

# LEGAL UPDATE

To: All School Committee Members and Superintendents  
From: Patrick J. Francomano Esq., MASC General Counsel  
Re: Revised Title IX Regulations: Overview  
Date: July 24, 2024

MASC has revised its model policies and related materials to reflect the US Department of Education's recent amendments to the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). Title IX prohibits discrimination on the basis of sex in "Education Programs or Activities Receiving Federal Financial Assistance."

Although we often strenuously cite the differences between policy, regulation and procedure and the extent of the school committee's role in developing the same, you may find that the model policies and related materials we are providing perhaps appear to occasionally run afoul of our preachings. Here is why. First, in some instances, the new regulations appeared somewhat prescriptive and it seemed wise to err on the side of caution and allow the lines to be blurred if there was no immediate down side. Second, some of those lines may have already been blurred by previously provided materials. Third, the extent and nature of the changes may appear so overwhelming, nuanced and/or confusing that a more comprehensive set of materials is required for districts to address the requirements of the new Title IX regulations.

There are occasional redundancies across the materials that have been left to ensure recognition of certain Title IX requirements. You will also find a new document that has been coded as a regulation in order to provide a bridge between the broader policy statements and the amended grievance procedure.

A major challenge in addressing these materials is that while broad policy statements may be sufficient to meet requirements under Title IX, it is not necessarily one size fits all when it comes to each district's desired practices and procedures. It is imperative that you do what is correct for your district and its needs. We have left in place prior timelines and procedures even if not specifically required under the new regulations. In that way the district may maintain the status quo for the time being and make changes later on as it deems appropriate. Two such examples are the timeline within the grievance procedure and not opting to make the single-investigator model the default in lieu of the past practice.

We anticipate making some revisions as theory meets practice and we receive your feedback.

The "Unofficial" bookmarked PDF version of the "Final Rule" including commentary may be found at:  
<https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf>

The following are three additional documents published by the Department:

- Final Rule Fact Sheet (15 Pages):  
<https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf>
- Final Rule Summary (5 Pages):  
<https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-summary.pdf>
- Resource Document including Model Language (26 Pages):  
<https://www2.ed.gov/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf>

As anticipated there have been multiple lawsuits filed seeking injunctive and declaratory relief, essentially requesting the Courts initially postpone the effective date of the Rule and permanently stop the Rule from going into effect. At last count there were eight lawsuits involving 26 states objecting to the inclusion of “gender identity” as a basis for sex discrimination. Three of these lawsuits have successfully placed the new regulations on hold in 14 states, while the remaining lawsuits are still to be considered. One of the three lawsuits could have nationwide implications because the judgment prohibited enforcement of the new regulations by any school attended by a member of the Young America’s Foundation, or a school attended by a member of Moms for Liberty’s child without respect to the school’s location. However the impact on MA is minimal given that MA law already prohibits discrimination based upon “gender identity.” We will of course be monitoring all of these and any new lawsuits and keep you informed of any developments that directly impact our members.

What follows below are some anticipated common questions you may have. They are not exhaustive but do manage to address many of the major shared areas of concern among our members. Hopefully you find them helpful.

### **What should districts be doing?**

- Identify what policies, procedures, and other materials need to be revised and, if required, voted upon by the school committee.
- Be sure the district follows all Title IX notice/publication requirements.
- Revise training materials and schedules as necessary for all staff.
- Ensure that staff at every level understand their roles and responsibilities and are in a position to fulfill the same.
- Monitor all district activities, practices and procedures to ensure alignment with Title IX requirements.
- Consult your district’s legal counsel for assistance in compliance and training,

### **Has the Title IX definition of discrimination based on sex changed at all?**

Sexual orientation and gender identity have been incorporated into the federal definition of sex-based discrimination, making Title IX consistent with MA law.

### **Is sex-based harassment different than sex-based discrimination?**

Sex based harassment has been incorporated into the definition of Sexual Discrimination and the newly entitled Title IX Sexual Discrimination Grievance Procedure addresses both sex-based harassment and other sex-based discrimination.

