2024 Joint Guidance on Federal Title IX Regulations
Additional Analysis: Employees

July 5, 2024

Note: This document focuses on a summary of Additional Analysis: Employees.[1] For a full overview of the changes from the 2020 Regulations and the 2024 Final Regulations, see *Title IX Text for Text 2020 and 2024 Regulation Final Comparison,* available at https://system.suny.edu/sci/titleix/.

The 2024 Title IX regulations have narrowed the differences between legal considerations under Title IX and Title VII of the Civil Rights Act. The U.S. Department of Education ("the Department") has also formalized the Title IX regulations' application to claims of sexual orientation and gender identity to be consistent with the U.S. Supreme Court's 2020 decision in *Bostock v. Clayton County, Georgia*. This Supreme Court case addressed sexual orientation and gender identity discrimination in employment matters. At the same time, the 2024 Title IX Regulations continue to present challenges in situations where employees may be complainants or respondents in matters involving sex discrimination or sex-based harassment. The 2024 Title IX regulations continue to include requirements for Title IX grievance procedures which will apply to employees but could conflict with established Title VII legal principles and practices. Employers must continue to carefully coordinate handling claims of sex discrimination, including sex-based harassment, where claims involve allegations of discrimination under multiple protected categories, in addition to sex discrimination.

Treatment of Employee Status under Regulations

The Regulations otherwise make clear that postsecondary institutions must comply with Title IX responsibilities and obligations with respect to their employees. The Department stated,

> "…Nothing in these final regulations shall be read in derogation of any employee's rights under Title VII, as expressly stated in § 106.6(f)…Similarly, nothing in these final regulations precludes an employer from complying with Title VII…The Department recognizes that employers must fulfill their

[1] The effective date of these Regulations will be August 1, 2024 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

> obligations under both Title VII and Title IX, and there is no inherent conflict between Title VII and Title IX. Nor is there any language in Title VII or Title IX preventing the Department from issuing regulations covering employment. *See* 85 FR 30439."[2]

In short, the Department continues to take an expansive position with respect to obligations it imposes on colleges and universities under employment discrimination statutes such as Title VII of the Civil Rights Act. This approach differs from its approach toward treatment of sex discrimination concerning students with disabilities. With respect to students with disabilities, the Department of Education noted that, "Title IX and its implementing regulations are limited to addressing sex discrimination; therefore, the Department declines to impose obligations or requirements with respect to rights conferred by the IDEA, ADA, or Section 504 in these final regulations."[3] However, the Department also stated the 2024 Regulations do not "… abrogate a recipient's obligation to comply with other Federal laws that protect the rights of students with disabilities at the postsecondary level…"[4]

Narrowing Conflict between the Title VII and Title IX Standards for Sex-Based Harassment involving Employees

The 2024 Title IX Regulations include three types of conduct which may constitute "sex-based harassment": "quid pro quo" harassment; four types of sexual misconduct which are addressed by the Violence Against Women Act (VAWA) and Clery Act: sexual assault, domestic violence, dating violence, and stalking; and sex-based harassment which causes a hostile environment. In the employment context, this is referred to as a "hostile work environment."

The 2024 regulations define "hostile environment harassment" as "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."[5] The definition of a "hostile work environment" under the 2020 regulations was much narrower. The 2020 regulations covered sexual harassment only if it was "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." The 2024 regulations' definition of "hostile environment" harassment is more like the definition of "hostile environment harassment" under Title VII.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for a covered employer to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex,

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[2] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474, 33845 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (hereinafter "2024 Title IX Final Rule").
[3] 2024 Title IX Final Rule, 89 Fed. Reg. 33553 (Apr. 29, 2024).
[4] 2024 Title IX Final Rule, 89 Fed. Reg. 33554.
[5] 34 C.F.R. § 106.2.

or national origin. Since 1986, the Supreme Court has recognized that sexual harassment may constitute sex discrimination under Title VII when it is "sufficiently severe *or* pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[6] The Department recognized that its definition of "hostile environment harassment" still is "…not identical to the factors the EEOC considers, but the EEOC similarly examines the totality of the circumstances, including the nature, frequency, and context of the conduct."[7]

Under Title VII, covered employers must investigate claims of sexual harassment by or against employees. This duty exists irrespective of the gender(s) of the parties to the alleged harassment. This obligation to begin an inquiry under Title VII is triggered once the employer "knew or should have known" that harassment may have occurred. An employer's knowledge under Title VII's "knew or should have known" standard is construed as including notice to any employer representative who supervises or manages employees or contractors. This obligation to investigate once an employer knew or should have known about allegedly harassing conduct is addressed in two Supreme Court decisions from 1998.[8] According to the *Faragher* and *Ellerth* decisions, if an employer can provide evidence that it has an effective process for investigating claims of harassment, the employer can rely on the investigation process as an affirmative defense in a Title VII sexual harassment claim. Conversely, if an individual who alleges harassment under Title VII did not utilize an existing investigation procedure, this also can support an employer's affirmative defense to a Title VII sexual harassment claim.

