



What is Title IX?

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- Title IX of the Education Amendments of 1972:

“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.” 20 USC 1681.

- DOE issues regulations implementing Title IX. The Office for Civil Rights (OCR) enforces them.

2024 Final Rule

Codified in the Code of Federal Regulations at 34 CFR Part 106

<https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf>

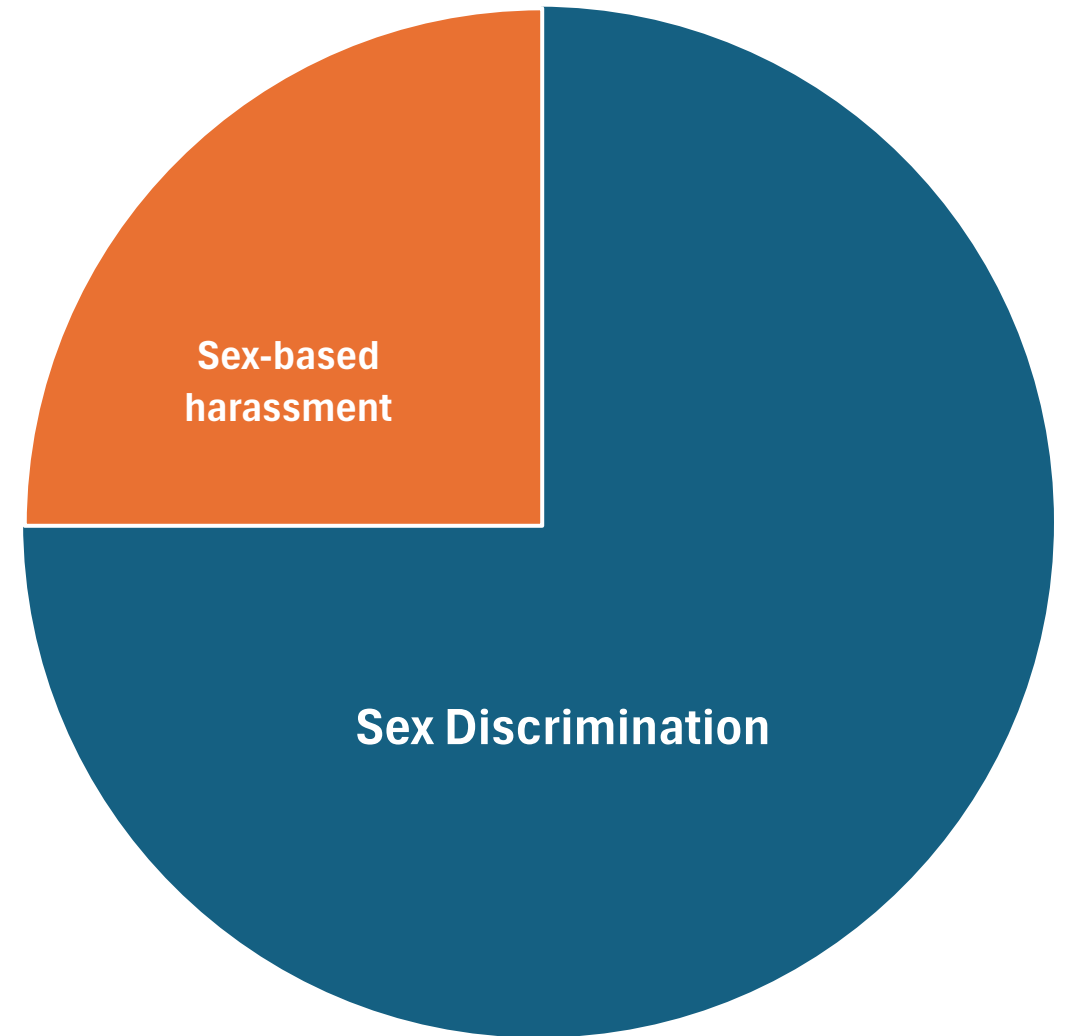
- Issued on April 19, 2024 to be effective August 1, 2024
- Regulations will not be enforced retroactively
- General themes
 - Remove barriers to reporting sex discrimination
 - More university flexibility in designing grievance procedures
- BUT...
Court injunction currently prevents enforcement

Expanded Scope of Sex Discrimination

§ 106.10

More conduct covered under Title IX and Grievance Procedures:

- 2020 Rule: only covered **sexual harassment**
- 2024 Rule: clarifies that sex discrimination includes discrimination based on **sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity**





Discrimination against Employees Based on Pregnancy

§ 106.57

- School must not discriminate against any employee or applicant on the basis of current, potential, or past pregnancy or related conditions
- School must treat pregnancy or related conditions as any other temporary medical condition for all job-related purposes
- School must provide reasonable lactation time and access to a lactation space

