

Unpacking the Proposed Title IX Regulations: A Breakfast Briefing for K-12 School Districts

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Unpacking the Proposed Amendments
to the Title IX Regulations:
A Breakfast Briefing for K-12 School Districts


Presented by: Joseph J. Perkoski, Emily P. Bothfeld,
Matthew M. Swift and Michelle L. Weber

July 12, 2022

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Background on
Proposed
Amendments



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Background on Proposed Amendments

- Notice of Proposed Rulemaking (NPRM) released on June 23, 2022.
- U.S. Department of Education is seeking to amend the regulations implementing Title IX of the Education Amendments of 1972.

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How Did We Get Here?

Obama-Era:
Informal Guidance

Trump-Era:
Regulations

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Current Status



- Once published in Federal Register, proposed amendments will be open for public comment for 60 days.
- Options following comment period:
 - Termination of rulemaking process (unlikely)
 - Supplemental NPRM
 - Final Rule
- Effective date of possible changes: TBD

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Impact on School Districts

- If finalized in current form, proposed amendments would require:
 - Revisions to policies and procedures
 - Staffing determinations
 - Additional training for employees and students

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The graphic features a blue rectangular box on the left containing the text "Key Proposed Changes". To the right, a green fountain pen is shown writing a green checkmark into the bottom-most of four black-outlined boxes, each containing a green checkmark. The boxes are arranged in a vertical, slightly staggered line. The name "Robbins Schwartz" is printed at the bottom center of the graphic.

Key Proposed Changes

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The graphic features a blue rectangular box on the left containing the text "Defining Prohibited Sex Discrimination" and "Proposed § 106.10". To the right, a bulleted list defines "Sex Discrimination" based on five categories: sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. The name "Robbins Schwartz" is printed at the bottom center of the graphic.

Defining Prohibited Sex Discrimination

Proposed § 106.10

- "Sex Discrimination" includes discrimination based on:
 1. Sex stereotypes
 2. Sex characteristics
 3. Pregnancy or related conditions
 4. Sexual orientation
 5. Gender identity


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Defining Prohibited Sex-Based Harassment

Proposed § 106.2

- Current regulations prohibit **sexual harassment**, as defined therein.
- Proposed regulations prohibit **sex-based harassment**, which includes sexual harassment **and** harassment based on:
 1. Sex stereotypes
 2. Sex characteristics
 3. Pregnancy or related conditions
 4. Sexual orientation
 5. Gender identity



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Types of Sex-Based Harassment

Proposed § 106.2

	Quid Pro Quo	Hostile Environment	Specific Acts
Proposed	When an employee or other person authorized by recipient to provide a service explicitly or implicitly conditions that service on a person's participation in unwelcome sexual conduct.	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 persons' ability to participate in or benefit from the recipient's education program or activity.	Sexual Assault Domestic Violence Dating Violence Stalking
Current	<ul style="list-style-type: none"> • Employee respondents only 	<ul style="list-style-type: none"> • Reasonable person • Severe and pervasive and objectively offensive • Denial of equal access 	Same

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Defining Sex-Based Harassment

- What impact would these changes have on a Title IX Coordinator's initial evaluation of reports of alleged sex-based harassment?

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Jurisdiction

Proposed § 106.11

- Conduct that occurs under an institution's **education program or activity** includes, but is not limited to, conduct that is subject to the institution's **disciplinary authority**.
 - Compare with current standard: "substantial control"

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Jurisdiction

Proposed § 106.11

- A school district has an obligation to address a sex-based **hostile environment in its education program or activity**, even where the sex-based harassment contributing to the hostile environment occurred outside the education program or activity or outside the U.S.

What is the impact of the alleged conduct?

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Jurisdiction

Proposed § 106.11

- Compare with current regulations:
 - **Do not** require districts to respond to alleged sexual harassment that occurs outside the education program or activity.



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Jurisdiction

- Would this change result in a heightened burden on schools and school districts to monitor off-campus conduct?

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Responding to Sex Discrimination

Proposed §106.44(a)

- Current
 - Duty to respond to potential sexual harassment when an employee with authority to institute corrective measures has **actual knowledge** of the harassment.
 - Must respond in a manner that is **not deliberately indifferent**.
- Proposed
 - Duty to take **prompt and effective action** to **end** any prohibited sex discrimination that has occurred in the educational program, **prevent** its recurrence, and **remedy** its effects.

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Responding to Sex Discrimination

- What steps would be required for a district to demonstrate compliance with the “prompt and effective action” standard?

