

What's Next?

Key Takeaways from Updates to Title IX Regulations for K-12 and Higher Education Institutions



SpencerFane®

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Agenda

Why are we here?

What is the status of current litigation?

What are the biggest shifts from the 2020 to 2024 regulations?

What's Next?

Why are we here?



The Department of Education released new Title IX regulations on April 19, 2024.



These regulations make significant changes to the scope and procedures previously included in the 2020 Amendments to Title IX.

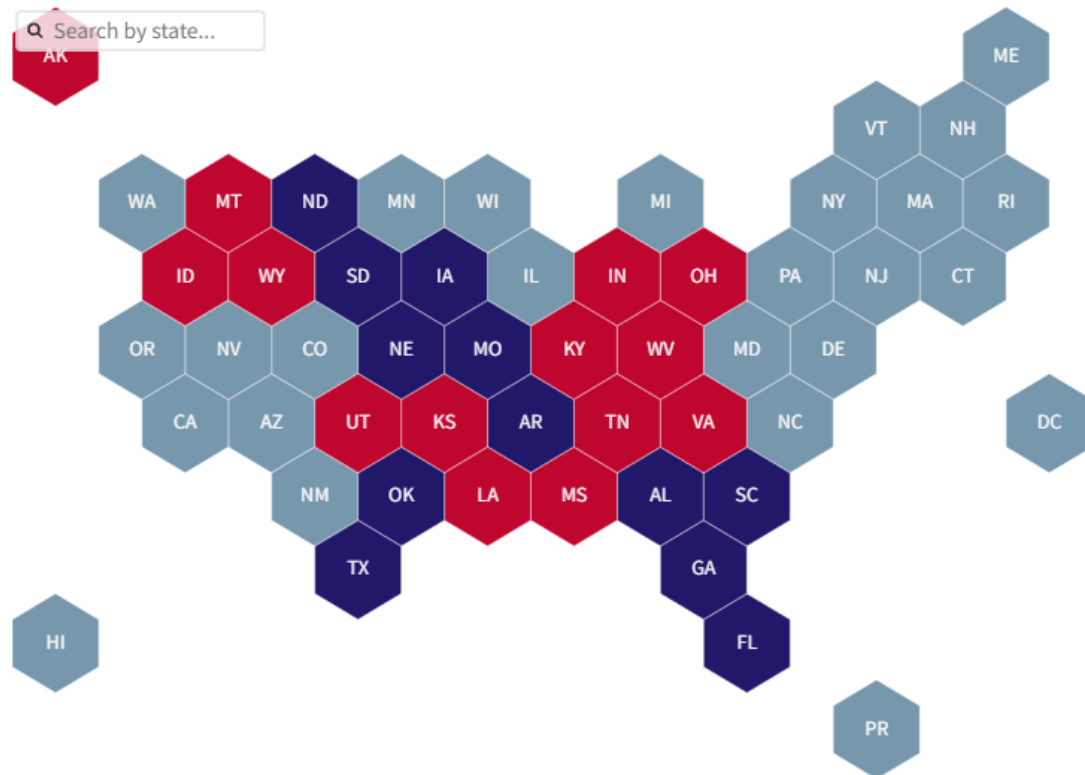


The new regulations are effective **August 1, 2024**, which means you must have new policies and notices finalized and communicated to your community by that date.

Legal challenges to Biden's Title IX rule and their status

26 states are challenging the Biden administration rule that expands Title IX protections to ban discrimination in schools based on gender identity and sexual orientation

■ Rule challenged ■ Rule on hold ■ No legal challenge



Pending Litigation

Pending Litigation



All of the lawsuits challenge the inclusion of “sexual orientation” and “gender identity” in the definition of sex discrimination

- Violates Administrative Procedures Act
- “Gender identity” is too broad or vague
- Forces students and staff to go against closely held beliefs by allowing transgender and nonbinary students to use bathrooms and locker rooms that align with their gender identity
- Puts states at odds with their own constitution or laws, e.g. Texas and expansive definition of “sex”
- Opens the door to inequality in school athletics by giving transgender girls access to girls’ sports

Pending Litigation



Alaska

Idaho

Indiana

Kansas

Kentucky

Louisiana

Mississippi

Montana

Ohio

Tennessee

Utah

Virginia

West
Virginia

Wyoming

Definitions

Definitions

Complaint	An oral <i>or</i> written request/notice to investigate
Complainant	Current, former, and prospective students and employees
Pregnancy or related conditions	Pregnancy, childbirth, termination of pregnancy, or lactation Medical conditions related to the same Recovery related to the same
Confidential employee	Designated employee whose communications are privileged or confidential

