



Title IX – 2024 Final Rule

Employee Training

August 13, 2024

Allegheny Valley School District

Pittsburgh | Harrisburg | New York | Cleveland | Beaver | San Francisco Bay Area*

TUCKER ARENSBERG
Attorneys

*As Tucker Arensberg LLP

I. Title IX and the 2024 Final Rule

Title IX

No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to **discrimination** under any education program or activity receiving federal financial assistance.

20 U.S.C. § 1681.

2020 Sexual harassment regulations

- On May 6, 2020, the United States Department of Education issued its long-awaited [Final Rule](#) (the “2020 Final Rule”) that focused on Title IX protections for victims of sexual misconduct.
- Old Rule:
A School District with **Actual Knowledge** of Sexual Harassment in an Education Program or Activity of the School District against a person in the United States, **must respond promptly** in a manner that is **not deliberately indifferent**.

2024 Final rule

- On April 29, 2024, the Department of Education released a new [Final Rule](#) (“2024 Final Rule”) with the goal of fully effectuating Title IX’s promise that no person experiences sexual discrimination in federally funded education.
- New Rule (§ 106.44)
 - (1) A recipient **with knowledge** of conduct that reasonably **may constitute sex discrimination** in its education program or activity must respond **promptly and effectively**; and
 - (2) A recipient must also comply with this section to **address sex discrimination** in its education program or activity.
- “On the Basis of Sex” (§ 106.10))

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.

“On the Basis of Sex”

COURT CASES

- The 2024 Final Rule’s definition of “on the basis of sex” is consistent with court decisions.
 - In Bostock v. Clayton County, 140 S. Ct. 1731 (2020), the Supreme Court held that discrimination against a person for being transgender is discrimination “on the basis of sex.” As the Supreme Court noted, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” In August 2020, the Fourth Circuit held that “we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him “on the basis of sex.”
 - Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 284 (W.D. Pa. 2017) (court issued a preliminary injunction against the school district and in favor of the students, holding they are likely to succeed on the claim that forcing them to use restrooms which either are single-user or those corresponding with their biological sex violates their right to Equal Protection under the law as guaranteed by the Fourteenth Amendment.
 - A.H. by Handling v. Minersville Area Sch. Dist., 2019 WL 4875331 (M.D. Pa. 2019) (partially granted an elementary school student’s (A.H.) motion for summary judgment on a claim that Minersville Elementary School prohibited A.H. from using girls’ restrooms at school, and at school sponsored events, in violation of Title IX’s prohibitions against sex discrimination and the Equal Protection Clause of the U.S. Constitution.)

Training

- The District must ensure its employees receive training related to their duties under Title IX promptly upon hiring or change of position that alters their duties under Title IX or this part, and annually thereafter.
- **All Employees** must be trained on:
 1. The District's obligation to address sex discrimination in its education program or activity
 2. The scope of conduct that constitutes sex discrimination under Title IX and the 2024 Final Rule, including the definition of sex-based harassment
 3. All applicable notification and information requirements under §§ 106.40(b)(2) and 106.44.

Training

Investigators and Decisionmakers and others implementing grievance procedures or modifying/terminating supportive measures

1. Same training as all employees
2. The recipient's obligations under § 106.44;
3. The recipient's grievance procedures under § 106.45;
4. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
5. 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

Training

- **Title IX Coordinator**

1. All of the training described above;
2. their specific responsibilities under §106.8(a), §§ 106.40(b)(3), 106.44(f) and (g);
3. the recipient's recordkeeping system and the requirements of §106.8(f); and
4. any other training necessary to coordinate the recipient's compliance with Title IX.

Prevalence (Middle School)

- 43 percent of middle school students experienced verbal sexual harassment the previous year
- 21 percent of middle school students reported having been pinched, touched, or grabbed in a sexual way
- 14 percent reported having been the target of sexual rumors
- 9 percent had been victimized with sexually explicit graffiti in school locker rooms or bathrooms.

(2020 Regulations, p. 30076)

Prevalence (High School)

- 51 percent of high school girls and 26 percent of high school boys experienced adolescent peer-on-peer sexual assault victimization.
- One in four young women experiences sexual assault before the age of 18.
- 10 percent of children were targets of educator sexual misconduct by the time they graduated from high school.
- 48 percent of U.S. students are subject to sexual harassment or assault at school before they graduate high school (56 percent of girls and 40 percent of boys).
- 36 percent of girls, 24 percent of boys, and 30 percent of all students in grades seven through 12 experienced sexual harassment online.

2020 Regulations, pp. 30075-76

Prevalence (LGBTQ+)

- 57 percent of LGBTQ students were sexually harassed at school during the past year.
- 38 percent of LGBTQ girls had been kissed or touched without their consent.
- 86 percent of high school transgender individuals had experienced a form of sexual violence due to their gender identity

(2020 Regulations, pp. 30077-78).

II. All Employees

A. OBLIGATION TO ADDRESS SEX DISCRIMINATION IN ITS EDUCATION PROGRAM OR ACTIVITY; AND APPLICABLE NOTIFICATION AND INFORMATION REQUIREMENTS UNDER §§ 106.40(B)(2) AND 106.44;

The District's obligation to address sex discrimination in its education program or activity

2020 FINAL RULE:

1. A District is required to respond to sexual harassment when the recipient has “actual knowledge.”
2. A District with “actual knowledge,” must respond promptly in a manner that is not “deliberately indifferent” (i.e., response is clearly unreasonable in light of the known circumstances).

Actual knowledge - notice of sexual harassment or allegations of sexual harassment . . . to any employee of an elementary school or secondary school recipient.)

The District's obligation to address sex discrimination in its education program or activity

GENERAL RULE - RESPONDING PROMPTLY AND EFFECTIVELY (§106.44(A)(1))

1. §106.44(a)(1) - A recipient **with knowledge** of conduct that reasonably **may constitute sex discrimination** must respond **promptly and effectively**.

Guidance:

1. The requirement in § 106.44(a)(1) to respond promptly and effectively; and
2. The specific actions outlined in § 106.44(b)–(k)
3. Will more effectively ensure that a recipient fully effectuates Title IX's nondiscrimination mandate.

Note: Although the Department has removed the definition of “actual knowledge” from these final regulations, . . . this revision expands rather than removes a recipient’s obligation to respond to conduct of which their employees have knowledge. (2024 Final Rule, p 325).

The District's obligation to address sex discrimination in its education program or activity

GENERAL RULE - RESPONDING PROMPTLY AND EFFECTIVELY (§106.44(A)(1)) – “WITH KNOWLEDGE”

- §106.44 (c) - 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 reasonably may constitute sex discrimination under Title IX or this part.**
- When does an employee have sufficient information to report?
 - It is not necessary for the employee to have factual information that **definitively indicates** that sex discrimination occurred to trigger the employee's notification requirements to apply.
 - It is enough for the employee to have information about conduct that could reasonably be understood to constitute sex discrimination under Title IX, including conduct that could constitute sex-based harassment.