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Employee Reporting Obligations

Proposed §§106.44(c) & 106.44(c)(1)

Employee Category	Obligation(s)
Any employee who is <u>not</u> a confidential employee	Report to Title IX Coordinator
Confidential employee	Provide Title IX Coordinator’s contact information and information about how to report

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Employee Reporting Obligations

- Would the proposed regulations require a school district to hire a “confidential employee”?

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Definition of Complaint

Proposed § 106.2

Current

“Formal Complaint”

Document filed by a complainant or signed by the Title IX Coordinator alleging **sexual harassment** against a respondent and requesting that the school district investigate the allegation of sexual harassment.

Proposed

“Complaint”

Oral or written request to the recipient to initiate the recipient’s grievance procedures for **sex discrimination** under Section 106.45.

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Right to File Complaint

Proposed §§ 106.2 & 106.45(a)(2)

- Current:
 - Complainant must be “participating in or attempting to participate” in the education program or activity at the time the complainant files a formal complaint.
- Proposed:
 - Complainant is permitted to file a complaint about sex discrimination even if they have chosen to leave the education program or activity as a result of the discrimination or for other reasons.

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Filing Complaints

- Under the proposed regulations, would a Title IX Coordinator still be permitted to file a complaint without consent from the complainant?

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<h2>Title IX Coordinator Response Obligations</h2> <p>Proposed § 106.44(f)</p>	<h3>Title IX Coordinator must take the following steps upon being notified of possible sex discrimination:</h3>	
	(1) Treat complainant and respondent equitably.	(2) Notify complainant of school district's grievance procedures.
	(3) If complaint is made, notify respondent of grievance procedures.	(4) Notify parties of informal resolution process, if any.
	(5) Offer and coordinate supportive measures to complainant and respondent.	(6) In response to a complaint, initiate grievance procedures or informal resolution process.
	(7) In absence of complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination if necessary to address conduct that may constitute sex discrimination.	(8) Take other prompt and effective steps to ensure that sex discrimination does not continue to recur, in addition to providing remedies.
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<h2>Supportive Measures</h2> <p>Proposed § 106.44(g)</p>	<ul style="list-style-type: none"> • Purpose: restore or preserve a person's access to the district's education program. • Examples: counseling, extension of deadlines, restrictions on contact between parties, voluntary or involuntary changes in class, work, or extracurricular or other activities.
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Supportive Measures

Proposed § 106.44(g)

- **May** include temporary measures that burden a respondent if:
 - 1) Imposed for non-punitive/non-disciplinary reasons; and
 - 2) Designed to protect safety of complainant or district's educational environment or to deter respondent from engaging in sex-based harassment.
- Measures that burden a respondent may be imposed only during pendency of grievance procedures.
- Measures must be no more restrictive than **necessary to restore or preserve complainant's access** to education program or activity.

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Supportive Measures

Proposed § 106.44(g)

- Involuntary measures that burden respondent are not permitted during involuntary resolution.
- Party may seek modification or reversal of supportive measures.

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Supportive Measures

- Would the proposed regulations still permit a district to place an employee on administrative leave during the pendency of the grievance procedures? Must the employee be paid during this administrative leave?

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Grievance Procedures

Proposed §§ 106.45 & 106.46

- Current:
 - One grievance process
 - Required for any formal complaint of sexual harassment
- Proposed:
 - Two grievance procedures
 - Section 106.45: Required for any complaint of sex discrimination
 - Section 106.46: Required for any complaint of sex-based harassment involving **postsecondary** student party, in addition to procedures required under Section 106.45
 - Does not apply in K-12 context!

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Grievance Procedures for Sex Discrimination Complaints

Proposed § 106.45

Required Elements:

- Equitable treatment of parties
- No conflicts of interest or bias
- **Decision maker may be same person as Title IX Coordinator or investigator**
- Presumption that respondent is not responsible until a determination is made
- Reasonably prompt timeframes
- Reasonable steps to protect privacy of all parties
- Objective evaluation of evidence

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Grievance Procedures for Sex Discrimination Complaints

Proposed § 106.45

Required Elements (continued):

- Notice of allegations
- **Dismissals permitted, but not required**
- Consolidation of complaints permitted
- Process that enables decision-maker to assess credibility of parties and witnesses when relevant
- Informal resolution process
- Possible supportive measures
- List of disciplinary sanctions and remedies

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Grievance Procedures for Sex Discrimination Complaints

