



EIIA[®]

2024 Title IX: Update and Preparing to Implement the Model Policy

Tuesday, June 25, 2024

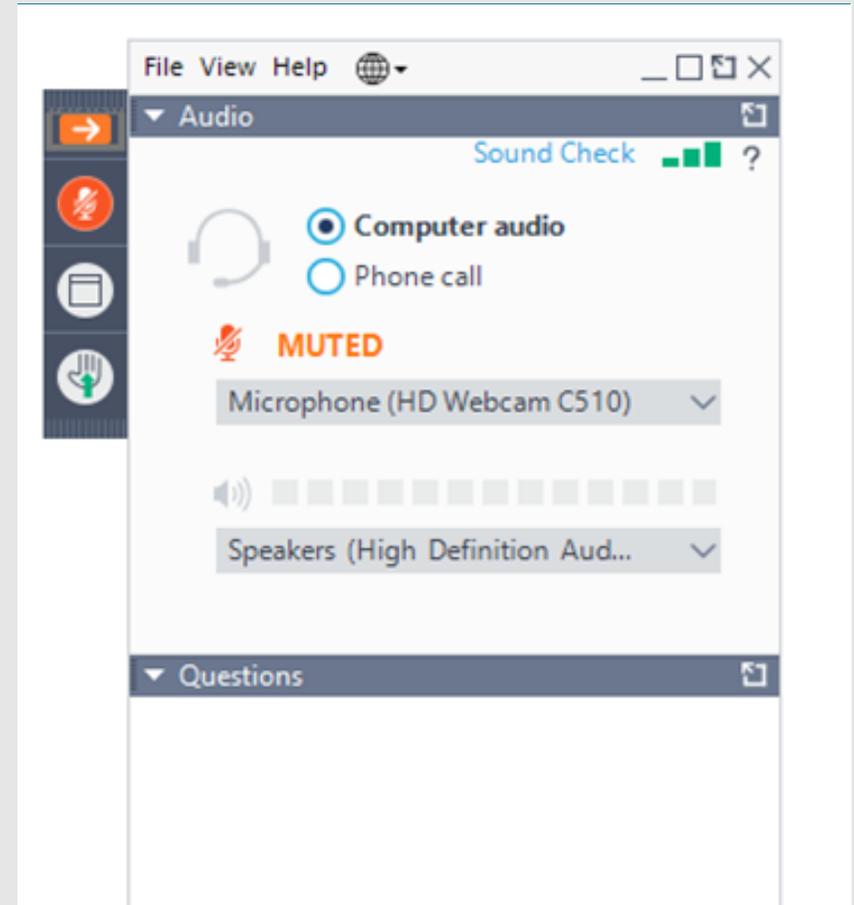


Partnering. Preparing. Protecting.



Housekeeping Items

- This webinar is being recorded
- Everyone is **MUTED** for now
- If possible, MUTE yourself to reduce background noise
- Raise your Hand  if you would like to ask a question, or
- Submit your questions through the Questions box and we will address them at a break
- The recording will be available on the website within 48 hours



Today's Panelists



- Greg Logan, EIIA
- Andrew Shaw, Novus Law Firm
- Natasha Baker, Novus Law Firm

AGENDA

- ❑ Overview
- ❑ Title IX Litigation Status
- ❑ Existing Requirements Under Other Laws
- ❑ Summary of Major Changes Under the 2024 Final Title IX Rule
- ❑ Next Steps
- ❑ EIIA Resources
- ❑ Questions & Answers



Overview

Current Status

- ❑ Draft Final Rule was issued on Friday, April 19, 2024
- ❑ Implementation deadline of August 1, 2024
- ❑ Implementation means a new policy and training in preparation for Fall 2024 term but not everyone must be trained by August 1, 2024, per the Department.
- ❑ Pending litigation



Title IX Litigation Status

Challenges to the Final Rule

- ❑ Seven federal lawsuits against the Department of Education (covering 26 states)
- ❑ All seek to enjoin the implementation of 2024 Final Rule and declare the Final Rule invalid under various theories
- ❑ Two injunctions (W.D. LA and E.D. KY) have already been granted with a third (D. KS) likely soon
- ❑ Department of Education has filed Notices of Appeal

What Do the Injunctions Mean?

