



# 2024 Title IX Regulations: Exploring Key Provisions

# Today's Speakers

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# Agenda

- The 2024 Title IX Regulations: Avoiding the Pendulum's Swing
- Exploring Key Provisions
  - Institutional Policies & Procedures
  - Organization & Structure of Title IX Compliance Program
  - School Community Awareness & Culture
- Q&A



# **The 2024 Title IX Regulations: Avoiding the Pendulum's Swing**

# Response to Sex Discrimination

- Must respond promptly and effectively if the school has knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity; and
- Must also comply with § 106.44 to address sex discrimination in its education program or activity, which addresses:
  - Expanded Title IX Coordinator responsibilities
  - Monitoring and addressing barriers to reporting
  - Notifications/referrals to Title IX Coordinator
  - Privacy rights
  - Informal resolution
  - Confidential employee obligations
  - Public awareness events
  - Supportive measures
  - Emergency removals and administrative leave

# Coverage

*Title IX applies to...*

- Conduct that occurs under a school's **education program or activity**
  - ✓ *Buildings owned/controlled by an officially recognized student org*
  - ✓ *Conduct that is subject to the school's disciplinary authority*
  - ✓ *Conduct that occurred outside the school's education program or activity or outside the U.S, but that creates a sex-based hostile environment in the school*

# Scope

*Sex-based discrimination includes discrimination based on...*

- Sex stereotypes,
- Sex characteristics,
- Pregnancy or related conditions,
- Sexual orientation, and
- Gender identity

# Education Program or Activity

- In the limited circumstances in which Title IX permits different treatment or separation based on sex, a school must not carry this out in a manner that subjects a person to more than de minimis harm.
- *What's more than de minimis harm?*
  - Adopting a policy or practice that prevents a person from participating in an education program or activity consistent with their **gender identity**.
- Title IX exceptions, 20 U.S.C. 1681(a)(1)-(9), not subject to this standard.



# Effective Date

- Final Rule is effective on August 1, 2024.
- Final Rule applies to complaints of sex discrimination regarding alleged *conduct that occurs on or after August 1, 2024.*
  - *Not when the alleged conduct is reported.*

# Legal Challenges

*Effective date may be delayed due to pending legal challenges.*

- Filed by 22 State Attorneys General
- Likely challenges:
  - Rulemaking process
  - Due process elements (or alleged lack thereof)
  - Definition of “sex” to include gender identity and other categories
  - Free speech



# Key Provisions on Institutional Policies & Procedures

# Definitional Changes

## *Sex-based Harassment...*

- Hostile Environment Harassment
  - *Unwelcome sex-based conduct that is subjectively and objectively offensive and is so severe or pervasive (based on totality of circumstances)*
  - *List of fact-specific factors to consider*
- Quid Pro Quo Harassment
  - *Conduct by an employee, agent, or other person authorized by the school*
- Specific offenses are generally the same

# Definitional Changes

*Complaints are...*

- *Verbal* or *written* requests that can objectively be understood as a request to investigate and make a determination about alleged discrimination.

# Definitional Changes

*Complainant is a...*

- Student
- Employee
- Person participating or attempting to participate in the education program or activity at the time of the alleged sex discrimination.

# What's New?

## *Informal Resolution*

- Discretion to offer IR before formal complaint is filed with some limitations:
  - Not for employee-student cases at K-12 (permissible in higher ed)
  - Not if there is conflict with federal, state, or local laws
  - May decline to offer even if parties request IR, for example, if the school determines the alleged conduct would present a future risk of harm to others

# What's New?

## *Informal Resolution*

- Must inform the parties in writing of IR offer and their rights and responsibilities in IR process:
  - Potential terms that can be requested/offered in an IR agreement—
    - Restrictions on contact
    - Restrictions on R's participation in parts of educational programs/activities/specific events
    - Any restrictions that could've been imposed as remedies/discipline if R had been found responsible
  - Notice that an IR Agreement is binding only on the parties
  - The types of info from IR process that can be disclosed if grievance procedures is initiated/resumed





# **Key Provisions on the Organization & Structure of Title IX Compliance Program**

# § 106.45

*General procedures for prompt and equitable resolution of all sex discrimination complaints*

- K-12 sex-based harassment
- Employee cases not involving sex-based harassment

# §106.46

*Specialized procedures for prompt and equitable resolution of sex-based harassment in higher education involving a student complainant/respondent*

- ✓ A school's grievance procedures **must include** the requirements from §106.45 and §106.46 for prompt and equitable resolution of sex-based harassment complaints.

