outside education program or activity, or outside US.
 - Proposed regulations change this and require recipient to address sex-based harassment even when it occurred outside the recipient's education program or activity or outside the US.
 - Conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a post-secondary institution (§106.11)
 - Conduct that occurs off-campus when respondent is a representative of the recipient or otherwise engaged in conduct under the recipient's disciplinary authority
- 

Responding to Sex Discrimination

- Current regulations only require a recipient to respond to possible sexual harassment when it has “actual knowledge” of the harassment – must respond in a manner that is not deliberately indifferent.
 - Post-secondary institutions, only employees with authority to institute corrective measures can have actual knowledge
 - Elementary/secondary – actual knowledge applies to all employees
 - Proposed regulations would require a recipient to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. §106.44(a)
- 

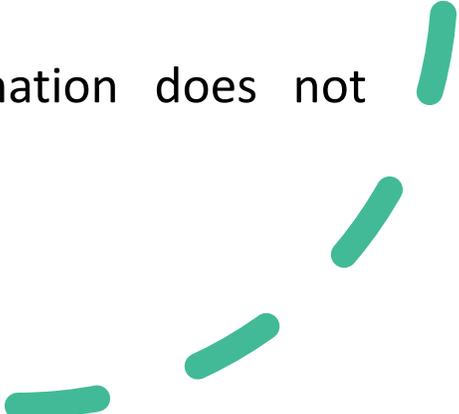
Notification Requirement §106.44(c)

- Proposed regulations require that recipients require certain employees to notify the Title IX Coordinator of conduct that may constitute sex discrimination.
 - Elementary/secondary schools – any employee who is not a confidential employee is obligated to notify the Title IX Coordinator.
 - Postsecondary – employee who has authority to take corrective action or, for incidents involving students, has responsibility for administrative leadership, teaching, or advising would be obligated to notify Title IX Coordinator.
 - All other employees would be obligated to notify or provide contact information for Title IX Coordinator about possible sex-based discrimination.
 - Confidential employees would only be obligated to provide individual with Title IX Coordinator contact information.
- 

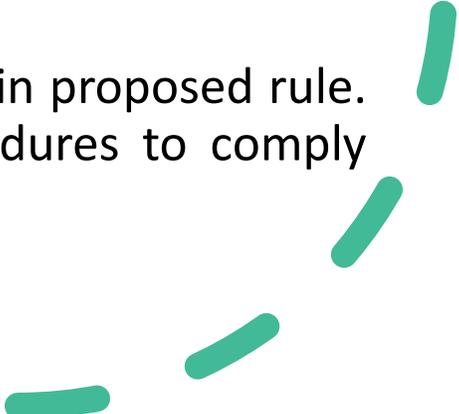
Training Requirements

- Must provide training to employees on when employees must report possible sex discrimination and how students, parents, etc. can report or file grievance.
 - Complainant would be protected even if they have to leave education program or activity.
 - Title IX Coordinator must monitor for barriers to reporting and address those barriers.
- 

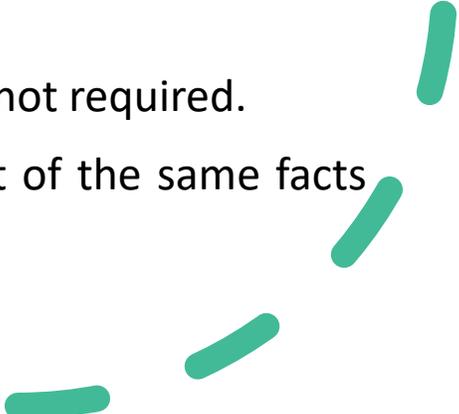
Title IX Coordinator Response to Complaint

