2024 Title IX and Policy 522 Update

Introduction

In April 2024, the U.S. Department of Education, Office of Civil Rights (OCR) released the latest version of the Final Rule (regulations) for Title IX (34 Code of Federal Regulations, part 106).

The U.S. Department of Education website states that the 2024 Final Rule protects all students and employees from all sex discrimination prohibited under Title IX, including discrimination based on sex stereotypes, sexual orientation, gender identity and sex characteristics. The 2024 Final Rule also revises the procedures that schools are to implement for Title IX grievances and related matters.

The 2024 Final Rule, which has an effective date of August 1, 2024, has been challenged in courts throughout the United States, though not in Minnesota at the time that the new version of Model Policy 522 was created. States that have challenged the 2024 Final Rule have focused upon the Final Rule's prohibition on gender identity discrimination and upon provisions that may potentially require schools to allow transgender students to use restrooms, locker rooms, and pronouns that align with their gender identity, among other claims. Courts have issued injunctions preventing enforcement of the Title IX Final Rule in states that have challenged the regulations.

The Title IX Final Rule provisions to which some states have objected in court are consistent with state law in Minnesota and some other states. The Minnesota Human Rights Act (Minnesota Statutes, chapter 363A) prohibits discrimination "in any manner in the full utilization of or benefit from any educational institution" because gender identity. In September 2020, the Minnesota Court of Appeals issued a decision involving a transgender student's use of a school locker room. The Court wrote, "we conclude from the plain language of the MHRA prohibits separating and segregating a transgender student from locker-room access" (the court later extended its reasoning to restroom use).

Because the 2024 Final Rule appears to be largely consistent with the Minnesota Human Rights Act and because the Final Rule's procedural provisions may be significantly beneficial, **MSBA created a new version of Model Policy 522, which is now posted on the MSBA website.**

The revisions to Model Policy 522 largely restructure the previous version of the model policy and include numerous changes. Due to the significant nature of these changes, the 2024 revisions are not shown in redline—the Model Policy 522 fully replaces the previous version.

In summary, the changes include:

- Article I, Paragraphs A-D - These paragraphs were substantially revised to comply with the new requirements of the 2024 Final Rule.

- Article I, Paragraph E – This paragraph includes language as to the expanded scope of a school district's obligations under the 2024 Final Rule.

- Article I, Paragraph J – This paragraph adds language to the existing paragraph as required by 34 C.F.R. § 106.31(a).

- Article II – The 2024 regulations delete references to "actual knowledge" and deliberate indifference" and insert a requirement that schools respond "promptly and effectively." *See* C.F.R. § 106.44(a). The definitions in Article II were revised to incorporate this change.

- Article III – This Article addresses the designation of a school district's Title IX Coordinator. The 2024 Final Rule significantly revised the designation requirements under Title IX, allowing some of the required roles/responsibilities in the grievance process to be combined or performed by one individual. It is recommended, however, that school districts designate a primary Title IX Coordinator and at least one alternate Title IX Coordinator so that the alternate can undertake Title IX Coordinator responsibilities in the event the primary Title IX Coordinator is a party to a complaint or is otherwise not qualified under this policy to serve in that role in a particular case.

- Article IV - This Article is essentially new as it incorporates numerous changes and significant additions to school district requirements related to protecting parent, family, marital status and related conditions as found in 34 C.F.R. § 106.40.

- Article VI, Paragraph F – This paragraph address emergency removals of students and employees from school who are alleged to have engaged in harassment and/or violence. The interrelationship between the Title IX regulations authorizing the emergency removal of students and the Minnesota Pupil Fair Dismissal Act (MPFDA) is unclear at this time. School districts should consult with legal counsel regarding the emergency removal of a student. At a minimum, it is recommended that school districts provide alternative educational services, as defined in the MPFDA, to any student so removed under the Title IX regulations.

- Article VII – The grievance procedures in this Article were significantly revised in the 2024 Final Rule resulting in substantial revisions to this Article.

- Article VII.B – As noted in this section, the Title IX regulations require reasonably prompt timeframes for major stages of the grievance procedures, but do not specify any particular timeframes. School districts may, therefore, establish their own district-specific timeframes. Despite this discretion, it is recommended that legal counsel be consulted before adjusting time periods as the suggested timeframes still comport with the general expectations of enforcement agencies and significant changes could lead to a legal challenge.

- Article VII.B.7(c) - This paragraph identifies how certain evidence is to be considered in determining if harassment occurred. One factor addressed is the issue of consent. This term is not defined in the Model Policy or in the new regulations. The federal Department of Education will not require a school district to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment and the determination as to what "consent" means will be left to the school district. If assistance is needed in a particular case in determining this standard, it is recommended that school district legal counsel be consulted.

- Article VII.E. – This paragraph addresses an untested provision of the Title IX regulations that gives schools some discretion to consolidate related complaints. The regulations provide that a school district's obligation to comply with Title IX and its regulations is not obviated or alleviated by the Federal Educational Rights and Privacy Act (FERPA), 20 United States Code, section 1232g, or its implementing regulations, 34 Code of Federal Regulations, part 99, or any state law or local law. Thus, as noted in this section of the model policy, schools have the discretion to consolidate related complaints despite the data privacy rights of individual parties or witnesses. It is important to note, however, that this decision is discretionary. Yet, the decision may have an impact not only on data privacy rights but the ultimate determination as to a violation by the respondent(s) due to the introduction of evidence that shows additional acts of alleged misconduct. For these reasons, there is a possibility that challenges could be raised if a school district unilaterally decides to consolidate complaints, even if it has the right to do so under Title IX. For these reasons, before making this decision, school districts may wish to consult with legal counsel as to whether to unilaterally proceed with consolidation or seek the prior written consent from parties to consolidate and waive their data privacy rights, to the extent the right to privacy or other due process rights are impacted.

- Article XV. C.5 – This paragraph provides a notification as to the prohibition that a school district must not distribute publications stating that applicants, students or employees may be treated differently based on sex unless otherwise permitted. The 2024 Final Rule adds requirements regarding the notice of nondiscrimination and the publication of this requirement.

- Article XVI – This Article sets out specific data retention requirements under the 2024 Final Rule. These retention requirements may differ from school district retention policies under their adopted Records Retention Schedule that is required by state law. Thus, school districts should consider whether amendments should be made to their Records Retention Schedule and submitted to the State Historical Society for approval.

To the extent that the 2024 Final Rule is challenged in a manner that would affect its enforcement in Minnesota, MSBA will make adjustments to the Model Policy in the future. For the time being, however, the revisions to this policy are applicable and enforceable for Minnesota schools. School boards are encouraged to consult with the school district's attorney if they have questions as to adopting the new version of Model Policy 522.