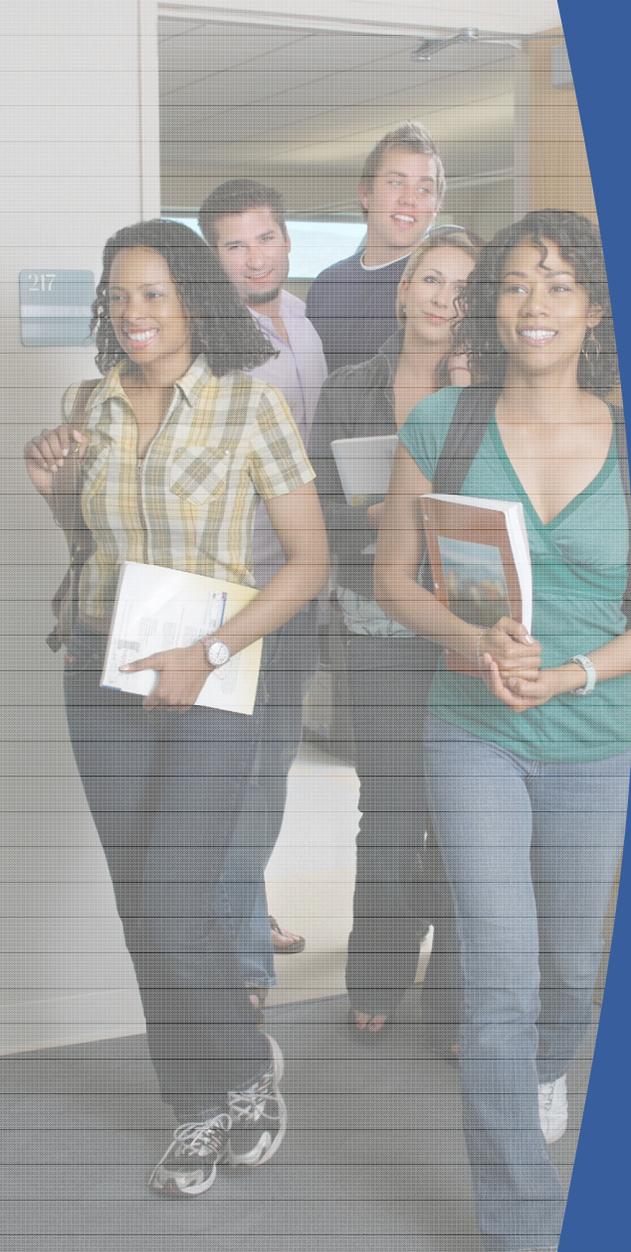
- ❑ Prohibit implementation of the Final Rule
- ❑ Enjoin enforcement of the Final Rule
- ❑ Appeals and Motions to Stay are in play...

What Do the Injunctions Mean?

- ❑ Continue to utilize policies consistent with the 2020 Regulations
- ❑ Discretion to expand definition of “sex” by policy – some already did this after Bostock ruling.
- ❑ Discretion to implement 106.45 discrimination procedures
- ❑ Limited discretion to modify procedures pertaining to harassment based on sex

Impacted States

- ❑ Covered by W.D. Louisiana ruling: ***Louisiana, Mississippi, Montana, Idaho***
- ❑ Covered by E.D. Kentucky ruling: ***Kentucky, Tennessee, Ohio, Indiana, Virginia, West Virginia***
- ❑ Pending: ***Kansas, Utah, Alaska, Wyoming, Texas, Oklahoma, Alabama, Florida, Georgia, South Carolina, Iowa, Missouri, Arkansas, Nebraska, North Dakota, South Dakota***



Policy Design Choices and Understanding the Model Policy

Definitions of Prohibited Misconduct

- ❑ Discrimination
- ❑ Quid pro quo
- ❑ Harassment based on sex
 - ❑ Caution if in state with injunction
- ❑ Retaliation under Title IX
- ❑ Stalking (Clery)
- ❑ Dating Violence (Clery)
- ❑ Domestic Violence (Clery)
- ❑ Sexual Assault (Clery)

Discrimination

- ❑ Have always needed to prohibit discrimination. 2020 Rule did not address.

- ❑ Sample Definition for Prohibited Discrimination Based on Sex

Except as permitted by Title IX, prohibited discrimination on the basis of sex (where sex includes sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity) is defined as actions that cause an individual to be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by [INSTITUTION].

- ❑ If enjoined, could still choose to define sex broadly, depending on state law.

Discrimination

❑ Use of de minimis standard if enjoined state/not enjoined state:

Except as permitted by Title IX, [INSTITUTION], including employees and agents of [INSTITUTION], shall not, engage in any of the following prohibited discriminatory actions on the basis of sex if it would cause more than de minimis harm:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

Discrimination

- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;*
- (5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;*
- (6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;*
- (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.*

Discrimination

For the purposes of this definition, unless permitted by Title IX, 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 and will be considered prohibited discrimination.

Quid Pro Quo

2020:

An employee conditions the provision of an aid, benefit, or service of [INSTITUTION] on an individual's participation in unwelcome sexual conduct.

2024:

Quid pro quo harassment. 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 conditions (or purports to condition) the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.

Harassment Based on Sex

If enjoined:

- Use severe, pervasive, objectively offensive
- Assess whether you want to exercise discretion to use broader 2024 definition under the 2020 Final Rule's grievance procedures. Check state law.