The District's obligation to address sex discrimination in its education program or activity

TITLE IX COORDINATOR

Dr. Hamsini Rajgopal
Allegheny Valley School District
Director of Finance & Business Operations
300 Pearl Avenue
Cheswick, PA. 15024
hrajgopal@avsd.school
724-274-5300

The District's obligation to address sex discrimination in its education program or activity

GENERAL RULE - RESPONDING PROMPTLY AND EFFECTIVELY (§106.44(A)(1)) – “PROMPTLY AND EFFECTIVELY”

- No Set Timeline for Responding Promptly - A reasonably prompt response to sex discrimination “is judged in the context of the recipient’s obligation to provide students and employees with education programs and activities free from sex discrimination.” (Final Rule, p. 426).
 - An unreasonable delay by a recipient’s Title IX Coordinator to take the required action under § 106.44(f)(1) to end sex discrimination in a recipient’s education program or activity, prevent its recurrence, and remedy its effects, would not meet Title IX’s obligation
- Effective action means that a Title IX Coordinator, upon learning of conduct that reasonably may constitute sex discrimination, takes reasonable steps calibrated to address possible sex discrimination based on all available information
 - When actions are not effective at ending sex discrimination and preventing its recurrence, the prompt and effective response requirement mandate additional efforts to end sex discrimination in the recipient’s education program or activity.

The District's obligation to address sex discrimination in its education program or activity

§ 106.40(B)(2) (PREGNANCY)

- When a student, or a person who has a legal right to act on behalf of the student, **informs any employee of the student's pregnancy or related conditions, the employee must:**
 1. promptly provides that person with the Title IX Coordinator's contact information; and
 2. Inform that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity informs
- Exception - unless the employee reasonably believes that the Title IX Coordinator has been notified.

The District's obligation to address sex discrimination in its education program or activity

CONFIDENTIAL EMPLOYEES (§106.44(D))

What is a Confidential Employee?

1. An employee of a recipient whose **communications are privileged or confidential** under Federal or State law. The employee's confidential status, for purposes of this part, is only with respect to information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies;
2. An employee of a recipient whom the recipient has **designated** as confidential under the 2024 Final Rule for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those services, the employee's confidential status is only with respect to information received about sex discrimination in connection with providing those services; . . .
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 only with respect to information received while conducting the study.

What are the District's obligations regarding Confidential Employees?

1. must notify all participants in the its education program or activity of how to contact its confidential employees, if any.

The District's obligation to address sex discrimination in its education program or activity

CONFIDENTIAL EMPLOYEES

What are a Confidential Employee's obligations?

1. Must explain to any person who reports conduct that reasonably may constitute sex discrimination under Title IX or this part:
 - a. The employee's status as confidential for purposes of this part, including the circumstances in which the employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination;
 - b. How to contact the recipient's Title IX Coordinator and how to make a complaint of sex discrimination; and
 - c. That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures.
- Who Are "Confidential Employees"
 - Department declined to designate specific types of individuals as confidential employees in the regulations;
 - may include, but are not limited to, guidance counselors, organizational ombuds, or staff within an on-campus sexual assault response center. (2024 Final Rule, p. 387)

The District's obligation to address sex discrimination in its education program or activity

CONFIDENTIAL EMPLOYEES - EMPLOYEES WHOSE COMMUNICATIONS ARE PRIVILEGED OR CONFIDENTIAL UNDER FEDERAL OR STATE LAW

42 Pa. C.S. § 5945

(a) General rule. No **guidance counselor, school nurse, school psychologist**, or home and school visitor in the public schools or in private or parochial schools or other educational institutions providing elementary or secondary education, including any clerical worker of such schools and institutions, who, while in the course of his professional or clerical duties for a guidance counselor, home and school visitor, school nurse or school psychologist, has acquired information from a student in confidence **shall be compelled or allowed:**

(1) **without the consent** of the student, if the student is 18 years of age or over; or

(2) **without the consent** of his parent or guardian, if the student is under the age of 18 years;

to disclose such information in any legal proceeding, trial, or investigation before any government unit.

(b) Exemption. Notwithstanding subsection (a), no such person shall be excused or prevented from complying with **23 Pa.C.S. Ch. 63 (relating to child protective services)**.

The District's obligation to address sex discrimination in its education program or activity

CONFIDENTIAL EMPLOYEES - EMPLOYEES WHOSE COMMUNICATIONS ARE PRIVILEGED OR CONFIDENTIAL UNDER FEDERAL OR STATE LAW

22 Pa. Code § 12.12

- (a) Use of a student's confidential communications to school personnel in legal proceedings is governed by statutes and regulations appropriate to the proceeding. See, for example, 42 Pa.C.S. § 5945 (relating to confidential communications to school personnel).
- (b) Information received in confidence from a student may be revealed to the student's parents or guardians, the principal or other appropriate authority when the health, welfare or safety of the student or other persons is clearly in jeopardy.

The District's obligation to address sex discrimination in its education program or activity

HYPOTHETICAL

- A 16-year-old student reports to the District's designated Confidential Employee that she was sexually assaulted in the District's bathroom by a teacher. The Confidential Employee explains:
 - His status as confidential for purposes of this part, including the circumstances in which he is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination (e.g. e.g., when the person is providing confidential services and not in circumstances when the employee is performing another role, such as teaching or coaching);
 - How to contact the recipient's Title IX Coordinator and how to make a complaint of sex discrimination; and
 - That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures.
- What else should/must the Confidential Employee do in this situation?
 - Mandated Reporter?
 - Inform student about Mandated Reporter status?

CONFIDENTIAL EMPLOYEE - COMMUNICATIONS

- The Student subsequently speaks with the Title IX Coordinator and fields a complaint of sex-based harassment. The Investigator requests an interview with the Confidential Employee to learn what the complainant told him. Can the Confidential Employee share this information?
 - § 106.45(b)(7)(i) of 2024 Final Rule excludes evidence provided to a confidential employee unless the person to whom the confidentiality is owed has voluntarily waived that confidentiality.
- Pregnancy
 - Confidential employees remain subject to § 106.40(b)(2)'s requirement to provide information to a student, or a person who has a legal right to act on behalf of the student, when the student or person with a legal right informs the employee of the student's pregnancy or related conditions. This obligation does not apply when the confidential employee—as with other employees—reasonably believes the Title IX Coordinator has already been notified. (2024 Final Rule, p. 379).

II. All Employees

B. CONDUCT THAT CONSTITUTES SEX DISCRIMINATION

Sex Discrimination

What is “Sex Discrimination”

Not expressly defined by the Final Rule. Instead, the Final Rule references §106.10 and §106.31 as examples of prohibited sex discrimination (Final Rule, p. 194):

1. §106.10 - Discrimination on the basis of sex includes discrimination on the basis of:
 - a. sex stereotypes,
 - b. sex characteristics,
 - c. pregnancy or related conditions,
 - d. sexual orientation, and
 - e. gender identity.
2. §106.31 - 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
3. Sex-Based Harassment

Sex Discrimination

SEX STEREOTYPES - §106.10

- “fixed or generalized expectations regarding a person’s aptitudes, behavior, self-presentation, or other attributes based on sex.”
 - Whitaker, 858 F.3d at 1049 (“A policy that . . . punishes [an] individual for his or her gender non-conformance . . . violates Title IX.”);
 - Pederson, 213 F.3d at 880 (recognizing that a university violated Title IX when its funding decisions in athletics were based on “paternalism and stereotypical assumptions about [women’s] interests and abilities,” and a “remarkably outdated view of women and athletics”)

Sex Discrimination

SEX CHARACTERISTICS - §106.10

- The term sex characteristics is intended to refer to physiological sex-based characteristics.
- Sex discrimination based on a person's physiological sex characteristics may include discrimination based on a person's anatomy, hormones, and chromosomes associated with male or female bodies.
- This could include, for example, discrimination based on physiological sex characteristics that differ from or align with expectations generally associated with male and female bodies.

