

Title IX Updates

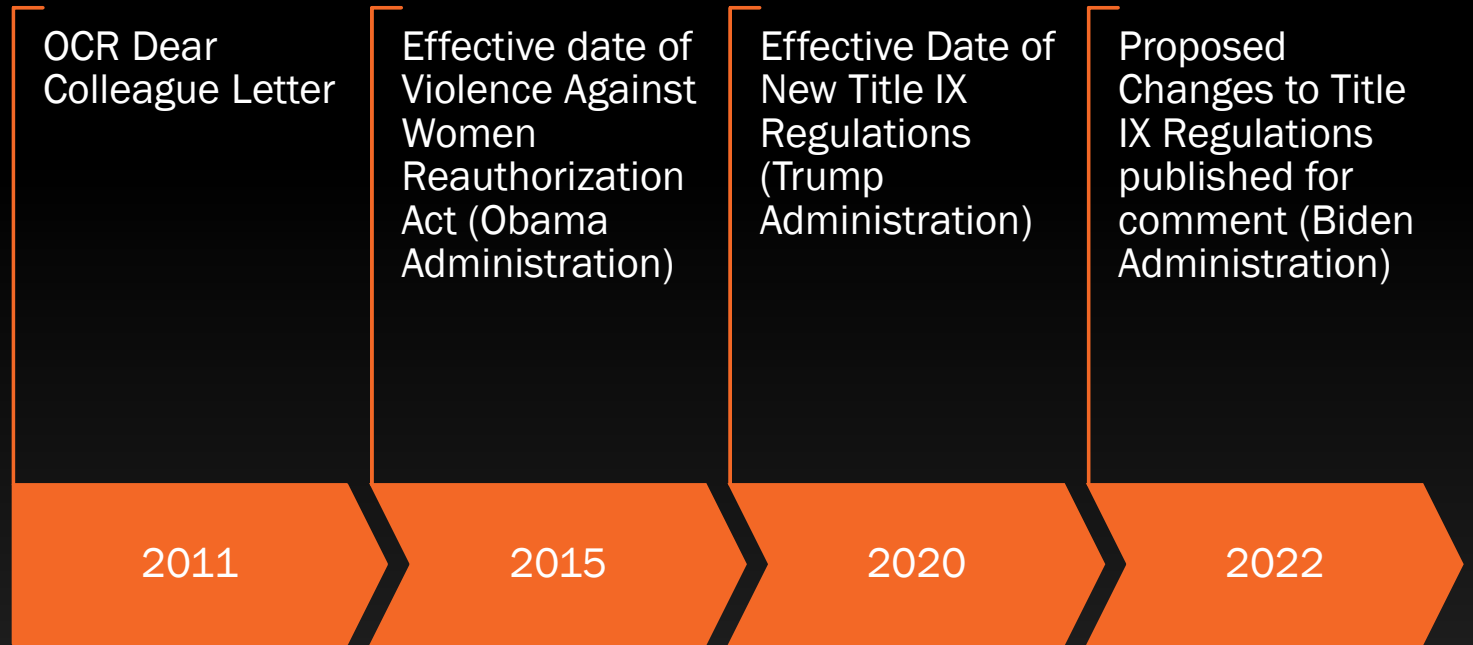
SEPTEMBER 21, 2022

PRESENTED BY:

BRANDEE HANCOCK, DEPUTY GENERAL
COUNSEL, BOARD OF REGENTS FOR THE
OKLAHOMA A&M COLLEGES AND CHIEF
LEGAL OFFICER TO THE OKLAHOMA
STATE UNIVERSITY PRESIDENT



Where are we?



Current Regulations (2020)

- Became effective August 14, 2020
- Resources
 - Webinars presented by Mackenzie Wilfong, General Counsel for Tulsa Community College, Aleigha Mariott, Director of Student Support and Conduct and Deputy Title IX Coordinator at Oklahoma State University are archived and available at no charge at <https://www.tulsacc.edu/title-ix-regulations-conference>.
 - Additional resources at <https://system.suny.edu/sci/tix2020/>.

Major Process Changes in 2020 Regulations

- Institutions can choose between preponderance of the evidence or clear and convincing as the standard of evidence.
 - Neither standard is defined in the regulations.
 - Must use the same standard for employees **and** students.
- Mandatory reporters (responsible employees) can be a much smaller group.
 - Only required to include the Title IX Coordinator and any official who has the authority to institute corrective measures on behalf of the institution.
- Title IX Coordinator responsible for providing supportive measures (non-disciplinary, non-punitive individual services offered to complaint and respondent).

