



TO: COSSBA

FROM: Jared Solomon & BPAG Legal Team

DATE: April 30, 2024

RE: Summary of Final Title IX Regulations issued by US Department of Education

On April 19, 2024, the Department of Education (ED) released its final rule on enforcing Title IX, the federal law outlawing sex discrimination in schools that receive federal funds. (ED has posted a [summary](#) of the major provisions in the new regulations.) Any school receiving “Federal financial assistance” must comply with Title IX and the corresponding regulations, or risk the loss of federal assistance. The definition of “Federal financial assistance” not only includes monetary assistance, but also any form of in-kind assistance. Title IX provides protections to students, teachers and employees in schools. In complying with the law, all school districts must have a Title IX coordinator. These new regulations update the definitions of *Elementary School* and *Secondary School*, which will now be defined separately, and include public and private pre-schools in the definition of an elementary school, and 2) include an institution of vocational education. Both definitions continue to rely on section 8101 of the [Elementary and Secondary Education Act](#) definitions.

Before issuing the proposed draft regulations, ED received feedback on the Title IX regulations, as amended in 2020, from a wide variety of stakeholders. This included students, parents, educators, state government representatives, advocates, lawyers, researchers, and representatives of elementary, secondary, and postsecondary schools. These sessions and meetings informed the proposed draft regulations released in July 2022. After releasing the draft, ED received and reviewed more than 240,000 comments from the public to inform this final rulemaking.

ED’s guidance says the final regulations are intended to strengthen several significant areas in the current regulations and provide schools with information to meet their Title IX obligations while providing appropriate discretion and flexibility to account for variations in school size, student populations, and administrative structures. It is important to note that these final regulations do not include rules governing athletic teams. The draft athletic rules were released in 2023 and ED has said it is still going through the more than 150,000 comments they received.

The following section is a high-level summary highlighting some of the significant changes in final regulations. Included after the summary is a review from the Bose Public Affairs Group education legal team discussing the changes in the final rule from the 2022 draft regulations. This document is not an exhaustive explanation of all the responsibilities for schools, nor does it discuss every nuance in each category, but rather notes the most important details and changes made by the proposed regulations:



- **Provide full protection from sex-based harassment.**

The final regulations are intended to strengthen protections from all forms of sex-based harassment, including sexual violence and unwelcome sex-based conduct that creates a hostile environment by limiting or denying a person's ability to participate in or benefit from a school's education program or activity.

- **Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities—and to prevent its recurrence and remedy its effects.**

The final regulations are intended to promote accountability by requiring schools to act promptly and effectively in response to information about conduct that reasonably may constitute sex discrimination, including sexual violence and other forms of sex-based harassment. These regulations also continue to require that schools train employees about the school's obligation to address sex discrimination, as well as employees' obligations to notify or provide contact information for the Title IX Coordinator.

- **Require schools to provide supportive measures to complainants and respondents affected by conduct that may constitute sex discrimination, including sexual violence and other forms of sex-based harassment.**

Under the final rule, schools are required to offer supportive measures, as appropriate, to restore or preserve a party's access to the school's education program or activity or provide support during a school's grievance procedures or the informal resolution process. Supportive measures cannot be unreasonably burdensome to a party and cannot be imposed for punitive or disciplinary reasons.

- **Require schools to respond promptly and effectively to all complaints of sex discrimination with a fair, transparent, and reliable process that includes trained, unbiased decisionmakers to evaluate all relevant and not otherwise impermissible evidence.**

The final regulations are intended to strengthen requirements for schools to conduct reliable and impartial investigations of all sex discrimination complaints. The final regulations maintain several major provisions from the current regulations to ensure consistency for schools. With regards to the handling the complaint, ED's changes include:

- All schools must treat complainants and respondents equitably.
- In evaluating the parties' evidence, a school must use the preponderance of the evidence standard of proof unless the school uses the clear and convincing evidence standard in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the school may use that standard in determining whether sex discrimination occurred. This is a return to the original standards set out by the Obama Administration.
- Title IX Coordinators, investigators, decisionmakers, and facilitators of an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- A school's grievance procedures must include a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the school's grievance procedures.
- A school's grievance procedures must require adequate notice to the parties of the allegations, dismissal, delays, meetings, proceedings, and determinations.