- Must treat complainant and respondent equitably at every stage.
 - Notify complainant of recipient's grievance procedures, and if complaint is made, notify respondent of grievance procedures and informal resolution process.
 - Offer and coordinate supportive measures as appropriate to both complainant and respondent.
 - Supportive measures may include counseling, extension of deadlines, restrictions on contact between parties, voluntary or involuntary changes in class, work or housing
 - Determine whether to initiate complaint in the absence of formal complaint.
 - Take other steps to ensure sex discrimination does not continue or recur.
- 

Grievance Procedures §106.45

- Proposed regulations adapt current regulations to apply to all complaints of sex discrimination that would take into account the age, maturity, and level of independence of students in various educational settings, the particular contexts of employees and third parties, and the need to ensure that recipients adopt grievance procedures that include basic and essential requirements for fairness and reliability for all parties.
 - Must adopt grievance procedures in writing and include a list of requirements
 - *Long list of grievance procedures listed in proposed rule. Will need to change policies and procedures to comply with new process.
- 

Grievance Procedure Requirements

- Equitable treatment of complainants and respondents.
 - Title IX Coordinator, investigators, and decisionmakers must not have conflicts of interest or bias.
 - Decisionmaker may be the same person as the Title IX Coordinator or investigator.
 - A presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance procedures.
 - Reasonably prompt timeframes for all major stages.
 - Reasonable steps to protect privacy of parties and witnesses.
 - Objective evaluation of relevant and not otherwise impermissible evidence.
 - Notice of the allegations to the parties.
 - Dismissals permitted in certain circumstances, but not required.
 - Consolidation permitted for complaints arising out of the same facts or circumstances.
- 

Grievance Procedure Requirements (Continued)

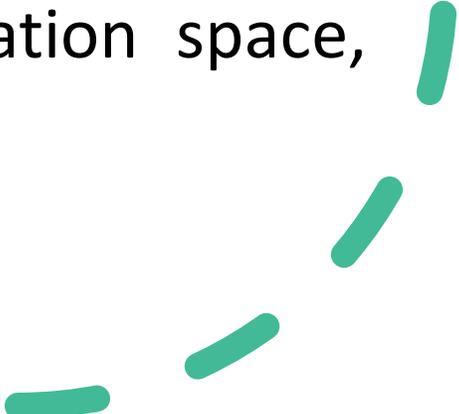
- Investigation requirements:
 - Burden is on the recipient to gather sufficient evidence.
 - Equal opportunity for all parties to present relevant fact witnesses and other evidence.
 - Determination by the decisionmaker of what evidence is relevant and what evidence is impermissible.
 - A description provided to the parties by the recipient of the relevant and not otherwise impermissible evidence, as well as a reasonable opportunity to respond.
- A process that enables the decisionmaker to assess the credibility of the parties and witnesses when credibility is in dispute and relevant.
- Clear processes for the determination of whether sex discrimination occurred, including
- Determining whether sex discrimination occurred using the preponderance of the evidence standard of proof, unless the clear and convincing evidence standard is used in all other comparable proceedings, including other discrimination complaints, in which case that standard may be used in determining whether sex discrimination occurred.
- Notifying parties of the outcome of the complaint and any opportunity to appeal.
- When there is a determination that sex discrimination occurred, the Title IX Coordinator provides and implements remedies for the complainant or others whose access to the recipient's education program or activity has been limited or denied by sex discrimination, and takes other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur.
- The grievance procedures are completed before imposing any sanctions.
- A recipient is prohibited from disciplining a party, witness, or other participant for making a false statement or for engaging in consensual sexual conduct based solely on the determination of whether sex discrimination occurred.
- Parties are permitted to choose to participate in an informal resolution process if one is provided by the recipient.
- Grievance procedures must describe the range of possible supportive measures and a range or list of disciplinary sanctions and remedies for sex-based harassment complaints.
- A recipient may add provisions to its grievance procedures as long as the provisions apply equally to the parties.

Informal Resolution

- Current regulations permit informal resolution only if a formal complaint alleging sexual harassment has been filed.
- Proposed regulations would permit resolution process whenever it receives a complaint of sex discrimination or has information about conduct that may constitute sex discrimination.
 - Participation must be voluntary
 - Not permitted in situations where employee is accused of sex discrimination against a student.