Under the *Faragher* and *Ellerth* decisions, therefore, employers may face liability for harassment by a supervisor that results in a negative employment action. The employer can avoid liability only if they can show they reasonably tried to prevent and promptly correct the behavior, and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer. For harassment by non-supervisors, employers are liable if they knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

Under Title VII, an employer is required to respond to a claim of sexual harassment related to an employee raised in a variety of settings. It can be raised through a formal grievance process, or by a third party. A sexual harassment allegation may be presented verbally under Title VII. An employee may raise a claim to a trusted administrator, faculty member, or supervisor. Multiple reporting options have been recognized as critical to reporting potential sexual harassment claims in the employment context, where the person's direct supervisor or faculty member may be the subject of the allegations.

As with the definition of sex-based harassment, changes in the 2024 regulations about notice of a complaint of sex discrimination bring Title IX requirements closer to alignment with these Title VII standards. The 2024 regulations provide a broader definition of a "complaint," so an

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[6] See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (internal quotation marks omitted) (emphasis added).
[7] 2024 Title IX Final Rule, 89 Fed. Reg. 33512 (Apr. 29, 2024).
[8] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

individual can raise a complaint of discrimination in several ways, without the need to use "magic words."[9] Similarly, the 2024 Title IX regulations no longer require actual knowledge for an employer institution to respond to a claim of sex discrimination, including sex-based harassment.[10] An institution may be responsible for responding to a complaint of sex discrimination which initially is raised with a wider range of personnel on campus. While these changes increase the scope of complaints which institutions must address under Title IX and make them responsible for responding to complaints based on a lesser standard of knowledge, institutions are already subject to similar standards with respect to their employees under Title VII.

The 2024 Rules Continue to Present Potential Conflicts between Multiple Grievance Procedures Which Apply to Employees

The 2024 Regulations still include requirements which differ from grievance procedures under other federal employment laws. This may result in potential conflicts in cases that implicate Title IX and the other laws. Under the Title IX regulations, employees will subject to the grievance procedure requirements of § 106.45 for claims of sex discrimination, and some cases of sex-based harassment. However, employees also may be subject to the requirements of §106.46 if they are a complainant or a respondent in a sex-based harassment claim in which a student is the other party.

The 2024 regulations offer a postsecondary college or university more discretion in fashioning grievance procedures for resolution of complaints under Title IX. However, the specific requirements of grievance procedures under Section 106.45 and Section 106.46 are still robust. In addition, an employer and its employees will not be able to consistently expect whether Section 106.45 or Section 106.46 applies to employees. Under the 2024 regulations the application of either of the grievance procedures depends not on an employee's status, but on whether a student is a party to a sex-based harassment claim. If a student is either a complainant or a respondent in a sex-based harassment claim, an employee is subject to Section 106.46 of the grievance procedures. Although the Department has provided opportunities for university employers to choose among different grievance procedure options, in practice, the 2024 Rule's highly-specific requirements for grievance procedures may conflict with processes already established for employees under Title VII and corresponding state anti-discrimination laws, as well as federal, state, and local labor relations laws and collective bargaining agreements.

The Department acknowledges that the new requirements for grievance procedures in Section 106.45 and Section 106.46 may conflict with existing employee grievance procedures. However, it maintains that the grievance procedures under the 2024 Title IX regulations may not contradict with current workplace practices and can work simultaneously with Title VII, a recipient's collective bargaining agreements, employee handbooks, and/or institutional specific policies and/or procedures. It states that an employer can address potential conflicts by taking actions like

[9] 34 C.F.R. § 106.2; 2024 Title IX Final Rule, 89 Fed. Reg. 33485 (Apr. 29, 2024).
[10] 34 C.F.R. § 106.44(a).

negotiating changes with employees' collective bargaining representatives which would minimize the burden of this requirement. In a collective bargaining setting, a union may dispute an employer's right to modify policies without negotiations, even though the modification is necessary to comply with new legal requirements like the 2024 Title IX regulations. This approach does not fully consider the logistics and costs of reopening the collective bargaining process, as well as the institutional impact of reopening collective bargaining agreements which may have taken a great deal of time and effort to achieve. This reality is magnified by the fact that colleges and universities now also are negotiating with groups of individuals who previously were not covered by collective bargaining, such as graduate students and resident assistants.

