

# Council of Business Affairs Conference (COBA) Winter Conference 2023

# What is next for Title IX? Key changes you should know.

February 3, 2023

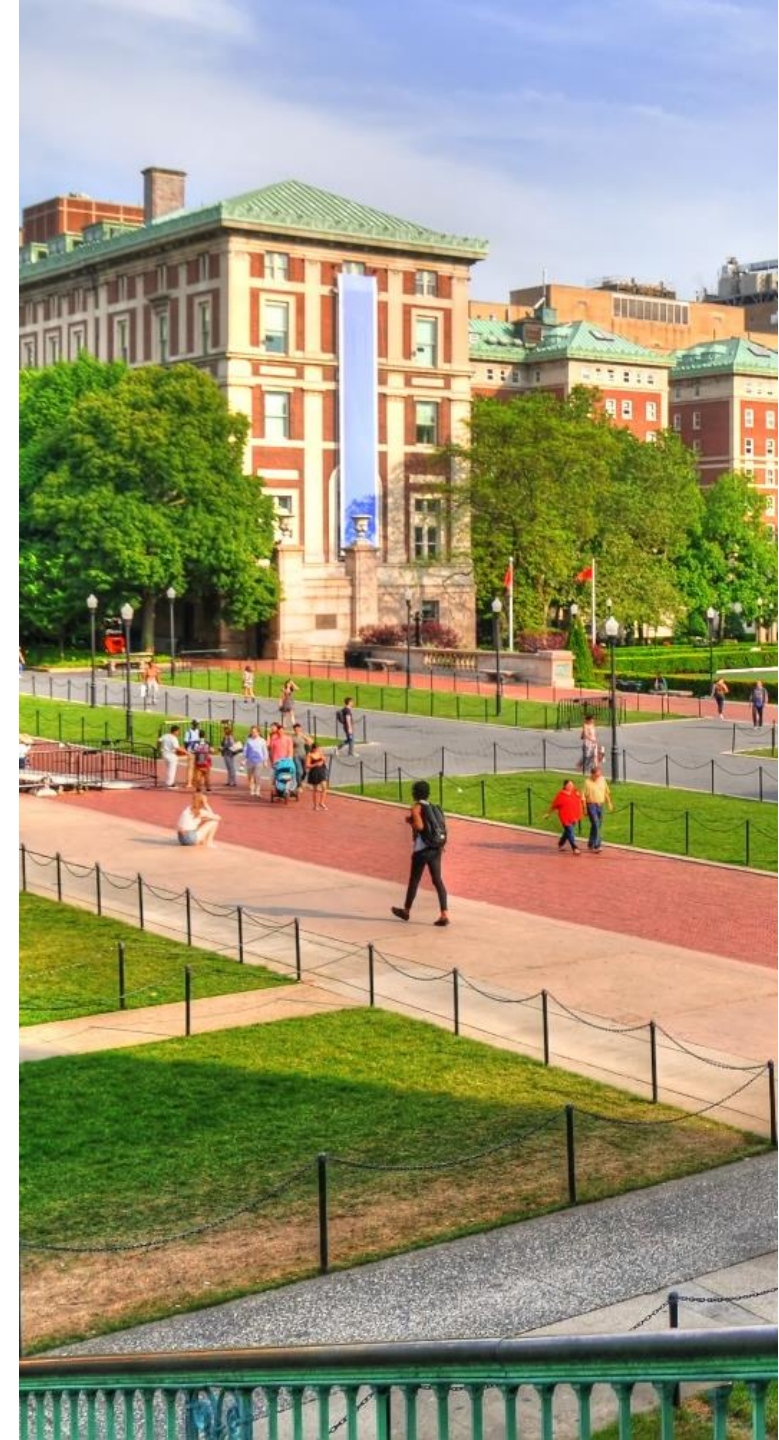
# Today's Speakers



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# Why Title IX and Compliance are Critical...