If not enjoined:

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. On the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

Retaliation Under Title IX

- ❑ Have always had to prohibit retaliation.
- ❑ Retaliation must be processed under a 106.45 procedure.
- ❑ If enjoined: could still adopt a 106.45 procedure.

Retaliation Under Title IX

[INSTITUTION] prohibits retaliation against any person opposing sex discrimination or participating in any sex discrimination investigation or complaint process, whether internal or external to [INSTITUTION]. Sex-based harassment, sexual assault, dating and domestic violence, and stalking are forms of sex discrimination for the purpose of this definition.

Retaliation Under Title IX

Retaliation is defined as any materially adverse action taken against an individual because they were involved in the disclosure, reporting, investigation, or resolution of a report of Prohibited Conduct. Retaliation includes threats, intimidation, harassment, coercion, discrimination, violence, or any other conduct against any person by [INSTITUTION], a student, or an employee or other person authorized by [INSTITUTION] to provide aid, benefit, or service under the [Institution]'s education program or activity, for the purpose of interfering with any right or privilege secured by this policy. Adverse action does not include perceived or petty slights, or trivial annoyances.

Retaliation Under Title IX

The prohibition against retaliation applies to any individuals who participate (or refuse to participate) in any manner in an investigation and to any student who refuses to participate in an investigation or proceeding.

Good faith actions pursued in response to a report of Prohibited Conduct are not Retaliation.

Clery Definitions

June 10, 2024 Letter from OCR's Legal Department

The 2024 Title IX regulations do not make any substantive changes to the content of the definitions of sexual assault, dating violence, domestic violence, and stalking that were incorporated to the 2020 Title IX regulations via cross-references to the Clery Act and VAWA 2013. The Department's Clery Act regulations include definitions of sexual assault, dating violence, domestic violence, and stalking that are based on the statutory definitions of those terms in the Clery Act and VAWA 2013.

Clery Definitions

June 10, 2024 Letter from OCR's Legal Department

Nothing in the 2024 Title IX regulations prohibits a recipient, including a postsecondary institution, from using the definitions of sexual assault, including the definition of rape, fondling, incest, and statutory rape in Appendix A to the Clery Act regulations; dating violence; domestic violence; and stalking in the Department's Clery Act regulations to define those terms under Title IX.

Clery Definitions

June 10, 2024 Letter from OCR's Legal Department

OCR has consulted with FSA's Clery Office and advises that to prevent unnecessary confusion and for ease of use, recipients that must comply with Title IX and the Clery Act can use the definitions in the Clery Act regulations for these purposes. However, sexual assault, dating violence, domestic violence, and stalking must be based on sex in order to be covered under Title IX. In addition, the Department reminds recipients that are subject to the Clery Act that they must adopt the definitions as they appear in the Clery Act regulations and that they cannot modify or replace the definitions through adjustments to their policies and procedures.

Stalking Based on Sex (Clery)

- ❑ *Engaging in a course of conduct, on the basis of sex, directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others; or suffer substantial emotional distress.*

Dating Violence (Clery)

Dating violence meaning violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and*
- Where the existence of such a relationship shall be determined based on a consideration of the following factors:*
 - The length of the relationship;*
 - The type of relationship; and*
 - The frequency of interaction between the persons involved in the relationship.*

Emotional and psychological abuse do not constitute violence for the purposes of this definition.

Domestic Violence (Clery)

*Domestic violence means a **felony or misdemeanor crimes of violence** committed by a person who:*

- Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of [INSTITUTION] or a person similarly situated to a spouse of the victim;*
- Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;*
- Shares a child in common with the victim; or*
- Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the State of [INSTITUTION].*

Sexual Assault(Clery)

*Sexual assault, **Any sexual act** directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. Sexual assault includes:*

Rape—The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. Attempted rape falls under this prohibition.

*Fondling—The touching of the **private body parts** of another for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.*

Consider defining highlighted terms. (Model policy defines).

Sexual Assault(Clery)

Sexual assault includes:

Incest—Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Statutory Rape—Sexual intercourse with a person who is under the statutory age of consent. In [STATE] the statutory age of consent is 18.



Policy Design Choices and Options in the Model Policy

Procedural Considerations

Enjoined vs. Not Enjoined

Enjoined

- Can have a 106.45 procedure for discrimination, retaliation.
- Can expand jurisdiction.
- Cannot use 106.45 or 106.46 for processing 2020 claims of harassment based on sex where the prohibited conduct is defined by the 2020 Final Rule.

Not Enjoined

- Must have a 106.45 procedure for discrimination, retaliation, sex-based harassment not involving a student.
- Must have a 106.46 procedure for sex-based harassment involving a student that uses one of the following.
 - Investigator model w/transcription
 - Questioning by Hearing Officer/Panel
 - Direct questioning by Parties

Procedural Considerations

106.45 Single Investigator Process in Model Policy

- Use for sex-based discrimination
- Use for retaliation
- Use for sex-based harassment not involving a student (unless enjoined)
- Consider using to cover other forms of discrimination or state-defined sex-based harassment.

