

# TITLE IX: WHAT FACULTY SHOULD KNOW

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**Note: These materials are intended to provide general information, not binding legal guidance. If you have a legal inquiry, you should consult an attorney in your state who can advise you on your specific situation.**



# TITLE IX: NEW REGULATIONS (2024)

**Title IX:** “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

**Effective date** of the new Title IX regulations is **August 1, 2024, applied prospectively.**



# LEGAL CHALLENGES

- Republican attorney generals filed lawsuits challenging the provisions in the new regulations that clarify that sex discrimination under Title IX includes discrimination based on sexual orientation or gender identity.
- Courts have granted injunctions against the 2024 regulations in 26 states.
- The 2024 regulations are also blocked in any school where a student or parent is a member of Young America's Foundation, Female Athletes United, and Moms for Liberty.
- In August 2024, SCOTUS upheld the injunctions barring the Department of Education from enforcing any portion of the 2024 regulations with respect to those jurisdictions and schools affected by the injunctions.
- The Department of Education has said that it will enforce the 2024 Regulations at any school where it is not enjoined from doing so and will enforce the 2020 Regulations at any school where it is enjoined.



# LEGAL CHALLENGES

- The Trump Administration will likely not defend the 2024 regulations in court or settle the lawsuits pending the revision of the regulations.
- The Trump Department of Education will likely not enforce the 2024 regulations while it revises the regulations.

# AAUP AND TITLE IX

- 1984 [Sexual harassment: Suggested policy and procedures for handling complaints](#) (revised 1990, 2014)
- 2012 [Campus Sexual Assault: Suggested Policies and Procedures](#)
- 2016 [The History, Uses, and Abuses of Title IX](#)
- 2019 AAUP Comments on the Dep't of Education's Proposed Title IX Regulations
- 2020 AAUP Response to Final Title IX Regulations (May 6, 2020)
- 2021 AAUP Comments on Dep't of Education's announced plan to issue NPRM (June 2021)
- 2022 Dep't of Education NPRM issued (July 12). AAUP Comments on NPRM (September 12)
- 2024 Dep't of Education issues Final Title IX Regulations (April 19, 2024)
- 2024 [AAUP Response to Final Title IX Regulations](#)

# AAUP GOALS FOR TITLE IX POLICIES AND PRACTICE

- Address gender inequity within a ***comprehensive assessment of bases for inequality***.
- Protect faculty ***academic freedom***
  - distinguish between protected speech and unprotected sexual harassment
- Protect ***due process*** in investigations and hearings.
- Integrate ***shared governance and collective bargaining*** as central to developing and implementing Title IX policies.

# AAUP STANDARDS FOR DISMISSAL PROCEDURES: RECOMMENDED INSTITUTIONAL REGULATION 5

Adequate Cause for dismissal “will be related directly and substantially to the fitness of faculty members in their professional capacities as teachers or researchers.”

Before any Dismissal Action Occurs:

Discussions between faculty member and administration officials towards mutual settlement

Statement of charges, “framed with reasonable particularity”

# AAUP STANDARDS: DISMISSAL PROCEDURES: THE HEARING

- ❑ **Burden of proof rests with institution**
- ❑ **Faculty elected to hearing committee**
- ❑ **Clear and convincing evidence standard**
- ❑ **Academic advisor or counsel**
- ❑ **Record of proceedings**
- ❑ **Confront and cross-examine all witnesses**



## AAUP STANDARDS: DISMISSAL PROCEDURES: THE HEARING AND REPORT

If hearing committee concludes adequate cause for dismissal has not been established, it reports to the president.

If the president rejects the report, the president will state reasons for doing so, in writing, to hearing committee and faculty member, and provide opportunity for response before reporting goes to governing board.

If hearing committee concludes that adequate cause for dismissal *has* been established, but that an academic penalty less than dismissal would be appropriate, it will so recommend, with supporting reasons.



