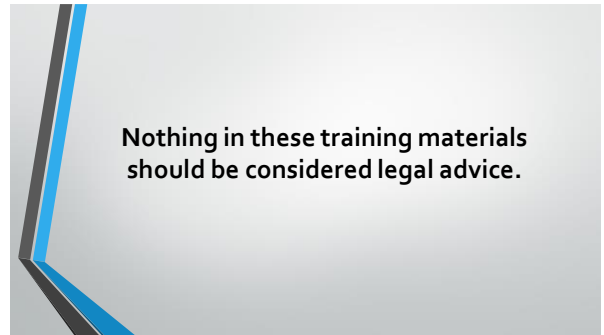
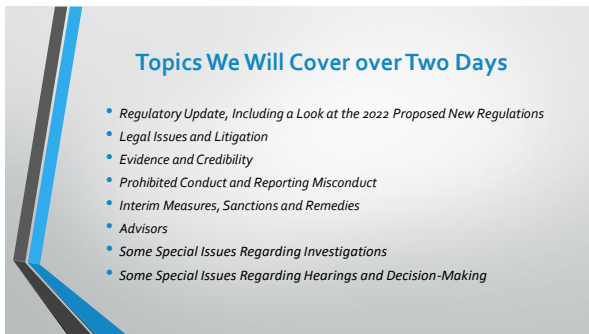


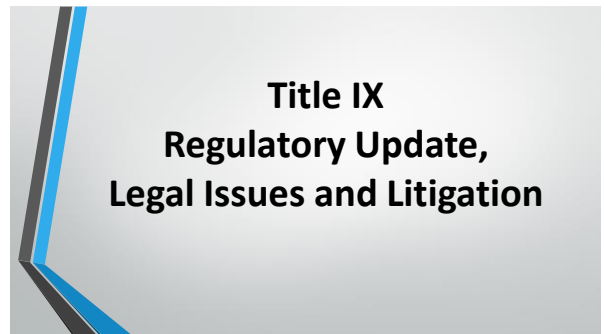
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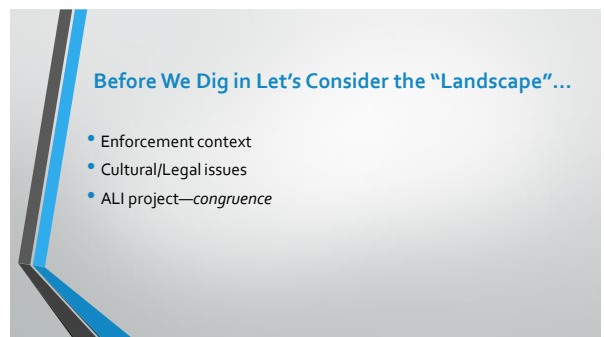
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Examples of Title IX Regulatory Enforcement Under Biden

LSU

- Title IX-related DOE investigation (also under investigation for Clery Act)
- LSU Law Firm Report
- NASA
- Voluntary Resolution Agreement (March 22, 2021)

Examples of Title IX Regulatory Enforcement Under Biden

San Jose State

- Resolution agreement with U.S. Dept of Justice and U.S. Attorney's Office for the Northern District of California
- Female student-athletes were abused by an athletic trainer and SJSU failed to appropriately respond to reports of the abuse
- SJSU will pay \$1.6 million to victims and will reform Title IX system
- SJSU's President stepped down

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Title IX— Cultural and Legal Issues

Tinder Points

- LGBTQI+ [NPRM at 23 n. 4] →
- Transgender Athletes/ Bathrooms
- Pronouns
- Expressive Freedoms—Note focus on "conduct"
- Due Process—single investigator, cross-examination—"college court?"
- **Reproductive rights**
- Men's rights
- Training/costs of compliance/ "reliance interest"
- Sexual violence prevention/intervention
- Transparency/FERPA
- Efficacy—Note DOE comments on supportive services

The Department generally uses the term "LGBTQI+" to refer to students who are lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, or describe their sex characteristics, sexual orientation, or gender identity in another similar way.

Title IX— Cultural and Legal Crossfire

- Efficiency
- Authenticity and mission
- Mental health
- Red blue purple affinity...and travel/enrollment management
- Prevention/ prevention
- Role of alcohol and other drugs...only mentioned with amnesty. SDFSCA guidance?
- Reporting structures// criminal justice interface
- Consumer focus: No contact and supportive measures
- Field position football fatigue
- DOE's role in education—DeVos comments in Florida

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American Law Institute (ALI) Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities

- This document is extraordinary and forward thinking.
- First effort by ALI to articulate principles of due process for student conduct administration in its history.
- Crafted by members of ALI, in consultation with others, the principles are likely to be influential to both jurists and educators—and indeed have been, as evidenced by newly proposed Title IX regulations that are noticeably consistent.
- All schools should review Title IX policies in consultation with this document.
- [student-misconduct-td1-black-letter.pdf.ali.org](https://www.ali.org/publications/student-misconduct-td1-black-letter.pdf)

Title IX- Some Observations on Related Litigation and Legal Issues

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Title IX Updates—Court Watch

SCOTUS—Winds of change

- Faith protection—*Guadalupe, etc.* [Note: Upcoming Bill Thru Webinar]
- “Sex”—*Bostock, etc.*
- Damages Limits—*Cummings*
- Privacy/ Substantive Due Process—*Dobbs v. Jackson Women’s Health Organization* (overturning *Roe*)
- Limits of Regulatory Authority—*State Farm, West Virginia v. Environmental Protection Agency*

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Title IX Updates—Court Watch (SCOTUS cont’d)

- Athletes—*NCAA v. Alston*
- First Amendment and “harassment”—Clues from *Mahoney (Fenves)/Elonis*
- No major Title IX focus as such on the docket but...
 - Justice Comey Barrett now sits on the high court, author of *Purdue* in a 7th Circuit case in 2019—focus on due process and a relaxed standard to plead sex discrimination—a prognosticator?
 - NOTE: Intersection of proposed Title IX regulations and *Dobbs* “... Title IX covers discrimination based on medical conditions related to or caused by pregnancy, childbirth, **termination of pregnancy**, or lactation ...” (NPRM at 461).

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Title IX Updates—Court Watch Cont’d

Judicial activism in lower federal courts on due process and compliance error/ inactivism of SCOTUS

Examples

- 6th Circuit in *Baum*
 - 7th Circuit in *Purdue*
 - Colorado Court of Appeals in *Doe v. University of Denver*
 - 3rd Circuit in *University of Sciences*
 - “Plausible allegations supporting the reasonable inference that USciences discriminated against him (plaintiff) on account of his sex.” (Male plaintiff drank alcohol at levels similar to female complainants but only male plaintiff’s actions were investigated.)
 - “USciences’s contractual promises of ‘fair’ and ‘equitable’ treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.”
- Billion Dollar Exposure; e.g., Univ. of Southern California—\$852 million settlement in case regarding abuse by campus gynecologist

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Dimensions of Title IX-Related Litigation

- Athletic Equity
- Deliberate Indifference
- Due Process
- Retaliation
- Erroneous Outcome
- Selective Enforcement
- Plausible Inference
- “Preventable” Sexual Assault Claims – State Negligence Claims
- Hazing/Student Suicide
- Breach of Contract
- Negligent Investigation?
- Tortious failure to provide fair process?

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Civil Action Under Title IX

- The US Supreme Court allows actions in court to pursue damages for Title IX (but with many limitations).
 - *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 3989, 141 L. Ed. 2d 277 (1998).
 - *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999).
 - “[S]chool administrators will continue to enjoy the flexibility they require in making disciplinary decisions so long as funding recipients are deemed ‘deliberately indifferent’ to acts of student-on-student harassment only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”
- Victims as “plaintiffs” face tough standards
 - Knowledge (Reporting)
 - Pattern
 - Objective
 - Deliberate indifference
- The Supreme Court has hesitated to:
 - Apply Title IX to a “single act”
 - Broadly protect LGBTQ rights, but see the recent *Bostock* Title VII decision (more to come on this...)

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“Gebser/Davis Framework” for Evaluating Institutional Compliance (with Some Twists)

3-Part Framework

1. A definition of actionable sexual harassment
2. The school’s actual knowledge
3. The school’s **deliberate indifference**

4. Promptness

5. Equitableness

6. Reasonableness

- 2020 regs re: grievance procedures well beyond *Gebser*
- Roadmap for litigation?
- Risk of DOE enforcement?
- Doug Lederman, *A New Day at OCR Inside Higher Ed* (June 28, 2017).

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From the 2020 Regulations:

The Department believes that the Davis definition in § 106.30 provides a definition for non-quit pro quo, non-Clergy Act/VAWA offense sexual harassment better aligned with the purpose of Title IX than the definition of hostile environment harassment in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter.

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"Deliberate Indifference"

As the Supreme Court reasoned in Davis, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances."

[U]nless the recipient's response to sexual harassment is clearly unreasonable in light of the known circumstances, the Department will not second guess such decisions.

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"Deliberate Indifference" Cont'd

[T]he final regulations apply a deliberate indifference standard for evaluating a recipient's decisions with respect to selection of supportive measures and remedies, and these final regulations do not mandate or scrutinize a recipient's decisions with respect to disciplinary sanctions imposed on a respondent after a respondent has been found responsible for sexual harassment.

[T]he Department will not deem a recipient not deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment.

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Deliberate Indifference

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613 (6th Cir. 2019).

In 2011, Michigan State University (MSU) student John Doe sexually assaulted fellow student Emily Kollaritsch. Kollaritsch reported the assault, and the university opened an investigation. The investigation lasted over six months. During that time, MSU placed no restrictions on Doe and made no accommodations for Kollaritsch, even though the two lived in the same dormitory. The school concluded that Doe had violated MSU's sexual harassment policy, placing him on probation and issuing an order that prohibited him from contacting Kollaritsch. Doe proceeded to violate the order on at least nine occasions by "stalking, harassing, and intimidating" Kollaritsch, who had a panic attack on each encounter. She reported the violations and then filed a complaint for retaliatory harassment with MSU. During its investigation, MSU provided no interim safety measures, and Kollaritsch obtained a protection order from a local court. MSU concluded that no retaliatory harassment had occurred.

