Now What? OCR Just Delayed Two Major Title IX Rules... Here’s Your Gameplan

Webinar: June 1, 2023

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T&H Title IX
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Title IX Leadership Alliances

K-12 Title IX Leadership Alliance

Community Colleges Title IX Leadership Alliance

NEW! 4-Year Institutions Title IX Leadership Alliance

Email titleIX@thlaw.com to join

Where Are We & How Did We Get Here?

- Trump proposed rule – sexual harassment process
  - ~ 124,000 comments
- Trump final rule – sexual harassment process
  - ~ 18 months between proposal and final
- Effective date for Trump rule
  - 100 days after final rule was released on May 6
  - ~ 21 months between proposal and effective date
- June 23, 2022
  - Biden proposed rule – sex-based discrim process
  - ~ 240,000 comments
  - Claim: May/June 2023 for final rule (~ 12 months proposal → final)

- Biden proposed rule – transgender athletics
  - ~ 150,000 comments
  - Claim: both rules final at the same time (May 2023)
- April 6, 2023

Biden administration will release new Title IX rules in May. What to expect.

Kayla Jimenez
USA TODAY

Published 12:00 p.m. ET Feb 8, 2023 | Updated 5:13 p.m. ET Feb 9, 2023

A long-awaited Title IX rule directing how federally funded schools and colleges handle sex and gender discrimination will become public in May, the Education Department said, though it’s unclear when it would take effect.

Ed HOME ROOM
THE OFFICIAL BLOG OF THE U.S. DEPARTMENT OF EDUCATION

A Timing Update on Title IX Rulemaking

Post by US Department of Education – Apr 5, 2023 - President’s Area Title IX

The Biden-Harris Administration is committed to ensuring all students are guaranteed an educational environment free from discrimination on the basis of sex. To that end, amending the Department of Education’s (Department) regulations that implement Title IX of the Education Amendments of 1972 (Title IX) is a top priority to ensure full protection against sex discrimination for all students in federally funded education programs and activities.

The Title IX proposed regulations that the Department released in July 2023 are historic. They would strengthen protections for students who experience sexual harassment and assault at school, and they would help protect transgender students from discrimination.

The Department received more than 348,000 public comments on the proposed rule, nearly twice as many comments as the Department received during its last rulemaking on Title IX. Carefully considering and reviewing these comments takes time, and is essential to ensuring the final rule is enduring. That is why the Department is updating its Spring Unified Agenda to reflect an anticipated date of October 2023 for its proposed Athletics regulation, which received over 30,000 comments during its recent public comment period from April 24 – May 16, 2023. The Department is currently reviewing each of these comments, and is grateful for the extensive public participation and comments received in this rulemaking process.
Where Are We Going?

- Blog post is silent about effective date
- We will at least be living with the current (2020) Title IX rules for fall semester of the 2023–24 academic year

What Are They Doing, Anyway?
Polling Access

Option One
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Option Two
- Go to Pollev.com on any browser
- Accept or dismiss cookies
- Enter THLAW411 as the Username
- Skip when asked to enter your name

If you could get rid of one change in the proposed Title IX amendments, what would it be?

- The change from "severe, pervasive, and objectively offensive" to "severe or pervasive"
- The references to addressing off-campus and extraterritorial conduct under Title IX
- The two processes for higher education institutions
- Oral complaints
- Increased training requirements
- Other (tell us in the chat)
Reading the Tea Leaves

What likely will not change?
- Prevention efforts
- Processes covering all forms of sex-based discrimination and not just sexual harassment
- “Severe or Pervasive” (SoP/Hostile Environment Sexual Harassment)
- Pregnant/parenting focus
- Confidential employee requirements
- Increased training

Reading the Tea Leaves

What likely will not change?
- Expanded supportive measures
- Expanded emergency removal
- Expanded informal resolution (no complaint required)
- Expanded focus on credibility
- Expansion to off-campus (but see later slide)
Reading the Tea Leaves

What **probably will not** change?

- Toned down K-12 process
- Two processes for PSI
- Single investigator/decision-maker model
- Flexibility on higher ed hearings (though remember due process cases for PSE)

Reading the Tea Leaves

What **might** change?

- Appeals
- Clarification of requirements for off-campus/abroad
- Special education and disability “collaboration” requirements
- Interplay with Title VII
- Oral complaints (wishful thinking?!)
Impact

What was the first word that came to your mind when you heard the news that the rules would be finalized in October?
Overall I feel ________ about the October implementation date.

- Positive
- Negative
- Neutral

Title IX Tips

How to Make—and Keep—a Resolution to Prepare for the New Title IX Rules

We are barely into 2023, and it’s shaping up to be the biggest year yet for Title IX. From transgender bathroom bans and athletic participation battles to growing scrutiny on general athletics equity and pregnant and parenting students, Title IX will continue to have its moment in the sun in 2023 as it has for the past few years. Of course, the biggest news for Title IX in 2023 will undoubtedly be the issuance of the Biden administration’s new Title IX rule. The Department of Education recently confirmed that it intends to host the new regulation on schools in May 2023. Schools, colleges, and universities will once again have to comply with an entirely new grievance structure quickly over the summer.

Those who spent the summer of 2020 scrambling to prepare for the 2020 Title IX rules know that implementing new rules over the summer is a huge feat. If you haven’t already resolved to begin preparing now to be ready for that process when it comes, you should! Like any other New Year’s resolution, there is a risk of giving up without a plan. Don’t have one? Don’t worry. The Thompson & Horton Title IX team has you covered. Keep reading for the essential action plan to help you achieve your Title IX goals in the New Year.
Now What? OCR Just Delayed Two Major Title IX Rules... Here’s Your Gameplan

My educational institution has already taken steps to prepare for the 2023 amendments by....