Major Process Changes in 2020 Regulations

- Report is different than a formal complaint
 - Does not trigger investigative or hearing process
 - Must provide information about supportive measures and explain process to file formal complaint
 - Third parties can report
- Formal complaint must be signed (can be digital) by complainant or Title IX Coordinator

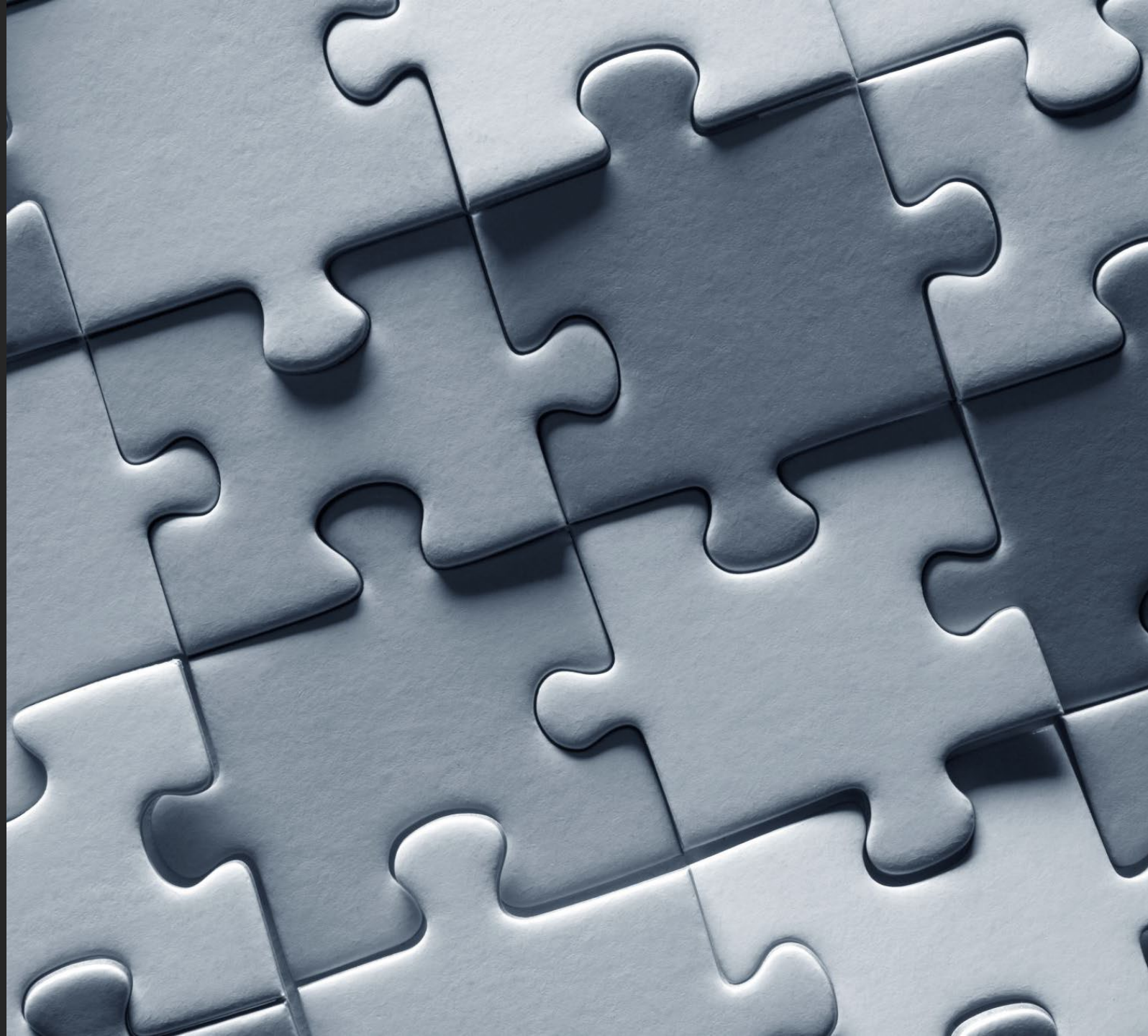
Major Process Changes in 2020 Regulations

- Formal complaints **must** be dismissed (from the Title IX process) if conduct:
 - Would not constitute sexual harassment even if proved,
 - Did not occur in institution's program/activity, or
 - Did not occur against a person in the United States (study abroad).
- Formal complaints **may** be dismissed (from the Title IX process):
 - If complainant requests to withdraw their complaint
 - If respondent is no longer enrolled or employed
 - When specific circumstances prevent gathering evidence sufficient to reach a determination
- Informal resolution (mediation) is now available unless complaint is a faculty on student issue. Requires specific notice to the parties and voluntary, written consent.