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Deliberate Indifference

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613 (6th Cir. 2019).

For "causation," Judge Batchelder pointed to language in Davis that a school may not be liable for damages unless its "deliberate indifference subject[ed] its students to harassment." She noted that Davis understood the verb "subject[s]" to mean that "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." In the Sixth Circuit's view, the fact that Davis linked the verb "subject[s]" to harassment, not injury, was critical; it necessarily meant that a deliberate indifference claim requires further actionable harassment. Thus, "a plain and correct reading" of causation in Davis dictates two ways the school's response can result in further harassment: (1) through action that investigates harassment, or (2) through inaction that renders the victim unprotected from harassment. Either way, Davis "presumes that post-notice harassment has taken place." The court thus rejected the plaintiffs' interpretation that the phrase "or . . . make [students] . . . vulnerable to [harassment]" established a separate basis for liability. On these facts, Judge Batchelder concluded that Kollaritsch failed to show that her subsequent encounters with John Doe were severe, pervasive, or objectively offensive. Similarly, the mere fact that MSU allegedly left the other plaintiffs vulnerable to encountering their assailants was insufficient to establish actionable further harassment. The students thus failed to satisfy the causation element under Davis; the school's response had not caused them to suffer a second instance of actionable harassment.

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Due Process

- "Due Process" - a complex and multidimensional concept
- More than dialectic between "complainants" and "respondents"
- The college as bystander or neutral: Citizens United?
 - Peter Lake, *Colleges Are Legally Pummeled From All Sides. It's Time They Fought Back.* In Chron. of Higher Educ., The New Risk Management: A Multilayered Strategy for Today's Legal Threats (Jan. 2022). [This special report is available in the Chronicle store.]
 - Is this the way to create college court?
- What about resource imbalances between institutions or complainants/respondents?
 - Doe v. Baum, 903 F.3d 575 (6th Cir. 2020).
 - Haidek v. Univ. of Mass., Amherst, 933 F.3d 56 (1st Cir. 2019).
 - John Doe v. Purdue University, Case No. 17-3565 (7th Cir. June 28, 2019).

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Erroneous Outcome

Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994).

A plaintiff must show facts both casting doubt on the outcome of the disciplinary proceeding and connecting that outcome to gender bias.

Samartha Harris, Third Circuit: Private Universities that Promise Basic Fairness Must Provide Hearing, Cross-Examination to Students Accused of Sexual Misconduct, FIRE Newswatch (June 1, 2020).

Selective Enforcement

Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994).

A plaintiff must plead facts showing that the institution treated a similarly situated individual differently on the basis of sex (e.g., that in a case where both parties were alleged to have had sex while heavily intoxicated and unable to consent, the university took action against one student but not the other).

Samartha Harris, Third Circuit: Private Universities that Promise Basic Fairness Must Provide Hearing, Cross-Examination to Students Accused of Sexual Misconduct, FIRE Newswatch (June 1, 2020).

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Plausible Inference

Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019).

"[T]o state a claim under Title IX, the alleged facts, if true, must support a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex."

*Amy Comey Barrett

"Preventable" Sexual Assault Claims – State Negligence Claims

Karasek v. Regents of Univ. of California, 956 F.3d 1093 (9th Cir. 2020).

1. a school maintained a policy of deliberate indifference to reports of sexual misconduct,
2. which created a heightened risk of sexual harassment,
3. in a context subject to the school's control, and
4. the plaintiff was harassed as a result.

Karasek v. Regents of the University of California, No. 18-22144 (9th Cir. 2020) – [Link](#)

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Hazing/Student Safety

Gruver v. LSU

- Max Gruver died in a fraternity hazing incident.
- His parents allege a novel Title IX complaint: "that LSU discriminated against male students by policing hazing in fraternities more leniently than hazing in sororities."

• Trial date has yet to be set...

McCluskey v. Univ. of Utah

- Lauren McCluskey was shot and killed by a man she had dated (she broke off the relationship after finding out he was a convicted sex offender).
- Her family had repeatedly asked the University to intervene after he stalked and extorted her.
- The University admitted they could have done more to intervene and did not handle the situation properly. The University settled for \$13.5 million.

Breach of Contract

Doe v. University of the Sciences, No. 19-2966 (3d Cir. May 31, 2020).

Here, the fairness promised by the Student Handbook and the Policy relates to procedural protections for students accused of sexual misconduct, and Doe alleges that he did not receive a "fair and impartial hearing." In this context, a "fair hearing" or "fair process" is a term of art used to describe a judicial or administrative hearing conducted in accordance with due process. [Internal citations omitted.]

We hold that USciences's contractual promises of "fair" and "equitable" treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.

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SCOTUS/*Bostock* and Implications for Title IX

Bostock v. Clayton County (June 15, 2020)

A consolidation of three cases of employment discrimination under Title VII.

Holding: An employer who fires an individual merely for being homosexual or transgender violates Title VII of the Civil Rights Act of 1964.

Bostock: Critical Language

"These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff's sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group."

"Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."

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Bostock: Critical Language

"An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

"... homosexuality and transgender status are inextricably bound up with sex."

"We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

The *Bostock* Caveats

"The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today."

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The *Bostock* Caveats

"As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations... this Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers."

"Because the Religious Freedom Restoration Act (RFRA) operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." "But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too."

"So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way."

Battleground: *Bostock* and the New Dept. of Education Position on LGBTQ Protections

"OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Notice of Interpretation addressing Title IX's coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below."

U.S. Dept. of Education, Office for Civil Rights, The Department's Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, June 2015.

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Bostock and the New Dept. of Education Position on LGBTQ Protections Cont'd

In 2020, the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ____ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Notice of Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity.

U.S. Dept. of Education, Office for Civil Rights, The Department's Interpretation of Title IX of the Executive Order of 11888 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, June 2022

The New Dept. of Education Position on LGBTQ Protections visible before June 23, 2022

"The Supreme Court has upheld the right for LGBTQ+ people to live and work without fear of harassment, exclusion, and discrimination – and our LGBTQ+ students have the same rights and deserve the same protections. I'm proud to have directed the Office for Civil Rights to enforce Title IX to protect all students from all forms of sex discrimination.

Today, the Department makes clear that all students—including LGBTQ+ students—deserve the opportunity to learn and thrive in schools that are free from discrimination."

U.S. Secretary of Education Miguel Cardona
U.S. Department of Education Confirms Title IX Protects Students from
Discrimination Based on Sexual Orientation and Gender Identity
[Press release]
JUNE 16, 2022

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Bostock Pushback

- 21 State Attorneys General pushed back in a letter to Pres. Biden
- 20 States Sue Biden Administration
 - *Tennessee et al. v. United States Department of Education et al*, Tennessee Eastern District Court, Case No. 3:21-cv-00308
 - On July 15, 2022, plaintiff's motion for injunction was granted and defendants motion to dismiss was denied.

Faith and Trifurcation? *Our Lady of Guadalupe School v. Morrissey-Berru (July 8, 2020)*

- "Ministerial exception": application to Title VII and Title IX.
- Employees vs. Students
- "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."
- Nonsectarian "tenets" or "teachers"? Viewpoint discrimination?
- What may be next for students?

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Some Reflections on *Bostock* and Title IX?

"Title IX's broad prohibition on discrimination "on the basis of sex" under a recipient's education program or activity encompasses, at a minimum, discrimination against an individual because, for example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming. All such classifications depend, at least in part, on consideration of a person's sex. The Department therefore proposes to clarify in this section [§ 106.10] that, consistent with *Bostock* and other Supreme Court precedent, Title IX bars all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." (NPRM at 522.)

- How will campuses define "sex" going forward right now?
- Title VII = Title IX? Proposed rules aim to facilitate both processes.
- LGBTQ+ rights and *Bostock*...note the Court's emphasis on the specific issues raised. "On the basis of sex" // "Because of... sex"
- Spending v. Commerce clause...the "notice issue" ...addressed at some length in NPRM
- How are religious institutions impacted? Title IX's "religious tenets" exception and its date of origin.

AREAS TO WATCH: ATHLETICS AND MEDICAL *Snyder-Hill et al. v. The Ohio State University, Ohio Southern District Court, Case No. 2:18-cv-00736-MHW-EPD*

- 93 plaintiffs sued The Ohio State University as a result of alleged sexual abuse they suffered as students at the hands of Dr. Strauss
- Title IX claims include:
 - Hostile environment/heightened risk
 - Deliberate indifference to both prior sexual harassment and reports of sexual harassment
- Judge granted Ohio State's motion to dismiss on the grounds of the statute of limitations (Sept. 22, 2021)
- Open cases against Ohio State are still pending
- Ohio State has previously settled with over 200 men

Kantele Franco, *Ohio State sex abuse survivors plan appeals, defend motives*, Associated Press, Sept. 28, 2021.

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Concluding Thoughts: Litigation

- Litigation potential always exists
- Follow your own policy
 - Do what you say and say what you do.
- Do not be afraid to consult with your attorney
- Equity, bias, impartiality
- Think "contractual fairness"
 - Peter Lake, *From Discipline Codes to Contractual Respect*, Chron. of Higher Educ. (Nov. 26, 2017).

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The 2022 Proposed Title IX Regulations: Highlights from DOE in Their Own Words

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Some Key Features of Proposed Title IX Regulations: Sex stereotypes, Pregnancy, Sexual orientation, Gender identity are covered under Title IX

The Department's proposed regulations clarify that Title IX's prohibition of discrimination based on sex includes protections against discrimination based on sex stereotypes and pregnancy. The Department is also clarifying that Title IX's protections against discrimination based on sex apply to sexual orientation and gender identity. This clarification is necessary to fulfill Title IX's nondiscrimination mandate.

FACTSHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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Proposed Title IX Regulations: Hostile Environment Sexual Harassment

The proposed regulations will restore vital protections for students against all forms of sex-based harassment. Under the previous Administration's regulations, some forms of sex-based harassment were not considered to be a violation of Title IX, denying equal educational opportunity. The proposed regulations would cover all forms of sex-based harassment, including unwelcome sex-based conduct that creates a hostile environment by denying or limiting a person's ability to participate in or benefit from a school's education program or activity.

FACTSHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

Obama Era Definition of Hostile Environment

In determining whether this denial or limitation [to access to educational benefits] has occurred, the United States examines all the relevant circumstances from an objective and subjective perspective, including:

1. the type of harassment (e.g., whether it was verbal or physical);
2. the frequency and severity of the conduct;
3. the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student);
4. the setting and context in which the harassment occurred;
5. whether other incidents have occurred at the college or university;
6. and other relevant factors

U.S. Dept. of Educ. Office for Civil Rights and U.S. Dept. of Justice Civil Rights Division, University of Minnesota/University of Michigan, at 47 (May 8, 2012), <https://www.ed.gov/officefor-civil-rights/20120508-civil-rights-division>

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Trump Era Definition "Sexual Harassment" [Three-Prong Test]

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a **reasonable person** to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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Biden Era Definition of Sex-Based Harassment

Sex-based harassment prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that is:

- (1) *Quid pro quo harassment.* An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or implicitly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;
- (2) *Hostile environment harassment.* Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
 - (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
 - (ii) The type, frequency, and duration of the conduct;
 - (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;
 - (iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
 - (v) Other sex-based harassment in the recipient's education program or activity.

A Note on "Unwelcome Conduct"

The Department proposes retaining the requirement that the conduct in categories one and two of the definition of "sex-based harassment" must be unwelcome. Although the Department does not propose revising this requirement, **the Department understands it is important to provide recipients with additional clarity on how to analyze whether conduct is unwelcome under the proposed regulations.** Conduct would be unwelcome if a person did not request or invite it and regarded the conduct as undesirable or offensive. Acquiescence to the conduct or the failure to complain, resist, or object when the conduct was taking place would not mean that the conduct was welcome, and the fact that a person may have accepted the conduct does not mean that they welcomed it. For example, a student may decide not to resist the sexual advances of another student out of fear, or a student may not object to a pattern of sexually harassing comments directed at the student by a group of fellow students out of concern that objections might cause the harassers to make more comments. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that they object, then that would generally support a conclusion that the conduct was not unwelcome, depending on the facts and circumstances. In addition, simply because a person willingly participated in the conduct on one occasion does not prevent that same conduct from being unwelcome on a subsequent occasion. **Specific issues related to welcomeness may also arise if the person who engages in harassment is in a position of authority.** For example, because a teacher has authority over the operation of their classroom, a student may decide not to object to a teacher's sexually harassing comments during class; however, this does not mean that the conduct was welcome because, for example, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections they will be singled out for harassing comments or retaliation. (NPRM at 82-83.)

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Proposed Title IX Regulations: Emphasis on Pregnancy and Parenting Students

The proposed regulations would update existing protections for students, applicants, and employees against discrimination because of pregnancy or related conditions. The proposed regulations would strengthen requirements that schools provide reasonable modifications for pregnant students, reasonable break time for pregnant employees, and lactation space.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

NOTABLE: U.S. Department of Education's Office for Civil Rights Announces Resolution of Pregnancy Discrimination Investigation of Salt Lake Community College

OCR determined that the college violated both Title IX of the Education Amendments of 1972 (Title IX) and Section 504 of the Rehabilitation Act of 1973 (Section 504) after investigating allegations that Salt Lake Community College encouraged a pregnant student to drop a course because she was pregnant, did not engage in an interactive process to provide her with academic adjustments or necessary services during her pregnancy, and did not excuse her pregnancy-related absences or allow her later to submit work following those absences.

OCR found that the college violated Title IX and its implementing regulations by failing: (1) to respond promptly and equitably to the student's complaint of pregnancy discrimination, (2) to engage in an interactive process with the student to determine the appropriate special services and/or academic adjustments to provide in light of her pregnancy, and (3) to excuse her absences related to pregnancy, provide her the opportunity to make up work missed due to these pregnancy-related absences, or provide her with alternatives to making up missed work at a later date.

We do have the authority by to institute corrective measures. OCR website: https://www.ocr-oeo.gov/

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Proposed Title IX Regulations: Broadens Mandated Reporters on Campus

The proposed regulations would promote accountability and fulfill Title IX's nondiscrimination mandate by requiring schools to act promptly and effectively in response to information and complaints about sex discrimination in their education programs or activities. And they would require that schools train employees to notify the Title IX coordinator and respond to allegations of sex-based harassment in their education programs or activities.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

A Note on "Employee with responsibility for administrative leadership, teaching, or advising"

It is the Department's current understanding that employees with responsibility for administrative leadership would include deans, coaches, public safety supervisors, and other employees with a similar level of responsibility, such as those who hold positions as assistant or associate deans and directors of programs or activities. The Department anticipates that employees with teaching responsibilities would include any employee with ultimate responsibility for a course, which could include full-time, part-time, and adjunct faculty members as well as graduate students who have full responsibility for teaching and grading students in a course. It is the Department's current understanding that employees with responsibility for advising would include academic advisors, as well as employees who serve as advisors for clubs, fraternities and sororities, and other programs or activities offered or supported for students by the recipient. When a person is both a student and an employee, the Department expects that the person would be required to notify the Title IX Coordinator only of information that may constitute sex discrimination under Title IX that was shared with the person while they were fulfilling their employment responsibilities (e.g., receiving information about sex discrimination from a student during class or office hours). Similar to employees who have the authority to institute corrective measures on behalf of the recipient, the Department now believes that whether an employee has responsibility for administrative leadership, teaching, or advising is a fact-specific determination to be made by the recipient taking into account the types of factors just discussed and any others that may be relevant in the recipient's educational environment. (NPRM at 84, 85.)

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A Note on Barriers to Reporting and Prevention

"It is the Department's current view that a recipient must identify and address barriers to reporting information that may constitute sex discrimination under Title IX in order to fulfill this obligation." 19 NPRM at 101.

The Department has long emphasized the importance of a recipient's efforts to prevent sex discrimination. For example, in the preamble to its 2020 amendments to the Title IX regulations, the Department repeatedly acknowledged the importance of efforts to prevent sex discrimination. . . . The Department also added requirements related to training for certain employees in the 2020 amendments to the Title IX regulations . . . that serve a prevention function and thus are crucial to the fulfillment of Title IX. 19 NPRM at 101 (emphasis added).

"The Department notes that under this proposed requirement, a recipient may use various strategies to identify barriers, such as conducting regular campus climate surveys, seeking targeted feedback from students and employees who have reported or made complaints about sex discrimination, participating in public awareness events for purposes of receiving feedback from student and employee attendees, or regularly publicizing and monitoring an email address designated for receiving anonymous feedback about barriers to reporting sex discrimination." 19 NPRM at 101.

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Proposed Title IX Regulations: Outlines Key Grievance Procedure Requirements

- All schools must treat complainants and respondents equitably.
- Schools have the option to offer informal resolution for resolving sex discrimination complaints.
- Title IX Coordinators, investigators, decisionmakers, and facilitators of an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- A school's grievance procedures must give the parties an equal opportunity to present relevant evidence and respond to the relevant evidence of other parties.
- The school's decisionmakers must objectively evaluate each party's evidence.

FACTSHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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A Note on "Bias" and "Impartiality"...

ALI states:

§ 4.1. *Inquiries to Be Impartial, Fair, and Context-Sensitive*
Colleges and universities should strive in all inquiries and investigations to be impartial, fair, and sensitive to context.

§ 6.3. *Impartiality*
Colleges and universities should adopt procedures and criteria for selecting impartial decisionmakers.

§ 6.3c. *Challenges for Bias*
Colleges and universities should provide a simple procedure for complainants or respondents to challenge the participation of an investigator or adjudicator in their case.

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ALI on "Bias" and "Impartiality":

- "One sense of impartiality is structural, the idea that the judge of a case should not be chosen for the case because of his or her likely views on the outcome."
- "Another aspect of impartiality is the avoidance of financial or other forms of self-interest in the adjudication: an impartial adjudicator is one who does not have a financial interest in the outcome."
- "A third sense of impartiality means that the person has not prejudged the facts and is not likely to have difficulty maintaining an open mind and deciding based on the evidence presented."
- "Prior involvement in or knowledge of the facts at issue may create the appearance or reality of bias."
- "Still another sense of impartiality is decisionmakers' freedom to decide without fearing repercussions from the influence of 'mob' passions."
- "One source of potential bias may arise when a decisionmaker has a preexisting relationship with one or more parties."

See ALI, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities (American Law Institute Fall 2019), at 129-130.

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"Bias"

Ikpeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985):

"With respect to the claim of bias, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven."

NPRM at 281:

"To ensure that the grievance procedures are equitable, a recipient must ensure that the procedures are administered impartially. The Department therefore proposes retaining—in proposed § 106.45(b)(2)—the requirement that any person designated as a Title IX Coordinator, investigator, or decisionmaker must not have a conflict of interest or bias regarding complainants or respondents generally or regarding a particular complainant or respondent."

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Proposed Title IX Regulations: Outlines Key Grievance Procedure Requirements

- The proposed regulations would not require a live hearing for evaluating evidence, meaning that if a school determines that its fair and reliable process will be best accomplished with a single-investigator model, it can use that model.
- A school must have a process for a decisionmaker to assess the credibility of parties and witnesses through live questions by the decisionmaker. The proposed regulations would not require cross-examination by the parties for this purpose but would permit a postsecondary institution to use cross-examination if it so chooses or is required to by law.

FACTSHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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Proposed Title IX Regulations: Outlines Key Grievance Procedure Requirements

- In evaluating the parties' evidence, a school must use the **preponderance-of-the-evidence standard of proof** unless the school uses the clear-and-convincing-evidence standard in all other comparable proceedings, including other discrimination complaints, in which case the school may use that standard in determining whether sex discrimination occurred.
- A school must not impose disciplinary sanctions under Title IX on any person unless it determines that sex discrimination has occurred.

