

2024 Legal Landscape and Update

Chicagoland TIX Consortium

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What happened?

- Final version of regulations was released Friday, April 19
- Regulations will take effect August 1, 2024
- Regulations cover sex discrimination, sexual harassment, pregnancy accommodations, and grievance procedures
- Regulations do not explicitly cover sex-separated sports teams

Litigation



- Filed by 22 states to date
- Likely challenges:
 - Rulemaking process
 - Due process elements (or alleged lack thereof)
 - Definition of “sex” to include gender identity and other categories
 - Free speech

What should we do?

- Revise policies and procedures (and related documents)
- Update training content and train key personnel before school starts
- Consider Illinois State law issues



Key Elements/Changes

Broader Scope

- Detailed procedural requirements for adverse treatment and programmatic sex discrimination
- Expanded geographic scope to include more off campus conduct (connected to hostile environment on campus; subject to disciplinary authority)
- Broader understanding of “sex” to include sexual orientation, gender identity, and pregnancy

Modified Definitions

- “Quid pro quo” harassment expansion
- Adoption of Title VII definition of “hostile environment”
- Clarification of “retaliation”
- Sexual assault and VAWA definitions from August 2020 regulation are essentially the same

Mandatory Reporting

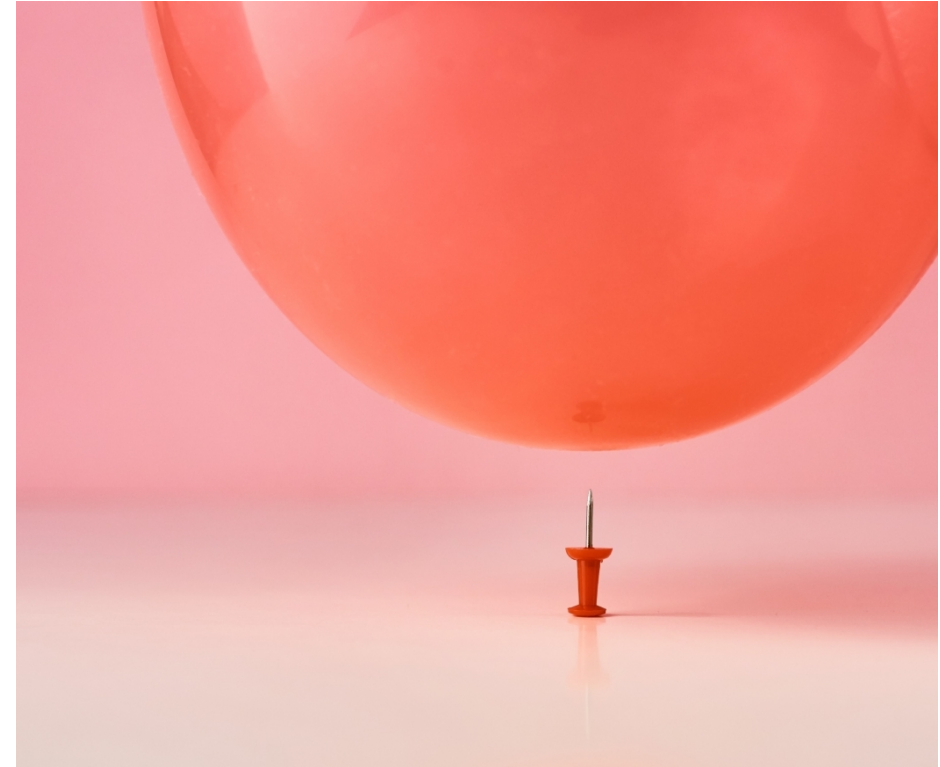
- Many higher education employees are reporters:
 - Authority to institute corrective measures
 - Administrators
 - Faculty
 - Advisors

Complaints

- “Formal” compliant concept is eliminated; complaints can be made verbally and without signature
- Alleged victim need only to have been a participant at the time of the misconduct to make a complaint of harassment
- Persons with legal authority to act on behalf of a victim are allowed to file complaints of harassment
- Wider group of potential complainants for sex discrimination other than sexual harassment

Interim Removals

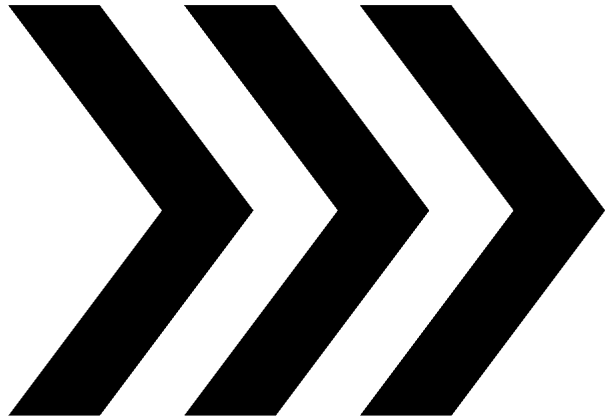
- Interim student removals are possible when there is an immediate or serious threat to “health or safety”
- Eliminates requirement of a threat to “physical safety”