Major changes

- Can't exclude students from activities based on **gender identity**
- Formerly “sexual harassment,” now “**sex-based harassment**”
 - includes sexual harassment as well as harassment on the basis of sex, sex stereotypes, pregnancy, gender identity, etc.
- New definition of **hostile environment harassment**
 - Depends on the type, duration, frequency, and context
 - Includes **verbal** hostility based on sex
 - Includes **online** conduct, e.g. social media, cyberstalking, images, etc.
 - Does **not** include isolated remarks, even if offensive or bothersome
 - Whether **misgendering** constitutes sex-based harassment is fact-specific, but stray remarks, such as misuse of language, would **not** constitute harassment

Definition of “Complainant”

- Complainant must be a UMass student, staff, or faculty member, or someone engaged in a UMass activity at the time of the conduct
- Complaints can now be brought by **former** or **prospective** students and employees **as long as** they were participating in the institution’s programs or activities when the alleged conduct took place. § 106.2.
- Includes off-campus activities/programs/conduct

Mandated Reporting or “Responsible employees”

Before 2024, MSP had negotiated excellent language: all of us were required to refer and provide resources; only directors, chairs, deans were mandatory reporters

Now, under the federal regs, all post-secondary institutions must require:

- All non-confidential employees who have (1) authority to institute corrective measures **or (2) responsibility for administrative leadership, teaching, or advising** to notify the Title IX Coordinator when the employee learns of conduct that may constitute sex discrimination. § 106.44(c)(2)(i)
- All other non-confidential employees must **either** report or provide information

UMass has taken a different position: ALL EMPLOYEES are mandatory reporters

Special cases

- **Confidential Employees:** Schools have discretion to designate confidential employees, who aren't subject to the mandatory reporting requirements
- **Union representatives (staff and elected leaders)** are treated as confidential advisors to union members
- **Pregnancy:** If a student discloses a pregnancy or related condition to an employee, the employee must: (1) Promptly provide the student with the Coordinator's contact information, and (2) Inform the student that the Coordinator can provide accommodations
- **Training Requirements:** Schools must provide training to **all** employees. Training must address all employees' obligations to report, how students can seek confidential assistance, and how students can initiate Title IX grievance procedure

Union Member-on-Member Harassment

- **Duty of Fair Representation** is owed to both alleged harasser and victim of harassment, if they are both members of the bargaining unit
- Union should provide **separate representation** for each member
- **However, neutrality not required:** A Union “should not ‘be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact.’” *Fitchburg School Committee*, MUP-4511 (1982)
- Union can investigate, make a credibility determination, and pursue the grievance/represent the interests of the credible employee. See *Hellums v. Quaker Oats, Co.*, 760 F.2d 202 (8th Cir. 1985)



Academic Freedom

- “Nothing in the Title IX regulations restricts the academic freedom of faculty members.”
- “Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.”
- “Conduct that could amount to harassment in other settings may not amount to harassment if engaged in appropriately in the academic setting, especially in the context of academic discourse.”
- “The Department does not believe it is necessary to revise § 106.6(d) [regarding constitutional protections] to explicitly protect academic freedom.” P. 116-117.

Major problems

- **Obligation to negotiate with the union:** Administration failed to uphold their legal obligation to bargain; MSP has filed charges
- **Court injunction stands:** Until the case is decided and the injunction is lifted, UMass does not have to make any changes to current policies. New rules cannot be enforced by DOE/OCR
- **Confusion about definitions, policies and processes:** Lack of clarity harms complainants as well as respondents
- **Ineffective EOA office:** Current processes take far too long and are mishandled
- **Legal liability shifts from the institution to individuals** under the new rules

Title IX procedures MUST be bargained with union

- Who are confidential employees?
- Reasonable timeframes
- Single or separate investigator/decisionmaker; one decider or panel
- Standard of proof: preponderance of evidence or clear & convincing
- Right to advisor (one or more); extent to which advisor can participate
- Informal resolution opportunities and process
- Whether investigator is required to produce investigative report
- Whether to hold live hearings; if live hearings, role of advisor(s)
- Appeals processes after determinations are made

Where are we now?

- All employees are currently “responsible employees” under the new rules
- BUT the new rules cannot be enforced because of the court injunction
- AND we have not been trained in Title IX policies and procedures
- AND our rights and responsibilities are unclear and were not negotiated
- AND experts have shown that mandatory reporting harms survivors and the campus
- AND many faculty will not report a student’s disclosure against their will
 - In a seminar discussion? Q&A with a guest speaker? An open mic night?
 - In a course paper or journal entry or creative essay?
 - In a survey response? → Possible conflicts with academic freedom, IRB, and MSP contract

If you're confused...

- **You are not alone!**
- **Have a confidential conversation with MSP leaders and/or staff anytime about any issue**
- **MTA Legal Department can provide attorneys if you are facing charges or other legal issues**
- **As soon as we are able to negotiate with the administration around Title IX policies and procedures, MSP will provide guidance to our members**