FACT SHEET: U.S. Department of Education's 2022
Proposed Amendments to its Title IX Regulations

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NOTE: Standard of Proof Alignment with ALI

"The Department notes that the American Law Institute (ALI) membership, at its May 2022 Annual Meeting, approved the following principle as part of its project on procedural frameworks for resolving campus sexual misconduct cases in postsecondary institutions:

§ 6.8. Standard of Proof

Colleges and universities should adopt the same standard of proof for resolving disciplinary claims of sexual misconduct by students as they use in resolving other comparably serious disciplinary complaints against students. Standards that require proof either by a "preponderance of the evidence" or by "clear and convincing evidence" can satisfy the requirements of procedural due process and fair treatment. Whatever standard of proof is adopted, decisions that the standard of proof is met should always rest on a sound evidentiary basis.

The Department's proposed regulations would align with the ALI position, providing that for sex discrimination complaints a recipient can use either the preponderance of evidence or the clear and convincing evidence standard of proof but must not use a higher standard of proof for evaluating evidence of sex discrimination than for other forms of discrimination or other comparable proceedings." NPRM #131754 (internal citations omitted).

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NOTE: Discipline v. Punishment

While punishment focuses on making a child suffer for breaking the rules, discipline is about teaching him how to make a better choice next time.

The Difference Between Punishment and Discipline.com/parenting.com

Proposed Title IX Regulations: Supportive Measures for Any Sex Discrimination

Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment.

Under the proposed regulations, schools would be required to offer supportive measures, as appropriate, to restore or preserve a party's access to the school's education program or activity. The current regulations require this support only when sexual harassment, rather than any form of sex discrimination, might have occurred.

FACT SHEET: U.S. Department of Education's 2022
Proposed Amendments to its Title IX Regulations

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Proposed Title IX Regulations: Retaliation

The proposed regulations would make clear that schools must not intimidate, threaten, coerce, or discriminate against someone because they provided information about or made a complaint of sex discrimination or because they participated in the school's Title IX process – and that schools must protect students from retaliation by other students.

FACT SHEET: U.S. Department of Education's 2022
Proposed Amendments to its Title IX Regulations

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What's next for the proposed regulations?

- 60 day notice and comment period.
 - Last notice and comment period garnered more than 100,000 comments.
 - Some advocacy groups are pooling comments so as to make process go smoother and quicker.
 - Process under the Trump administration took 2 years from proposed rule to final rule.
- It's likely that the new regulations will not go into effect until 2023 or later.
- There will be a separate process for student athletes/transgender issues. Expect more on informal resolutions, Clery manual, possible FERPA guidance.
- Congressional Review Act?
 - Depends on timeline.

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A Closer Look at Some Selected Features of the Proposed Regulations

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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2. Section 106.1 is revised to read as follows:

106.1 Purpose.

The purpose of this part is to effectuate Title IX, which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484.

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3. Section 106.2 is revised to read as follows:

106.2 Definitions. [SELECTED ONLY]

Complainant means:

- (1) a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX, or
- (2) a person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.

Complaint means an oral or written request to the recipient to initiate the recipient's grievance procedures as described in § 106.45, and if applicable § 106.46.

Confidential employee means:

- (1) an employee of a recipient whose communications are privileged under Federal or State law associated with their role or duties for the institution;
- (2) an employee of a recipient whom the recipient has designated as a confidential resource for the purpose of providing services to persons in connection with sex discrimination—but if the employee also has a role or duty not associated with providing these services, the employee's status as confidential is limited to information received about sex discrimination in connection with providing these services; or
- (3) an employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination—but the employee's confidential status is limited to information received while conducting the study.

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Disciplinary sanctions means consequences imposed on a respondent following a determination that the respondent violated the recipient's prohibition on sex discrimination. **[This needs to read "Title IX related disciplinary sanctions" or the like. Ed.]**

Educational institution means a local educational agency (LEA) as defined by section 8101 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7801(30)), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education.

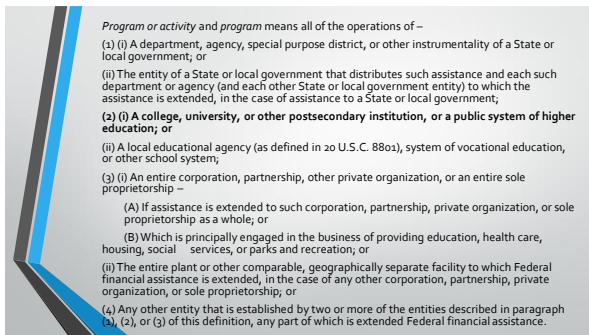
Peer retaliation means retaliation by a student against another student.

Pregnancy or related conditions means:

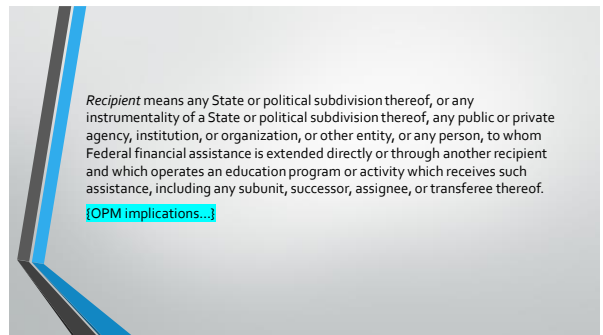
- (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
- (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.

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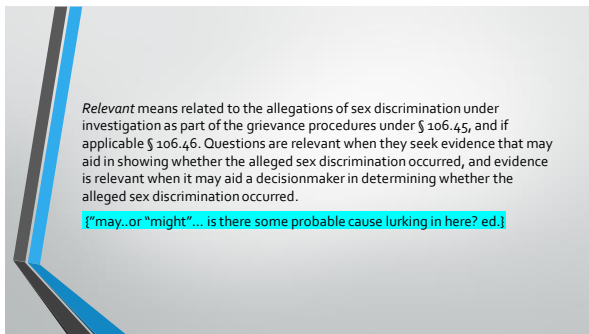
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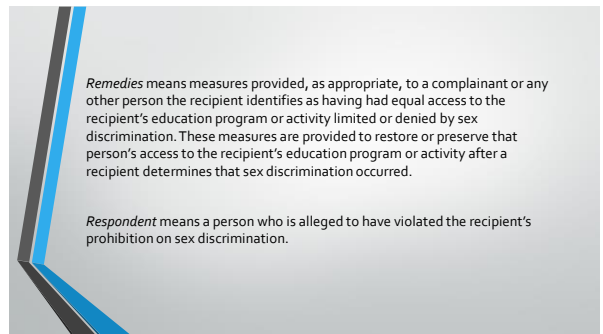
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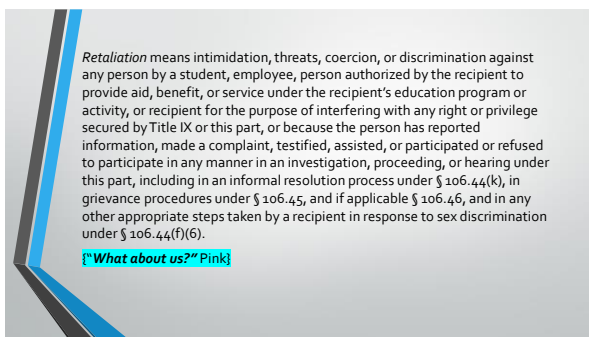
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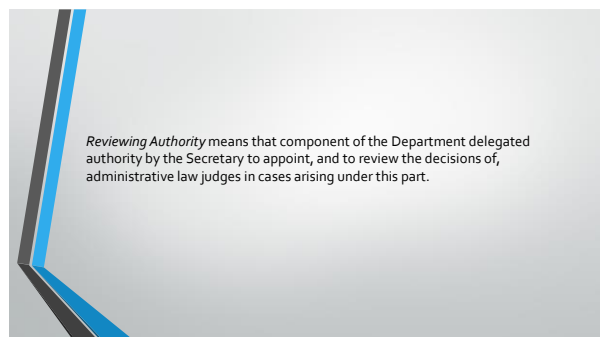
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Sex-based harassment prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that is:

- (1) *Quid pro quo harassment.* An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such aid, benefit, or service on a person's participation in unwelcome sexual conduct;
- (2) *Hostile environment harassment.* Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
 - (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
 - (ii) The type, frequency, and duration of the conduct;
 - (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;
 - (iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
 - (v) Other sex-based harassment in the recipient's education program or activity.

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(3) *Specific Offenses.*

- (i) Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;
- (ii) Dating violence meaning violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim;
- (iii) Domestic violence meaning felony or misdemeanor crimes of violence committed by a person who:
 - (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;
 - (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
 - (C) Shares a child in common with the victim; or
 - (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or
- (iv) Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - (A) Fear for the person's safety or the safety of others; or
 - (B) Suffer substantial emotional distress.

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Supportive measures means non-disciplinary, non-punitive individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a party, and without fee or charge to the complainant or respondent to:

- (i) restore or preserve that party's access to the recipient's education program or activity, including temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment; or
- (ii) provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).

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106.8 Designation of coordinator, adoption and publication of nondiscrimination policy and grievance procedures, notice of nondiscrimination, training, and recordkeeping.

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(a) *Designation of a Title IX Coordinator.*

- (1) *Title IX Coordinator.* Each recipient must designate and authorize at least one employee, referred to herein as the Title IX Coordinator, to coordinate its efforts to comply with its responsibilities under this part.
- (2) *Delegation to designees.* As appropriate, the recipient may assign one more designees to carry out some of the recipient's responsibilities for compliance with this part, but one Title IX Coordinator must retain ultimate oversight over those responsibilities.

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(b) *Adoption and publication of nondiscrimination policy and grievance procedures.*

- (1) *Nondiscrimination policy.* Each recipient must adopt and publish a policy stating that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission (unless subpart C of this part does not apply) and employment.
- (2) *Grievance procedures.* A recipient must adopt and publish grievance procedures consistent with the requirements of § 106.45, and if applicable § 106.46, that provide for the prompt and equitable resolution of complaints made by students, employees, or third parties who are participating or attempting to participate in the recipient's education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX and this part.

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(c) *Notice of nondiscrimination.* A recipient must provide a notice of nondiscrimination to students; parents, guardians, or other authorized legal representatives of elementary school and secondary school students; employees; applicants for admission and employment, and all unions and professional organizations holding collective bargaining or professional agreements with the recipient.