Sex Discrimination

PREGNANCY OR RELATED CONDITIONS §106.10

- § 106.2. - Pregnancy or related conditions means:
 - Pregnancy, childbirth, termination of pregnancy, or lactation;
 - Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
 - Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions

Sex Discrimination

SEXUAL ORIENTATION - §106.10

- a recipient's intentional separation or different treatment of students based on their sexual orientation generally would constitute sex discrimination under the final regulations. (2024 Final Rule, p. 1238).

Sex Discrimination

GENDER IDENTITY - §106.10

- Gender identity describes an individual's sense of their gender, which may or may not be different from their sex assigned at birth. (p. 1234).
- Bostock instructs that when a person is discriminated against because their gender identity is not consistent with their sex assigned at birth, “sex” is, at least in part, a basis for that discrimination. See Bostock, 590 U.S. at 669

Sex Discrimination

106.11; 106.44(A)(2) – EDUCATION PROGRAM OR ACTIVITY

- Education Program or Activity (§106.11)
 - The 2024 Final Rule applies to all sex discrimination occurring under a recipient’s education program or activity in the United States.
 - This includes but is not limited to . . . 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 when some conduct alleged to be contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.

- Education Program or Activity (§106.44(a)(2))
 - “A recipient must also comply with this section to address sex discrimination in its education program or activity”

Sex Discrimination

§106.31 – EDUCATION PROGRAM OR ACTIVITY

■ Education Program or Activity (§106.31)

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,
 - except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b).
- 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.

Sex Discrimination

§106.31 – EDUCATION PROGRAM OR ACTIVITY - DE MINIMIS HARM

- Harm must generally be something more than innocuous, or *de minimis*, to be actionable discrimination
- Harm under § 106.31(a)(2) must be genuine and objectively non-trivial and assessed from the perspective of a reasonable person in the individual's position.

Sex Discrimination

“§106.31 – EDUCATION PROGRAM OR ACTIVITY - EXCEPT AS PROVIDED ELSEWHERE IN THIS PART”/ “EXCEPT AS PERMITTED BY”

Exceptions are limited to:

1. the enumerated exceptions in 20 U.S.C. §§ 1681(a)(1) through (9)

1. (3)EDUCATIONAL INSTITUTIONS OF RELIGIOUS ORGANIZATIONS WITH CONTRARY RELIGIOUS TENETS; (4)EDUCATIONAL INSTITUTIONS TRAINING INDIVIDUALS FOR MILITARY SERVICES OR MERCHANT MARINE; (5)PUBLIC EDUCATIONAL INSTITUTIONS WITH TRADITIONAL AND CONTINUING ADMISSIONS POLICY; (6)SOCIAL FRATERNITIES OR SORORITIES; VOLUNTARY YOUTH SERVICE ORGANIZATIONS; (7)BOY OR GIRL CONFERENCES (8)FATHER-SON OR MOTHER-DAUGHTER ACTIVITIES AT EDUCATIONAL INSTITUTIONS; (9)INSTITUTION OF HIGHER EDUCATION SCHOLARSHIP AWARDS IN “BEAUTY” PAGEANTS

2. regulatory provisions that implement those statutory provisions, namely:

- 106.12 (religious exemption),
- 106.13 (military and merchant marine educational institutions),
- 106.14 (membership practices of social fraternities and sororities, YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls, and voluntary youth service organizations); §
- 106.15(d), (e) (admissions to certain classes of educational institutions);

3. 20 U.S.C. §1686 and § 106.32(b)(1) (sex-separate housing); and

4. § 106.41(b) (sex-separate athletic teams)

Sex Discrimination

§106.31 – EDUCATION PROGRAM OR ACTIVITY - ATHLETICS

- § 106.31(a)(2) does not apply to permissible sex separation of athletic teams permitted under 34 CFR 106.41(b).
- 34 CFR 106.41(b), (c) - individual students may be excluded from a particular male or female athletic team on the basis of their sex, even when doing so may impose on them more than de minimis harm, as long as students, regardless of sex, have an equal opportunity to access the recipient's athletic program as a whole.
- Note: The Department has issued a Notice of Proposed Rulemaking. If finalized, it would:
 - Prohibit a categorical ban on transgender students playing sports consistent with their gender identity
 - But possibly Permit a more targeted criteria, substantially related to sport, level of competition, and grade or education level, could be permissible.

Sex Discrimination

§106.31 – EDUCATION PROGRAM OR ACTIVITY - ATHLETICS

- A.M. by E.M. v. Indianapolis Pub. Schools, 122CV01075JMSDLP, 2022 WL 2951430, at *11 (S.D. Ind. July 26, 2022), the court held that Indiana's recently enacted law that prohibited an individual from playing on a sports team that does not conform to his or her gender identity "punishes that individual for his or her gender non-conformance," which violates the clear language of Title IX.
- B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ., 98 F.4th 542, 556 (4th Cir. 2024) (where a statute's "undisputed purpose [] and only effect . . . is to exclude transgender girls . . . from participation on girls sports teams," that statute discriminates on the basis of transgender status.). The court referenced the proposed regulations and stated:

We do not hold that government officials are forbidden from creating **separate sports teams for boys and girls** or that they lack power to police the line drawn between those teams. We also **do not hold that Title IX requires schools to allow every transgender girl to play on girls teams, regardless of whether they have gone through puberty and experienced elevated levels of circulating testosterone.**

Sex Discrimination

“§106.31 – EDUCATION PROGRAM OR ACTIVITY - RESTROOMS, LOCKER ROOMS, ETC.

- A recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm.
- nothing in Title IX or the final regulations prevents a recipient from offering single-occupancy facilities, among other accommodations, to any students who seek additional privacy for any reason.

Sex Discrimination

“§106.31 – EDUCATION PROGRAM OR ACTIVITY – DRESS CODES

- sex-specific appearance codes, including sex-specific dress and grooming codes, are subject to Title IX and § 106.31(a)(2)
 - a recipient may adopt an appearance code with some sex-based distinctions to the extent those distinctions do not cause more than de minimis harm.
-
- Hypotheticals
-
1. The Boy’s Baseball team requires that its players wear protective cups. There is no requirement for the Girls’ Softball Team. Does this violate the 2024 Final Rule/Title IX?
 2. The District enacts a new dress code that requires girls to wear skirts to school. Does this violate the 2024 Final Rule/Title IX?
 3. The Boys’ Basketball team is required to have short hair. There is no hair length requirement for members of the Girls’ Team

Sex Discrimination

“§106.31 – EDUCATION PROGRAM OR ACTIVITY - DRESS CODES

Answers:

1. 2024 Final Rule - some sex-based distinctions may be appropriate in the protective gear or uniforms a recipient expects students to wear when participating in certain physical education classes or athletic teams.
2. Peltier, 37 F.4th at 114, 127–31 - holding that based on the “plain language and structure of the statute,” Title IX “unambiguously covers . . . sex-based dress codes,” and remanding the case for consideration of whether the girl plaintiffs were harmed by the charter school’s policy requiring only girls to wear skirts.
3. Hayden v. Greensburg Cmty. Sch. Corp., 743 F.3d 569, 583 (7th Cir. 2014) (holding that a policy requiring male basketball players, but not female basketball players, to keep their hair cut short, violated Title IX and the Equal Protection Clause

Sex Discrimination

SEX-BASED HARASSMENT

What is sex-based harassment?