- A school's grievance procedures must give the parties an equal opportunity to present and access relevant and not otherwise impermissible evidence, as well as provide a reasonable opportunity for each party to respond to that evidence.
 - The school's decisionmakers must objectively evaluate each party's relevant and not otherwise impermissible evidence.
 - A school must have a process enabling the decisionmaker to assess a party's or witness's credibility when credibility is in dispute and relevant.
 - A school must not impose disciplinary sanctions under Title IX on any person unless it determines at the conclusion of grievance procedures that sex discrimination for which the person was responsible has occurred.
- **Provide schools with flexibility to adapt the regulations' grievance procedure requirements to their educational communities so that all schools can implement Title IX enforcement fairly in their educational environments.**

These final regulations are intended to allow all schools to meet their Title IX obligations while providing appropriate discretion and flexibility to account for variations in school size, student populations, and administrative structures. For instance, schools have the option to use a single-investigator model, and schools may choose to use this model in some, but not all, cases as long as it is clear in their grievance procedures when this model will be utilized. Schools also have the option to offer an informal resolution process for sex discrimination complaints unless the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student, or unless such a process would conflict with Federal, State, or local law. The final regulations also include policy that accounts for differences in the age, maturity, needs, and level of independence of students in various educational settings.

- **Protect students, employees, and applicants from discrimination based on pregnancy or related conditions.**

The final regulations are intended to update longstanding existing protections for students, employees, and applicants against discrimination based on pregnancy, childbirth, termination of pregnancy, lactation, related medical conditions, or recovery from these conditions. Specifically, the final regulations strengthen requirements that schools provide reasonable modifications for students based on pregnancy or related conditions, allow for reasonable break time for lactation for employees, and access to a clean, private lactation space for students and employees. The final regulations also require that when a student, a parent of a minor student, or other authorized legal representative informs a school employee of a student's pregnancy or related conditions, the employee then must provide the individual with information about the school's obligations to prevent discrimination and ensure equal access. The regulations also prohibit schools from disclosing personally identifiable information obtained through complying with Title IX, including information about reasonable modifications for pregnancy or related conditions.

- **Prohibit discrimination against LGBTQI+ students, employees, and others.**

The rule prohibits discrimination and harassment based on sexual orientation, gender identity, and sex characteristics in federally funded education programs. In this part of the rule, ED applies the reasoning of the U.S. Supreme Court's 2020 ruling in *Bostock v. Clayton County*, which interpreted Title IX to protecting against discrimination based on the above characteristics. This is likely to be viewed as one of the more controversial pieces of the regulation by some.

- **Protect people from harm when they are separated or treated differently based on sex in school.**
The final regulations are intended to clarify that a school must not separate or treat people differently based on sex in a manner that subjects them to more than de minimis harm, except in limited circumstances permitted by Title IX. The final regulations specify that preventing someone from participating in school (including in sex-separate activities) consistent with their gender identity causes that person more than de minimis harm. This general nondiscrimination principle applies except in the limited circumstances specified by statute, such as in the context of sex-separate living facilities and sex-separate athletic teams. This is the other provision likely to stir controversy. As mentioned earlier, these regulations do not include new rules governing eligibility criteria for athletic teams.
- **Protects students, employees, and others from retaliation.**
The regulations reinforce that schools must not intimidate, threaten, coerce, or discriminate against someone in order to interfere with their Title IX rights or because they reported sex-based discrimination or harassment, or participated in, or refused to participate in, the school's Title IX process. The regulations also make clear that schools must protect students from peer retaliation by other students.
- **Support the right of parents and guardians to act on behalf of their elementary and secondary school children.**
The final regulations allow parents and guardians to act on behalf of a minor student, including when seeking assistance under Title IX and participating in a school's Title IX grievance procedures.
- **Ensure that schools communicate their nondiscrimination policies and procedures.**
The final regulations require schools to clearly and effectively inform key people, including students, employees, and applicants, of their nondiscrimination policies and procedures.
- **Prohibit schools from sharing personal information.**
The final regulations prohibit schools from disclosing personally identifiable information they obtain through complying with Title IX, with limited exceptions, such as when they have prior written consent or when the information is disclosed to the parent of a minor.