### **Do the new regulations require changes to the district’s grievance procedure?**

Under the former regulations, the specific grievance procedure requirements only applied to complaints involving sexual harassment. The grievance procedure requirements now apply to all alleged violations of Title IX, thus significantly increasing its scope.

### **Is the district still permitted to use an informal resolution process?**

Under the new regulations the district, at its discretion, may determine whether or not it is appropriate to offer an informal resolution process, including mediation or restorative justice. At any time prior to determining whether sex discrimination occurred pursuant to the district’s grievance procedure, the district may opt to offer and facilitate informal resolution options, when it receives information about conduct that reasonably may constitute sex discrimination under Title IX or when a complaint of sex discrimination is made. Both parties must give voluntary, informed, written consent to attempt any offered informal resolution and the process must be facilitated by trained personnel.

### **Under Title IX, what is meant by a “hostile environment”?**

A “hostile environment” in the context of “Sex-based harassment” is established where “unwelcome sex-based conduct ... is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the district’s education program or activity.”

### **Is a specific investigative model required under Title IX?**

In an effort to provide districts with greater flexibility, the new regulations allow for the use of a single-investigator model, except for sex discrimination complaints involving allegations against an employee accused of sex-based harassment of a student, or if the process is otherwise contrary to Federal, State, or local law. However, this requires specific action by the district detailing when and how the single investigator model may be used. The revised MASC materials reference the availability of the single-investigator model but default to the previous model leaving it to each district if and when it wishes to employ the single-investigator model.

### **What are the district's obligations under Title IX as applied to privacy?**

The revisions to the Title IX regulations reflect additional emphasis on privacy protections for both students and others involved in sex discrimination claims and investigations, by generally prohibiting disclosure of personally identifiable information arising out actions taken in compliance with Title IX and requiring grievance procedures which include appropriate steps to protect the privacy of the parties and witnesses.

### **Has the standard of proof changed?**

The final regulations address the standard of proof to be applied when determining if sex discrimination occurred, allowing for the use of the lower "preponderance of the evidence" standard unless the higher "clear and convincing" standard is already used in other similar proceedings. This was already the default standard in the original model.

### **May a respondent still be removed on an emergency basis under the new regulations?**

A district may remove a respondent (employee or student) from the district's education program or activity on an emergency basis following a safety and risk analysis that establishes an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This is a change from the prior regulations with the word "imminent" being substituted for the word "immediate" and provides the district with some greater flexibility.

### **How is retaliation addressed under the new Title IX regulations?**

Although intimidation, threats, coercion, or discrimination against any person by the district, a student, or an employee for the purpose of interfering with Title IX rights were prohibited under the earlier Title IX regulations, the new regulations have:

- Incorporated those terms under a formal definition of retaliation, including a reference to peer retaliation.
- Provided that such retaliation is a Title IX violation subject to the district's grievance procedure and/or, as appropriate, an informal resolution process.
- Required the district to include a statement that retaliation is prohibited in its notice of allegations to the parties whose identities are known upon initiation of grievance procedures.

### **How has the Title IX Coordinator's role changed?**

Although some might find the new multiple references to the duties of the Title IX Coordinator as encompassing actions that are reasonable and/or otherwise foreseeable, the new regulations (and in turn MASC's model materials) are perhaps more precise in their dictates. The Title IX Coordinator is clearly established as the individual who is responsible for all aspects of Title IX including the development of systems and procedures for awareness, training, enforcement and education.

### **What training obligations are imposed upon the district?**

The new regulations mandate training for Title IX Coordinators and all others responsible for implementing and executing the school's grievance procedure as well as informal resolution. It is imperative to note that all employees must be trained on:

- (i) The district's obligation to address sex discrimination in its education program or activity;
- (ii) The scope of conduct that constitutes sex discrimination under Title IX, including the definition of sex-based harassment; and
- (iii) All applicable notification and information requirements in response to reports of sexual discrimination and pursuant to the district's Title IX Grievance Procedure.

