

The Latest & Greatest: Title IX Regulations and Practice Tips

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Janet Bubert
July 21, 2023

Title IX of the 1972 Education Amendments



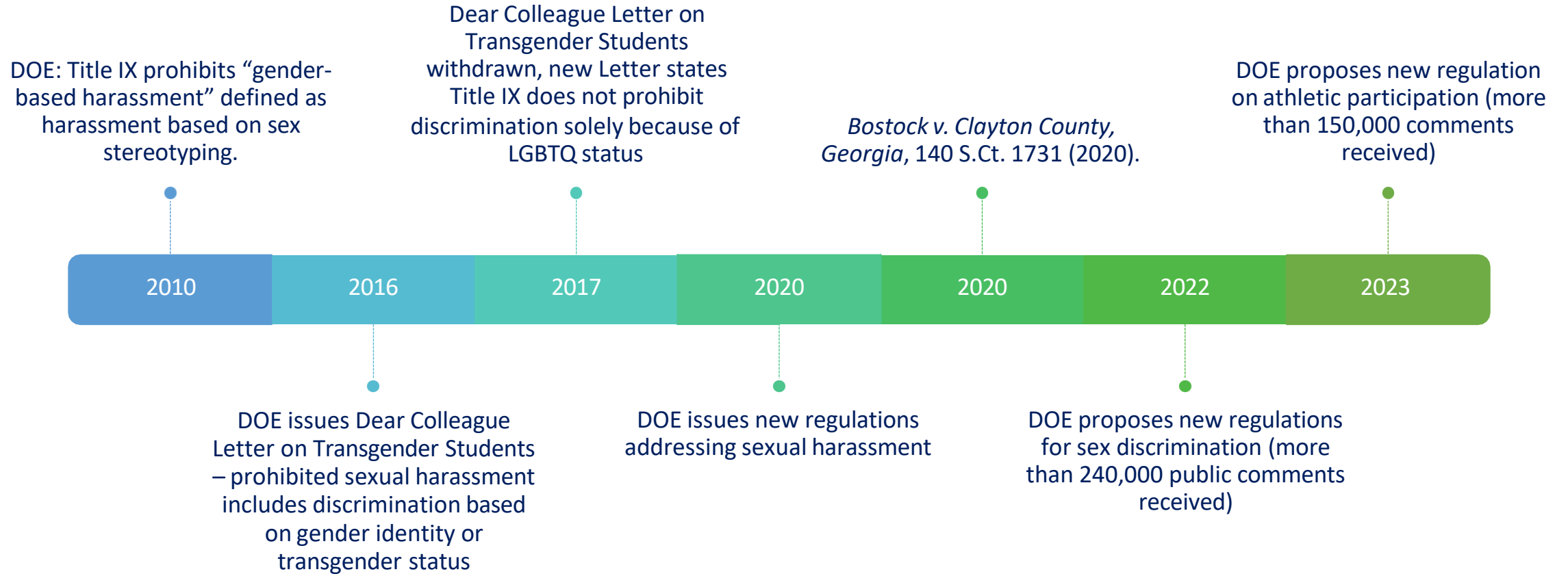
No Person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

June 23, 1972



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Recent Title IX History



2022 Proposed Regulations

What the 2020 Regulations added to Title IX

- **Defined sexual harassment** as conduct on the basis of sex that is:
 - Quid pro quo harassment,
 - Hostile environment harassment, or
 - Conduct meeting criteria of certain federal criminal offenses (sexual assault, dating violence, domestic violence)
- Identified obligations for schools receiving federal funds following **notice of sexual harassment**
- Required procedures for a **formal complaint process**
- Included training requirements

2022 Proposed Changes: Scope of Title IX Protection

- Discrimination on the basis of sex would include discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Implements the DOE's current interpretation

2022 Proposed Changes: Defining Sexual Harassment (106.2)

- Sexual harassment based on “hostile environment”
- **Current:** Unwelcome sex-based conduct that is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school district’s education program or activity.”
- **Proposed:** 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 school district’s education program or activity.