# NEW TITLE IX REGULATIONS

## EVALUATION OF KEY PROVISIONS

# DO TITLE IX REGULATIONS MEET AAUP PRINCIPLES?

**AAUP Comments urge the Dep't of Education to adopt regulations that:**

- Address gender inequity within a ***comprehensive assessment of bases for inequality***.
- Protect faculty ***academic freedom***
  - distinguish between protected speech and unprotected sexual harassment
  - no “mandatory reporting” policies covering all faculty
- Protect ***due process*** in investigations and hearings.
- Endorse ***shared governance and collective bargaining*** as integral to developing and implementing Title IX policies.



# TITLE IX: **NEW** REGULATIONS (2024)

## MAIN POINTS (COVERAGE, DEFINITIONS) (1)

- Addresses all forms of sex discrimination (not only sex-based harassment).
  - Clarifies that this includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, gender identity
  - Covers hostile environment claims that include conduct occurring outside the recipient's education program or activity or outside the United States.
- Definition of sex-based harassment broadened.
- All faculty (involved in administrative leadership, teaching, advising in educational program) are required to be mandatory reporters regarding students.

# TITLE IX: **NEW** REGULATIONS (2024)

## MAIN POINTS (DUE PROCESS) (2)

- Single investigator model permitted.
- No live hearing required, but is permitted.
- Different requirements for grievance procedures for sex discrimination (including sex-based harassment not involving students) and sex-based harassment where a student is a complainant or a respondent.
- The same standard of proof (either preponderance of evidence, or clear & convincing) is not required for student respondents and faculty respondents.
- Clear and convincing evidence standard is permitted if it is also used in college/university's comparable proceedings.

# **NEW TITLE IX REGULATIONS**

DEFINING SEX DISCRIMINATION,  
INCLUDING SEXUAL HARASSMENT

# NEW TITLE IX REGULATIONS: IMPROVED DEFINITION OF HOSTILE ENVIRONMENT

## ***2020 Regulation (§ 106.30(a)):***

“Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”

## ***New Regulation (§ 106.2):***

“Unwelcome sex-based conduct that, based on the totality of the circumstances, 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 recipient’s education program or activity.”

# NEW TITLE IX REGULATIONS: MORE INCLUSIVE DEFINITION SEX DISCRIMINATION

## ***2020 Regulation:***

No provisions comparable to the new §106.10 added in 2024.

## ***New Regulation (§ 106.10):***

Sex discrimination, including sex-based harassment, covers discrimination based on “sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”



# 2020 AND NEW TITLE IX REGULATIONS: LACK EXPLICIT PROTECTION OF ACADEMIC FREEDOM

## ***2020 Regulation §106.6(d)(1):***

“Nothing in the regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the **First Amendment of the U.S. Constitution.**”

## ***New Regulation §106.6(d)(1):***

“Nothing in the regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the **First Amendment of the U.S. Constitution.**”

# NEW TITLE IX REGULATIONS

## MANDATORY REPORTERS

# NEW TITLE IX REGULATIONS: HIGHER ED FACULTY AS MANDATORY REPORTERS (1)

## ***2020 Regulations:***

***Do not mandate all post-secondary faculty to be mandatory reporters.***

§106.30(a): *Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient.

***New Regulation: ALL Post-Secondary FACULTY are mandatory reporters about students*** (§106.44(c)):

Any non-confidential employee and who either has authority to take corrective action or has **responsibility for administrative leadership, teaching, or advising** in the recipient's education program or activity is obligated to notify the Title IX Coordinator about information **of a student** being subjected to conduct that may constitute sex discrimination.



# NEW TITLE IX REGULATIONS: HIGHER ED FACULTY AS MANDATORY REPORTERS (2)

## *2020 Regulations:*

*Do not mandate all faculty to be mandatory reporters.*

## ***New Regulation: Post-secondary FACULTY may be mandatory reporters about employees:***

A post-secondary institution must require any non-confidential employee who has **responsibility for administrative leadership, teaching, or advising** in an education program or activity and has information **about an employee** being subjected to conduct that may constitute sex discrimination, to **either**:

- Notify the Title IX Coordinator; or
- Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with the information.