Sex-based harassment is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity, that is:

- *Quid pro quo* harassment.
- Hostile environment harassment.
- Specific offenses.

Sex Discrimination

SEX-BASED HARASSMENT - QUID PRO QUO HARASSMENT

Elements:

- An employee, agent, or other person authorized by the school district to provide an aid, benefit, or service under the recipient's education program or activity;
- Explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

Guidance:

- Acquiescence to the conduct or the failure to complain, resist, or object to the conduct does not mean that the conduct was welcome, and the fact that a person may have accepted the conduct does not mean they welcome it. (2024 Final Rule, p. 78)
- Can include situations in which an employee or other person purports to provide and condition an aid, benefit, or service on a person's participation in unwelcome sexual conduct, even if that person is unable to provide that aid, benefit, or service. (2024 Final Rule, p. 78)
- The threat of a detriment falls within the definition of quid pro quo sex-based harassment, whether or not the threat is actually carried out (2024 Final Rule, p. 79)

Sex Discrimination

SEX-BASED HARASSMENT - HOSTILE ENVIRONMENT HARASSMENT

Elements:

1. Unwelcome sex-based conduct that is subjectively and objectively offensive (based on the totality of the circumstances); and
2. Is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.

Factors: Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

1. The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
2. The type, frequency, and duration of the conduct;
3. 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 conduct;
4. The location of the conduct and the context in which the conduct occurred; and
5. Other sex-based harassment in the recipient's education program or activity.

Sex Discrimination

SEX-BASED HARASSMENT - HOSTILE ENVIRONMENT HARASSMENT

Subjectively and Objectively Offensive

- Unwelcome sex-based conduct must be evaluated both subjectively and objectively.
- The objective standard is assessed from the perspective of a reasonable person in the complainant's position.
- Subjective offensiveness must be supported by evidence.
- The two elements are distinct, and a decisionmaker must find sufficient evidence to satisfy each element under the applicable standard before determining that alleged conduct constitutes sex-based harassment

Sex Discrimination

SEX-BASED HARASSMENT - HOSTILE ENVIRONMENT HARASSMENT

Severe or Pervasive

- Based on the specific circumstances in which a particular incident arises, a single serious incident—even if not pervasive—may be so severe as to create a hostile environment.
- Based on the specific circumstances in which it occurs, pervasive conduct—even if no single occurrence of the conduct, taken in isolation, is severe—may likewise create a hostile environment.

Pervasive:

- Harassment can be pervasive if it is widespread, openly practiced, or well-known to students and staff (such as sex-based harassment occurring in the hallways or harassment occurring during recess under a teacher's supervision).
- Pervasiveness also can be found if there is a pattern or practice of harassment if the harassment is sustained and nontrivial or part of a continuous series of events.

Sex Discrimination

SEX-BASED HARASSMENT - HOSTILE ENVIRONMENT HARASSMENT

Limits or Denies

- 2024 Final Rule changed “effectively denies” language in 2020 Final Rule to “denies or limits”
- However, the 2020 Final Rule stated that the “effectively denies a person access” element of the definition of sexual harassment “does not act as a more stringent element than the ‘interferes with or limits a student’s ability to participate in or benefit from the school’s programs’
- Moreover, the 2020 Final Rule similarly provided that the standard did not “require showing that a complainant “dropped out of school, failed a class, had a panic attack, or otherwise reached a ‘breaking point’” because “individuals react to sexual harassment in a wide variety of ways.”

Standard:

- Must be some impact on a student’s ability to participate or benefit from the education program or activity, but the definition does not specify any particular limits or denials.
- Animus is not an element of a hostile environment claim – i.e., the respondent need not act with animus towards the complainant

Sex Discrimination

SEX-BASED HARASSMENT - HOSTILE ENVIRONMENT HARASSMENT

Hypothetical #1 – Student A calls Student B “girly” as they pass one another in the hall. This is the first time Student A has made such a statement to Student B.

1. Is this sex-based harassment?
2. What if multiple students call student B “girly” over an extended period of time, but each of them only does it once and there’s no evidence that the students are coordinating their insults.

Hypothetical #2 – Student A plays a crude, sexist and objectively offensive prank on Student B. However, Student B laughs and, a few hours later, posts on social media: “Student A really got me with that one...hilarious!” A week later, Student B sends Student A an email complimenting him on the prank. However, Student B’s father sees the email and complains that Student A’s “prank” is sex-based harassment.

1. What evidence should the decision-maker consider when determining whether the prank constitutes sex-based harassment?

Hypothetical #3 – The District has received information that Student A has been the victim of A.I. generated nude images circulating among the student body on social media. However, the image was generated outside of school and none of the students have shared the image while in school. Even so, the images are being discussed in school, Student A has been humiliated and transferred to a cyber charter school. Can the District investigate her complaint that she’s a victim of harassment?

Sex Discrimination

SEX-BASED HARASSMENT - HOSTILE ENVIRONMENT HARASSMENT

- Hypothetical #1 - Isolated comments generally do not meet the definition of hostile environment sex-based harassment. (2024 Final Rule, p. 122). When the elements of sex-based hostile environment are satisfied for an affected student, a recipient has an obligation to address that hostile environment, even if a particular respondent's conduct does not justify discipline. (2024 Final Rule, p. 144).
- Hypothetical #2 - Unwelcome sex-based conduct must be evaluated both subjectively and objectively. Evidence regarding whether sex-based conduct meets the subjective element of the definition could include, but is not limited to, the complainant's own statements about the alleged conduct or other sources that could establish the complainant's experience of the alleged conduct.
- Hypothetical #3 - courts have recognized that elementary schools and secondary schools retain authority to discipline students for certain online, off-campus harassing speech not involving schoolwork or not part of a school-sponsored activity. Chen Through Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 711 (9th Cir. 2022) (school "properly disciplined" two students for "off-campus social media posts" that "amounted to severe bullying or harassment targeting particular classmates" (internal quotation marks omitted)), cert. denied sub nom. Eppler v. Albany Unified Sch. Dist., 143 S. Ct. 2641 (2023).

Sex Discrimination

SEX-BASED HARASSMENT – SPECIFIC OFFENSES

- **Sexual assault** (an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation);
- **Dating violence** (violence committed by a person: (A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) Where the existence of such a relationship shall be determined based on a consideration of the following factors: (1) The length of the relationship; (2) The type of relationship; and (3) The frequency of interaction between the persons involved in the relationship)).
- **Domestic violence** (felony or misdemeanor crimes 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)
- **Stalking** (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).