Other Provisions

- Retaliation – clarifies that Title IX protects against retaliation, including peer retaliation
 - Ex – intimidation, threats, coercion because of reporting or participating in investigation
 - Discrimination based on pregnancy – protects students and employees from discrimination based on pregnancy or related conditions by providing reasonable modifications, break time, lactation space, etc.
- 

Athletics

- We know about equitable funding. What has been difficult is the confusion regarding how Title IX should be applied in athletics when it comes to transgender students.
- The proposed rule would establish that policies violate Title IX when they categorically ban transgender students from participating on sports teams consistent with their gender identity.
- There will be some limits and schools will be provided with a framework for developing eligibility criteria that protects students from being denied equal athletic opportunity, while giving schools the flexibility to develop their own participation policies.





What are the Limits?

- Proposed criteria would have to account for the sport, level of competition, and grade or education level to which they apply and cannot be premised on disapproval of transgender students or a desire to harm a particular student.
- The proposed standard provides that if a recipient applies sex-based criteria to determine a student's eligibility to participate on a female or male sports team consistent with their gender identity, such criteria must, for each grade and education level, sport, and level of competition
 - (1) be substantially related to achieving an important educational objective; and
 - (2) minimize harms to students whose participation consistent with their gender identity is limited or denied.



How does this look for Recipients?

- Drawing from judicial application of equal protection principles, US DOE asserts that there must be a “direct, substantial relationship between’ a recipient’s objective and the means used to achieve that objective,” and criteria may not rely on “overly broad generalizations” about the capacities of males and females.
- For elementary school and “immediately following elementary school,” US DOE states that it would be difficult for a school to justify excluding students based on gender identity.
 - Less emphasis on competition - more on learning and participation.
- For older students (high school & college), US DOE expects some limitations may be imposed when they enable the school to achieve an important educational objective, fairness in competition, and meet the other requirements.



High School & College

- For high school intramural competition - may be more likely to allow participation.
- For high school varsity where students may be competing for scholarships - more limitations may be justifiable.
- For high school and NCAA where universities receive federal funding, sex eligibility criteria for transgender athletes must also take account of the sport to which they apply.
 - Guidance suggests that not all differences between students will confer a competitive advantage or raise safety concerns.
 - The DOE specifically points to NCAA and IOC policies allowing for a sport-by-sport approach to eligibility criteria. This means that schools would need to consider the nature of different activities and the competitive advantage or risk in a specific activity.



Fairness in Women's Sports Act (FL HB 1028)

- This bill specifies that an athletic team or sport that is designated for females, women, or girls may not be open to students of the male sex, based on the student's biological sex listed on the student's official birth certificate at the time of birth.
- The bill applies the requirements to interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public secondary school, high school, public college, or university institution. The bill provides civil remedies for those who suffer harm by violations of the section of law.
- Subject of current litigation.



Transgender Student Bathroom Cases

- Adams v. St. Johns County School Board - December 31, 2022, the 11th Circuit Court of Appeals issued a 7-4 *en banc* decision in favor of the St. Johns County School Board. Applies to Florida, Georgia, and Alabama. In short, public schools may separate bathrooms based on biological sex. (Concurring/Dissenting opinions are a must read).
- Other courts have held differently. Grimm v. Gloucester County Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020) stated that schools cannot require a transgender student to use the bathroom of his or her biological sex—or even an “all-gender” bathroom—and must instead permit the student to use the bathroom of their expressed gender identity.
- Where does this leave us?
 - Supreme Court will eventually have to weigh in and clarify the split in circuits.



What Now?

- Wait for final rules to be published.
- Calendar when the rules take effect.
- Revise policies and procedures accordingly (check with your policy provider if you have one).
- Train, train, and train staff!



Final Discussion and Q&A