Pending already filed litigation in Federal Court, these regulations are scheduled to take effect August 1, 2024 – well before the start of the 2024-25 school year.

Additional Links

1. Read the full regulatory notice in the [Federal Register](#).
2. ED has posted a [summary](#) of the major provisions in the new regulations.
3. ED has posted a [resource](#) for drafting nondiscrimination policies, notices of nondiscrimination, and grievance procedures

BPAG Legal Analysis

Title IX Notable Changes in Final Rule Announced April 2024

New Definitions:

1. Expanded definition of “complainant” in 34 CFR 106.2

Old version: means an individual who is alleged to be the victim of conduct that could constitute sexual harassment

New Version: (1) A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; or (2) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient’s education program or activity at the time of the alleged sex discrimination.

2. Expanded definition of “complaint” in 34 CFR 106.2, leading to application of more robust procedures and safeguards to cover “sex discrimination” not just “sexual harassment”
3. Definition of “formal complaint” removed from regulations (section 106.30 deleted entirely)
4. Creation of “Confidential employees” as defined in 34 CFR 106.2 (contemplates a confidential employee as being someone separate from the Title IX Coordinator (*see* section 106.44(d)):

(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 this part 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; or

(3) An employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination—but the employee’s confidential status is only with respect to information received while conducting the study.

5. Definition of “education program or activity” removed from section 106.44 and “Application” section revised and expanded (section 106.11) to ensure conduct occurring outside education programs and activities or outside the U.S. are included if they contribute to a hostile environment:

Except as provided in this subpart, this part applies to every recipient and to all sex discrimination occurring under a recipient’s education program or activity in the United

States. For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even 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.

6. New definition for "relevant" in 34 CFR 106.2 (which is evidence that "aids the decisionmaker in determining whether the alleged sex discrimination occurred")
7. New definition applying to the "Scope" of what is considered "discrimination on the basis of sex" set forth in section 106.10:

includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
8. Removes definition of "supportive measures" from section 106.30 and puts more comprehensive guidance on the same within section 106.44(g). In its discussion of "supportive measures," the regulations distinguish between supportive measures for sex discrimination that is not sex-based harassment or retaliation, saying:

For allegations of sex discrimination other than sex-based harassment or retaliation, a recipient's provision of supportive measures does not require the recipient, its employee, or any other person authorized to provide aid, benefit, or service on the recipient's behalf to alter the alleged discriminatory conduct for the purpose of providing a supportive measure.

And adds requirements to elementary and secondary schools for considering "supportive measures" when the complainant or respondent is a student with a disability:

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.

Prohibits differential treatment / separation on the basis of sex (under expanded definition of sex discrimination) with noted exceptions – Section 106.31: The final regulations clarify that a school must not separate or treat people differently based on sex in a manner that subjects them to more than de minimis harm, except in limited circumstances permitted by the statutory text and specifically cited regulations relating to housing and athletics. Provides a broad definition of "de minimis harm":

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.

****NOTE:** This regulation does not exclude section 106.33 from the de minimis harm prohibition, meaning the de minimis harm prohibition applies to "toilet, locker room, and shower facilities" that are separated "on the basis of sex" even though the specific text in this regulation notes an exception for permissible de minimis harm that cites to "20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1)." This means the new regulations seemingly take the position that section 1686 of the statute only corresponds with regulation 34 CFR 106.32(b)(1) and that it does NOT correspond with § 106.33.

