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Unpacking the DRAFT Title IX Regulation Amendments: A Practical Discussion Regarding Likely Impact and Timing and What to do in the Meantime

Josh Whitlock

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Jackson Lewis P.C. • [Charlotte, NC]

(980) 465-7237 • Josh.Whitlock@jacksonlewis.com

Roadmap

Where we've been + the latest

Likely timing of actual final (i.e., not draft) amendments

- Four Lists:
- Five significant changes to anticipate
 - Five upcoming decision points
 - Five things to do in the meantime
 - Five ways we intend to support You

Where We've Been + the Latest

Title IX Timeline

- 1972 – Title IX enacted
- 1997 – Sexual Harassment Guidance
- 2001 – Revised Sexual Harassment Guidance
- 2006 – Dear Colleague Letter (Bush)
- 2011 – Dear Colleague Letter (Obama)
- 2014 – Q&A on Sexual Violence
- 2017 – Withdrawal/interim guidance
- 2018 – Draft regulations + notice and comment period
- 2020 – Final regulations published May, take effect August
- 2022 – Draft amendments published July + notice and comment period
- 2023 – Final amendments *likely* published + take effect

Public Comment and (Likely) Finalization Timing

- Proposed amendments formally published on July 12, 2022; open for public comment for 60 days
- Comments must be submitted no later than September 12, 2022 via the Federal Rulemaking Portal at <http://www.regulations.gov>
- DOE will not accept comments submitted by fax or e-mail or after deadline
- We can assist with comments
- Last set of regulations (May 2020) took around 18 months from date draft published until final regulations published (and took effect after three months)
- Best guess = final amendments published late spring/early summer 2023 and in effect by fall 2023 BUT totally possible earlier or later

WARNING



- **Super important to note that the draft amendments are NOT currently in effect or binding and will not be until after the notice and comment period runs its full course (likely well into 2023). The May 2020 regulations are in effect and binding until then.**

Five Significant (Likely) Changes To Anticipate

Re-expansion of types of behaviors covered by / protections afforded by Title IX

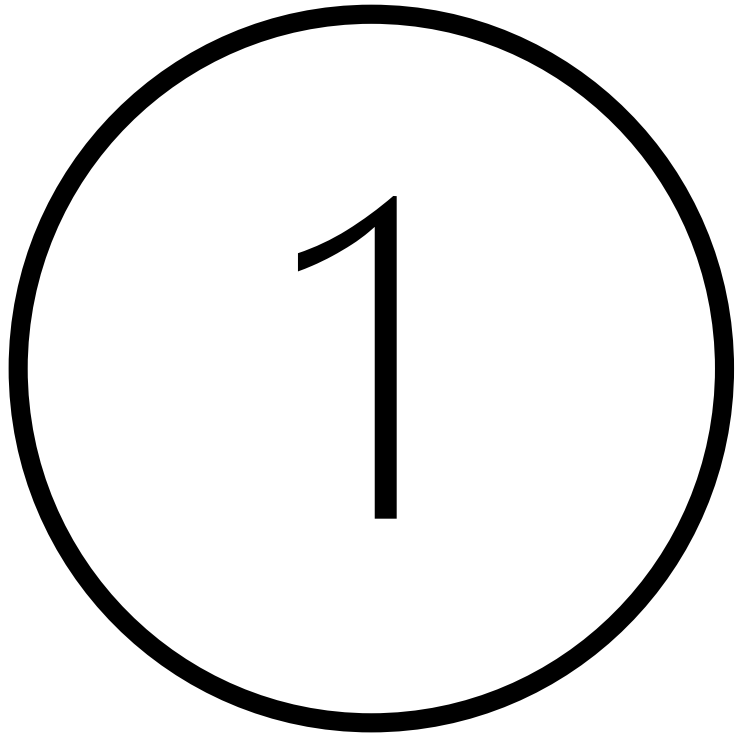
Nuanced changes to reporting requirements and obligation to act triggers

Additional grievance procedure flexibility (including removal of live hearing requirement)