Definitions

Relevant	Q's - May aid in showing whether the alleged sex discrimination occurred Evidence – when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred
Retaliation	Now expressly prohibits peer retaliation and requires recipient to respond to information and complaints of retaliation using same process for discrimination
Supportive measures	Offered to complainant <i>and</i> respondent

Definitions

Sex discrimination (§ 106.10)	Includes discrimination based on: <ol style="list-style-type: none">1. sex stereotypes2. sex characteristics3. pregnancy or related conditions4. sexual orientation5. gender identity
Sex-based harassment	A form of sex discrimination that means sexual harassment and <i>other</i> harassment on the basis of sex, including on the basis described in § 106.10.
Consent	No definition included

Scope

Scope of Covered Conduct

Broadens the scope of conduct that constitutes sex discrimination and therefore triggers the need for grievance procedures.

Before included:

- Quid Pro Quo
- Specific Offenses

Now:

- Quid Pro Quo
- Specific Offenses (e.g., sexual assault, dating violence, stalking, domestic violence), and
- Hostile Environment Harassment

Includes: sex stereotypes, sex characteristics, pregnancy/related conditions, sexual orientation, gender identity

Hostile Environment Harassment

Unwelcome

Sex-based
conduct

Subjectively ***and***
objectively
offensive

Severe ***or***
pervasive

Limits or denies
ability to
participate
in/benefit from the
education program
or activity

Hostile Environment Harassment

Whether a hostile environment has been created is a **fact-specific** inquiry that includes consideration of the following:

- (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- (ii) The type, frequency, and duration of the conduct;
- (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- (iv) The location of the conduct and the context in which the conduct occurred; and
- (v) Other sex-based harassment in the recipient's education program or activity

Geographic Scope

Must address all sex discrimination occurring under an education program or activity in the United States, including:

- Conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a *postsecondary* institution.
- Conduct that is subject to the recipient's ***disciplinary authority***.
- Must address sex based hostile environment under its education program or activity EVEN IF some of conduct occurred outside of the education program/activity or outside of the U.S. if it is alleged to contribute to the hostile environment.

Reporting and Responding Requirements



K-12 & Higher Education Institutions



A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond ***promptly and effectively***.

Title IX coordinator must ***actively monitor*** education programs or activities for barriers to reporting information and take steps reasonably calculated to address such barriers.



K-12 Institutions

ALL employees who are not confidential employees must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination

Higher Education



Non-Confidential Employee with Authority/Responsibilities

- Any non-confidential employee who either (1) has authority to take corrective action on behalf of the institution, *or* (2) has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity **must notify the Title IX Coordinator** if they have information about conduct that may reasonably constitute sex discrimination.

All Other Non-Confidential Employees

- Must either: (1) **notify** the Title IX Coordinator, *or* (2) **provide** the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination when the employee has information about conduct that reasonably may constitute sex discrimination.

Pregnancy and Related Medical Conditions: K-12 & Higher Education Institutions

When an employee has notice of a student's pregnancy or related conditions, the employee must provide the Title IX Coordinator's contact information and inform that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the education program or activity.

Pregnancy and Related Medical Conditions: K-12 & Higher Education Institutions

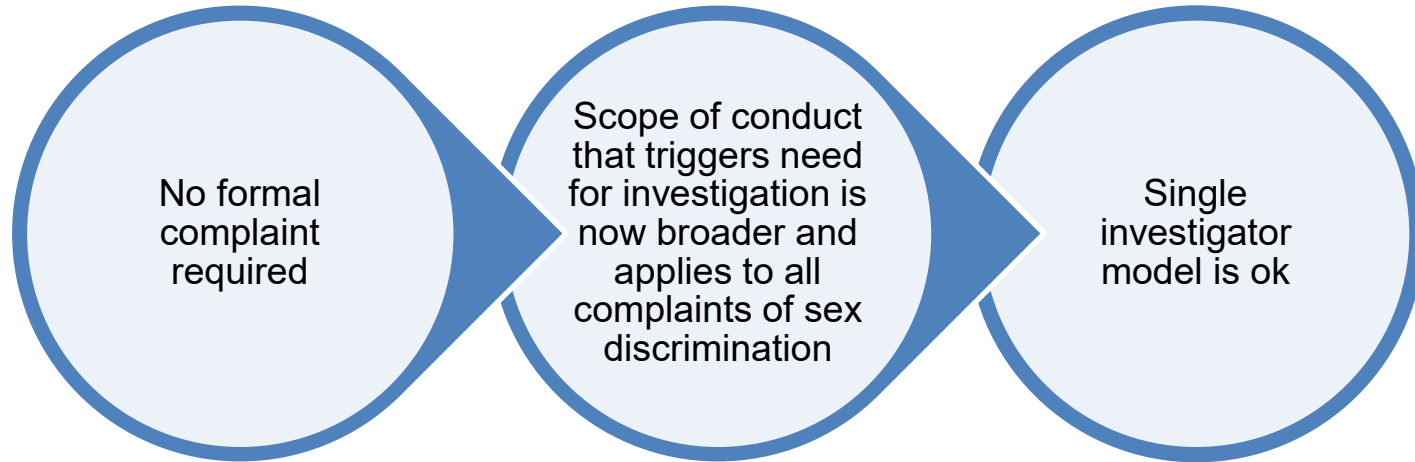
Once student or representative informs Title IX coordinator, the school must:

- Inform the student of the school's obligations to students who are pregnant or experiencing pregnancy-related conditions
- Provide the school's notice of nondiscrimination
- Provide the student with the option of individualized, reasonable modifications
- Allow the student a voluntary leave of absence for, at minimum, the medically necessary time-period and reinstatement upon return
- Ensure the student's access to a clean, private space for lactation.

Grievance Procedures



Grievance Procedures



Grievance Procedures: K-12 & Higher Education Institutions

- Equitable treatment of complainants and respondents
- No conflict of interest or bias
- Presumption of no responsibility until conclusion
- Reasonably prompt timeframes for all major stages
- Reasonable steps to protect privacy of parties and witnesses.
- Objective evaluation of all relevant and not otherwise impermissible evidence.
- Exclusion of three types of evidence as impermissible.
- Clear articulation of separate grievance procedures for particular types of conduct, if applicable.

Grievance Procedures:

K-12 & Higher Education Institutions (for non sex-based harassment claims)



Notice to all parties of complaint/investigation

Sex-based harassment complaints must include notice of supportive measures and range of disciplinary sanctions/remedies

Dismissal of complaint may be appropriate with right to appeal

Consolidation of complaints permitted

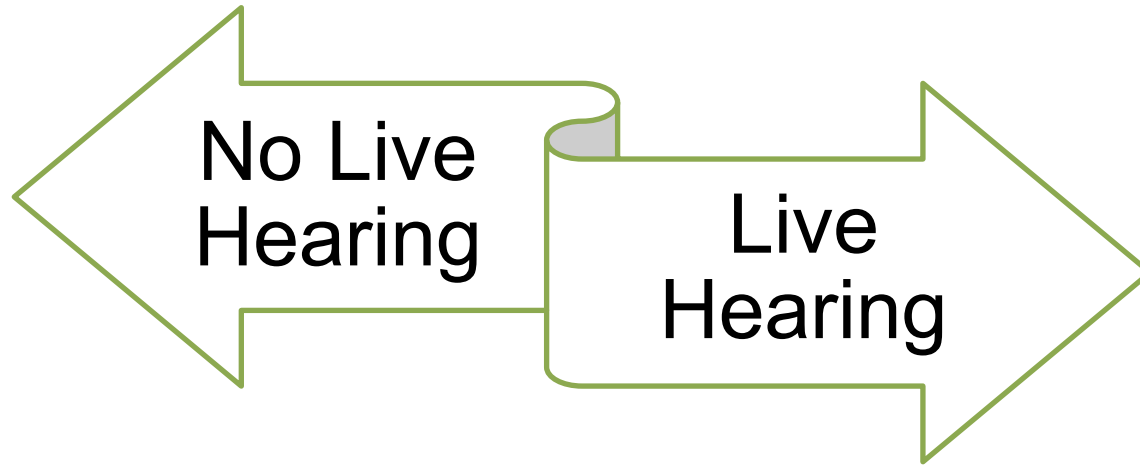
No live hearing required but must maintain ability of decisionmaker to question parties/witnesses

Written determination with rationale and right to appeal using preponderance of evidence standard*