Additionally, all training materials must be publicly available.

### **Are there any additional requirements under Title IX when dealing with students with disabilities?**

The new regulations require that the Title IX Coordinator consult with one or more members of a student's IEP or Section 504 team throughout the grievance procedures if either complainant or respondent is a student with a disability, in order to ensure compliance with the requirements of the IDEA and Section 504.

### **What is the impact of Title IX on a district's obligations to both students and employees based on pregnancy or pregnancy-related conditions?**

The new regulations more specifically address a district's obligation to both students and employees based on pregnancy or related conditions. Districts must provide for reasonable modifications for students based on the above, must provide access to a clean, private lactation space for students and employees, as well as reasonable break time for lactation for employees. Districts are generally prohibited from revealing personally identifiable information about reasonable modifications for pregnancy or related conditions and district employees are required to advise a student (or parents of a minor student) of the school's obligations to prevent discrimination when informed of a student's pregnancy or related condition. This is another example of Title IX catching up to protections currently under MA law.

### **Are "supportive measures" still contemplated under the new regulations?**

Supportive measures continue to be a major component of a district's response to potential or actual violations of Title IX. Supportive measures are individualized services designed to ensure equal educational access, protect safety, and/or deter sexual discrimination, which are reasonably available, non-punitive, non-disciplinary, and not unreasonably burdensome to the complainant or respondent. These may be offered before or after the filing of a Formal Complaint or where no Formal Complaint has been filed. They are subject to confidentiality protections. A new requirement is the district's obligation to offer an opportunity for either party to appeal the implementation of supportive measures and to propose alternatives.

### **Are districts responsible for conduct off school grounds or are there any geographical limits to a district's responsibility to address potential violations of Title IX?**

Conduct beyond the schoolhouse grounds may constitute sex discrimination when the conduct occurs in the course of activities under a district's education program or activities that are within the district's disciplinary authority. Even conduct which occurs outside the education program/activity or conduct outside of the U.S., which is alleged to be contributing to a sex-based hostile environment under a district's educational program or activity, must be considered by the district.

### **Are all employees required to report potential sex discrimination?**

All non-confidential employees are required to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX. The new regulations discuss several requirements surrounding a district's confidential employee(s) to the extent that any exist. The district's designation of someone as a confidential employee and its implications should be discussed at length with your district's legal counsel well in advance.

A confidential employee is: An employee of the district whose communications are privileged or confidential under Federal or State law or an employee of the district whom the district has designated as confidential for the purpose of providing services to persons related to sex discrimination. The employee's confidential status is only with respect to information received about sex discrimination in connection with providing those services.

If your district has designated one or more employees as confidential then all participants in the district's education program or activity must be notified of how they may be contacted. The confidential employee must explain to any person who informs them of conduct that reasonably may constitute sex discrimination under Title IX:

- (i) The employee's status as confidential for purposes of Title IX, including the circumstances in which the employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination;
- (ii) How to contact the district's Title IX Coordinator and how to make a complaint of sex discrimination; and
- (iii) That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures.

**Do the new regulations provide any insight into the use of restrooms and locker rooms?**

Although the use of restrooms and locker rooms were not specifically targeted under the new regulations, they do contain a reference to a "*de minimis*" harm standard for sex separation currently permitted by existing regulations. Where facilities are comparable, current regulations permit separate toilet, locker room, and shower facilities on the basis of sex. 34 CFR 106.33. According to the new regulations the "otherwise permissible sex separation is consistent with Title IX as long as it is carried out in a manner that does not impose more than *de minimis* harm on affected students." The regulations provide that a student who is prevented from participating in school (including in sex-separate activities) consistent with their gender identity suffers more than *de minimis* harm in Violation of Title IX.

We look forward to hearing your input as you adapt these materials to your individual needs. Please feel free to let us know what provisions may or may not be working for you and what additional challenges we can assist you in addressing. As always, do not hesitate to contact us with any questions, comments, or observations.

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