Important shifts around informal resolution and supportive measures

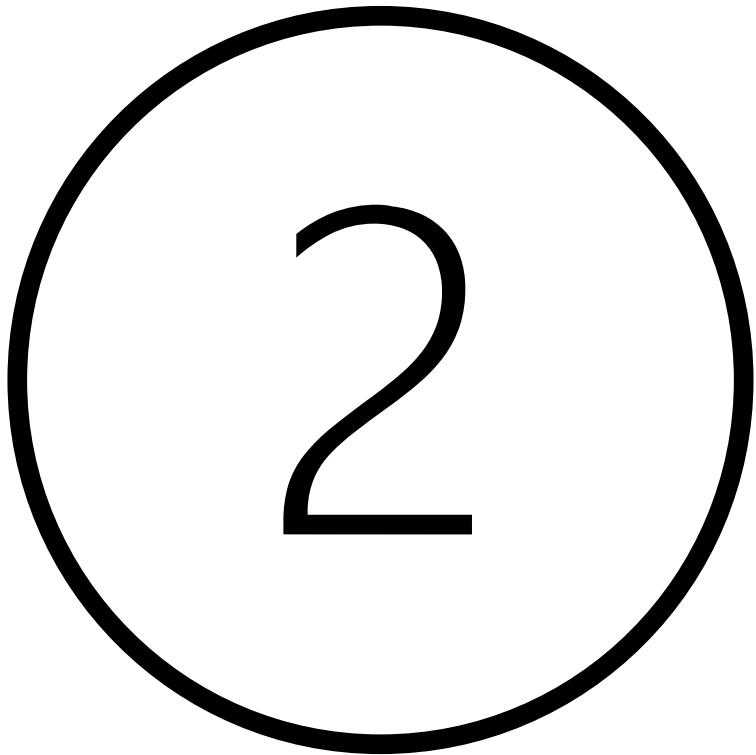
Significant expansion of Title IX Coordinator expectations and training requirements

Re-Expansion Of Types Of Behaviors Covered By / Protections Afforded By Title IX



- ❑ Changes to terminology and definitions:
 - Title IX Sexual Harassment
 - Sex Discrimination
 - Sex Based Harassment
- ❑ Geographic scope / off-campus activity
- ❑ Explicit reinforcement and further explanation of gender identity-, sex stereotype-, sexual orientation-, and pregnancy-related protections
- ❑ Lessening of requirements around formal complaint (person who was participating or attempting to participate in the education program or activity *at the time of the conduct*)

Nuanced Changes To Reporting Requirements And Obligation To Act Triggers



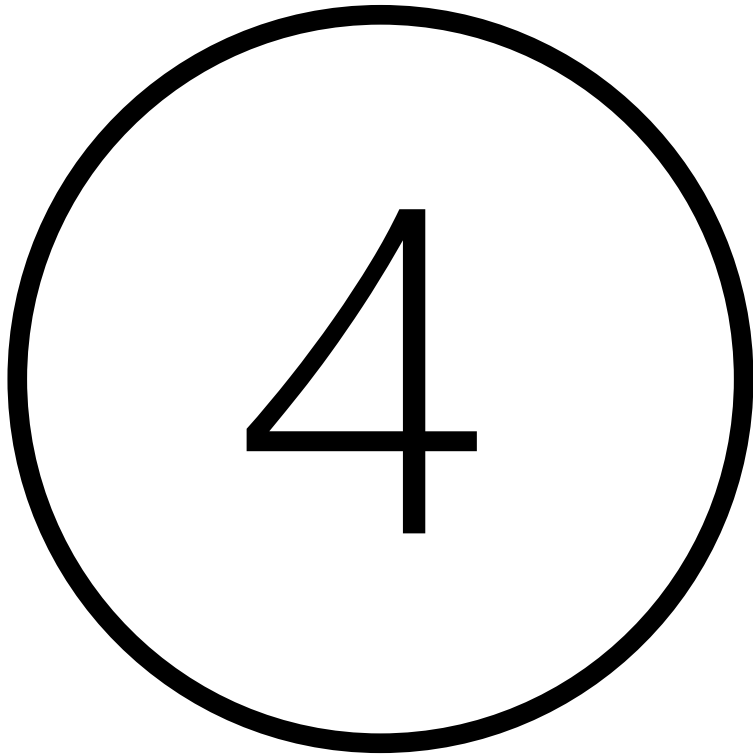
- ❑ Move from “responsible employee” (pre-May 2020) to “ability to take action” (May 2020) to various specific categories, each with corresponding reporting obligations (proposed)
- ❑ Would require clear category/requirement listing in P&P and various other places + new/more nuanced approach to “all employee” training