2022 Proposed Changes: Defining Sexual Harassment (106.2)

- “Quid Pro Quo” harassment:
- When an employee or other person authorized by a school district to provide an aid, benefit, or service explicitly or impliedly conditions that aid, benefit or service on a person’s participation in unwelcome sexual conduct.
- Not just paid employees (i.e., volunteer coach)

2022 Proposed Changes: Defining Education Program or Activity (106.2)

- **Current:** Includes a location, event or circumstance where the school exercises substantial control over both the respondent and the context in which the harassment occurred.
- **Proposed:** Includes conduct that is subject to the school's disciplinary authority.

2022 Proposed Changes: Required action upon notice of sex discrimination (106.44)

1. Treat the complainant and respondent equitably;
2. Notice to complainant of Title IX grievance procedures; Notice to respondent if complaint made;
3. Offer supportive measures;
4. In response to complaint, initiate Title IX grievance procedures;
5. If no complaint, consider need for complaint if necessary to address conduct;
6. Take appropriate & effective steps to ensure sex discrimination does not continue.

2022 Proposed Changes: Required action upon notice of sex discrimination (106.44)

- Required action triggered by express requirement that a school **must require all of its employees** to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.

2022 Proposed Changes: One grievance procedure (106.8, 106.45)

- Schools must adopt a grievance procedure that provides for prompt and equitable resolution of a complaint by a student, employee, or third party participating in education program or activity.
- Eliminates distinction between one process used solely for formal complaints of sexual harassment; and a separate process used to address all other complaints of sex discrimination and related unlawful conduct.

2022 Proposed Changes: Grievance procedure (106.45)

- Grievance procedure identifies multiple roles for Title IX coordinator, investigator, decision-maker, review of appeal
- Current Regs: No person can serve two roles, except for Title IX coordinator & investigator
- Proposed: Decision-maker may be the same person as the Title IX Coordinator and/or investigator; Decision-maker for appeal must not be involved in process prior to appeal

2022 Proposed Changes: Grievance procedure (106.45)

- Requires schools to use “preponderance of the evidence” standard of proof – unless a school uses “clear and convincing” standard of proof for all other comparable proceedings.
- Discretionary dismissals (no more mandatory) for:
 - Alleged conduct does not constitute sex discrimination
 - Respondent cannot be identified or no longer employed by or participating in education program
 - Voluntary withdrawal by complainant

2022 Proposed Changes: Students with Disabilities

- If a complainant or respondent is a student with a disability, would add requirement for Title IX Coordinator to consult with IEP Team or Section 504 Team throughout the grievance process to ensure compliance with the requirements of the IDEA and Section 504.

2022 Proposed Changes: Prohibited Retaliation (106.2)

- Retaliation is currently prohibited under Title IX
- Proposed regs define retaliation to include **intimidation, threats, coercion, or discrimination** against any person by a student, employee, person authorized by the school district to provide aid, benefit, or service under the school district's education program or activity, or school district **for the purpose of interfering with any right or privilege secured by Title IX** or this part, or because the person has reported information, made a complaint, testified, assisted, or **participated or refused to participate** in any manner in an investigation, proceeding, or hearing under Title IX.

2022 Proposed Changes: Mandatory Training (106.8)

- All employees would have to be trained on:
 - The school's obligation to address sex discrimination in its education program or activity;
 - The scope of conduct that constitutes sex discrimination under the Title IX regulations, including the definition of sex-based harassment; and
 - All applicable notification and information requirements.
- Role-specific training on different types of sex discrimination, beyond only sexual harassment.

2022 Proposed Changes: Nondiscrimination Notice (106.8)

Required notice of nondiscrimination must be prominently includes on website and in each handbook, catalog, announcement, bulletin, and application form that the school makes available to students, parents, guardians, employees, applicants for admission or employment.

2022 Proposed Changes: Pregnancy

Upon receiving notice of a student's pregnancy, must refer to Title IX coordinator for further assistance, which includes:

- Discussing options for individualized, reasonable modifications as needed to prevent discrimination and ensure equal access education program or activity.
- Excused absence for medical reasons.
- Providing the student a clean, private space for lactation.

Not Addressed by 2022 Proposed Regulations:

- Must comply with grievance procedures before imposing disciplinary sanctions.