106.46 Options for Sex-Based Harassment Involving a Student

- Unless enjoined, select one of the following procedures:
 - Investigator model w/transcription
 - Questioning by Hearing Officer/Panel
 - Direct questioning by Parties

Jurisdictional Considerations

Enjoined

- Can be limited to locations in U.S. or in institution-owned or controlled locations.
- *NOTE: Private institutions have always had discretion over their jurisdiction. Particularly faith-based institutions.*

Not Enjoined

- May be obligated to respond to off-campus or international sex discrimination, including sexual harassment
- Must respond to conduct that is subject to the institution's disciplinary authority (i.e., including off campus conduct if other elements are met)

Definition of Complainant

If Enjoined, Use 2020 Definition.

- Students, employees, those participating or attempting to participate in institutions programs or activities. Alumni must have been “attempting to participate” when filing a complaint.
- *NOTE: institutions have always had discretion to expand procedural rights so you could use the 2024 definition.*

2024 Model Policy

- Students, employees, those who have been, those participating or attempting to participate in institutions programs or activities.

Concept of Notice

If Enjoined, Could Use 2020

- Required an institution to respond when it had actual knowledge.
- Actual knowledge limited to TIXC and employees who have authority to institute corrective measures.
- Response could not be deliberately indifferent.
- *NOTE: institutions have always had discretion to expand notice obligations.*

2024 Model Policy

- If institution has knowledge of conduct that may reasonably constitute sex discrimination, it must respond promptly and effectively.
- Must also follow the procedural requirements for investigating and resolving sex discrimination and sex harassment involving students.

Required Reporting Obligations

If Enjoined, Use 2020

- Actual knowledge limited to TIXC and employees who have authority to institute corrective measures.
- *NOTE: institutions have always had discretion to expand notice obligations.*

2024 Model Policy

- K-12 any non-confidential employee must report
- Requires employees with authority to take corrective action to report to TIXC
- Requires all other non-confidential employees to report to TIXC OR provide contact info of TIXC and information about how to make a complaint.
- TIXC must also monitor for barriers to reporting.

Supportive Measures

If Enjoined, Use or Modify 2020

- Silent on supportive measures to Respondents.
- *NOTE: institutions have always had discretion to offer supportive measures to Respondents.*

2024 Model Policy

- Offer supportive measures to Respondent if initiating grievance procedures or informal resolution.

Requirement of Formal Complaint

If Enjoined, MUST Use 2020

- Formal Complaint required to initiate grievance procedures or alternative resolution.

2024 Model Policy

- No Formal Complaint required.
- TIXC may initiate the process after evaluating specified factors and determining imminent or serious harm or the conduct prevents institution from ensuring equal access based on sex.
- Notice of allegations required. Specifics regarding contents of notice.

Permissible Informal Resolution

If Enjoined, Must Use 2020

- Informal resolution for allegations of sexual harassment between students and employees prohibited.

2024 Model Policy

- Post-secondary: informal resolution for allegations of sexual harassment between students and employees may be permissible.

Confidentiality Requirements

If Enjoined, Must Use 2020

- No gag orders permitted.

2024 Model Policy

- Privacy more protected.

Training Obligations

Training

- Training for all employees
- Training for all confidential employees
- Training for the TIXC
- Training for those involved in the grievance process
- Training for those who administer informal resolutions
- Training on pregnancy and related-conditions

NOTE: VAWA/Clery training requirements.

If enjoined, 2020 training obligations still exist.

Obligations Related to Pregnancy and Related Conditions

Pregnancy and
Related
Conditions

- Training for all employees
- Notification obligations (discretionary if enjoined)
- Lactation space and accommodations (discretionary if enjoined)
- Limited documentation



Next Steps

Immediate Next Steps

Considerations

- Review Model Policy, keeping in mind these explanations.
- If enjoined, decide your risk tolerance, determine state law obligations.
- If not enjoined (or if exercising discretion), determine whether to modify definitions of prohibited conduct.
- Determine which process you want to use for sex-based harassment involving a student.
 - Investigator with transcription
 - Questioning by hearing panel
 - Questioning by parties (if permitted by state law)
- Determine intersection with other Civil Rights Policies.
- Prepare for implementation.

EIIA Resources

EIIA Legal Services Program

- Sample Model Policy for Title IX
- Sample templates for implementation of model Title IX Policy



Grand River Solutions

- EIIA partnership with Grand River Solutions for Title IX Coordinators, Investigators, Hearing Officers, Advisors, etc.





Final Thoughts



Questions and Answers