- (1) *Contents of notice of nondiscrimination.* The notice of nondiscrimination must include the following elements:
- (i) A statement that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission (unless subpart C of this part does not apply) and employment;
 - (ii) A statement that inquires about the application of Title IX and this part to the recipient may be referred to the recipient's Title IX Coordinator, to the Office for Civil Rights, or to both;
 - (iii) The name or title, office address, email address, and telephone number of the recipient's Title IX Coordinator;
 - (iv) How to locate the recipient's nondiscrimination policy under paragraph (b)(1) of this section; and
 - (v) How to report information about conduct that may constitute sex discrimination under Title IX, how to make a complaint of sex discrimination under this part, and how to locate the recipient's grievance procedures under paragraph (b)(2) of this section, § 106.45, and if applicable § 106.46.

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(2) *Publication of notice of nondiscrimination.*

- (i) Each recipient must prominently include all elements of its notice of nondiscrimination set out in paragraphs (c)(1)(i)-(v) of this section on its website and in each handbook, catalog, announcement, bulletin, and application form that it makes available to persons entitled to notice under paragraph (c) of this section, or which are otherwise used in connection with the recruitment of students or employees.
- (ii) If necessary, due to the format or size of any publication under paragraph (c)(2) of this section, the recipient may instead comply with paragraph (c)(2) of this section by including in those publications a statement that the recipient prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator, and providing the location of the notice on the recipient's website.
- (iii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex, except as such treatment is permitted by Title IX or this part.

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(d) *Training.* The recipient must ensure that the persons described below receive training related to their responsibilities as follows. This training must not rely on sex stereotypes. **! "not rely on"? clarify.**

- (1) *All employees.* All employees must be trained on:
- (i) The recipient's obligation to address sex discrimination in its education program or activity;
 - (ii) The scope of conduct that constitutes sex discrimination under this part, including the definition of sex-based harassment; and
 - (iii) All applicable notification and information requirements under §§ 106.40(b)(2) and 106.44.

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(2) *Investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures.* In addition to the training requirements in paragraph (d)(1) of this section, all investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures under § 106.44(g)(4) must be trained on the following topics to the extent related to their responsibilities:

- (i) The recipient's obligations under § 106.44;
- (ii) The recipient's grievance procedures under § 106.45, and if applicable § 106.46;
- (iii) How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
- (iv) The meaning and application of the term relevant in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under § 106.45, and if applicable § 106.46.

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(3) *Facilitators of informal resolution process.* In addition to the training requirements in paragraph (d)(1) of this section, all facilitators of an informal resolution process under § 106.44(k) must be trained on the rules and practices associated with the recipient's informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.

(4) *Title IX Coordinator and designees.* In addition to the training requirements in paragraphs (d)(1)-(3) of this section, the Title IX Coordinator and any designees under paragraph (a) of this section must be trained on their specific responsibilities under paragraph (a) of this section, § 106.40(b)(3), § 106.44(f), § 106.44(g), the recipient's recordkeeping system and the requirements of paragraph (f) of this section, and any other training necessary to coordinate the recipient's compliance with Title IX.

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(e) *Students with disabilities.* If a complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with the student's Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or the group of persons responsible for the student's placement decision under 34 CFR 104.35(c) (Section 504 team), if any, to help ensure that the recipient complies with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, throughout the recipient's implementation of grievance procedures under § 106.45, and if applicable § 106.46. **If a complainant or respondent is a postsecondary student with a disability, the Title IX Coordinator may consult, as appropriate, with the individual or office that the recipient has designated to provide support to students with disabilities to help comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. ! "may" "not must or might"ed.**

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(f) **Recordkeeping.** A recipient must maintain for a period of at least seven years:

- (1) For each complaint of sex discrimination, records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome.
- (2) For each incident of conduct that may constitute sex discrimination under Title IX of which the Title IX Coordinator was notified, records documenting the actions the recipient took to meet its obligations under § 106.44.
- (3) **All materials used to provide training** under paragraph (d) of this section. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.
- (4) All records documenting the actions the recipient took to meet its obligations under §§ 106.40 and 106.57. [\[clarify...ed.\]](#)

106.6 Effect of other requirements and preservation of rights.

(b) **Effect of State or local law or other requirements.** The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement. Nothing in this part would preempt a State or local law that does not conflict with this part and that provides greater protections against sex discrimination.

(e) **Effect of Section 444 of General Education Provisions Act (GEPA) Family Educational Rights and Privacy Act.** The obligation to comply with this part is not obviated or alleviated by the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.

(g) **Exercise of rights by parents, guardians, or other authorized legal representatives.** Nothing in this part may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person, subject to paragraph (e) of this section, including but not limited to making a complaint through the recipient's grievance procedures for complaints of sex discrimination.

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6. Section 106.8 is revised to read as follows:

106.10 Scope.

Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

8. Section 106.11 is revised to read as follows:

106.11 Application.

Except as provided in this subpart, this part applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States. For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

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13. Section 106.21 is amended by revising paragraphs (a) and (c) to read as follows:

106.21 Admissions.

(a) **Status generally.** No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies.

(c) **Parental, family, or marital status, pregnancy or related conditions.** In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

- (1) Must treat pregnancy or related conditions or any temporary disability resulting therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and
- (2) Must not:
 - (i) Adopt or apply any policy, practice, or procedure concerning the current, potential, or past parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;
 - (ii) Discriminate against any person on the basis of current, potential, or past pregnancy or related conditions, or establish or follow any policy, practice, or procedure that so discriminates; and
 - (iii) Make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss or Mrs." A recipient may ask an applicant to self-identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by this part.

15. Section 106.31 is amended by revising paragraph (a) to read as follows:

106.31 Education programs or activities.

(a) **General.**

- (1) Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance.
- (2) **In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or this part. Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.**
- (3) This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (i) a recipient to which subpart C does not apply, or (ii) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient. [\[Greek life impacts...ed.\]](#)

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16. Section 106.40 is revised to read as follows:

106.40 Parental, family, or marital status; pregnancy or related conditions.

(a) *Status generally.* A recipient must not adopt or apply any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy or related conditions.*

(1) *Nondiscrimination.* A recipient must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions. A recipient may permit a student based on pregnancy or related conditions to participate voluntarily in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions.

(2) *Requirement for recipient to provide information.* A recipient must ensure that when any employee is informed of a student's pregnancy or related conditions by the student or a person who has a legal right to act on behalf of the student, the employee promptly informs that person of how the person may notify the Title IX Coordinator of the student's pregnancy or related conditions for assistance and provides contact information for the Title IX Coordinator, unless the employee reasonably believes the Title IX Coordinator has already been notified.

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(ii) Provide the student with voluntary reasonable modifications to the recipient's policies, practices, or procedures because of pregnancy or related conditions, under paragraph (b)(4) of this section.

(iii) **Allow the student a voluntary leave of absence** from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's physician or other licensed healthcare provider. To the extent that a recipient maintains a leave policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead if the student so chooses. Upon the student's return to the recipient's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the leave began.

(iv) Ensure the availability of a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

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(c) *Comparable treatment to temporary disabilities or conditions.* To the extent not otherwise addressed in paragraph (b)(3) of this section, a recipient must treat pregnancy or related conditions or any temporary disability resulting therefrom in the same manner and under the same policies as any other temporary disability or physical condition with respect to any medical or hospital benefit, service, plan, or policy the recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's education program or activity.

(6) *Certification to participate.* A recipient may not require a student who is pregnant or has related conditions to provide certification from a physician or other licensed healthcare provider that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless:

(i) The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;

(ii) The recipient requires such certification of all students participating in the class, program, or extracurricular activity; and

(iii) The information obtained is not used as a basis for discrimination prohibited by this part.

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(3) *Specific actions to prevent discrimination and ensure equal access.* Once a student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions, the Title IX Coordinator must promptly:

(i) Inform the student, and if applicable the person who notified the Title IX Coordinator, of the recipient's obligations to:

(A) Prohibit sex discrimination under this part, including sex-based harassment;

(B) Provide the student with the option of reasonable modifications to the recipient's policies, practices, or procedures because of pregnancy or related conditions, under paragraphs (b)(3)(ii) and (b)(4) of this section;

(C) Allow access, on a voluntary basis, to any separate and comparable portion of the recipient's education program or activity under paragraph (b)(c) of this section;

(D) Allow a voluntary leave of absence under paragraph (b)(3)(iii) of this section;

(E) Ensure the availability of lactation space under paragraph (b)(3)(iv) of this section; and

(F) Maintain grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination, including sex-based harassment, under § 106.45, and if applicable § 106.46.

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(4) *Reasonable modifications for students because of pregnancy or related conditions.* Reasonable modifications to the recipient's policies, practices, or procedures for a student because of pregnancy or related conditions, for purposes of this section:

(i) Must be provided on an individualized and voluntary basis depending on the student's needs when necessary to prevent discrimination and ensure equal access to the recipient's education program or activity, unless the recipient can demonstrate that making the modification would fundamentally alter the recipient's education program or activity. A fundamental alteration is a change that is so significant that it alters the essential nature of the recipient's education program or activity;

(ii) Must be effectively implemented, coordinated, and documented by the Title IX Coordinator; and

(iii) May include but are not limited to breaks during class to attend to related health needs, expressing breast milk, or breastfeeding; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course sequence; extension of time for coursework and rescheduling of tests and examinations; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other appropriate changes to policies, practices, or procedures.

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18. Section 106.44 is revised to read as follows:

106.44 Action by a recipient to operate its education program or activity free from sex discrimination.

(a) *General.* A recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. To ensure that it can satisfy this obligation, a recipient must comply with this section.

(b) *Monitoring.* A recipient must:

(1) Require its Title IX Coordinator to monitor the recipient's education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX; and

(2) Take steps reasonably calculated to address such barriers.

[\[See slide 31 supra, re: barriers to reporting, prevention, campus climate surveys\]](#)

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(c) *Notification requirements.*

- (1) An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.
- (2) All other recipients must, at a minimum, require:
 - (i) Any employee who is not a confidential employee and who has authority to institute corrective measures on behalf of the recipient to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX;
 - (ii) Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that may constitute sex discrimination under Title IX;

- (iii) Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity and has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX to either:
 - (A) Notify the Title IX Coordinator when the employee has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX; or
 - (B) Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with the information; and

- (iv) All other employees who are not confidential employees, if any, to either:
 - (A) Notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX; or
 - (B) Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with information about conduct that may constitute sex discrimination under Title IX.