Proposed Title IX Regulations for Participation in Athletics

April 2023 Proposed Title IX Regulation for Athletics

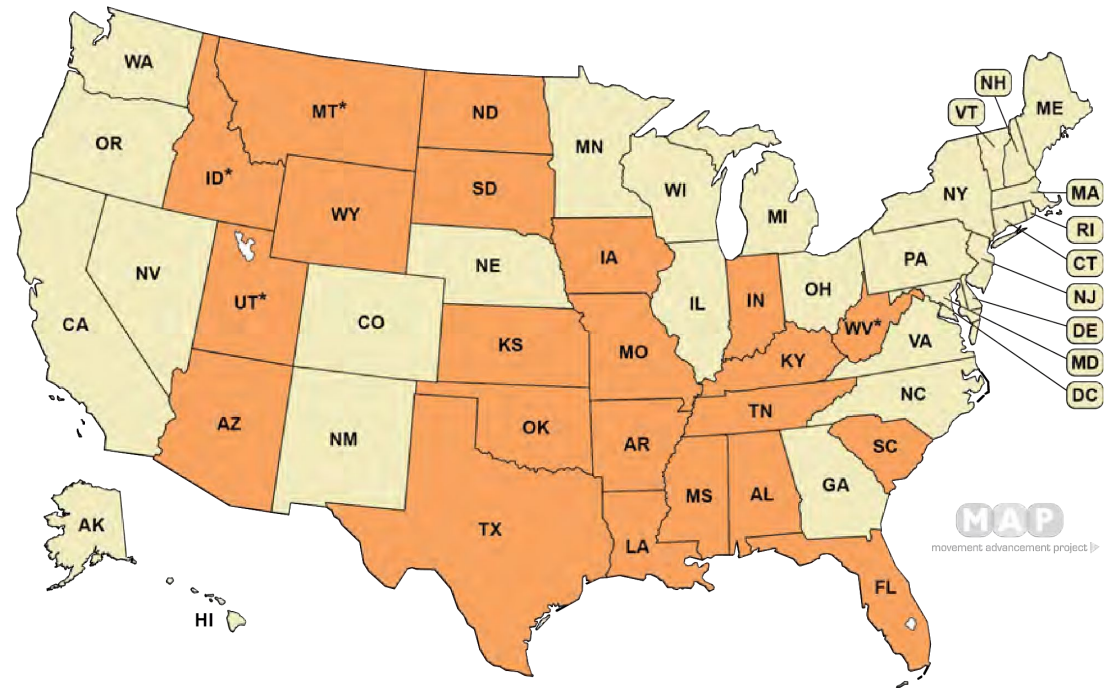
Adds 34 C.F.R. 106.41(b)(2):

If a recipient adopts or applies **sex-related criteria that would limit or deny a student's eligibility** to participate on a male or female team consistent with their **gender identity**, such criteria **must**, for each sport, level of competition, and grade or education level:

- (i) be substantially related to the achievement of an **important educational objective**, and
- (ii) **minimize harms** to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

April 2023 Proposed Title IX Regulation for Athletics

- Amendment prohibits a policy banning transgender students from participating in sports consistent with their gender identity.
- Many states have laws that would prevent a transgender student from participating on a school sports team based on the student's identified gender.



April 2023 Proposed Title IX Regulation for Athletics

Sport participation criteria that could implicate compliance issues include:

- Requirement for participation based on sex assigned at birth.
- Requirement basing eligibility for a team on the sex marker on an identification document (i.e., birth certificate, passport, etc.).
- A rule prohibiting a transgender female who has gone through puberty from participating on a girl's sports team.

April 2023 Proposed Title IX Regulation for Athletics

Based on DOE comments, there are implications for:

- Any sex-based criteria at elementary level
- Sex-based limitations on “no cut” teams at middle school level
- Sex-based criteria at high school level for intramural teams





While we're waiting ...



Lessons Learned

- Encourage strong documentation procedures to show compliance with Title IX regulations.
- Plan for the additional complications that may arise when a student with a disability is involved in a formal Title IX grievance.
- Create redundancy in training for Title IX roles.

OCR/DOJ Pet Peeves:

- Over-reliance on code of conduct procedures.
- Insufficient supportive measures.
- Failure to sufficiently consider whether conduct by young students may constitute sexual harassment.
- Failure to monitor students after investigation completed.

Good luck out there!

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