# § 106.45 (& §106.46)

## *Basic requirements for grievance procedures...*

1. Treat C & R equitably.
2. No conflicts of interest or bias by Title IX Coordinator, investigator, and decisionmaker against parties (individually or generally); **decisionmaker may be the Title IX Coordinator or investigator.**
3. R is presumed not responsible until determination at end of grievance procedures.
4. **School must establish reasonably prompt timeframes for the major stages of the grievance procedures** (allows for good cause extensions).  

“Major stages”: Decision to dismiss/ investigate; investigation; determination; appeal (if any)
5. Take reasonable steps to protect privacy, but do not restrict parties’ participation in the grievance procedures and ability to receive support.

# § 106.45 (& §106.46)

## *Basic requirements for grievance procedures...*

6. Objective evaluation of all relevant evidence; credibility determinations must not be based on person's role in complaint.
7. Impermissible evidence must be excluded regardless of relevance.
8. Consistent principals for determining which grievance procedures will apply to sex discrimination complaints.

### *What is impermissible evidence?*

- Evidence under privilege protected by law or provided to confidential employee, *unless there is a voluntary waiver.*
- Treatment records, *unless there is voluntary, written consent.*
- Evidence about C's sexual interests or prior sexual conduct *unless—*
  - (1) *offered to prove someone other than R committed alleged conduct, or*
  - (2) *evidence about specific incidents of C's prior sexual conduct with R and offered to prove C's consent to the alleged conduct.*

# § 106.45 Notice of Allegations

*Schools must provide to known parties...*

- Grievance procedures for sex discrimination complaints, sex-based harassment (if applicable), and any IR process.
- Sufficient information available at the time to allow the parties to respond to the allegations.
- Statement that retaliation is prohibited.
- Statement that parties have equal opportunity to access relevant and permissible evidence or, if school is providing access to an accurate description of this evidence, upon parties' request.
- Notice to known parties of additional allegations of sex discrimination from investigation.

# § 106.46 Notice of Allegations

*Must provide written notice of info required from 106.45  
AND inform parties:*

- Respondent is presumed not responsible until a determination is made at the end of grievance procedures under this section.
- Parties have opportunity to present relevant and permissible evidence to a trained, impartial decisionmaker.
- Parties may have advisor of their choice at meetings and proceedings.
- Parties have equal opportunity to access relevant and permissible evidence or investigative report that accurately summarizes evidence (access to evidence available upon request).
- School's code of conduct, if applicable, prohibits knowingly making false statements or knowingly submitting false information during the grievance procedure.
- Written notice to known parties of additional sex-based harassment allegations from investigation.
  - ✓ *Schools may delay providing written notice to R in order to appropriately address reasonable safety concerns following an individualized safety and risk analysis.*

# § 106.45 Dismissals

*School has discretion to dismiss if...*

- Unable to identify R after taking reasonable steps.
- R not employed by school or participating in education program or activity.
- C voluntarily withdraws complaint allegation(s), TIX C declines to initiate a complaint, and school determines remaining allegation(s) would not constitute sex discrimination.
- School determines that even if proven, complaint allegation(s) would not constitute sex discrimination (after reasonable efforts to clarify allegations).