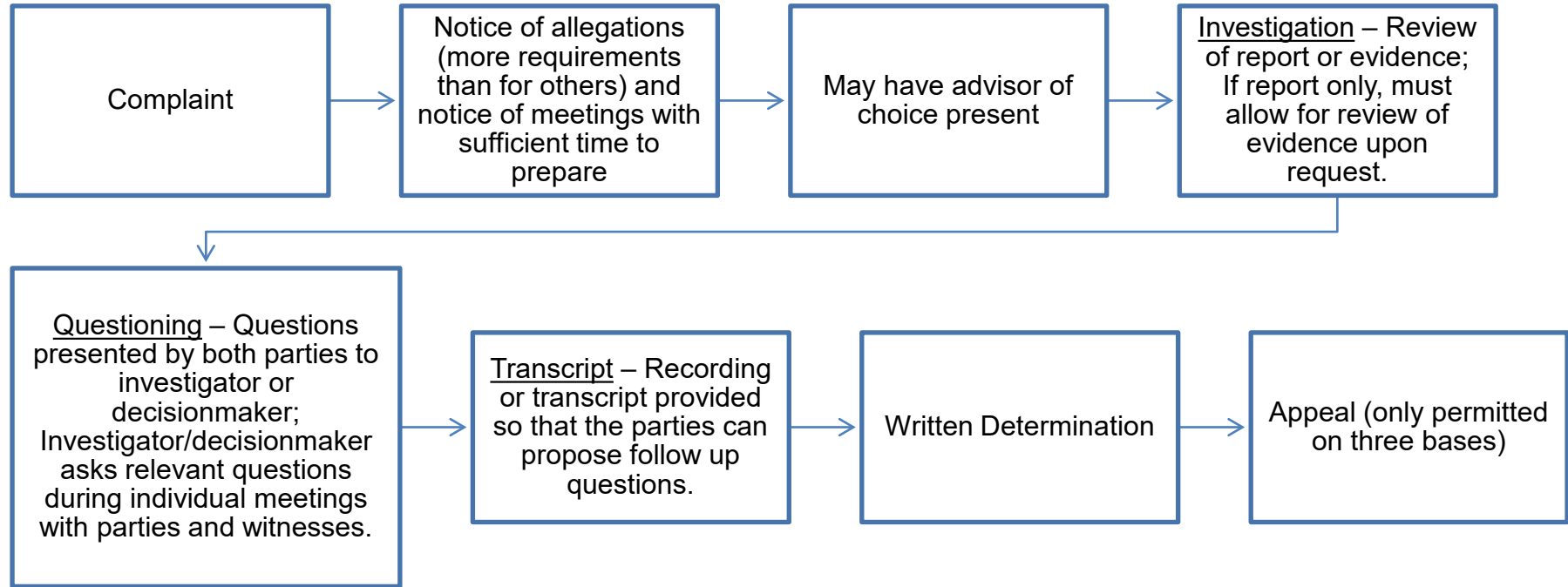
Higher Education: Additional Grievance Procedures for Sex-Based Harassment Involving a Student Party

- Heightened written notice requirements
- Equal opportunity to have an advisor of the party's choice at any meeting or proceeding and same opportunities to have other person's present
- Permits an institution to allow expert witnesses (as long as equally applied)
- Reasonable extension of timeframes for good cause and with written notice to the parties, including the reasons for delay
- Equal opportunity to access relevant evidence
- Permits a live hearing
- Simultaneously provide written notice to the parties of the determination that includes a description of the allegations, information about policies and procedures, decisionmaker's evaluation, determination, sanctions, and information about appeal process.