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- (3) A postsecondary institution must make a fact-specific inquiry to determine whether the requirements of paragraph (c)(2) of this section apply to a person who is both a student and an employee of the postsecondary institution. In making this determination, a postsecondary institution must, at a minimum, consider whether the person's primary relationship with the postsecondary institution is to receive an education and whether the person learns of conduct that may constitute sex discrimination under Title IX in the postsecondary institution's education program or activity while performing employment-related work.

- (4) The requirements of paragraphs (c)(1) and (c)(2) of this section do not apply when the only employee with information about conduct that may constitute sex discrimination under Title IX is the employee-complainant.

(d) *Confidential employee requirements.*

- (1) A recipient must notify all participants in the recipient's education program or activity of the identity of any confidential employee.
- (2) A recipient must require a confidential employee to explain their confidential status to any person who informs the confidential employee of conduct that may constitute sex discrimination under Title IX and must provide that person with contact information for the recipient's Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX.

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- (e) *Public awareness events.* When a postsecondary institution's Title IX Coordinator is notified of information about conduct that may constitute sex-based harassment under Title IX that was provided by a person during a public event held on the postsecondary institution's campus or through an online platform sponsored by a postsecondary institution to raise awareness about sex-based harassment associated with a postsecondary institution's education program or activity, the postsecondary institution is not obligated to act in response to this information under this section, § 106.45, or § 106.46, unless the information reveals an immediate and serious threat to the health or safety of students or other persons in the postsecondary institution's community. However, in all cases the postsecondary institution must use this information to inform its efforts to prevent sex-based harassment, including by providing tailored training to address alleged sex-based harassment in a particular part of its education program or activity or at a specific location when information indicates there may be multiple incidents of sex-based harassment.

(f) *Title IX Coordinator requirements.* A recipient must require its Title IX Coordinator to take the following steps upon being notified of conduct that may constitute sex discrimination under Title IX:

- (1) Treat the complainant and respondent equitably;
- (2) (i) Notify the complainant of the grievance procedures under § 106.45, and if applicable § 106.46, and (ii) If a complaint is made, notify the respondent of the applicable grievance procedures and notify the parties of the informal resolution process under this section if available and appropriate;
- (3) Offer and coordinate supportive measures under paragraph (g) of this section, as appropriate, to the complainant and respondent to restore or preserve that party's access to the recipient's education program or activity;
- (4) In response to a complaint, initiate the grievance procedures or informal resolution process under § 106.45, and if applicable § 106.46;
- (5) In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures under § 106.45, and if applicable § 106.46, if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient's education program or activity; and
- (6) Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, in addition to remedies provided to an individual complainant.

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(g) *Supportive measures.* Upon being notified of conduct that may constitute sex discrimination under Title IX, a Title IX Coordinator must offer supportive measures, as appropriate, to the complainant or respondent to the extent necessary to restore or preserve that party's access to the recipient's education program or activity. For allegations of sex discrimination, other than sex-based harassment or retaliation, a recipient's provision of supportive measures would not require the recipient, its employee, or other person authorized to provide aid, benefit or services on the recipient's behalf to alter the allegedly discriminatory conduct for the purpose of providing a supportive measure.

(1) Supportive measures may vary depending on what the recipient deems to be available and reasonable. These measures may include but are not limited to: counseling; extensions of deadlines and other course-related adjustments; campus escort services; increased security and monitoring of certain areas of the campus; restrictions on contact between the parties; leaves of absence; voluntary or involuntary changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative; and training and education programs related to sex-based harassment.

(2) Supportive measures that burden a respondent may be imposed only during the pendency of a recipient's grievance procedures under § 106.45, and if applicable § 106.46, and must be terminated at the conclusion of those grievance procedures. These measures must be no more restrictive of the respondent than is necessary to restore or preserve the complainant's access to the recipient's education program or activity. A recipient may not impose such measures for punitive or disciplinary reasons.

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(3) For supportive measures other than those that burden a respondent, a recipient may, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures under § 106.45, and if applicable § 106.46, or at the conclusion of the informal resolution process under paragraph (k) of this section, or the recipient may continue them beyond that point.

(4) A recipient must provide a complainant or respondent affected by a decision to provide, deny, modify, or terminate supportive measures with a timely opportunity to seek modification or reversal of the recipient's decision by an appropriate, impartial employee. The impartial employee must be someone other than the employee who made the decision being challenged and must have authority to modify or reverse the decision, if appropriate. A recipient must make a fact-specific inquiry to determine what constitutes a timely opportunity for seeking modification or reversal of a supportive measure. If the supportive measure burdens the respondent, the initial opportunity to seek modification or reversal of the recipient's decision must be provided before the measure is imposed or, if necessary under the circumstances, as soon as possible after the measure has taken effect. A recipient must also provide a complainant or respondent affected by a supportive measure with the opportunity to seek additional modification or termination of such supportive measure if circumstances change materially.

(5) A recipient must ensure that it does not disclose information about any supportive measures to persons other than the complainant or respondent unless necessary to provide the supportive measure. A recipient may inform a party of supportive measures provided to or imposed on another party only if necessary to restore or preserve that party's access to the education program or activity.

(6) Under paragraph (f)(3) of this section, the Title IX Coordinator is responsible for offering and coordinating supportive measures.

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(7) (i) If the complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with the Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or the group of persons responsible for the student's placement decision under 34 CFR 104.35(c) (Section 504 team), if any, to help ensure the recipient complies with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the implementation of supportive measures.

(ii) If the complainant or respondent is a postsecondary student with a disability, the Title IX Coordinator may consult, as appropriate, with the individual or office that the recipient has designated to provide supports to students with disabilities to help ensure that the recipient complies with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the implementation of supportive measures.

(h) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision must not be construed to modify any rights under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12134.

(i) *Administrative leave.* Nothing in this part precludes a recipient from placing an employee respondent on administrative leave from employment responsibilities during the pendency of the recipient's grievance procedures. This provision must not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12134.

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(j) *Recipient prohibitions.* When conducting an informal resolution process under paragraph (k) of this section, implementing grievance procedures under § 106.45, and if applicable § 106.46, or requiring a Title IX Coordinator to take other appropriate steps under paragraph (f)(6) of this section, a recipient must not disclose the identity of a party, witness, or other participant except in the following circumstances:

- (1) When the party, witness, or other participant has provided prior written consent to disclose their identity;
- (2) When permitted under the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99;
- (3) As required by law; or
- (4) To carry out the purposes of this part, including action taken to address conduct that may constitute sex discrimination under Title IX in the recipient's education program or activity.

(k) *Discretion to offer informal resolution in some circumstances.*

(1) At any time prior to determining whether sex discrimination occurred under § 106.45, and if applicable § 106.46, a recipient may offer to a complainant and respondent an informal resolution process, unless there are allegations that an employee engaged in sex discrimination toward a student or such a process would conflict with Federal, State or local law. A recipient that provides the parties an informal resolution process must, to the extent necessary, also require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

(i) A recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that may constitute sex discrimination under Title IX or a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of the parties' wishes.

(ii) Circumstances when a recipient may decline to allow informal resolution include but are not limited to when the recipient determines that the alleged conduct would present a future risk of harm to others.

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(2) A recipient must not require or pressure the parties to participate in an informal resolution process. The recipient must obtain the parties' voluntary consent to the informal resolution process and must not require waiver of the right to an investigation and adjudication of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise of any other right.

(3) Before initiation of an informal resolution process, the recipient must provide to the parties notice that explains:

- (i) The allegations;
- (ii) The requirements of the informal resolution process;
- (iii) That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures;
- (iv) That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;
- (v) The potential terms that may be requested or offered in an informal resolution agreement;
- (vi) Which records will be maintained and could be shared;
- (vii) That if the recipient initiates or resumes its grievance procedures under § 106.45, and if applicable § 106.46, the recipient or a party must not access, consider, disclose, or otherwise use information, including records, obtained solely through an informal resolution process as part of the investigation or determination of the outcome of the complaint; and
- (viii) That, when applicable, and if the recipient resumes its grievance procedures, the informal resolution facilitator could serve as a witness for purposes other than providing information obtained solely through the informal resolution process.

(4) The facilitator for the informal resolution process must not be the same person as the investigator or the decisionmaker in the recipient's grievance procedures. Any person designated by a recipient to facilitate an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. Any person facilitating informal resolution must receive training under § 106.8(d)(3).

(5) Potential terms that may be included in an informal resolution agreement include but are not limited to:

- (i) Restrictions on contact; and
- (ii) Restrictions on the respondent's participation in one or more of the recipient's programs or activities or attendance at specific events, including restrictions the recipient could have imposed as remedies or disciplinary sanctions had the recipient determined that sex discrimination occurred under the recipient's grievance procedures.

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19. Section 106.45 is revised to read as follows:

106.45 Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination.

(a) (1) *General.* For purposes of addressing complaints of sex discrimination, a recipient's prompt and equitable grievance procedures must be in writing and include provisions that incorporate the requirements of this section. The requirements related to a respondent apply only to sex discrimination complaints alleging that a person violated the recipient's prohibition on sex discrimination. When a sex discrimination complaint alleges that a recipient's policy or practice discriminates on the basis of sex, the recipient is not considered a respondent.

(a)(2) *Complainant.* The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting that the recipient initiate its grievance procedures:

- (i) A complainant;
- (ii) A person who has a right to make a complaint on behalf of a complainant under § 106.6(g);
- (iii) The Title IX Coordinator;
- (iv) With respect to complaints of sex discrimination other than sex-based harassment, any student or employee, or third party participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.