Additional Grievance Procedure Flexibility (Including Removal Of Live Hearing Requirement)



- ❑ Two-tier system:
 - Sex discrimination complaints (106.45)
 - Applies to everyone – employees, students, 3rd parties
 - Basic elements/requirements are familiar (equitable treatment, reasonably prompt timeframes, presumption of non-responsibility, information about supportive measures)
 - Significant flexibility, including potential use of single investigator model
 - Sex-based harassment complaints involving post-secondary students (106.46)
 - Grievance procedures for this sub-category must comply with 106.45 requirements + additional requirements (around notice to parties, advisors of choice, appeal rights, etc.)
- ❑ Live hearings not required, but allowed
- ❑ Discretion around evidentiary standard (preponderance unless clear and convincing used in all comparable procedures)

Important Shifts Around Informal Resolution, Supportive Measures, and Dismissal



- ❑ IR no longer requires formal written complaint
- ❑ Additional IR guidance and requirements
- ❑ Supportive measures may now include temporary measures that burden the respondent (with limits)
 - May be imposed only during the pendency of the grievance procedures
 - Must be no more restrictive than is necessary to restore or preserve the complainant's access to education program or activity
- ❑ No mandatory dismissal
- ❑ Must provide parties opportunity to challenge both supportive measures and dismissal (with someone other than initial decision maker)
 - Decisionmaker cannot be the same person who implemented the measures

Significant Expansion Of Title IX Coordinator Obligations/Expectations and of Training Requirements



- ❑ Host of new responsibilities, e.g. ...
- ❑ Proactive monitoring and addressing of barriers to reporting discrimination/harassment
- ❑ Interaction with athletics around mandatory disclosures
- ❑ New steps related to prohibiting and addressing retaliation
- ❑ Upon receiving notice that a student is pregnant, a Title IX Coordinator must:
 - Inform student of institution's obligations re: pregnancy and related conditions;
 - Provide student with option of reasonable modification to policies/practices/procedures; and
 - Ensure availability of lactation space

Significant Expansion Of Title IX Coordinator Obligations/Expectations and of Training Requirements



- ❑ All Employees must be trained on:
 - The recipient's obligation to address sex discrimination in its education program or activity
 - The scope of conduct that constitutes sex discrimination (including the proposed definition of "sex-based harassment")
 - All applicable notification and information requirements
 - Issues related to pregnancy and parenting
- ❑ Investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures must be trained on:
 - ❑ Topics addressed above
 - ❑ Institutional obligations and grievance procedures
 - ❑ How to serve impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - ❑ The meaning and application of the term "relevant" in relation to questions and evidence, and the types of evidence that are impermissible regardless of evidence
- ❑ Facilitators of an informal resolution process must be trained on:
 - ❑ Topics addressed above
 - ❑ The rules and practices associated with the recipient's informal resolution process
- ❑ Title IX Coordinator and any designees must be trained on:
 - ❑ Topics addressed above
 - ❑ Their specific responsibilities
 - ❑ Recordkeeping requirements
 - ❑ Any other training necessary to coordinate the recipient's compliance with Title IX

Five Upcoming Decision Points

Which grievance procedure model(s) will the institution use?

Which evidentiary standard will the institution use?

How will the institution shift resources based on likely changes?

How will the institution support the Title IX Coordinator in their expanded and shifted role?

How will the institution keep its Title IX team engaged and inspired (through another round of changes in this already challenging, but always critically important context)?

Five Things You Can / Should Do In The Meantime

Internal education and preparation

Marshall/reconfigure resources

Select and prepare the team

Continue following current grievance procedure approach with only minor tweaks as necessary

Train, train, train (ongoing, varied methods, creative, fundamental-focused)

Five Ways We Intend To Support You

Extension of training series access

Additional content added to training series learning management system

Complimentary team Q&A

One-on-one call with institutional training administrator

Significant “returning partner” discounts on next series, additional services, etc.

Q&A



THANK YOU!



**Joshua D. Whitlock
Jackson Lewis P.C.**

980-465-7242

Josh.Whitlock@jacksonlewis.com



**Kelly A. Walker
Jackson Lewis P.C.**

980-465-7254

Kelly.Walker@jacksonlewis.com