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<tbody>
<tr>
<td>A</td>
<td>Scheduling a meeting with leadership to discuss resources for implementation</td>
</tr>
<tr>
<td>B</td>
<td>Scheduling training for Title IX “team” members on the 2023 amendments</td>
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<tr>
<td>C</td>
<td>Scheduling training for all employees on the 2023 amendments</td>
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<td>D</td>
<td>Revising policies and procedures</td>
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<tr>
<td>E</td>
<td>Revising templates (checklists, decision trees, letters, forms) for the processes under the 2023 amendments</td>
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<tr>
<td>F</td>
<td>Researching third party options including policy revisions, and/or templates under the 2023 amendments</td>
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<td>G</td>
<td>Something else (tell us in the chat)</td>
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<td>H</td>
<td>None of the above</td>
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The Good News...

- Steps you have already taken are not a waste because the rules (presumably) will go into effect (eventually)
- The delay provides us more time to think about changes to be made—if we use that time!
- Nothing prevents you from updating policies this summer to implement elements of the amendments that seem likely to be finalized as proposed, are non-controversial in your community, and make sense for your institution
The Bad News...

- We may be looking at a mid-year rollout which will be even more challenging than a summer one
- We are stuck with the 2020 amendments, many of which are inefficient and ineffective
- You should consider policy updates to your current policies, procedures, and other materials under the 2020 amendments
- Your Title IX “team” and employees need to keep up their training on the current rules

Effective Date
The Hard Facts

• For a significant or major rule, 60 days is required
• ED need not tell us the effective date until the final rule
• We only got 40 extra days in 2020 for a global pandemic
Let’s Do (Some More) Math

• The 2020 Title IX Amendments were released on May 6, 2020 with an August 14, 2020 effective date giving educational institutions 100 days to implement the final rule (with an extra 40 days for COVID)
• The 2023 Title IX Amendments would have to be finalized by October 3, 2023 to even give educational institutions 90 days before a January 1, 2024 implementation deadline
• As long as the rules are published by October 31, 2023, educational institutions would have at least 60 days before a January 1, 2024 release date

Mid-Year Implementation

• The preamble to the 2020 Title IX Rules recognized that a mid-year implementation would be difficult for schools
• Some commenters requested that the rule be released in the summer “so that the requested 90-day implementation window takes place over the summer, when recipients have more time and ability to implement the changes constructively”
• Some commenters “asserted that requiring changes to be made in the middle of a school year will raise problems with applying two different sets of rules to sexual misconduct incidents occurring in the same school year based on an arbitrary cut-off date”
Let’s Do Some Math

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<thead>
<tr>
<th>Trump Administration Proposed Sexual Harassment Rules</th>
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<tr>
<td>Nov 2018 ~ 18 Months</td>
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<td>Final Rule</td>
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<tr>
<th>Biden Administration Proposed Grievance Procedure Rules</th>
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<td>May 2020 Total ~ 11 Months</td>
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<td>June 2022 ~ 6.5 Months</td>
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<th>Biden Administration Proposed Athletics Rules</th>
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<td>Aug 2020 Total ~ 6 Months</td>
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<tr>
<td>Apr 2023 ~ 6.5 Months</td>
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<th>Goal: Oct 2023</th>
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<tr>
<td>Goal ??? = 6 ~ Jan. 2024 Total ~ 18 Months</td>
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Our Quick Take(aways)

- Is anything worse than the “COVID summer”?
- Perhaps the winter holidays will buy us some time?
- Hope for the best, but prepare for the worst

Planning Ahead
Preemptive Policy Changes?

- Preventative Measures
- Independent Informal Resolution Facilitator
- All-Employee Training
- Certain Process Requirements (e.g., appeals for supportive measures)
- Pregnancy & Parenting Requirements
- Title IX & Special Education/Disability Collaboration

What Can’t Change (For Now)....

- Different investigator, initial decision-maker, and appellate decision-maker
- Cumbersome decision-making process still required (hearings for higher ed and written Q&A for K-12)
- Appeals still broadly required for three required reasons
No Time To Slow Down

• Meet with leadership to obtain needed resources
• Pencil in training for November, December, or January
• Begin preparing policies and procedures
• Prepare necessary templates

Know Your Policy Process

• Where does your policy come from?
• Will stakeholders be available?
• Interim policies?
• Remember distinctions of policies vs. procedures
Our Quick Take(aways)

• Now is not the time to take your foot off the gas
• Particularly with the uncertainty regarding mid-year implementation, the more you can do this summer, the better

T&H Webinars & Blogs

• “An Attempted Compromise? Breaking Down the Proposed Title IX Rule for Transgender Athletes”
• “The Essential Title IX Action Plan for 2023”
  vimeo.com/thompsonhorton

• Title IX Tips Blog
  www.titleIXtips.com
Settle Into the 2020 Rules

The 2020 Rules Are Here to Stay

• Your Title IX team should be well-trained on the current (2020) rules
• Your policies and procedures should be updated for the new academic year based on lessons learned under the current rules
• Consider changes to structures (e.g., deputy Title IX Coordinators)
K-12 June Title IX Certification

• June 13, 2023 via Zoom
• 11:00 a.m. to 4 p.m. Central (12 p.m. to 5 p.m. Eastern)
• Hot topics K-12 coordinators, deputy coordinators, and administrators need to know

For more info & to register
bit.ly/K-12Certification

PSE certification info: titleix@thlaw.com

While You’re At It….

• OCR Guidance on Title VI/Discriminatory Discipline
• OCR’s Fact Sheet on DEI Efforts
• Athletics Equity (Female vs. Male Teams)
• Pregnancy & Parenting Requirements

Read more at www.titleIXtips.com
Thank You!
Questions?

Email titleix@thlaw.com for more information on our Title IX services