# Education Claim Awards Greater Than \$1 Million United Educators (UE) Large Loss Report

Category of Claim	HE/ K-12	2023	2022	2021	2020	2019
<b>Discrimination – Gender/Age</b>	<b>4-HE 1-K12</b>	<b>\$1M-3M \$2M</b>	\$750—4M	800- 1.46M	250k- 850k	400K- 850K
<b>Sexual Harassment</b>	<b>1-K12</b>	<b>\$1.26M</b>	585K	0	0	0
<b>Sexual Misconduct</b>	<b>3-HE 7-K12</b>	<b>\$2.25M-490M \$10M-102.5M</b>	650—2.4M	500K- 73M	300K- 215M**	250K- 500M
<b>Sexual Discrimination</b>	<b>1-HE 1-K12</b>	<b>\$1.7M \$1.225M</b>	0	0	0	0
<b>Defamation</b>	<b>2-HE</b>	<b>\$1.5M &amp; \$4M</b>	0	1.75M	0	0
<b>Retaliation</b>	<b>1-HE 1-K12</b>	<b>\$17M \$24.8M</b>	600-2.4M	360K	360K	0

# Education Claim Awards Greater Than \$1 Million United Educators (UE) Large Loss Report

Category of Claim	HE/ K-12	2023	2022	2021	2020	2019
<b>Wrongful Termination</b>	<b>2-HE 1-K12</b>	<b>\$23.6M \$2.8M</b>	1.28M	300K-4.9M	300K- 4.9M	0
<b>Ransomware</b>	<b>1-HE</b>	<b>\$1.14M</b>	547K-10M	0	0	0
Bullying	0	0	3M	500K	0	700K
Wrongful Death	0	0	0	1M-8M	0	423K- 14M
Concussion	0	850K	0	0	5.87M	1.1M
Free Speech	1/0	0	2M	505K	0	550K
Unequal Pay	1/0	0	3.7M	250K-2.7M	0	0

# Words to remember.....

Keep me safe....your duty is...

Known or should have known

Failure to disclose knowledge  
of prior offenses

Protected perpetrator, did you??

# Take action

# New words to remember.....

...strengthen protections for LGBTQI+

...eliminate sex discrimination

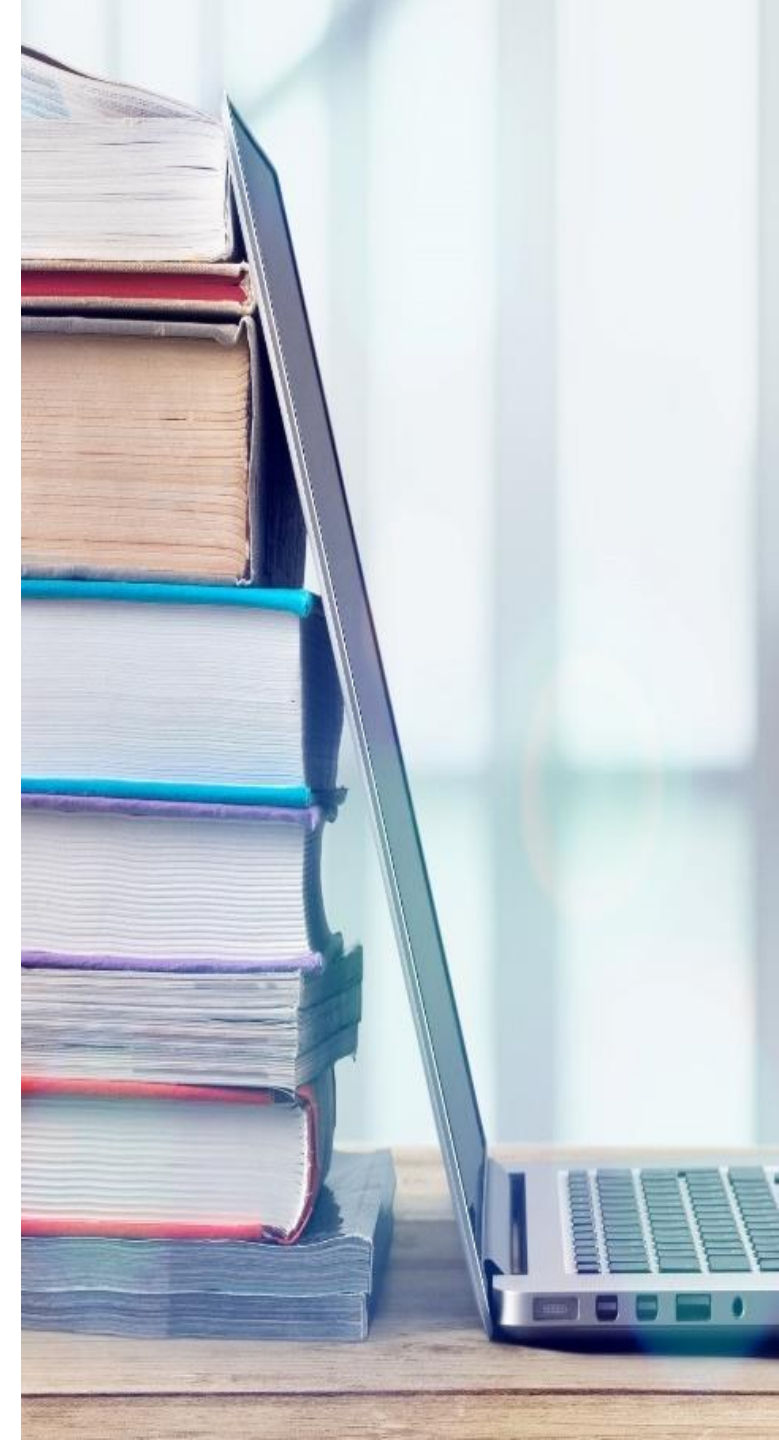
...fair to all involved...