# NEW TITLE IX REGULATIONS

DUE PROCESS:

DETERMINING VIOLATIONS

DETERMINING SANCTIONS

# TITLE IX REGULATIONS: INFORMAL RESOLUTION PROCESS

## ***2020 Regulations*** (§106.45(b)(9):

- Post-secondary institution may facilitate an informal voluntary resolution process, if a formal complaint alleging sexual harassment has been filed.
- Post-secondary institution may not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

## ***New Regulations*** (§106.44(k):

- Any time prior to determining whether sex discrimination occurred, post-secondary institution may offer to complainant and respondent informal resolution process.



# TITLE IX REGULATIONS: DEFINING STANDARD OF PROOF

- Preponderance of the evidence standard: “concluding that a fact is more likely than not to be true.”
- Clear and convincing evidence standard: “concluding that a fact is highly probably to be true.”
- These standards define the “degree of confidence” needed in determining responsibility in Title IX sexual harassment cases.

(Dept. of Ed. discussion of the regulations, 85 Fed. Reg. 30373, 30382)



# TITLE IX REGULATIONS: STANDARD OF PROOF

## *2020 Regulations:*

- Burden of proof is on the recipient.
- The grievance process “must state **whether the standard of evidence** to be used to determine responsibility is”:
  - preponderance of the evidence, **or**
  - clear and convincing evidence standard.
- **Same standard of evidence** must be used for formal complaints of sexual harassment against students and against employees, including faculty.

## *New Regulations:*

Burden is on the recipient to gather sufficient evidence to reach a determination.

Must use **preponderance of the evidence** standard, **unless the recipient uses clear and convincing (C&C) evidence standard in all other comparable proceedings**, including proceedings relating to other discrimination complaints, **in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred.**

**Example:** If a **collective bargaining agreement** uses the C&C evidence standard for employees charged with in race discrimination, as well as all other comparable allegations, it could elect to use the C&C standard for sex discrimination charges against an employee.





# NEW TITLE IX REGULATIONS: WEAKENED DUE PROCESS PROTECTIONS

## **2020 Regulations:**

May not use a “*single investigator*” model:

§106.45(b)(6)(i): Postsecondary institutions’ grievance process must provide for a **live hearing**.

§106.45(b)(7)(i): “The decision-maker(s)...cannot be the same person(s) as the Title IX Coordinator or the investigator(s).”

Post-secondary institution **may adopt additional provisions in its grievance procedures**, to apply equally to all parties

## **New Regulations:**

- May use a “*single investigator*” model (**decisionmaker** may be the **same person** as Title IX Coordinator or investigator);
- **No hearing required.**
- **Title IX Coordinator provides and implements remedies** if sex discrimination is found to have occurred;
- Post-secondary institution **may adopt additional provisions in its grievance procedures**, to apply equally to all parties (§106.45(j)).

## TITLE IX NEW REGULATIONS: **TWO LEVELS** OF GRIEVANCE PROCEDURES

Section **106.45**: Prompt and equitable grievance procedures required to address any complaint of **sex discrimination**. [i.e. **low level** of due process]

Section **106.46**: **Additional requirements** for grievance procedures to address complaints of **sex-based harassment involving a student complainant or respondent** [i.e. **more** due process]

# NEW TITLE IX REGULATIONS: SOME COMPARISONS OF DUE PROCESS LEVELS

## ***§106.45 (minimum level for all cases):***

- No written notice of complaints, meetings, outcome of investigation, sanctions;
- Written notice of determination of whether sex discrimination occurred and right to appeal;
- Equal opportunity to access the evidence, if requested by a party;
- Opportunity to present and respond to evidence during investigation;
- No provision in the Regulations for a live hearing.