Major Process Changes in 2020 Regulations

- All investigations must end with a written report.
- Structured process with specific timelines to allow parties to review investigative report and evidence before the hearing.
- For all decisions (faculty, staff, and students) the institution must have a live hearing with cross-examination by an advisor, which can be done virtually.
 - Only advisor can conduct cross-examination.
 - The institution must provide an advisor “without fee or charge” to any party without an advisor in order to conduct cross-examination (can limit the role to only conducting cross-examination).
 - The decision maker must rule on relevance of questions on the record.
 - Regulations required parties and witnesses must attend hearing and submit to live, advisor-led cross-examination. If party or witness does not attend, all statements submitted by absent party must be excluded. This provision was vacated by a federal district court in Massachusetts (<https://www2.ed.gov/about/offices/list/ocr/blog/20210824.html>).
- All training materials used for anyone in the Title IX process must be made public on a website

Proposed Changes



Definitions

- Full text of proposed regulations at <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf>.
- Prohibit all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
- Quid pro quo harassment prohibited
- Harassment creating a hostile environment prohibited
 - “Unwelcome conduct this is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient's education program or activity.”
- “Program or activity” includes conduct in buildings owned or controlled by a student organization officially recognized by the institution and conduct occurring off campus when respondent is a representative of the recipient or is otherwise engaged in conduct under the recipient disciplinary authority

Institutional Obligations

- Moves away from “actual knowledge” standard in 2020 regulations
 - Must take prompt and effective action to end any prohibited sex discrimination, prevent its recurrence, and remedy its effects
- Responsible employee category broadened from 2020 regulations
 - For higher education, any employee with authority to take corrective action, or if the incident involves students, any employee with responsibility for administrative leadership, teaching, or advising
- Excludes confidential employees
- Complainant may file a complaint even if they leave the institution
- Prohibit retaliation, including peer retaliation

Institutional Obligations – Grievance Procedures for Sex Discrimination

- Treat complainants and respondents equitably
- Unbiased decision-makers and investigators
- Presumption of not responsible
- Reasonably prompt timeframes for all major stages
- Reasonable steps to protect privacy of parties/witnesses
- Notice of allegations
- Investigation that allows equal opportunity for parties to present relevant facts/witnesses/evidence
 - Burden on institution to gather sufficient evidence
 - Determination of relevancy of information
 - Provide parties description of evidence and reasonable opportunity to respond
- Informal resolution allowed but not required but NOT when complaint alleges sex discrimination by employee against student

Institutional Obligations – Grievance Procedures for Sex-Based Harassment Involving a Student

- Generally same as sex-based discrimination but with additional requirements
- Written notice of not just allegations, but also dismissal, delays, meetings, interviews, and hearings
- Access to relevant evidence or to a written report summarizing evidence
- Process to assess credibility of parties/witnesses that includes either:
 - Decisionmaker asking relevant questions in meeting/hearing and allowing parties to propose relevant questions
 - Allowing advisor for each party to ask relevant questions to other parties/witnesses during hearing
 - Cannot rely on statements supporting a party's position if the party refuses to answer credibility questions
- Allow advisors for each party
- Hearing allowed but not required
 - Must allow participation from separate locations in any hearing
- Opportunity to appeal based on procedural irregularity, new evidence, and conflict of interest or bias + any other bases offered equally by institution

Institutional Obligations

- Broadens protections based on pregnancy or related conditions
- When a student tells an employee of pregnancy or related conditions, employee must provide information about how to contact the Title IX Coordinator
- Title IX Coordinator must:
 - Provide student with option of individualized, reasonable modifications to prevent discrimination and ensure equal access
 - Allow student a voluntary leave of absence for medical reasons and reinstatement upon return
 - Provide a clean, private space for lactation
- Employees must be provided reasonable break time and a clean, private space for lactation

Now What?



Comment period
ended September 12



More than 235,000
comments submitted



Timeline unknown



Separate rule-making
to address athletic
participation