*School must notify parties of dismissal basis and options for appealing dismissal; **must offer appeal process that is the same as comparable proceedings, if any.***

# § 106.46 Dismissals

*School must simultaneously notify parties in writing of dismissal basis and, if applicable, obtain C's withdrawal in writing.*

*School must offer appeal of dismissal (& determination) on same three bases from 2020 Title IX regulations.*

# § 106.45 Investigations

- Burden is on the school (not parties) to conduct an investigation that gathers sufficient evidence to determine if sex discrimination occurred.
- Must provide an equal opportunity for parties to present factual witnesses and relevant, permissible evidence.
- Must review all evidence and determine relevance and permissibility.
- Must provide each party with equal opportunity to access relevant, permissible evidence (if “description option,” upon request) with reasonable opportunity to respond.
- Must take reasonable steps to prevent and address unauthorized disclosures of evidence.



# § 106.46 Investigations

*Furthermore, for sex-based harassment, postsecondary schools...*

- Must provide written notice of the date, time, location, participants, and purpose of all meetings or proceedings with sufficient time for parties to prepare.
- Must provide same opportunities for advisors of choice to be present in meetings and proceedings; restrictions on advisor's role must apply equally to parties.
- Have discretion for parties to present expert witnesses.
- Must allow for reasonable extensions of time for good cause with written notice of reason for delay.
- Must provide party & advisor equal opportunity to access relevant, permissible evidence (and before/during live hearing if applicable).
- Must provide party with a reasonable opportunity to review and respond to evidence prior to determination.
- Must take reasonable steps to prevent and address unauthorized disclosures of evidence.

# § 106.45 Assessing Credibility

Schools 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.

- ✓ School complies with this requirement if it conducts Questioning Process described in § 106.46.

# § 106.46 Assessing Credibility

- All Q's must be relevant **and** permissible!
- Decisionmaker must evaluate and determine relevance/permissibility prior to Q's being asked; must explain any decision to exclude a Q.
- School must not permit unclear or harassing Q's, even if Q is relevant/permissible; decisionmaker must give a party the chance to clarify or revise if Q is unclear or harassing.
- School can adopt other reasonable rules on decorum to be equally applied to parties.
- Decisionmaker can choose to place less/no weight on statements by a party/witness who refuses to respond to relevant, permissible questions.
- Decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on party/witness' refusal to respond to questions.

# § 106.46 Assessing Credibility

*Schools must provide a process as specified in the regulations before determining if sex-based harassment occurred:*

**Live  
Hearing  
Process**

**Questioning  
Process**

# § 106.46 Assessing Credibility

*If school conducts a live hearing process, must allow...*

- Parties to propose Q's asked by decisionmaker of any party or witness
- Each party's advisor to ask Q's of any party or witness
  - *If advisor-conducted Q's are permitted and party does not have advisor, school must provide an advisor of the school's choice without charge (must not appoint confidential employee; may appoint attorney but not required).*

**Live Hearing  
Process**

# § 106.46 Assessing Credibility

*If school does not conduct a live hearing process, must allow...*

- Investigator/decision-maker to ask Q's during individual meetings with party/witness.
- Each party to propose Q's for investigator/decision-maker to ask other party/witness.
- Provide each party with an audio/AV recording or transcript and provide enough time for party to have a reasonable opportunity to propose follow-up Q's.

**Questioning  
Process**

# § 106.45 Determination

- Preponderance of the evidence std, *unless* school uses clear and convincing evidence std in all comparable proceedings (**then discretion on std allowed**).
- Schools must notify the parties in writing of the determination, rationale for determination, and applicable procedures for appeal.
- TIX C to oversee remedies/disciplinary sanctions.
- Schools must comply with grievance procedures; may only impose discipline for sex discrimination if there is a determination at the end of grievance procedures that R engaged in prohibited sex discrimination.
- Schools must not discipline participants in grievance procedures for making a false statement or for engaging in consensual sexual conduct, based solely on determination that sex discrimination occurred.