The Department maintains that all employees must be afforded prompt and equitable grievance procedures when they are subject to or alleged to have engaged in, sex discrimination; and that an employee's position, tenure, part-time status, or at-will status, should not dictate whether that employee is subject to the procedural requirements of the Department's Title IX regulations. The intent is to promote fair, transparent, and reliable outcomes for all employees. Grievance procedures for complaints involving employees must follow the same rules as for student-only complaints.

Any grievance procedure implemented by a college or university must be consistent with Section 106.45 and/or Section 106.46, if applicable, or offer an informal resolution, consistent with Section 106.44(k). The grievance procedures must be designed to ensure a fair, transparent, and reliable process, including procedures that may result in termination or suspension of a respondent.

Recipients are permitted to use a single procedure for all of its complaints (provided it meets the requirements of 106.45 and 106.46). Potential options include:

a. A grievance procedure for employee-to-employee sex-based harassment complaints consistent with 106.45 and its legal and/or contractual requirements for complaints involving employees;
b. A grievance procedure for employee to student sex-based harassment complaints to satisfy 106.46 and those legal and/or contractual requirements
c. A grievance procedure for student-to-student sex-based harassment complaints that will be compliant with 106.46 and state laws as applicable to student discipline.

However, grievance procedures must include some baseline requirements:

1. Equitable treatment of parties
2. Absence of bias/conflicts of interest of the decision makers
3. Adequate notice to the parties of the allegations and timeframes for the grievance procedures
4. Appropriate guidelines for ensuring the adequate, reliable, and impartial investigation of the complaint

5. Opportunity for the parties to present evidence
6. Guidelines for how a decision maker must assess the evidence and the credibility of parties in the hearings

According to the Department, to the extent that an institution may impose other procedural requirements, inclusion of those additional requirements would not be considered burdensome under Title IX.

If an institution already has procedures that satisfy the current Title IX regulations, whether it is a grievance procedure outlined in a policy or a collective bargaining agreement, which is compliant with Sections 106.45 and 106.46, an institution may not need to make any changes to its current grievance procedure.

Considerations for Handling Claims Involving Multiple Bases for Discrimination

Where a complainant may allege discrimination on multiple grounds, a recipient will still need to investigate the sex discrimination claim through the Title IX process. Employer institutions may continue to implement a single grievance procedure which would meet Title IX requirements and address other discrimination claims.

Within this context, an individual could investigate a complaint under both the Title IX and Title VII standards. However, an investigator would need to be mindful and explicit about when they are applying Title IX processes and definitions, and when they are applying standards which exist under employment discrimination (Title VII-based) procedures, when collecting and evaluating evidence. A hearing officer or hearing panel must also be explicit in the same way when they are evaluating evidence. Such a dual application could occur if all types of complaints are investigated under a procedure which adheres to the Title IX procedural requirements. Alternatively, a complaint could be assessed under Title IX-specific procedures, and under a recipient employer's nondiscrimination policy and procedures.

Sexual Orientation and Gender Identity Discrimination Prohibited under Title VII and Title IX of the federal Civil Rights Act

In 2020, the Department addressed the intersection of Title VII of the Civil Rights Act, which prohibits employment discrimination, and the 2020 Title IX Final Rule after the Supreme Court's decision in *Bostock v. Clayton County*, *Georgia.*[11] In that case, the Supreme Court ruled that "sex" under Title VII explicitly includes "sexual orientation" and "gender identity discrimination." Following *Bostock*'s reasoning regarding Title VII, allegations of Title IX violations on the basis of sexual orientation and/or gender identity discrimination have also been considered sex discrimination under Title IX.

[11] 140 S. Ct. 173 (2020).

The 2024 regulations expressly incorporate *Bostock*'s prohibition on sexual orientation and gender identity discrimination in employment into the definition of sex discrimination in educational settings. The preamble to the 2024 regulations states that "…sex discrimination as prohibited by Title VII, 'encompasses discrimination based on sexual orientation and gender identity.'"[12] Section 106.10 follows Title VII's prohibition of sexual orientation and gender identity discrimination.[13] As a practical matter, this means that employee claims of discrimination on the basis of sexual orientation and gender identity must be addressed under Title IX grievance processes as well as administrative and legal processes under Title VII.

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[12] 2024 Title IX Final Rule, 89 Fed. Reg. 33542 (Apr. 29, 2024).
[13] 2024 Title IX Final Rule, 89 Fed. Reg. 33801.