## ***§106.46 (for sexual harassment involving student complainants or respondents in post-secondary institutions) :***

- Written notice of complaints, all meetings or hearings, dismissal of complaint, notice of appeal;
- Equitable access to the evidence;
- Right to advisor (may be attorney) at any stage of process;
- If live hearing is provided, each party may propose questions, or college/university may permit advisor to question witnesses.
- Written decision on whether harassment occurred and sanctions.



# TITLE IX REGULATIONS: DETERMINING DISCIPLINARY SANCTIONS

## *2020 Regulations:*

- Define requirements for hearings for **“determination of responsibility.”**
- Do not define requirements for hearings to determine **“disciplinary sanctions.”**

## *New Regulations:*

- Require “prompt and equitable grievance procedures” for **“determination of whether sex discrimination occurred”** or **“whether sex-based harassment occurred.”**
- Arguably could have separate hearing to determine **“disciplinary sanctions,”** as (§106.45(j) permits a recipient to **adopt additional provisions in its grievance procedures,** to apply equally to all parties).

# TITLE IX REGULATIONS

INCORPORATING AAUP PRINCIPLES & STANDARDS IN  
SHARED GOVERNANCE AND/OR COLLECTIVE  
BARGAINING

# INCORPORATING *AAUP PRINCIPLES AND STANDARDS* UNDER 2020 OR NEW REGULATIONS [1]

**Use shared governance and/or collective bargaining** to negotiate for protections that are higher than minimum standards. **Examples:**

➤ **Defining sex discrimination/sex-based harassment:**

- Academic freedom must be explicitly protected.

➤ **Title IX offices and processes:** Faculty engagement in hiring and training Title IX officials; training hearing panels.

➤ **Require written documents at all stages,** including complaints, investigative reports, decisions about sex-based harassment and sanctions.

➤ **Informal Resolution Processes:** Faculty engagement in developing policies.

➤ **Defining “mandatory reporters” [under Title IX 2020 regulations only]**

- Narrow the scope of faculty who are mandatory reporters;
- Policies that aid faculty in providing support to students and colleagues.



## UNDER 2020 AND NEW TITLE IX REGULATIONS: INCORPORATING AAUP PRINCIPLES AND STANDARDS [2]

### **Additional examples for shared governance/CB for higher than minimum standards.**

#### ➤ **Investigation and/or hearing processes**

- Right to advisor for all types of meetings/proceedings for all sex discrimination cases.
- No single-investigator model (separate roles of Title IX Coordinator, investigator, and decisionmaker).
- “Live” hearing panels with elected faculty members for “determination of responsibility” and for recommendations about “disciplinary sanctions.”
- Clear & Convincing evidence as the standard of proof for determining responsibility and sanctions.
- Avoid dual system of due process for sexual misconduct under Title IX regulations and other sex-based discrimination/misconduct under college/university code of conduct.\*

\*Note: The 2020 §106.45(b)(3)(i) states that dismissal of a formal complaint because the alleged conduct does not meet the definition of sexual harassment in §106.30 “does not preclude action under another provision of the recipient’s code of conduct.” The new regulations delete this provision.



# POLICY EXAMPLES

- Western Michigan University – CB Academic Freedom
- University of Oregon – Scope of Mandatory Reporting [through July 31, 2024]
- University of Oregon – Scope of Mandatory Reporting [as of August 1, 2024]
- Illinois Wesleyan University – Title IX/Dismissal Procedures



# WMU COLLECTIVE BARGAINING AGREEMENT

10.§6.1 In cases of hostile environment sexual harassment, and subject to applicable law, Western and the Chapter recognize that the classroom constitutes a setting which involves wide latitude in the presentation and discussion of ideas which are germane to the subject matter being taught (see Article 13, Academic Freedom and Academic Responsibility).

<https://www.wmuaaup.org/contract/agreements>



# UNIVERSITY OF OREGON: EMPLOYEE RESPONSIBILITIES

## **Reporting requirements through July 31, 2024**

Until the emergency policy goes into effect, the university will continue to differentiate reporting responsibilities between employee categories.