# § 106.46 Written Determination

*School to simultaneously provide determination in writing that includes....*

- Description of alleged sex-based harassment
- Policies and procedures used to evaluate allegations
- Decisionmaker's evaluation of relevant and permissible evidence and determination on if sex-based harassment occurred
- The disciplinary sanctions imposed on R (if conduct occurred)
- Additional remedies to be provided to C (if conduct occurred)
- Other students identified by school to be experiencing effects of conduct (if conduct occurred and to the extent appropriate)
- School's procedures for parties to appeal





# **Key Provisions: School Community Awareness & Culture**

# Reporting

Confidential  
Employees

- All Other Employees
- Certain Other Employees

*\*Requirements do not apply for an employee who is personally subject to conduct*

# Reporting

*Confidential employee? YES, if...*

- ✓ Their communications are privileged or confidential under Federal or State law.
  - Limited to info they receive while functioning within the scope of their duties.
- ✓ School has designated employee as confidential for providing sex-discrimination related services.
  - Limited to info they receive while providing services (&not other, unassociated duties).
- ✓ They are conducting IRB-approved research to gather info about sex discrimination.
  - Limited to info they receive while conducting research.

# Reporting

## *Confidential employees...*

- School must notify all participants in the education program or activity of how to contact confidential employees (if any, excluding IRB-approved researchers).
- School must require a confidential employee to explain the following:
  - Employee's confidential status, including the circumstances in which the employee is not required to notify the Title IX Coordinator about the conduct,
  - How to contact the Title IX C,
  - How to make a complaint of sex discrimination, and
  - The TIX C's ability to offer/coordinate supportive measures, IR process, or investigation under grievance procedures.

# Reporting

## *K-12 – Notification Requirements*

- Must require all non-confidential employees to notify the Title IX C when the employee has information about conduct that reasonably may constitute sex discrimination.

# Reporting

## *Postsecondary – Notification Requirements*

- **All non-confidential employees must either:**
  - Notify the Title IX Coordinator or
  - Provide person with the TIX C's contact info and info on how to make a complaint of sex discrimination.
- **Certain non-confidential employees MUST notify the Title IX C with info of conduct, e.g. if they:**
  - Have authority to institute corrective measures, or
  - Have responsibility for administrative leadership, teaching, or advising in the education program or activity.

# Reporting

## *Postsecondary: Student or Employee?*

- Must reasonably determine and specify whether, and under what circumstances, a person who is both a student and an employee is subject to the reporting requirements.
- § 106.46(b) notes on “Student employees”:
  - When C/R is both a student and employee, the school must make a fact-specific inquiry to determine whether § 106.46 requirements apply.
  - In making determination, school must consider, at minimum, if (1) the party’s primary relationship with the school is to receive an education and (2) the alleged conduct occurred while the party was performing employment-related work.

# Reporting

## *Postsecondary*

- Not required to respond to info shared at a public event or online to raise awareness about sex-based harassment, unless there is an imminent and serious threat to the health or safety of a complainant, any students, employees, or other persons.
  - Must use this info when preventing sex-based harassment,, including by providing tailored training to address conduct in a particular part or location of its education program or activity when information indicates there may be multiple incidents of sex-based harassment.
  - Title IX C or any other employees are not required to attend these public awareness events.