Supportive Measures

- Prohibits their imposition for punitive or disciplinary reasons
- Allows parties to appeal supportive measure decisions and seek revisions if circumstances change

Dismissal



- Rigid mandatory dismissals are eliminated
- Permissive dismissal, which would be unusual and taken only after additional steps to clarify

Informal Resolution

- Formal written complaint no longer a predicate
- Now permitted for claims that an employee harassed a college or university student (in institution's discretion and where no conflict with federal, state or local law)
- Investigator cannot facilitate informal resolution

Training

Mandatory basic training for all employees at hiring and annually

Role-specific and more detailed training for persons who play a specific role in Title IX process

Pregnancy/Gender Identity

Pregnancy and Pregnancy-Related Conditions

- Discrimination and harassment based on pregnancy or pregnancy related conditions is prohibited
- Institution must provide reasonable modifications based on individualized needs (do not have to fundamentally alter programs)
- Right of reinstatement to academic status held when leave began
- Explicit requirement for lactation space
- Limitations on document demands to validate conditions of pregnancy and certifications of safety

Pregnancy Reporting

- If a student informs an employee of student's pregnancy or related conditions, employee must provide student with Title IX Coordinator's contact information and inform student of Title IX Coordinator's authority to prevent discrimination and ensure equal access
- Once Title IX Coordinator is notified, institution must then contact student and inform student of legal rights, including reasonable modifications

Gender Identity

- Included as part of “sex” for purposes of defining discrimination and harassment
- An institution must not engage in different treatment or separation that causes *more than de minimis* harm unless a statutory exception applies (housing; athletics)
- Differential treatment or separation based on gender identity subjects a person to more than *de minimis* harm

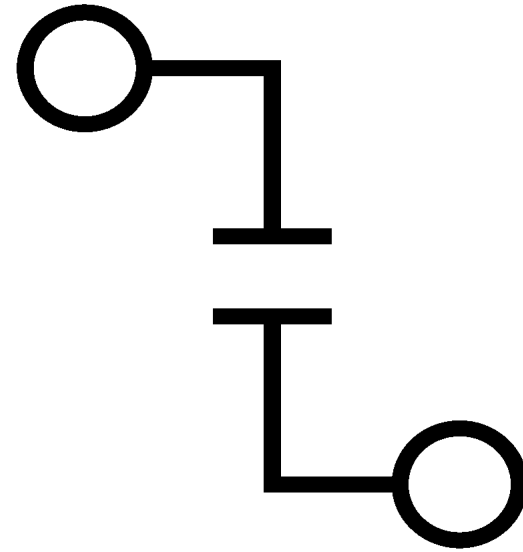
Athletics

- Separation of athletics teams by sex is the subject of a separate notice of proposed rulemaking and not addressed by August 1, 2024 regulations
- Finalized athletics team regulation not anticipated until 2025

Grievance Procedures

Grievance Procedures

- Distinction between general procedures for sex discrimination and sexual harassment
- Special procedures for higher education sexual harassment cases with a student complainant or respondent



General Procedures

- Apply to sex discrimination, and all non-student sexual harassment cases
- Include fairness, equity, notice, presumption, and relevance elements similar to August 2020 regulations
- Require fewer elements to be in writing and does not require an investigation report
- Does not require the use of advisors
- Does not require a hearing, although “decisionmaker” must be allowed to question parties and witnesses where necessary to determine credibility

Higher Education Student/Harassment Procedures

- Require written notice of allegations similar to August 2020 regulations
- Allow parties to be accompanied by advisors
- Right to appeal dismissals
- Must include a mechanism that permits decisionmaker to question parties and witnesses where credibility is in dispute
- Allows an augmented investigator model, investigator/adjudicator model, or live hearing for decision-making

Augmented Investigator-as-Decisionmaker-Model

- Investigator must be allowed to ask parties and witnesses relevant questions, including those that bear on credibility
- Must allow parties to propose questions to be asked of other party and witnesses by the investigator
- Must provide parties a recording or transcript of initial interview in time to propose follow-up questions
- Investigator can then issue a written decision, after parties have been presented with evidence or a summary thereof and been given a chance to respond

Investigator/Adjudicator Model

- Investigator conducts the investigation and provides the parties access to the evidence or a report, including recordings or transcripts of interviews
- A separate person is appointed as decisionmaker, who holds subsequent meetings with parties and witnesses, asks questions bearing on credibility, and asks questions (including follow up questions) proposed by the parties
- Decisionmaker then issue a written decisional document.

Live Hearing Model

- Similar to August 2020 concept of a live hearing with some changes:
- Decisionmaker must be allowed to ask questions and
- Party can either:
 - Propose their questions to a decisionmaker to have them asked, or
 - Have an advisor ask questions on their behalf

Cross-Examination/Weight



- No strict exclusionary rule
- Decisionmaker may place “less weight or no weight” upon statements where party or witness refuses to respond to relevant questions



Questions