Sex Discrimination

SEX-BASED HARASSMENT – SPECIFIC OFFENSES

- Similar to the 2020 Final Rule, the specific offenses of sexual assault, dating violence, domestic violence, and stalking need not:
 - Satisfy the elements of severity or pervasiveness or subjective and objective offensiveness in order to constitute sex-based harassment.
 - Satisfy the element of unwelcomeness in order to constitute sex-based harassment.

III. Investigators and Decisionmakers

A. THE DISTRICTS OBLIGATIONS UNDER § 106.44

Barriers to Reporting (§106.44(b))

A recipient must require its Title IX Coordinator to:

1. Monitor the recipient's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or this part; and
2. Take steps reasonably calculated to address such barriers.

Emergency Removal (106.44(h))

- May remove a respondent from the recipient's education program or activity on an emergency basis if:
 - undertake an individualized safety and risk analysis,
 - determines that an imminent and serious threat to the health or safety of a complainant or any 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 IDEA, Section 504 or the ADA.
- Change from 2020 Final Rule – Removed the “physical health or safety” requirement
 - A serious non-physical threat to student safety may warrant the emergency removal of a respondent following an individualized assessment. For example, a complainant who is stalked by a respondent may not experience a physical threat, yet the stalking could present an imminent and serious threat to the student's health and safety. The Department concludes that serious, non-physical threats can be assessed as objectively as physical threats. (2024 Final Rule, p. 514).
 - Note: Neither 2020 Final Rule nor 2024 Final Rule required physical conduct and recognized that threats beyond physical violence could justify emergency removal (2024 Final Rule, p. 521).

Administrative Leave (106.44(i))

- May place and 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 or the Americans with Disabilities Act.
- What is Administrative Leave:
 - the Department continues to understand administrative leave as a temporary separation from one's employment, generally with pay and benefits, and thus, the term applies to a recipient's employees. (Final Rule, p. 528).

Informal Resolution (§ 106.44(g))

GENERAL RULES

- Can be offered at any time prior to determining whether sex discrimination occurred
 - Not available if the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student or such a process would conflict with Federal, State or local law.
- If provided, Title IX Coordinator must 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.
- District has discretion to determine whether it is appropriate to offer an informal resolution process and may decline to offer informal resolution despite one or more of the parties' wishes.
 - District may decline to allow informal resolution when it determines that the alleged conduct would present a future risk of harm to others.
- District must not require or pressure the parties to participate in an informal resolution process.
- District must obtain the parties' voluntary consent to the informal resolution process
- District must not require waiver of the right to an investigation and determination of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise of any other right.

Informal Resolution (§ 106.44(g))

NOTICE

- 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, including notice that an informal resolution agreement is binding only on the parties; and
 - vi. What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed.

Informal Resolution (§ 106.44(g))

TERMS OF INFORMAL RESOLUTION AGREEMENT

- 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 at the conclusion of the recipient's grievance procedures that sex discrimination occurred.

Note: The 2020 Final Rule only included references to mutual no-contact orders. The 2024 Final Rule eliminate the term “mutual” to ensure that a recipient understands that it is not limited to imposing mutual restrictions on contact between the parties.

Informal Resolution (§ 106.44(g))

FACILITATOR

- 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).

III. Investigators and Decisionmakers

B. GRIEVANCE PROCEDURE UNDER 106.45

Grievance Procedure (106.45)

GENERAL RULE AND COMPLAINT PROCESS (106.45(A))

- The 2024 Final Rule requires each district to adopt, publish, and implement grievance procedures for the prompt and equitable resolution of complaints of sex discrimination.
- The following statement published in a recipient's grievance procedures would accurately summarize this general requirement:

[ABC School] has adopted grievance procedures that provide for the prompt and equitable resolution of complaints made by students, employees, or other individuals who are participating or attempting to participate in its education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX or the Title IX regulations.

Grievance Procedure (106.45)

GENERAL RULE AND COMPLAINT PROCESS (106.45(A))

A recipient's grievance procedures for the prompt and equitable resolution of complaints of sex discrimination must be in writing and include provisions that incorporate the requirements of this section.

- Who can Make a Complaint requesting that the District investigate and make a determination about alleged discrimination?
 1. Sex Discrimination or Sex-Based Harassment: (i) A complainant; (ii) A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant; (iii) The Title IX Coordinator (discussed above);
 2. Sex Discrimination: Any student or employee; or Any person other than a student or employee who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.

Grievance Procedure (106.45)

BASIC REQUIREMENTS(106.45(B))

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 sex discrimination until a determination 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 caseby-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 decision whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any;
5. Require the recipient to 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 their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures;

Grievance Procedure (106.45)

BASIC REQUIREMENTS(106.45(B))

6. Require an objective evaluation of all evidence that is relevant, as defined in § 106.2, and not otherwise impermissible under paragraph (b)(7) of this section—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;
7. Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed or considered, except by the recipient to determine whether an exception in paragraphs (i) through (iii) applies; must not be disclosed; and must not otherwise be used), regardless of whether they are relevant:
 - a. Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee (unless waived);
 - b. A party’s or witness’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 or witness (unless consented to); and
 - c. 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 evidence about specific incidents of the complainant’s prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment.

Grievance Procedure (106.45)

BASIC REQUIREMENTS (106.45(B))

8. If a recipient adopts grievance procedures that apply to the resolution of some, but not all, complaints articulate consistent principles for how the recipient will determine which procedures apply.
9. For complaints alleging sex-based harassment, the grievance procedures must:
 - a. Describe the range of supportive measures available to complainants and respondents; and
 - b. List, or describe the range of, the possible disciplinary sanctions that the recipient may impose and remedies that the recipient may provide following a determination that sex-based harassment occurred.

Grievance Procedure (106.45)

NOTICE (106.45(C))

- Upon initiation of the recipient's grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known. The notice must include:
 1. The District's grievance procedures;
 2. Sufficient information available at the time to allow the parties to respond to the allegations (i.e., the identities of the parties, the conduct alleged to constitute sex discrimination, and the date(s) and location(s) of the alleged incident(s)).
 3. A statement that retaliation is prohibited;
 4. A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence.
 5. A statement that if the District provides a description of the evidence, the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party.
- If the District decides to investigate additional allegations of sex discrimination by the respondent toward the complainant that are not included in this notice or that are included in a complaint that is consolidated, the recipient must provide notice of the additional allegations to the parties whose identities are known.

Grievance Procedure (106.45)

DISMISSAL (106.45(D))

A District may dismiss a complaint of sex discrimination for any of the following reasons:

1. Inability to identify the Respondent;
2. The respondent is not participating in the recipient's education program or activity and is not employed by the recipient
3. The complainant voluntarily withdraws any or all of the allegations in the complaint, the Title IX Coordinator declines to initiate a 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 even if proven;
4. The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination.
 - Prior to dismissing the complaint under this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant.

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

Grievance Procedure (106.45)

DISMISSAL (106.45(D))

Must notify Complainant that the dismissal may be appealed and provide the complainant (or respondent, if notified of allegations) with an opportunity to appeal the dismissal

Grounds for Appealing a Dismissal:

1. Procedural irregularity that would change the outcome;
2. New evidence that would change the outcome and that was not reasonably available when the determination whether sex-based harassment occurred or dismissal was made; and
3. 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.