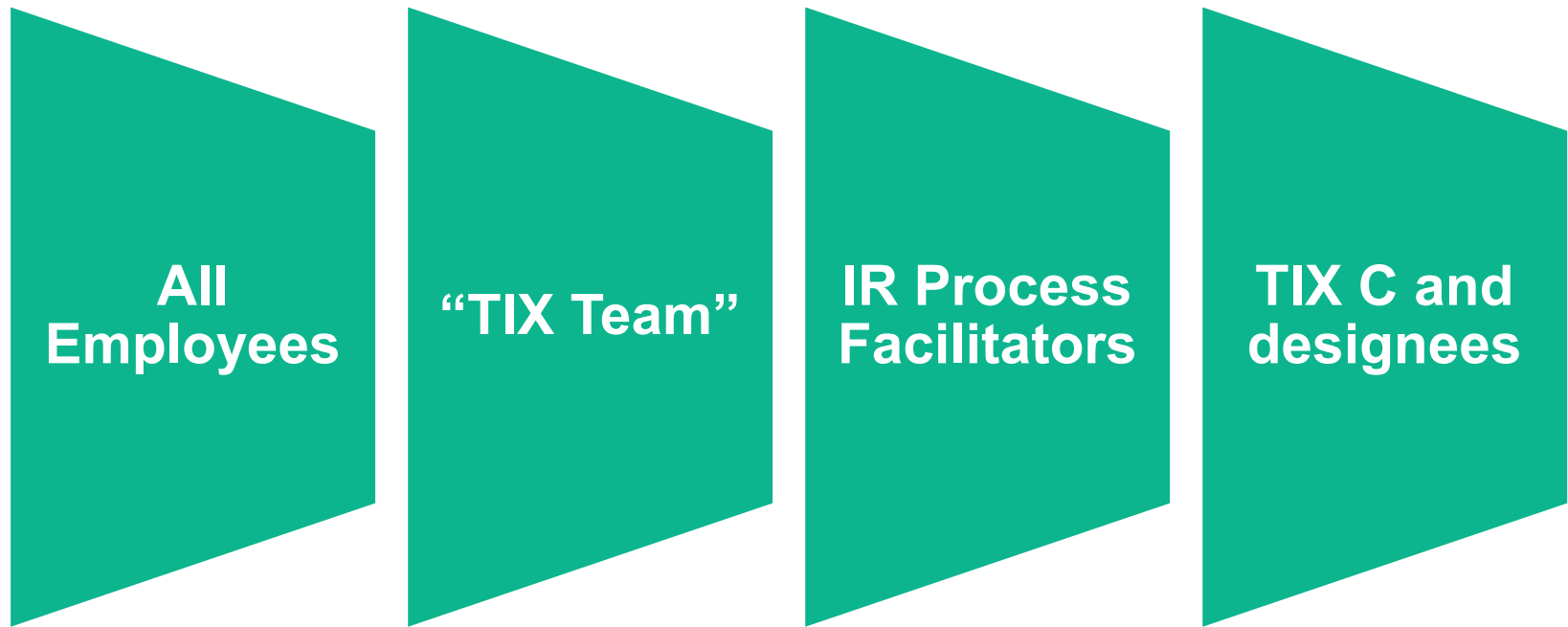


# Reporting

- Must monitor the education program or activity for barriers to reporting and take steps reasonably calculated to address barriers
- *What does this look like?*
  - Research partnerships, climate surveys...

# Training

*Content-specific to their duties*



- \* Must receive training **promptly** upon hiring or change of position that alters their duties, and **annually** thereafter.
- \* Must not rely on sex stereotypes.

# Training

*Content for all employees must cover...*

- School's obligation to address sex discrimination in its education program or activity;
- The scope of conduct that constitutes sex discrimination under Title IX, including definition of sex-based harassment; and
- All applicable notification and information requirements (notify/referral to TIX C) of possible sex discrimination and of pregnancy or related conditions.

# Training

*Content for “TLX Team” must cover...*

- School’s obligations under § 106.45 and § 106.46
- How to serve impartially, including avoiding prejudgment of the at-issue facts, conflicts of interest, and bias;
- The meaning and application of “relevant” for questions and evidence;
- The types of impermissible evidence regardless of relevance under § 106.45 and § 106.46; **AND**
- Content covered in training for All Employees.

# Training

*Content for IR Process Facilitators must cover...*

- The rules and practices associated with the school's IR process;
- How to serve impartially, including avoiding conflicts of interest and bias; **AND**
- Content covered in training for All Employees.

# Training

*Content for TIX C and designees must cover...*

- Specific responsibilities applicable to designation of TIX C, §106.8(a);
- Specific actions TIX C must coordinate to prevent discrimination and ensure equal access for pregnancy or related conditions, §106.40(b)(3);
- TIX C responsibilities and supportive measures, §106.44(f), (g);
- The school's recordkeeping system and recordkeeping requirements, §106.8(f);
- Any other training necessary to coordinate the recipient's compliance with Title IX; **AND**
- Content covered in trainings for All Employees, TIX Team, and IR Process Facilitators.