Proposed § 106.45

Required Elements (continued):

- Burden on institution to gather evidence
- Equal opportunity for all parties to present evidence
- Determination by decision-maker of what evidence is relevant and permissible
- Provide parties with **description** of relevant evidence and reasonable opportunity to respond
- **Preponderance of the evidence standard**
- Notice to parties of outcome and opportunities to appeal (*but note: **appeal is optional**)
- Completion of process before imposition of sanctions
- Provision and implementation of remedies by TIXC
- **No discipline against anyone for making false statement or engaging in consensual sexual conduct based solely on determination of whether sex discrimination occurred**

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Grievance Procedures

- Are there risks associated with having the Title IX Coordinator or investigator also serve as the decision-maker?
- Would school districts still be prohibited from instituting “gag orders” under the proposed regulations?

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<h2>Informal Resolution</h2> <p>Proposed § 106.44(k)</p>	<h3>Current</h3> <ul style="list-style-type: none"> • Permitted only when formal complaint alleging Title IX sexual harassment has been filed. • Participation must be voluntary. • Not permitted in employee-on-student cases. 	<h3>Proposed</h3> <ul style="list-style-type: none"> • Permitted whenever school district receives complaint of sex discrimination or has information about conduct that may constitute sex discrimination under Title IX. • Participation must be voluntary. • Not permitted in employee-on-student cases.
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<h2>Informal Resolution</h2>	<ul style="list-style-type: none"> • Under the proposed regulations, could the Title IX Coordinator serve as the informal resolution facilitator?
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Retaliation

Proposed §§ 106.2 &
106.71

- Proposed regulations would **clarify** that Title IX protects individuals from retaliation, including peer retaliation (student-on-student).
- Retaliation = intimidation, threats, coercion, discrimination, or taking disciplinary action against anyone **because** the person has reported possible sex discrimination, made a sex discrimination complaint, or participated in any way in a school district's Title IX process.

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Retaliation

- Would the proposed Title IX regulations prohibit employee-on-employee retaliation?

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Pregnancy or Related Conditions

Proposed § 106.2 and 106.40

- Includes:
 - Pregnancy, childbirth, termination of pregnancy, or lactation
 - Medical conditions related to the above
 - Recovery from the above
- When employee learns of student's pregnancy or related condition, employee must notify the student (or their parent/guardian) that they may inform TIXC and provide TIXC's contact information.

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Pregnancy or Related Conditions

Proposed § 106.2 and 106.40

- After receiving notice of student's pregnancy or related condition, TIXC must:
 - Notify student of institution's obligations concerning pregnancy and related conditions
 - Provide voluntary reasonable modifications
 - Allow voluntary leave of absence for medical reasons and reinstatement upon return
 - Provide clean, private space for lactation
- Pregnant employees must be provided with (a) reasonable break time for lactation and (b) clean and private lactation space.

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Pregnancy or Related Conditions

- What does “private space” for lactation mean?

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Sexual Orientation, Gender Identity, and Sex Characteristics

Proposed §§ 106.10
& 106.31(a)(2)

- Prohibition on adopting policies/practices that **prevent student from participating** in district’s education program or activity **consistent with their gender identity.**

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Discrimination Based on Sexual Orientation, Gender Identity, and Sex Characteristics

- What would this proposed regulation require with respect to bathroom and locker room access by transgender and non-binary students?
- What about sports participation?

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Big Picture Summary



- | | |
|---|--|
| <ul style="list-style-type: none"> • Current Regulations: <ul style="list-style-type: none"> • Actual Knowledge • Deliberate Indifference • Narrower definitions and scope • Formal complaint to trigger action | <ul style="list-style-type: none"> • Proposed Regulations: <ul style="list-style-type: none"> • Prompt and effective action • End, prevent, remedy • Broader definitions and scope • Verbal complaints permitted |
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Questions?

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- Title IX Coordinator
 - August 15 from 12:00pm – 1:30pm

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As managing partner, Joseph Perkoski represents educational institutions and public sector employers with a focus on board and executive leadership. Joseph also represents his clients on a broad range of labor and employment issues including collective bargaining, grievance arbitration and contract interpretation. Joseph has defended employers in unfair labor practice charges before the Illinois Education Labor Relations Board, the Illinois State and Local Labor Relations Boards and the National Labor Relations Board. In addition, Joseph has litigated on behalf of management claims involving civil rights, discrimination, wrongful discharge, and harassment issues.