Grievance Procedure (106.45)

DISMISSAL (106.45(D))

If an appeal is filed, the District must:

1. Notify the parties, including notice of allegations if not previously provided to respondent;
2. Implement appeal procedures equitably for all parties
3. Ensure that Appeal decisionmaker did not take part in the investigation or dismissal of the complaint
4. Ensure that the Appeal decisionmaker has been trained.
5. Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome
6. Notify the parties of the result of the appeal and the rationale for the result.

Grievance Procedure (106.45)

DISMISSAL (106.45(D)) - DISTRICT OBLIGATIONS AFTER DISMISSAL

1. Offer supportive measures to the complainant as appropriate.
2. For dismissals where complainant withdrew any or all allegations or where the District determined that allegations do not constitute sex discrimination and where the respondent has been notified of the allegations, offer supportive measures to the respondent as appropriate.
3. 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 activit

Grievance Procedure (106.45)

CONSOLIDATION (106.45(E))

1. 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.
2. 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 § 106.46 in addition to the requirements of this section.

Grievance Procedure (106.45)

INVESTIGATION ((106.45(F))

District must provide for adequate, reliable, and impartial investigation of complaints. To do so, the recipient must:

1. Ensure that the burden is on the District (not 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 fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible;
3. Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance;
4. Provide each party with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, as follows:
 - a. provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence;
 - b. provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence;
 - c. take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures

Grievance Procedure (106.45)

QUESTIONING PARTIES AND WITNESSES (106.45(G))

- must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

Grievance Procedure (106.45)

DETERMINATION (106.45(H))

1. Use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred
 - decisionmaker must evaluate relevant and not otherwise impermissible evidence for its persuasiveness;
 - if the decisionmaker is not persuaded that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sex discrimination occurred.
2. Notify the parties in writing of the determination whether sex discrimination occurred (including the rationale for such determination),
3. Notify the parties in writing of the procedures and permissible bases for the complainant and respondent to appeal, if applicable.
4. If there is a determination that sex discrimination occurred, Title IX Coordinator must:
 - coordinate the provision and implementation of remedies to a complainant;
 - coordinate the imposition of any disciplinary sanctions on a respondent (including notice of such sanctions to complainant)
 - take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur

Grievance Procedure (106.45)

DETERMINATION (106.45(H))

5. District may not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the recipient's grievance procedures that the respondent engaged in prohibited sex discrimination;
6. 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 whether sex discrimination occurred

Grievance Procedure (106.45)

APPEALS (106.45(I))

a recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints.

III. Investigators and Decisionmakers

C. SERVING IMPARTIALLY

Pittsburgh | Harrisburg | New York | Cleveland | Beaver | San Francisco Bay Area*

TUCKER | ARENSBERG
Attorneys

CONFLICT OF INTEREST AND BIAS

- The 2024 Final Rule's general prohibition on conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent largely mirrors the language of the 2020 Final Rule, except with respect to the categorical prohibition in 2020 on the use of a single-investigator model.
- Generally speaking, conflicts of interest can exist when a member of the Title IX teams' personal or private interests may compromise his or her judgment, decisions, or actions.
- A bias is a disproportionate weight in favor of or against an idea or thing, usually in a way that is closed-minded, prejudicial, or unfair.
 - Biases can be innate or learned
 - An **implicit bias**, or **implicit stereotype**, is the unconscious attribution of particular qualities to a member of a certain social group
- A recipient has flexibility in how it ensures its personnel are unbiased, which could include restricting Title IX personnel from pursuing close relationships with students, training more than one employee to perform Title IX roles so they can step in when conflicts of interest arise, or hiring outside personnel when conflicts of interest arise.

- Whether bias exists requires examination of the particular facts of a situation.

Districts should apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists.

- Biased decision making increases the risk of erroneous outcomes because bias, rather than evidence, dictates the conclusion

IMPARTIALITY WITHOUT PREJUDGMENT

- **Prejudgment** means forming an opinion about a situation or a person that is formed before knowing or considering all of the facts.
 - Title IX personnel must refrain from drawing conclusions or making assumptions about either party's credibility or truthfulness until conclusion of the grievance process.
 - It is inappropriate for investigators and/or decision-makers to prejudge credibility based on a party's status as a complainant or respondent

AVOIDING CONFLICTS, BIAS AND PREJUDGMENT

- Be honest with yourself - check and recognize your initial prejudgments and watch what you say;
 - Would I be happy if my colleagues became aware of the conflict?
 - Would I be happy if the conflict appeared in the media with respect to the grievance process?
 - If I saw someone else with the same potential conflict, would I think they should be barred from participating?
- Focus on the Task at Hand:
 - Keep an open mind;
 - Seek out witnesses and evidence;
 - Gather facts and focus on the facts;
- Analyze your relationships - The Department notes that Decision-Makers are obligated to serve impartially and thus should not endeavor to “develop a personal relationship” with one party over another.
- Recuse yourself if necessary.

III. Investigators and Decisionmakers

D. RELEVANCE

Relevance

- Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures
- Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.
 - emergency removal is not “relevant evidence” that can be considered in reaching a determination under § 106.45(b)(6) and (h)(1).
 - supportive measures are not “relevant evidence” that can be considered in reaching a determination

Relevance

- Information that Must Be Excluded Even if Relevant

- Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee
- A party's or witness'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 or witness
- Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless it is:
 - Evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct; or
 - evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment.
- The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred

IV. Title IX Coordinator

A. RESPONSIBILITIES UNDER §106.8(A), §§ 106.40(B)(3), 106.44(F) AND (G)

Title IX Coordinator

106.8(A) (GENERAL)

- Each school must designate and authorize at least one employee (“Title IX Coordinator”) to coordinate its efforts to comply with its responsibilities under Title IX and the 2024 Final Rule.
 - May have more than one Title IX Coordinator, but must designate one of its Title IX Coordinators to retain ultimate oversight
 - May delegate, or permit a Title IX Coordinator to delegate, specific duties to one or more designees.
 - If a complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with one or more: 1) members of the student’s IEP team; 2) members of the group of persons responsible for the student’s placement decision to determine how to comply with the requirements of the IDEA and Section 504 of the Rehabilitation Act throughout the recipient’s implementation of grievance procedures under § 106.45.
 - Title IX Coordinator must: (1) Monitor the recipient’s education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or this part; and (2) Take steps reasonably calculated to address such barriers. (§ 106.44(b))

Title IX Coordinator

106.40(B)(3) - PREGNANCY

- When the Title IX Coordinator is notified of student's pregnancy or related condition, the Title IX Coordinator must:
 - Provide notice of the District's obligations under 106.40(b)(1)-(5) and 106.44(j) of the 2024 Final Rule
 - Provide a copy of the District's notice of nondiscrimination
 - Make reasonable modifications based on the student's individual needs after consulting with the student
 - breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom; intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time for coursework and rescheduling of tests and examinations; allowing a student to sit or stand, or carry or keep water nearby; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other changes to policies, practices, or procedures

Title IX Coordinator

106.40(B)(3) - PREGNANCY

- allow the student to voluntarily access any separate and comparable portion of the recipient's education program or activity.
- allow the student to voluntarily take a 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 licensed healthcare provider.
 - If the student qualifies for leave under a leave policy maintained by a recipient that allows a greater period of time than the medically necessary period, the recipient must permit the student to take voluntary leave under that policy instead if the student so chooses;
 - Upon return, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the voluntary leave began.
- ensure that the student can access 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.