# Supporting Pregnant/Parenting Students

*Definitional clarity...*

- **Parental status** means the status of a person who—in relation to someone younger than 18 years or older than 18 years but incapable of self-care due to physical/mental disability—is:
  - A biological parent;
  - An adoptive parent;
  - A foster parent;
  - A stepparent;
  - A legal custodian or guardian;
  - In loco parentis; or
  - Actively seeking legal custody, guardianship, visitation, or adoption.

# Supporting Pregnant/Parenting Students

*Definitional clarity...*

- **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.



# Supporting Pregnant/Parenting Students

- **School must not discriminate against any student based on the student's current, potential, or past pregnancy or related conditions.**
  - ✓ Allowing a student to voluntarily participate in a separate, comparable portion offered to non-pregnant students is not prohibited discrimination.
- **School must not adopt or implement 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.**

# Supporting Pregnant/Parenting Students

## *Notification Requirements for Pregnancy, Related Conditions*

- *Unless an employee reasonably believes that the Title IX C has been notified, any employee informed of a student's pregnancy or related conditions must promptly inform the student (or student's designee) of:*

- The TIX's contact info, and
- The TIX C's ability to coordinate specific actions to prevent sex discrimination and ensure equal access to the education program or activity.

*✓ Training requirements for all employees on these notification/information requirements.*

# Supporting Pregnant/Parenting Students

## *Specific actions by TIX C...*

- Must inform student of the school's **obligations and provide notice of nondiscrimination.**
- Must make **reasonable modifications** to policies, practices, or procedures as necessary, based on student consultation and individualized needs.
  - Not reasonable if school can show modification would fundamentally alter the nature of its education program or activity.
  - Student has discretion to accept or decline; if accepts, school must implement.

# Supporting Pregnant/Parenting Students

## *Specific actions by TIX C...*

- Must allow student to voluntarily take a leave of absence to cover, at minimum, the period of time deemed medically necessary by the student's licensed healthcare provider.
  - Upon return, student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the voluntary leave began.
- Must ensure student can access clean, private, unintrusive lactation space (must not be a bathroom) for breastfeeding/expressing milk as needed.

# Supporting Pregnant/Parenting Students

## *Specific actions by TIX C...*

- Must not require supporting documents unless necessary and reasonable to determine reasonable modifications or other specific actions.
- Must treat pregnancy or related conditions in the same manner & under same policies as other temporary medical conditions with respect to benefits, services, policies, participation, and admission, among others.
- Must not require certification from healthcare provider that the student is physically able to participate in class/program/activity, subject to exceptions.



**Questions?**

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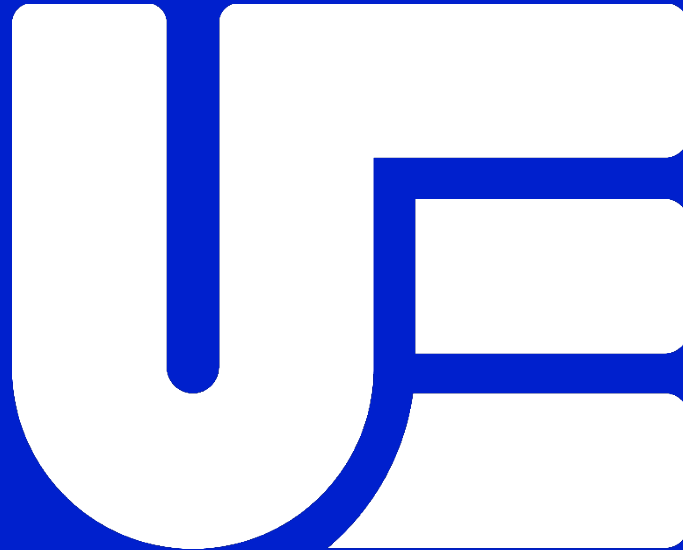


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