

Book: Policy Manual

Section: For Board Review - Title IX Regulations

Title: Overview

Code: 1

Status: From Neola

Policy 2266 – Nondiscrimination on the basis of sex in education programs or activities.

This new policy is provided for the purpose of implementing the recent Title IX regulations promulgated by the Department of Education. The regulatory requirements go into effect on August 14, 2020. The regulations provide detailed requirements concerning Title IX protections, as well as detailed provisions for identifying, reporting, investigating and making determinations of responsibility for acts of sexual discrimination/harassment that school districts must follow in responding to such incidents. Finally, the regulations provide great detail concerning the use of supportive measures, providing remedies, and imposing sanctions to respondents in the event a violation is found to have occurred. In some instances, the process imposed by these regulations is inconsistent with those used in other, similar, contexts.

Due to the unique nature of the regulatory structure, the policy is drafted as a standalone policy applicable only to Title IX governed complaints and investigations. It has been intentionally kept separate from existing school district policies regarding other forms of discrimination, harassment, or bullying, as well as separate from Policy 5517 - Student Anti-Harassment, which shall continue to apply to claims reviewed under state law. The policy also references that and other policies covering similar concepts and serving a similar purpose, namely to provide protections against conduct that harms students' ability to access the District's educational opportunities.

There are a couple of reasons for this structure. First, as noted the new Title IX regulations require a significantly more comprehensive and specific method of response to reports of sexual discrimination/harassment than is required for other forms of discrimination/harassment.

Specifically, districts are required to appoint a Title IX Coordinator, apply specific presumptions and standards, and incorporate specific definitions, in addition to other requirements that are articulated in the policy. In practice, those requirements may prove time-consuming, onerous, and unwieldy, especially if applied to all forms of discrimination/harassment. Likewise, there remains concern that the application of the presumption of innocence is not consistent with investigative procedures and standards applicable in other contexts. Also, the investigation process, being more rigid in its design, may not reasonably be concluded within 90 calendar days as required in the case of state law anti-harassment.

Second, since their release, the guidelines have received considerable criticism along with legal challenges that may result in nullifying or delaying the application of all or part of the new rules. Wisconsin joined 16 other states and the District of Columbia in suing the Department of Education to enjoin the regulations. The plaintiff states have sought expedited review of the complaint in federal court, specifically due to the implementation timeline. The Department of Education's response is due on July 15, 2020. Finally, the upcoming presidential/congressional election could result in a new administration that, should that occur, is likely to revise or altogether withdraw the recent regulations.

Given the above, Neola recommends a standalone policy that can be adopted (and later removed, if needed) with little or no impact on other anti-discrimination/anti-harassment policies. Neola will hold off as well on revising those other nondiscrimination/anti-harassment policies and procedures until at least the Fall update cycle to allow for some time for clarification and/or resolution of uncertainties related to the Title IX framework is known. This means as well that this Policy, which implements the new federal Title IX regulations, will be complementary to current Policy 5517, which provides some overlap in coverage and applies state law provisions found in Wis. Stat. § 118.13.

The policy language, particularly as it relates to certain definitions, may undergo additional changes in the coming months without regard to the pending federal court cases. This is because the regulations contemplate further action by other agencies to implement provisions of the regulations, such as the definition of "rape" which is to be updated and/or revised by the Federal Bureau of Investigation as it phases out the current Uniform Crime Reporting System (UCR) for the more comprehensive National Incident-Based Reporting System. Therefore, this policy, as noted, is provided to assist Districts in meeting the implementation guideline, with the understanding that we will continue to monitor developments as they occur.

AG 2266 – Nondiscrimination on the Basis of Sex in Education Programs or Activities

The new guideline is provided to accompany the new policy. The Guideline provides additional procedures and includes provisions on training and recordkeeping requirements to supplement the policy.

In particular, the AG expands on some of the definitions in the policy and provides examples of them. The AG provides direction concerning the need to identify and avoid conflicts of interest or impermissible bias associated with complainants and respondents generally or the specific Complainant and Respondent in a particular case. Additionally, the AG outlines circumstances that might serve as reasonable/good cause for temporarily delaying an investigation in the context of the Title IX process (noting in the Policy that timelines in Policy 5517 – Student Anti-Harassment which incorporates Wis. Admin. Code § PI 9 must still be met in every instance in which the complaint context implicates state student nondiscrimination protections in Wis. Stat. § 118.13).

The AG further details the preliminary assessment that the Title IX Coordinator should complete upon receipt of a Formal Complaint of Sexual Harassment to verify it falls under the jurisdiction of Policy 2266. The AG additionally defines the supportive measures that the Title IX Coordinator needs to offer to the Complainant and Respondent, along with the content of the notice that needs to be provided to a party in advance of a meeting, interview and/or hearing.

While the policy explains the roles of Title IX Coordinator, investigator, and decision-maker, the AG addresses in detail the scope and nature of the role of advisor.

The AG also provides more detailed information about the remedies that can be offered if a Respondent is determined responsible for violating the policy.

Finally, the AG sets forth details concerning the training the Board should provide to all employees, members of the District's Title IX team, and students in order to meet its Title IX obligation to operate an education program and activities that are free from discrimination the basis of sex. The AG concludes with a list of the records that need to be retained associated with the implementation of Policy 2266.