New protection--pregnancy discrimination

...promote accountability

# Title IX of the Education Amendments of 1972 - 20 U.S.C. §1681(a)

*“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.”*





# A Brief Timeline...

- May 6, 2020: ED issues its final rule adopting revised Title IX regulations
- August 14, 2020: Trump Administration Title IX regulations go into effect
- Also in June 2021: ED issues [notice of interpretation](#) on *Bostock*
  - ED will enforce Title IX's prohibition on discrimination on the basis of sex to include (1) discrimination based on sexual orientation and (2) discrimination based on gender identity
- June 23, 2022: ED [proposes changes to regulations](#) on the 50<sup>th</sup> Anniversary of Title IX
  - ED will conduct a separate rulemaking to address Title IX's application to athletics
- May 2023?: Possible date for issuance of new Title IX regulations



# Federal Enforcement

- U.S. Department of Justice (DOJ)
- U.S. Department of Education
  - Title IX – OCR
    - Loss or suspension of Federal financial assistance
    - Referral to DOJ
  - And Clery Act – FSA (Federal Student Aid)
    - Fine of \$67,544 per violation



# What's new?

## Recipient's Response to Sexual Harassment

### 2020 Final Title IX Regulations

A recipient with actual knowledge of sexual harassment in a recipient's education program or activity against a person in the United States must respond in a manner that is not deliberately indifferent. § 106.44(a) and 106.44(b)(2).

A recipient is deliberately indifferent if its response to sexual harassment is clearly unreasonable in light of the known circumstances. § 106.44(a).

Employees with the authority to institute corrective measures have actual knowledge. § 106.30(a).

### 2022 Proposed Title IX Regulations

A recipient must take **prompt and effective action\*** to end any prohibited sex discrimination that has occurred in its education program or activity, **prevent its recurrence, and remedy its effects.\*** Proposed § 106.44(a).

Employees who have authority to take corrective action or, for incidents involving students, has responsibility for administrative leadership, teaching or advising in the recipient's education program or activity, are **obligated\*** to notify the Title IX Coordinator. Proposed § 106.44(c).

All other employees are obligated to notify the Title IX Coordinator or provide their contact information and information about reporting, except confidential employees. Confidential employees must provide the Title IX Coordinator's contact information and information about reporting. **The institution must provide clear information and training on notice requirements\***. Proposed 106.44(c).

**\*Management of Risk**

# What's new?

## Education Program or Activity

### 2020 Final Title IX Regulations

“[E]ducation program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. §106.44(a).

If the conduct alleged in the formal complaint ... did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment[.] § 106.45(b)(3).

### 2022 Proposed Title IX Regulations

Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority.

A recipient has **an obligation to address a sex-based hostile environment under its education program or activity\***, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States. Proposed § 106.11(a).

***\*Management of Risk***

# What's new?

## Sexual Harassment

### 2020 Final Title IX Regulations

Sexual harassment is sexual assault and quid pro quo harassment, as well as other forms of sexual misconduct that constitute a sexually hostile environment. Added domestic violence, dating violence, and stalking to the definition of sexual harassment, as defined by reference to VAWA.

Hostile environment is only unwelcome conduct determined by a reasonable person to be so severe **and** pervasive **and** objectively offensive that it effectively denies a person equal access to a recipient's education program or activity. § 106.30(a).

### 2022 Proposed Title IX Regulations

Employs the term "sex-based harassment" that includes sexual assault, quid pro quo harassment, dating violence, domestic violence, stalking, and hostile environment harassment.

Hostile environment harassment is unwelcome sex-based conduct that is sufficiently severe **or** pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity. Proposed § 106.2.