Expands section 106.40 discussion of pregnancy protections: adds requirement for recipient to make reasonable modifications to policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to education programs and activities based on a student's individualized needs with the only limitation being a modification that "would fundamentally alter the nature of [the recipient's] program or activity" and then listing potential "reasonable modifications."

Alterations to required response of recipient:

1. Applies to "sex discrimination" generally, not just "sexual harassment" allegations;
2. No longer says "respond promptly and in a manner that is not deliberately indifferent" and instead says: "must respond promptly and effectively" and also in compliance with the remainder of section 106.44's requirements.

Guidance to Title IX Coordinator on initiating a complaint and grievance procedure process without a complainant actually making a complaint (or if a complainant withdraws allegations): factors for consideration set forth specifically at section 106.44(f)(1)(v)(A)(1-8) and section 106.44(f)(1)(v)(B), which the Title IX Coordinator must contemplate in making a determination.

Gives recipients discretion in offering informal resolution procedures under certain circumstances: section 106.44(k) provides:

a recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that reasonably may constitute sex discrimination under Title IX or 1539 this part or when a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of the parties' wishes

****However,** consent to the informal process must still be voluntary. Moreover, informal procedures are still not permitted if the allegations claim an employee engaged in sex-based harassment of an elementary school or secondary school student.

Changes to Grievance Procedures under section 106.45 (applicable to all recipients – primary through post-secondary):

1. Sets forth who may make a "Complaint" and provides explicit permission for complaints to be made by students, employees, parents/guardians, the Title IX Coordinator, and any other 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.

2. Permits a recipient to use a Decisionmaker who was/is also the Title IX Coordinator or investigator (so long as there is still no conflict of interest or bias). (*See* section 106.45(b)(2).)
3. Expands upon the requirement to provide the parties with the evidence and sets forth specific procedural requirements for doing so, explicitly permitting access to the evidence only and not necessarily requiring control of the evidence be relinquished to the parties through serving copies of it, stating in section 106.45(f)(4):

(i) A recipient must provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence. If the recipient provides a description of the evidence, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party;

(ii) A recipient must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence described in paragraph (f)(4)(i) of this section; and

(iii) A recipient must take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures. For purposes of this paragraph, disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized.

**Recall, the prior version provided a more exacting requirement of sending the evidence to the parties: "Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report."

4. No longer requires notice of a right to an advisor or that an advisor must be permitted to participate (right to an advisor is in postsecondary requirements ONLY, *see* section 106.46). That said, new section 106.6(g) discusses the right of a parent, guardian, or authorized legal rep to participate and act on behalf of a child. The NPRM discussion cited the inclusion of such an individual as sufficient, whereas a post-secondary situation would not permit someone to have a parent / guardian act on their behalf, necessitating the right to an advisor.
5. No requirement that there be an Investigator's Report exchanged. All that is required is the right to respond to the evidence (as accurately described or as reviewed by the parties).
6. No specific discussion on the type of "hearing" that must occur, but a required "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." (*See* section 106.45(g).)

****Note that there is no right of the parties to ask questions or exchange questions with other parties / witnesses at a hearing, as was required under the prior version of the regulations.**

7. No specific requirement for what must be in the Decisionmaker's decision other than: notice of "whether sex discrimination occurred . . . the rationale for such determination, and the procedures and permissible bases for . . . appeal." (*See* section 106.45(h)(2).)

No specific limitations on the reasons or processes for making an appeal other than now, "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." (*See* section 106.45(i).)

New section specifically adding required procedures applicable to post-secondary institutions ONLY (*See* new section 106.46)

Section 106.71 requires full compliance with the procedures set forth in the new regulations for any type of retaliation under Title IX, including peer retaliation.