AWARDS

Illinois Super Lawyers, 2008-2020

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RECENT PUBLICATIONS

Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law: Transactional Considerations*, IICLE (2017)

Contribution author, "Labor Relations: Contract Administration Including Unfair Labor Practices," *Illinois School Law: Personnel and Student Issues*, IICLE (2010, 2012, and 2015)

"Finding a New Way: Subcontracting Revisited," *UPDATE Magazine*, Illinois ASBO (2011)

Contributing author, "Labor Issues in the Transactional Side of the Project," *Construction Law – Transaction Practice*, IICLE (2010)

RECENT PRESENTATIONS

Legislative Update: A Review of New Laws Affecting Illinois Community Colleges, Illinois Council of Community College Presidents Retreat (September 2019)

Court Cases and Other Legal Updates for the Higher Education Workplace, Illinois CUPA-HR Spring Conference (May 2019)

Legal Update, ICCCF Spring Conference (April 2019)



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Emily practices in the area of education law with a focus on student and higher education matters. She counsels school districts and higher education institutions on a variety of issues, including matters related to student discipline, Title IX, free speech, student disability rights, student data privacy and policy development. She has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General and Illinois Department of Human Rights. Emily regularly represents school districts and higher education institutions in state and federal court on civil rights and constitutional claims and breach of contract claims.

Prior to joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.

RECENT PUBLICATIONS

"Disabled Athlete Can't Support ADA Claims," *Chicago Daily Law Bulletin* (2018)

RECENT PRESENTATIONS

Legal Gymnastics in the Age of COVID and Other Challenges, Illinois Council of Community College Presidents Retreat (January 2022)

Making Sense of the Alphabet Soup: FERPA, COPPA, SOPPA, ISSRA, MHDDCA, and PIPA and Strategies for Compliance, Secured Schools K-12 Data Privacy and Cybersecurity Conference (January 2022)

Legislative Update: A Review of New (and Proposed) Laws Affecting Illinois Community Colleges' Risk Management Practices, Illinois Community College Chief Financial Officers Fall Conference (October 2019)

A Student's "Right" to a College Education: Due Process Rights in Academic and Non-Academic Discipline, Illinois Community College Chief Student Services Officers' Summer Meeting (June 2019)



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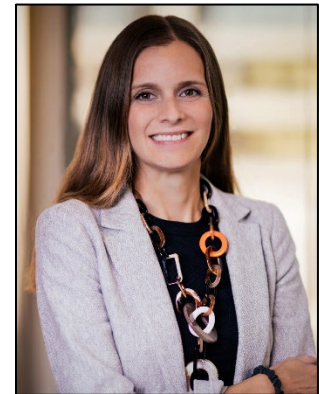
RECENT PUBLICATIONS

"DeVos Rollbacks Could Hit Schools Hard," *Chicago Daily Law Bulletin* (2017)

RECENT PRESENTATIONS

Removals to Interim Alternative Educational Setting for 45 School Days... Who, What, Where, When, Why, and How?, Illinois Alliance of Administrators of Special Education Winter Conference (February 2022)

Risk Assessments, Threat Assessments and the Impact on Students with Disabilities, Illinois Alliance of Administrators of Special Education Fall Conference (October 2019)



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Before he joined Robbins Schwartz, Matthew served as in-house counsel and FOIA Officer for the Illinois Office of the Governor. In that role, he counseled dozens of agencies on compliance with sensitive FOIA requests, advised on current and potential litigation issues, and served as a legal liaison to the Illinois Department of Human Rights and the Illinois Human Rights Commission.

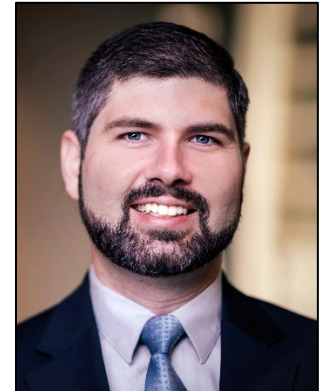
RECENT PUBLICATIONS

“All Together Now – Employment Law Issues in the New Title IX Rules,”
Chicago Daily Law Bulletin (2020)

“Life After Leave: Bringing Employees Back in a COVID-19 Age” *Best Practices Magazine*, American Association of School Personnel Administrators (2020)

RECENT PRESENTATIONS

Red Light, Green Light? Responding to Recent Decisions about COVID-19 Mitigations, ED-RED's Virtual Member Meeting (February 2022)



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