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(b) *Basic requirements for grievance procedures.* A recipient's grievance procedures must:

- (1) Treat complainants and respondents equitably;
- (2) Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The decisionmaker may be the same person as the Title IX Coordinator or investigator;
- (3) Include a presumption that the respondent is not responsible for the alleged conduct until a determination whether sex discrimination occurred is made at the conclusion of the recipient's grievance procedures for complaints of sex discrimination;
- (4) Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay. Major stages include, for example, evaluation (i.e., the recipient's determination of whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any;

- (5) Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, provided that the steps do not restrict the ability of the parties to obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with a family member, confidential resource, or advisor; prepare for a hearing, if one is offered; or otherwise defend their interests;
- (6) Require an objective evaluation of all relevant evidence, consistent with the definition of relevant in § 106.2—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness; and

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(7) Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:

- (i) Evidence that is protected under a privilege as recognized by Federal or State law, unless the person holding such privilege has waived the privilege voluntarily in a manner permitted in the recipient's jurisdiction;
- (ii) A party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent for use in the recipient's grievance procedures; and
- (iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. The fact of prior consensual sexual conduct between the complainant and respondent does not demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.

(c) *Notice of allegations.* Upon initiation of the recipient's grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known.

- (1) The notice must include:
 - (i) The recipient's grievance procedures under this section, and if applicable § 106.46, and any informal resolution process under § 106.44(k);
 - (ii) Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident, the conduct alleged to constitute sex discrimination under Title IX, and the date and location of the alleged incident, to the extent that information is available to the recipient; and
 - (iii) A statement that retaliation is prohibited.
- (2) If, in the course of an investigation, the recipient decides to investigate additional allegations about the respondent's conduct toward the complainant that are not included in the notice provided under paragraph (c)(1) of this section or that are included in a complaint that is consolidated under paragraph (e) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

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(d) *Dismissal of a complaint.*

- (1) A recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable § 106.46, for any of the following reasons:
 - (i) The recipient is unable to identify the respondent after taking reasonable steps to do so;
 - (ii) The respondent is not participating in the recipient's education program or activity and is not employed by the recipient;
 - (iii) The complainant voluntarily withdraws any or all of the allegations in the complaint and the recipient determines that without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX even if proven; or
 - (iv) The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX. Prior to dismissing the complaint under this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant.

(2) Upon dismissal, a recipient must promptly notify the complainant of the basis for the dismissal. If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent of the dismissal and the basis for the dismissal promptly following notification to the complainant, or simultaneously if notification is in writing.

- (3) A recipient must notify all parties that a dismissal may be appealed, provide any party with an opportunity to appeal its dismissal of a complaint, and must:
 - (i) Notify the parties when an appeal is filed and implement appeal procedures equally for the parties;
 - (ii) Ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint;
 - (iii) Ensure that the decisionmaker for the appeal has been trained as set out in § 106.8(d)(2);
 - (iv) Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and (v) Notify all parties of the result of the appeal and the rationale for the result.

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(4) A recipient that dismisses a complaint must, at a minimum:

- (i) Offer supportive measures to the complainant as appropriate under § 106.44(g);
- (ii) For dismissals under paragraphs (1)(iii) or (1)(iv) of this section in which the respondent has been notified of the allegations, offer supportive measures to the respondent as appropriate under § 106.44(g); and
- (iii) Require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity under § 106.44(f)(6).

(e) *Consolidation of complaints.* A recipient may consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances. If one of the complaints to be consolidated is a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures for investigating and resolving the consolidated complaint must comply with the requirements of this section and § 106.46. When more than one complainant or more than one respondent is involved, references in this section and in § 106.46 to a party, complainant, or respondent include the plural, as applicable.

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(f) *Complaint investigation.* A recipient must provide for adequate, reliable, and impartial investigation of complaints. To do so, the recipient must:

- (1) Ensure that the burden is on the recipient—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;
- (2) Provide an equal opportunity for the parties to present relevant fact witnesses and other inculpatory and exculpatory evidence;
- (3) Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance, consistent with § 106.2 and with paragraph (b)(7) of this section; and
- (4) Provide each party with a description of the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, as well as a reasonable opportunity to respond.

(g) *Evaluating allegations and assessing credibility.* A recipient must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

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(h) *Determination of whether sex discrimination occurred.* Following an investigation and evaluation process under paragraphs (f) and (g) of this section, the recipient must:

- (1) Use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred. Both standards of proof require the decisionmaker to evaluate relevant evidence for its persuasiveness; if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker should not determine that sex discrimination occurred.
- (2) Notify the parties of the outcome of the complaint, including the determination of whether sex discrimination occurred under Title IX, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable;
- (3) If there is a determination that sex discrimination occurred, as appropriate, require the Title IX Coordinator to provide and implement remedies to a complainant or other person the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination, and require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity under § 106.44(f)(6);
- (4) Comply with this section, and if applicable § 106.46, before the imposition of any disciplinary sanctions against a respondent; and
- (5) Not discipline a party, witness, or others participating in a recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination of whether sex discrimination occurred.

(i) *Additional provisions.* If a recipient adopts additional provisions as part of its grievance procedures for handling complaints of sex discrimination, including sex-based harassment, such additional provisions must apply equally to the parties.

(j) *Informal resolution.* In lieu of resolving a complaint through the recipient's grievance procedures, the parties may instead elect to participate in an informal resolution process under § 106.44(k) if provided by the recipient consistent with that paragraph.

(k) *Provisions limited to sex-based harassment complaints.* For complaints alleging sex-based harassment, the grievance procedures must:

- (1) Describe the range of supportive measures available to complainants and respondents under § 106.44(g); and
- (2) Describe the range of, or list, the possible disciplinary sanctions and remedies that the recipient may impose following a determination that sex-based harassment occurred.

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21. Section 106.46 is added to subpart D to read as follows:

106.46 Grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions.

- (a) *General.* A postsecondary institution's prompt and equitable written grievance procedures for complaints of sex-based harassment involving a student complainant or student respondent must include provisions that incorporate the requirements of § 106.45 and this section.
- (b) *Student employees.* When a complainant or respondent is both a student and an employee of a postsecondary institution, the postsecondary institution must make a fact-specific inquiry to determine whether the requirements of this section apply. In making this determination, a postsecondary institution must, at a minimum, consider whether the party's primary relationship with the postsecondary institution is to receive an education and whether the alleged sex-based harassment occurred while the party was performing employment-related work.

(c) *Written notice of allegations.*

- (1) Upon the initiation of the postsecondary institution's sex-based harassment grievance procedures under this section, a postsecondary institution must provide written notice to the parties, whose identities are known, of:
- (i) All information required under § 106.45(c); and
 - (ii) Allegations potentially constituting sex-based harassment, including the information required under § 106.45(c)(1)(ii), with sufficient time for the parties to prepare a response before any initial interview.

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(2) The written notice must also inform the parties that:

- (i) The respondent is presumed not responsible for the alleged conduct until a determination of whether sex-based harassment occurred is made at the conclusion of the grievance procedures under this section and that prior to the determination, the parties will have an opportunity to present relevant evidence to a trained, impartial decisionmaker;
- (ii) They may have an advisor of their choice to serve in the role set out in paragraph (e)(2) of this section, and that the advisor may be, but is not required to be, an attorney;
- (iii) They are entitled to receive access to relevant evidence or to an investigative report that accurately summarizes this evidence as set out in paragraph (e)(6) of this section; and
- (iv) If applicable, any provision in the postsecondary institution's code of conduct prohibits knowingly making false statements or knowingly submitting false information during the grievance procedure.

- (3) To the extent the postsecondary institution has legitimate concerns for the safety of any person as a result of providing this notice, the postsecondary institution may reasonably delay providing written notice of the allegations in order to address the safety concern appropriately. Legitimate concerns must be based on individualized safety and risk analysis and not on mere speculation or stereotypes.

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(d) *Dismissal of a complaint.* When dismissing a complaint alleging sex-based harassment and involving a student complainant or a student respondent, a postsecondary institution must:

- (1) Provide the parties, simultaneously, with written notice of the dismissal and the basis for the dismissal, if dismissing a complaint under any of the bases in § 106.45(d)(1), and
- (2) Obtain the complainant's withdrawal in writing if dismissing a complaint based on the complainant's voluntary withdrawal of the complaint or allegations under § 106.45(d)(1)(iii).

(e) *Complaint investigation.* When investigating a complaint alleging sex-based harassment and throughout the postsecondary institution's grievance procedures for complaints of sex-based harassment involving a student complainant or a student respondent, a postsecondary institution:

- (1) Must provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all meetings, investigative interviews, or hearings with **sufficient time for the party to prepare** to participate;
- (2) Must provide the parties with the same opportunities to be accompanied to any meeting or proceeding by the **advisor of their choice**, who may be, but is not required to be, an attorney, and not limit the choice or presence of the advisor for the complainant or respondent in any meeting or grievance proceeding; however, the postsecondary institution may establish restrictions regarding the extent to which the advisor may participate in the grievance procedures, as long as the restrictions apply equally to the parties;

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- (3) Must provide the parties with the same opportunities, if any, to have persons other than the advisor of the parties' choice present during any meeting or proceeding;
- (4) Has discretion to determine whether the parties may present expert witnesses as long as the determination applies equally to the parties;
- (5) Must allow for the reasonable extension of timeframes on a case-by-case basis for good cause with written notice to the parties that includes the reason for the delay; and

(6) Must provide each party and the party's advisor, if any, with **equitable access** to the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible, consistent with §§ 106.2 and 106.45(b)(7), in the following manner:

- (i) A postsecondary institution must provide either equitable access to the relevant and not otherwise impermissible evidence, or to the same written investigative report that accurately summarizes this evidence. If the postsecondary institution provides an investigative report, it must further provide the parties with equitable access to the relevant and not otherwise impermissible evidence upon the request of any party;
- (ii) A postsecondary institution must provide the parties with a reasonable opportunity to review and respond to the evidence as provided under paragraph (6)(i) of this section prior to the determination of whether sex-based harassment occurred. If a postsecondary institution conducts a live hearing as part of its grievance procedures, it must provide this opportunity to review the evidence in advance of the live hearing; it is at the postsecondary institution's discretion whether to provide this opportunity to respond prior to the live hearing, during the live hearing, or both prior to and during the live hearing;
- (iii) A postsecondary institution must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures; and
- (iv) Compliance with paragraph (e)(6) of this section satisfies the requirements of § 106.45(f)(4).