### **Employee Reporting Categories**

Every university employee falls into one of three categories, each with specific reporting obligations for all forms of prohibited discrimination, regardless of whether the disclosure is made by a student or employee.

#### Designated Reporters

Employees with authority to address prohibited conduct.

#### Assisting Employees

These employees should explicitly ask the person making the disclosure whether they want assistance with submitting a report

#### Confidential Employees

Employees with professional obligations and/or commitments to confidentiality.



# UNIVERSITY OF OREGON: EMPLOYEE RESPONSIBILITIES

## Reporting requirements as of August 1, 2024

- The University of Oregon implemented an [emergency policy on August 1, 2024](#), to comply with these requirements. ***Under the emergency policy, all faculty and staff must report disclosures of discrimination, harassment, and retaliation, including those made by students to the Title IX coordinator.***
- New Title IX regulations specifically state that ***anyone with responsibility for teaching, advising, or administrative leadership is obligated to notify the Title IX coordinator of sex-based discrimination and harassment*** to ensure the university can respond effectively by offering support and options for addressing what happened. Under the emergency policy, students will retain agency to decide how they want to move forward.
- Under the revised regulations and UO emergency policy, there is no longer a specific list of designated reporters who have a duty to report. Instead, ***all faculty and staff are expected to report disclosures of sex discrimination, harassment, and retaliation to the Title IX coordinator.*** Your obligation to report is not at a student's discretion.
  - All [employees are designated reporters](#), except most [student employees](#) and those deemed as [confidential employees](#). This expectation includes graduate employees, resident assistants, and orientation leaders.
  - Members of the board of trustees are also designated reporters under this policy.
- Title IX regulations allow for certain employees to be designated as confidential. ***There are confidential employees at the UO***, those with professional obligations and/or commitments to confidentiality, who maintain confidentiality while offering information, resources, and reporting options to students, including confidential advocates in the Care and Advocacy Program in the Office of the Dean of Students.

<https://investigations.uoregon.edu/employee-responsibilities>



# ILLINOIS WESLEYAN UNIVERSITY: TITLE IX/DISMISSAL PROCEDURES

## Sexual Misconduct Policy provisions (p. 8):

### **F. Principles for the Grievance Process. Under this grievance process, IWU shall:**

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xi. Ensure that any individual designated as a Title IX Coordinator/Deputy Coordinator, investigator, or decision-maker(s) understands that IWU is committed to the principles of academic freedom. Vigorous discussion and debate are fundamental to the University, and this Policy is not intended to stifle teaching methods or infringe upon academic freedom. The protections of academic freedom must be carefully considered in all reports of Sexual Misconduct involving faculty. The fact that speech or a particular expression is offensive is not, standing alone, a legally sufficient basis to establish a violation of this Policy. The academic setting is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material.



# ILLINOIS WESLEYAN UNIVERSITY: ACADEMIC FREEDOM

## Sexual Misconduct Policy provisions (p. 9):

### **Section 6: Live Hearings under the Grievance Process**

A. Decision-Maker(s).

i. *Faculty member Respondent*. The grievance procedures for faculty members (including Adjunct Professors) can be found in the Faculty Handbook, Chapter VI,

[Note, however, this section also includes the following provision:]

v. Notwithstanding any other University policies applicable to the decision-maker(s) (i.e., Faculty Handbook) the provisions of this Policy will control the Grievance Process.

## Provisions from the Faculty Handbook (Ch. II-14) (revised Aug. 22. 2023)

### **C. ARTICLE II. Academic Freedom and Due Process**

Dismissal for cause proceedings will be conducted according to the “Procedures for Dismissal for Cause” as established by the Hearing Committee and published in the *Faculty Handbook* and, more generally, the American Association of University Professors’ “1958 Statement on Procedural Standards in Faculty Dismissal Proceedings.” (pp. 11-14 of *AAUP Policy Documents and Reports*, 2001, 9th edition).