Title IX Coordinator

106.40(B)(3) - PREGNANCY

- Supporting documentation can only be required when the documentation is necessary and reasonable for the recipient to determine the reasonable modifications to make or whether to take additional specific actions described above
- Examples of situations when requiring supporting documentation is not necessary and reasonable include:
 - When the need for a specific action is obvious, like when a student who is pregnant needs a bigger uniform;
 - when the student has previously provided the recipient with sufficient supporting documentation;
 - when the reasonable modification because of pregnancy or related conditions at issue is allowing a student to carry or keep water nearby and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom;
 - when the student has lactation needs'
 - When the specific actions are available to students for reasons other than pregnancy or related conditions without submitting supporting documentation.

Title IX Coordinator

106.40(B)(3) - PREGNANCY

- must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions 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.
- must not require a student who is pregnant or has related conditions to provide certification from a healthcare provider or any other person that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless:
 - The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
 - The recipient requires such certification of all students participating in the class, program, or extracurricular activity; and
 - The information obtained is not used as a basis for discrimination prohibited by this part

Title IX Coordinator

RESPONSE UPON NOTIFICATION - 106.44(F)

- When notified of possible sex discrimination, the Title IX Coordinator must take the following actions to promptly and effectively end any sex discrimination in the District education program or activity, prevent its recurrence and remedy its effects:
 1. Treat the complainant and respondent equitably;
 2. Offer and coordinate supportive measures, as appropriate, for the complainant.
 3. if the recipient has initiated grievance procedures or offered an informal resolution process to the respondent, offer and coordinate supportive measures, as appropriate, for the respondent;
 4. Notify the complainant or, if the complainant is unknown, the individual who reported the conduct, of the grievance procedures and the informal resolution process, if available and appropriate;
 5. If a complaint is made, notify the respondent of the grievance procedures and the informal resolution process, if available and appropriate;
 6. In response to a complaint, initiate the grievance procedures or the informal resolution process if available and appropriate and requested by all parties;

Title IX Coordinator

RESPONSE UPON NOTIFICATION - 106.44(F)

7. In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures. To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following factors:
 1. The complainant's request not to proceed with initiation of a complaint;
 2. The complainant's reasonable safety concerns regarding initiation of a complaint;
 3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
 4. The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
 5. The age and relationship of the parties, including whether the respondent is an employee of the recipient;
 6. The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
 7. The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
 8. Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46.

If, after considering these and other relevant factors, the Title IX Coordinator determines that the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the recipient from ensuring equal access on the basis of sex to its education program or activity, the Title IX Coordinator may initiate a complaint.

Title IX Coordinator

PRACTICAL GUIDANCE – INITIATING A COMPLAINT

- A Title IX Coordinator must consider whether the alleged conduct implicates any of the considerations listed in factors described above.
- A Title IX Coordinator would consider each of the factors in light of the alleged conduct and the information available at that time.
- The Title IX Coordinator's required consideration of these enumerated factors does not preclude the Title IX Coordinator from considering other information that may be known to them and that could also be relevant to the Title IX Coordinator's ultimate decision whether to initiate a complaint.
- After considering each of the enumerated factors, along with any other factors and information the Title IX Coordinator deems relevant, the Title IX Coordinator must determine whether the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or whether the conduct as alleged prevents the recipient from ensuring equal access based on sex to its education program or activity. If neither of the two considerations is present, then a recipient's Title IX Coordinator **must not initiate a complaint**.

Title IX Coordinator

RESPONSE UPON NOTIFICATION - 106.44(F)

8. If initiating a complaint without the complainant (see above), notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others, including by providing supportive measures consistent with paragraph (g) of this section; and
9. Regardless of whether a complaint is initiated, take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.
 - the prompt and effective steps that a Title IX Coordinator may take are limited to non-disciplinary action, including for example providing additional training for employees, educational programming aimed at the prevention of sex discrimination, or remedies such as permitting a complainant to retake a class. (2024 Final Rule, p. 457).
 - no additional steps would be necessary when the sex discrimination involved only the parties and did not impact others participating or attempting to participate in the recipient's education program or activity, and the sex discrimination was addressed fully through a recipient's grievance procedures or informal resolution process. (2024 Final Rule, p. 458).
 - a Title IX Coordinator might determine that no additional steps are necessary if the complainant has pursued remedies under a collective bargaining agreement. (2024 Final Rule, p. 458).

Title IX Coordinator

RESPONSE UPON NOTIFICATION - 106.44(F)

- A Title IX Coordinator is not required take these steps if the Title IX Coordinator reasonably determines that the conduct as alleged could not constitute sex discrimination under Title IX or this part.
- What if an employee reports conduct that they reasonably believe to be sex discrimination?
 - while a recipient must train and require its non-confidential employees to report information about conduct that they believe reasonably may constitute sex discrimination to the Title IX Coordinator under § 106.44(c), a Title IX Coordinator's assessment of the same report might reasonably conclude that the conduct as alleged could not constitute sex discrimination. (Final Rule, p. 433).

Title IX Coordinator

PARENTAL RIGHTS (§106.6(G))

- A parent, legal guardian, or other authorized legal representative must be permitted to exercise whatever rights the parents, guardian, or other authorized legal representative might have to act on behalf of a complainant or other person as a result of State, local, or other sources of law; such rights might include making a complaint of sex discrimination, accompanying a minor student to meetings, interviews, and hearings, and otherwise participating in the recipient's grievance procedures.
- A Title IX Coordinator is not prohibited from consulting a parent in conducting the inquiry to determine whether to initiate a complaint under the 2024 Final Rule.
- Hypothetical: Student reports conduct that constitute sex discrimination to the Title IX Coordinator, but the Student does not wish to file a complaint and institute the grievance process. However, Student's parents insist that the process be started. What does the Title IX Coordinator do?

Title IX Coordinator

HYPOTHETICALS

1. Title IX Coordinator has decided to not monitor for barriers to reporting because they have not received any complaints about barriers to reporting. Is the Title IX Coordinator complying with Title IX?
2. A school employee overhears certain students stating that they don't want to report sex discrimination because they are worried about retaliation? What should the District do?
3. School District implements a system where it accepts complaints of conduct that might constitute sex discrimination via email. However, months after implementation, the District notices that no email complaints have been received. Upon further investigation, the District discovers that numerous complaints were screened by the email systems spam filter. What should the District do?
4. School District learns that some confidential employees are telling students that discrimination based on sexual orientation or gender identity should not be reported to the Title IX Coordinator and are discouraging individuals from making their own reports of such discrimination to the Title IX Coordinator. What should the District do?