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A Note on "Confidential Employees" as "Advisors"

"The second category of confidential employees would include employees designated by the recipient to provide confidential services to individuals who may have experienced or been accused of engaging in conduct that may constitute sex discrimination. The information received by these employees about sex discrimination would also be confidential. For example, a recipient may designate certain employees as advisors to students in its grievance procedures. These advisors would serve as confidential employees while providing services to individuals in connection with those grievance procedures.

NPEM at 100, emphasized

(f) Evaluating allegations and assessing credibility.

(a) *Process for evaluating allegations and assessing credibility.* A postsecondary institution must provide a process as specified in this subpart that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment. This assessment of credibility includes either:

- (i) Allowing the decisionmaker to ask the parties and witnesses, during individual meetings with the parties or at a live hearing, relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, before determining whether sex-based harassment occurred and allowing each party to propose to the decisionmaker or investigator relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, that the party wants asked of any party or witness and have those questions asked during individual meetings with the parties or at a live hearing under paragraph (g) of this section subject to the requirements in paragraph (f)(3) of this section; or
- (ii) When a postsecondary institution chooses to conduct a live hearing, allowing each party's advisor to ask any party and any witnesses all relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, subject to the requirements under paragraph (f)(3) of this section. Such questioning must never be conducted by a party personally. If a postsecondary institution permits advisor-conducted questioning and a party does not have an advisor who can ask questions on their behalf, the postsecondary institution must provide the party with an advisor of the postsecondary institution's choice, without charge to the party, for the purpose of advisor conducting questioning. The advisor may be, but is not required to be, an attorney.

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(2) *Compliance with § 106.45(g).* Compliance with paragraph (f)(a)(i) or (f)(a)(ii) of this section satisfies the requirements of § 106.45(g).

(3) *Procedures for the decisionmaker to evaluate the questions and limitations on questions.* The decisionmaker must determine whether a proposed question is relevant and not otherwise impermissible under §§ 106.2 and 106.45(b)(7), prior to the question being posed, and must explain any decision to exclude a question as not relevant. If a decisionmaker determines that a party's question is relevant and not otherwise impermissible, then it must be asked except that a postsecondary institution must not permit questions that are unclear or harassing of the party being questioned. A postsecondary institution may also impose other reasonable rules regarding decorum, provided they apply equally to the parties.

(4) *Refusal to respond to questions related to credibility.* If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position. The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond questions related to their credibility. **[watch this one....ed]**

(g) *Live hearing procedures.* A postsecondary institution's sex-based harassment grievance procedures may, but need not, provide for a live hearing. If a postsecondary institution chooses to conduct a live hearing, it may conduct the live hearing with the parties physically present in the same geographic location, but at the postsecondary institution's discretion or upon the request of either party, it will conduct the live hearing with the parties physically present in separate locations with technology enabling the decisionmaker and parties to simultaneously see and hear the party or the witness while that person is speaking or communicating in another format. A postsecondary institution must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

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(h) *Written determination of whether sex-based harassment occurred.* The postsecondary institution must provide the determination whether sex-based harassment occurred in writing to the parties simultaneously.

(1) The written determination must include:

- (i) A description of the alleged sex-based harassment;
- (ii) Information about the policies and procedures that the postsecondary institution used to evaluate the allegations;
- (iii) The decisionmaker's evaluation of the relevant evidence and determination of whether sex-based harassment occurred;
- (iv) When the decisionmaker finds that sex-based harassment occurred, any disciplinary sanctions the postsecondary institution will impose on the respondent, and whether remedies other than the imposition of disciplinary sanctions will be provided by the postsecondary institution to the complainant; and, to the extent appropriate, other students identified by the postsecondary institution to be experiencing the effects of the sex-based harassment; and
- (v) The postsecondary institution's procedures for the complainant and respondent to appeal.

(2) The determination regarding responsibility becomes final either on the date that the postsecondary institution provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

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(i) *Appeals.*

(1) A postsecondary institution must offer the parties an appeal from a determination that sex-based harassment occurred, and from a postsecondary institution's dismissal of a complaint or any allegations therein, on the following bases:

(i) Procedural irregularity that would change the determination of whether sex-based harassment occurred in the matter;

(ii) **New evidence that would change the outcome of the matter and that was not reasonably available at the time the determination of whether sex-based harassment occurred or dismissal was made, and [rehearing...ed.]**

(iii) The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome of the matter. **[at a hearing and on appeal? Ed.]**

(2) A postsecondary institution may offer an appeal equally to the parties on additional bases, as long as the additional bases are available to all parties.

(3) As to all appeals, the postsecondary institution must comply with the requirements in § 106.45(d)(3)(i), (iv), and (v) in writing.

(j) *Informal resolution.* If a postsecondary institution offers or provides the parties to the grievance procedures under § 106.45 and under this section with an informal resolution process under § 106.44(k), the postsecondary institution must inform the parties in writing of the offer and their rights and responsibilities in the informal resolution process and otherwise comply with the provisions of § 106.44(k)(3) in writing.

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22. Section 106.47 is added to subpart D to read as follows:

106.47 Assistant Secretary review of sex-based harassment complaints.

The Assistant Secretary will not deem a recipient to have violated this part *solely because* the Assistant Secretary would have reached a different determination than a recipient reached under § 106.45, and if applicable § 106.46, based on an independent weighing of the evidence in sex-based harassment complaints. **[emphasis added, holdover from 2020]**

23. Section 106.51 is amended by revising paragraph (b)(6) to read as follows:

106.51 Employment.

(6) Granting and return from leaves of absence, leave for pregnancy or related conditions, leave for persons of either sex to care for children or dependents, or any other leave;

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24. Section 106.57 is revised to read as follows:

106.57 Parental, family, or marital status; pregnancy or related conditions.

- (a) *Status generally.* A recipient shall not adopt or apply any policy, practice, or procedure, or take any employment action on the basis of sex:
- (1) Concerning the current, potential, or past parental, family, or marital status of an employee or applicant for employment which treats persons differently; or
 - (2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.
- (b) *Pregnancy or related conditions.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of current, potential, or past pregnancy or related conditions.
- (c) *Comparable treatment to temporary disabilities or conditions.* A recipient shall treat pregnancy or related conditions or any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

- (d) *Pregnancy leave.* In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(e) *Lactation time and space.*

- (1) A recipient must provide reasonable break time for an employee to express breast milk or breastfeed as needed.
- (2) A recipient must ensure the availability of a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed.

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106.60 Pre-employment inquiries.

- (a) *Marital status.* A recipient must not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."
- (b) *Sex.* A recipient may ask an applicant for employment to self-identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by this part.

106.71 Retaliation.

A recipient must prohibit retaliation in its education program or activity. When a recipient receives information about conduct that may constitute retaliation, the recipient is obligated to comply with § 106.44. A recipient must initiate its grievance procedures upon receiving a complaint alleging retaliation under § 106.45. As set out in § 106.45(e), if the complaint is consolidated with a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures initiated by the consolidated complaint must comply with the requirements of §§ 106.45 and 106.46. Prohibited retaliation includes but is not limited to:

- (a) Initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX or this part; or
- (b) Peer retaliation.

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Where is Title IX headed?

What does the future hold for Title IX? Take-aways....

- LGBTQI+ protections: transgender athletes' rights issues
 - Several states have laws that prevent transgender individuals from playing on female sports teams
- March 2021, class action lawsuit filed against the Dept. of Education in Oregon federal court by 33 LGBTQI+ plaintiffs from 30 institutions.
 - Is the religious exemption in Title IX constitutional?
- *Speech First, Inc. vs. Fenves; Speech First, Inc. vs. Cartwright*
- State law pushbacks
- Rewrite Codes....again? And when? Notice and comment likely to change proposed rules
- Apply Title IX practices to other conduct codes?
- Time for preventative audits: lessons from LSU, USC.
- Nuclear weapons??? and Reproductive Rights—Title IX makes significant pivot...
 - SCOTUS overturns *Roe v. Wade* in *Dobbs*

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What does the future hold for Title IX? Take-aways....

- Political landscape 2022/2024 ::: SCOTUS
- End game for Title IX and detailed grievance regulation...what is ultimately sustainable? Will what we know of Title IX today devolve to state variances, subject to federal court oversight?
- Reporting and reporters...do we want this much flexibility?
- Training means assessment, especially on reporting and definitions.
- Culture intervention--- rise , or return, of "remedies"
- Here comes new Clery manual---prevention and reporting on it.
 - OCT 1st is just about 10 weeks away (gulp!).
- Let's get Constitutional...What about *Citizens United*? Even *Gebser/Davis*? *Mathews v Eldridge*? *Textualism, Originalism, and the Title IV trojan horse*. ALI and "mission sensitivity."
- SCOTUS → limits of federal regulatory power

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What does the future hold for Title IX? Take-aways....

- Does education culture have better solutions? Can we be, must we be, impartial in relation to our own mission? What are the limits of rooting out bias? Are the legal rules themselves a Title IX problem? *Fernes* ::: *NPRM on bias*/// "Defamation by Litigation" ::: *FERPA restrictions*
- Budgets and industry challenges. DOE cost estimates are perhaps "aspirational."
- College court becomes more like family court---supportive services and review.
- Protections for Title IX operatives... 2015 guidance.
- Lawyers and legalisms... Student conduct dominated by law, lawyers and legalisms? Law as competitor?
- The Transparency Dilemma:: a)revise FERPA or b)create more detailed hearing and notice procedures...(DOE goes with b.)

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What does the future hold for Title IX? Take-aways....

- Title IX and the "new tenure"... mid-twentieth century deference over? ALJ project signals a bleed over effect....? The pursuit of happiness as a protected interest?
- Trifurcation?
- Congressional action in light of SCOTUS rulings....Title IX implications
- Vectoring...where are we headed?
- Culture impact...how do we explain the proposed regulations to our stake holders and "shapeholders"?:Active monitoring required...
- Courts are inventing many new ways to hold colleges accountable for decisions on sexual misconduct? Compliance in the process of attempting compliance---meta-compliance issues dominate.
- The single investigator model as lightning rod.
- Arbitration and no cause dismissal?
- Flexibility=Title IX looks different across the country
- Comment please!

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