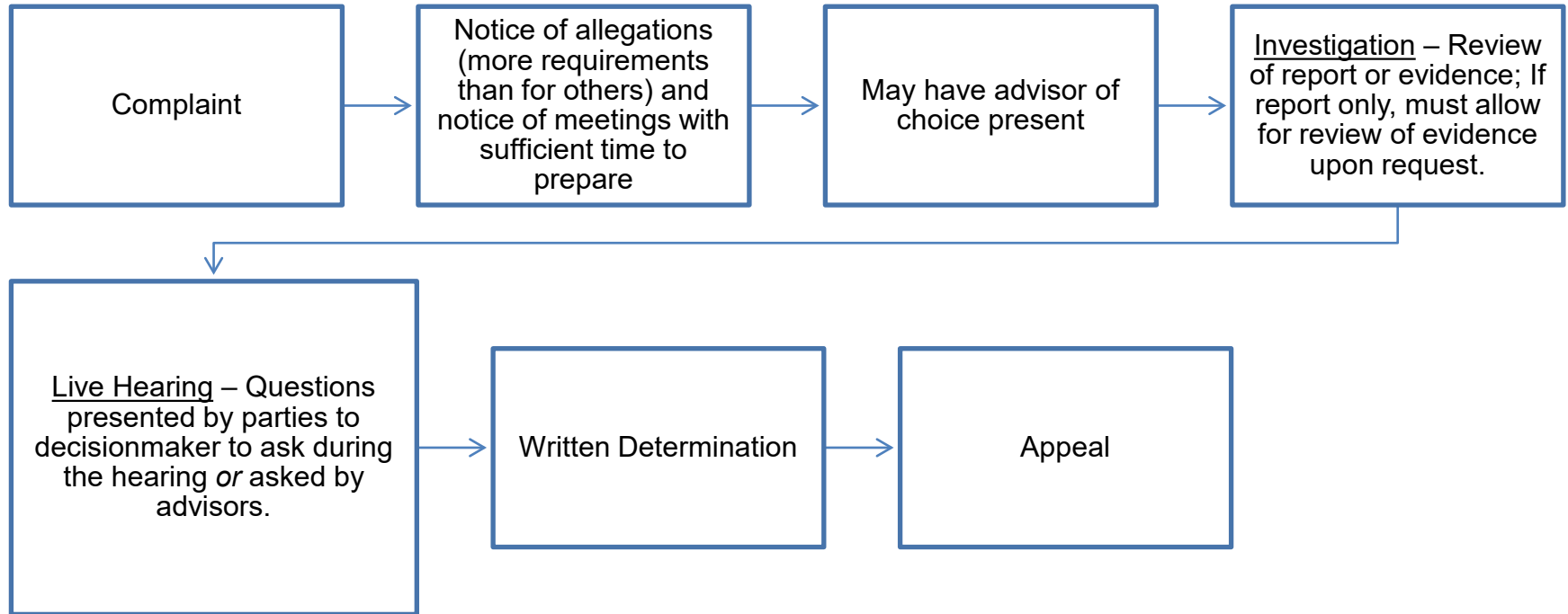
Two Options: Higher Education Sex-Based Harassment Involving a Student Party



No Live Hearing



Live Hearing



Training Requirements



Training for *All Employees*

The institution's obligation to address sex discrimination in its education program or activity, including when employee must notify Title IX coordinator of conduct

The scope of conduct that constitutes sex discrimination under Title IX, including the definition of sex-based harassment

All applicable notification and information requirements related to pregnancy and related medical conditions and the recipients notice and grievance procedures

Training for Investigators, Decisionmakers, and Other Persons*



Topics covered in all employee training



Grievance procedures



How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias



Meaning and application of term “relevant” in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance

Training for Facilitators of Informal Grievance Process



All employee training



Informal resolution process



How to serve impartially, including by
avoiding prejudgment of the facts at
issue, conflicts of interest, and bias

Training for Title IX Coordinator and Designees



All trainings for employees, investigators, decisionmakers, and other persons, as well as facilitators of informal resolution process

All responsibilities and duties of the Coordinator under the Rules

Recordkeeping systems (complaints, notifications, trainings)

Privacy



Increased Protection

Broader protection that prohibits recipient from disclosing personally identifiable information obtained in the course of the investigation/grievance procedure ***unless prior written consent or disclosed to parent of minor.***

Informal Resolution



Informal Resolution Process

Separate facilitator from investigator/decisionmaker or appeal officer



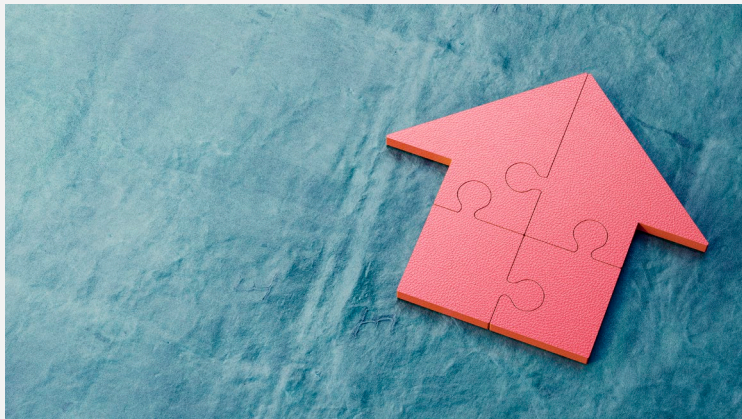
Can be initiated with or without formal complaint



What's Next?



What's Next?



- Monitor implementation of regulations based on state
- Update Title IX policy and grievance procedures
- Update nondiscrimination policy
- Publish and disseminate policies and procedures
- Designate Title IX team
- Train, train, train
- Reassess and monitor barriers to reporting



Questions?



Let us help you!



Policies



Procedures



Manuals/Handbooks



Training



Investigations