Title IX Coordinator

ANSWERS

1. The obligation to monitor for barriers to reporting is not triggered only when a concern is raised over barriers to reporting. The Title IX Coordinator must monitor for barriers regardless of whether a concern has been raised about such barriers. (2024 Final Rule, p. 338)
2. The recipient could conduct student focus groups or survey students about why they feel discouraged from reporting or fear retaliation. Depending on what the recipient learns, the recipient may in response decide to include more readily available information on how to report sex discrimination and emphasize a recipient's prohibition on retaliation in required trainings for all students. (2024 Final Rule, p. 331)
3. The lack of access would constitute a barrier to reporting possible sex discrimination. The recipient should therefore monitor the efficacy of this online reporting system for access issues and take steps reasonably calculated to address those issues to fulfill its obligations under § 106.44(b). 2024 Final Rule, p. 330.
4. Title IX Coordinator would be required to take steps reasonably calculated to address such barriers, for example, through publicizing corrected information and training employees.

Supportive Measures (§106.44(g))

SCOPE AND DEFINITION

Supportive measures are:

individualized measures offered as appropriate, as reasonably available, **without unreasonably burdening** a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:

1. Restore or preserve that party's access to the recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment; or
2. Provide support during the recipient's grievance procedures or during the informal resolution process.

Supportive Measures (§106.44(g))

REQUIREMENTS

1. Supportive measures may vary depending on what the recipient deems to be reasonably available. 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 applied to one or more parties; leaves of absence; 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.
- Guidance:
 - there may be circumstances in which supportive measures for respondents, such as counseling, support groups, or specialized training, if reasonably available, can be appropriate to restore or preserve a party's access to the recipient's education program or activity.
 - there may be supportive measures that apply retroactively, such as retroactive withdrawals, extensions of deadlines, adjustments to transcripts, or tuition reimbursements, that, if reasonably available, can be appropriate to restore or preserve a party's access to the recipient's education program or activity.
 - may apply mutual or non-mutual no-contact orders to complainants and/or respondents as supportive measures.

Supportive Measures (§106.44(g))

REQUIREMENTS

2. Supportive measures must not **unreasonably burden** either party and must be designed to protect the safety of the parties or the recipient's educational environment, or to 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). A recipient must not impose such measures for punitive or disciplinary reasons.
 - a stay-away order may be burdensome because it requires a respondent to change routes when navigating campus or avoid a certain hallway in order to preserve a complainant's access to the recipient's education program or activity, but it would be a permissible supportive measure to the extent that the order was imposed to preserve access and was not imposed for any punitive or disciplinary reason.
 - a respondent might be asked to register for classes after a complainant in order to make sure that the two parties are not in the same class. Such a request may be burdensome, but it would not be punitive or disciplinary because the reason for providing the supportive measure was not to punish or discipline, but rather to ensure that both parties have access to the recipient's education program or activity during the course of the grievance procedures.
 - If a party could show that a supportive measure that burdened them was intended to punish them because, for example, the supportive measure did not remedy barriers to access for the other party, the recipient would need to terminate the supportive measure

(2024 Final Rule, p. 490)

Supportive Measures (§106.44(g))

REASONABLE OR UNREASONABLE BURDEN

The Department declined to provide a specific list of what supportive measures might constitute a “reasonable” or “unreasonable” burden. Instead, the Department expects recipients to engage in a fact-specific inquiry to determine whether supportive measures constitute a reasonable burden on a party:

1. take into account the nature of the educational programs, activities, opportunities, and benefits in which the party is participating, not solely those components that are “academic” in nature
2. many actions taken by school personnel to quickly intervene and correct behavior, such as educational conversations with students or changing student seating, would be considered reasonable supportive measures.
3. actions such as suspension or expulsion are inherently burdensome and would be an unreasonable burden upon a party as a supportive measure.
4. should not rely on its flexibility to provide supportive measures that burden a party at the expense of considering other supportive measures, including those that can be provided by the recipient without burden on either party

Supportive Measures (§106.44(g))

REQUIREMENTS

3. A recipient may, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures or at the conclusion of the informal resolution process, or the recipient may continue them beyond that point.
4. A recipient must provide a complainant or respondent with a timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the recipient's decision to provide, deny, modify, or terminate supportive measures applicable to them.
 - The impartial employee must be someone other than the employee who made the challenged decision and must have authority to modify or reverse the decision, if the impartial employee determines that the decision to provide, deny, modify, or terminate the supportive measure was inconsistent with the definition of supportive measures in § 106.2.
 - A recipient must also provide a party with the opportunity to seek additional modification or termination of a supportive measure applicable to them if circumstances change materially.

Basis for challenge: 1) unreasonably burdensome, 2) not available, 3) being imposed for punitive or disciplinary reasons; 4) not being imposed without fee or charge; and 5) not effective in meeting the purposes for which it is intended, including to restore or preserve access to the education program or activity, provide safety, or provide support during the grievance procedures.

Supportive Measures (§106.44(g))

IMPARTIAL EMPLOYEE TO REVIEW SUPPORTIVE MEASURES

- The 2024 Final Rule requires, at minimum, assigning one person to handle challenged decisions.
 1. the Title IX Coordinator may choose to delegate the responsibility to provide or deny supportive measures to another employee and provide appropriate and impartial review of requests to terminate or modify such measures themselves; or
 2. the Title IX Coordinator may be the one to provide or deny supportive measures and the recipient or the Title IX Coordinator may designate an alternative appropriate and impartial administrator to review challenges to supportive measures
- Neither the Title IX Coordinator nor any other employee will be permitted to both provide and review the same supportive measures.

Supportive Measures (§106.44(g))

REQUIREMENTS

5. A recipient must not disclose information about any supportive measures to persons other than the person to whom they apply, including informing one party of supportive measures provided to another party, unless necessary to provide the supportive measure or restore or preserve a party's access to the education program or activity, or when an exception in § 106.44(j)(1) through (5) applies.
-
- NOTE: "Necessary to Provide or Restore:"
 - It is not the identity of the person but the information about the supportive measure itself that warrants protection.
 - if one party is receiving counseling as a supportive measure, it is unlikely that a recipient would be permitted to disclose that information to another party
 - it may be necessary to tell one party that another party has changed classes in order to maintain the protections of an existing stay-away order.

Supportive Measures (§106.44(g))

PROHIBITED DISCLOSURES OF PERSONALLY IDENTIFIABLE INFORMATION. (106.44(J)(1)-(5))

A recipient must not disclose personally identifiable information obtained in the course of complying with this part, except in the following circumstances:

1. When the recipient has obtained prior written consent from a person with the legal right to consent to the disclosure;
2. When the information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue;
3. To carry out the purposes of this part, including action taken to address conduct that reasonably may constitute sex discrimination under Title IX in the recipient's education program or activity;
4. As required by Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement;
5. To the extent such disclosures are not otherwise in conflict with Title IX or this part, when required by State or local law or when permitted under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.

Supportive Measures (§106.44(g))

REQUIREMENTS

6. If the complainant or respondent is an elementary or secondary student with a disability, the recipient must require the Title IX Coordinator to consult with one or more members, as appropriate, of the student's Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or one or more members, as appropriate, of the group of persons responsible for the student's placement decision under 34 CFR 104.35(c), if any, to determine how to comply 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.

IV. Title IX Coordinator

B. RECORD KEEPING

RECORD KEEPING – 106.8(F)

1. Must maintain for a period of at least seven years: for each complaint - records documenting the informal resolution process under or the grievance procedures and the resulting outcome.
2. For each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination, 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 available upon request for inspection by members of the public.



Pittsburgh | Harrisburg | New York | Cleveland | Beaver | San Francisco Bay Area*