# What's new?

## LGBTQIA+ Protections

2020 Final Title IX Regulations	2022 Proposed Title IX Regulations
Did not address, <i>but see</i> ED Notice of Interpretation of <i>Bostock v. Clayton County</i> .	Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. Proposed § 106.10.  <b>Management of Risk – create new training programs for all stakeholders</b>

# What's new?

## Reporting

### 2020 Final Title IX Regulations

Complainant must be a participant or attempting to participate in the education program or activity of the recipient at the time of filing a formal complaint. § 106.44.


### 2022 Proposed Title IX Regulations

Complainants may file a complaint about sex discrimination even after leaving the recipient's education program or activity. Proposed §§ 106.2 and 106.45(a)(2).

Title IX Coordinator must monitor for barriers to reporting information about conduct that may constitute sex discrimination under Title IX. Recipient **must take reasonably calculated steps to address reporting barriers\*** identified by the Title IX Coordinator. Proposed § 106.44(b).

**\* Management of Risk – update policy and procedures, especially website references**

# What's new?

	2020 Title IX Final Regulations	2022 Proposed Title IX Regulations
<b>Grievance Process</b>	Live hearings and cross-examination by a party's advisor are required. § 106.45.	 <p>Recipient may, but need not, provide for a live hearing. If a live hearing is available, a party's advisor is allowed to ask certain relevant questions to the other party or any available witnesses. If a live hearing is not available, the decision-maker is allowed to ask certain relevant questions during a meeting with the party to assess the credibility of the parties and witnesses. Proposed § 106.45(g).</p> <p><b>Management of Risk – create clarity on position</b></p>
<b>Retaliation</b>	Recognizes retaliation as intimidation, threats, coercion, or discrimination for the purpose of interfering with any right or privilege secured by Title IX. § 106.71.	<p>Recognizes “peer retaliation” as a form of retaliation, defined as “retaliation by a student against another student.” Proposed § 106.2</p> <p><b>Management of Risk – Update current policies to align with new definition</b></p>



# What's new?

## Pregnant and Parenting Students

### 2020 Final Title IX Regulations

Recipients must not apply any rule, relating to potential parental, family, or marital status of a student or applicant that treats individuals differently based on sex.

Recipient must not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery.

Recipients must treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery in the same manner and under the same policies as any other temporary disability or physical condition.

Recipient must not make pre-admission inquiries into an applicant's marital status.  
Recipient may ask an applicant to self-identify their sex, but only if all applicants are asked and the response is not used as a basis for discrimination. § 106.21(c).

### 2022 Proposed Title IX Regulations

Recipient must not discriminate based on a **student's current, potential, or past pregnancy or related conditions\***.

Recipient may permit a student to participate voluntarily in a separate part of its education program or activity, so long as the recipient ensures the separate education program or activity is comparable to what is offered to students who are not pregnancy and who do not have related conditions.

When **an employee\*** is informed of a student's pregnancy or related conditions, the **employee must promptly inform\*** the student (or individual with the legal right to act on behalf of the student) of how they can notify and contact the Title IX Coordinator for assistance, unless the employee reasonably believes that the Title IX Coordinator is already aware.  
Proposed § 106.40.

**\*Management of Risk – addition of new policy on pregnancy and new expectations of “employee”**

# What's new?

## Pregnant and Parenting Students *Continued*

### 2020 Final Title IX Regulations

(see previous slide)

### 2022 Proposed Title IX Regulations

Identifies “[s]pecific actions to prevent discrimination and ensure equal access.” The Title IX Coordinator must promptly inform the student (or if applicable the person who notified the Title IX Coordinator) that:

- (1) the recipient is prohibited from sex discrimination, including sex-based harassment;
- (2) **reasonable modifications to the recipient’s policies, practices, and procedures because of pregnancy or related conditions are available\*** to the student (discussed in further detail later in the proposed regs);
- (3) the recipient’s obligation to allow access, on a voluntary basis, to any separate and comparable portion of the recipient’s education program or activity;
- (4) the recipient’s obligation to allow a voluntary leave of absence (discussed in further detail later in the proposed regs);
- (5) the recipient’s obligation to ensure the **availability of lactation space\*** (discussed in further detail later in the proposed regs);
- (6) the recipient’s obligation to maintain grievance procedures that provide for prompt and equitable resolution of complaints of sex discrimination, including sex-based harassment. Proposed § 106.40.

**\*Management of Risk – addition of new policies for pregnancy-related conditions**

# Future Considerations....

...provisions related to athletics and gender identity...

...Role of HR going forward...

...enhance grievance policies...

fair to all involved...

...prompt and equitable resolution...how?

...nondiscrimination policies....

# Q&A

# Thank You



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