Buelow Vetter
Buikema Olson & Vliet, LLC
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# TITLE IX TRAINING

# CESA #7

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Attorney Mary S. Gerbig
Attorney Aleah M. Loll
Attorney Jennifer L. Williams
Buelow Vetter Buikema Olson & Vliet, LLC
20855 Watertown Road, Suite 200
Waukesha, WI 53186
Service centers in Sheboygan,
Appleton and Green Bay
mgerbig@buelowvetter.com
920-362-5064
aloll@buelowvetter.com
262-409-7313
jwilliams@buelowvetter.com
414-477-0649

# TITLE IX TRAINING

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## Part One: Overview of the Final Title IX Regulations & Grievance Process

## I. Introduction and Background

### A. Title IX of the Education Amendments of 1972

"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

### B. The U.S. Supreme Court has analyzed the conditions under which a school district will be held liable for money damages under Title IX for employee-on-student sexual harassment and student-on-student sexual harassment.

#### 1. Employee-on-Student Sexual Harassment

Damages may not be recovered for teacher-student sexual harassment in an implied private action under Title IX unless a school district official who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.

"The number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience. No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher's conduct is reprehensible and undermines the basic purposes of the educational system. The issue in this case, however, is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. . . . Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference."

*Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998)

**2. Student-on-Student Sexual Harassment**

A school district can be held liable under Title IX for student-on-student harassment if the school acts with deliberate indifference to known acts of harassment in its programs or activities. The harassment must be so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

"The standard set out in *Gebser* v. *Lago Vista Independent School Dist.*, 524 U.S. 274–that a school district may be liable for damages under Title IX where it is deliberately indifferent to known acts of teacher-student sexual harassment–also applies in cases of student-on-student harassment.

It is not necessary to show an overt, physical deprivation of access to school resources to make out a damages claim for sexual harassment under Title IX, but a plaintiff must show harassment that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities.

Courts must also bear in mind that schoolchildren may regularly interact in ways that would be unacceptable among adults. Moreover, that the discrimination must occur 'under any education program or activity' suggests that the behavior must be serious enough to have the systemic effect of denying the victim equal access to an education program or activity. A single instance of severe one-on-one peer harassment could, in theory, be said to have such a systemic effect, but it is unlikely that Congress would have thought so."

*Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

**3. Building on the above U.S. Supreme Court analysis and standards, the U.S. Department of Education provided guidance** on how schools should respond to reports of sexual harassment under Title IX through a series non-binding guidance documents, such as 2011 *Dear Colleague Letter* issued by the Obama Administration, which was later withdrawn by the Trump Administration.

**4. On May 6, 2020, the Department of Education released its Title IX regulations specifying how schools must respond to allegations of sexual harassment in order to comply with Title IX's prohibition against sex discrimination.**

**a.** The previous regulations did not address or even mention sexual harassment at all.

**b.** The Department received more than 124,000 public comments on its proposed regulations.

**c.** The current regulations took effect **August 14, 2020**.

## II. Overview of New Title IX Regulations & U.S. Department of Education Discussion of Public Comments on Proposed Regulations 2022

### A. Who's Who? Definition Complainant, Respondent, and Other Key Individuals in the Title IX Complaint Process

**1. Complainant:** An individual alleged to be the victim of conduct that could constitute sexual harassment. 34 CFR 106.30(a).

**a. Proposed Changes:** The Department proposes moving the definition of "complainant" to § 106.2, referring to "sex discrimination" rather than "sexual harassment," and removing the term "victim." The Department also proposes adding language stating that a third-party complainant (i.e., a person other than a student or employee) must be participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred. *Unofficial Version of Proposed Rule*, pg. 67.

**b.** "Examples of possible third-party complainants include a prospective student, a visiting student-athlete, or a guest speaker who is participating or attempting to participate in the recipient's education program or activity." P. 69.

**2. Respondent:** An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. *Id*.

**a. Proposed Changes:** The Department proposes defining a "respondent" as an individual who is alleged to have violated the recipient's prohibition on sex discrimination.

**3. Title IX Coordinator:** Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities. This individual must be referred to as the Title IX Coordinator. The Title IX Coordinator has additional, specific responsibilities throughout the Title IX complaint process, such as the responsibility to receive complaints, assign an investigator, and coordinate and oversee the effective implementation of supportive measures and remedies.

4. **Investigator:** The individual who conducts the investigation, prepares an investigation report, and submits the report to the decision-maker. The investigator is assigned by the Title IX Coordinator. The Title IX Coordinator may assign himself/herself as the investigator.

5. **Decision-maker:** The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. 34 CFR 106.45(7).

   a. **Proposed Changes:** Allows a single-investigator model. The Title IX Coordinator can serve as the investigator and/or decision-maker under the proposed revisions.

6. **Department of Education Discussion:**

   "The Department believes that fundamental fairness to both parties requires that the intake of a report and formal complaint, the investigation (including party and witness interviews and collection of documentary and other evidence), drafting of an investigative report, and ultimate decision about responsibility should not be left in the hands of a single person (or team of persons each of whom performed all those roles). Rather, after the recipient has conducted its impartial investigation, a separate decision-maker must reach the determination regarding responsibility; that determination can be made by one or more decision-makers (such as a panel), but no decision-maker can be the same person who served as the Title IX Coordinator or investigator. Commenters correctly noted that separating the investigative and decision-making functions will not only increase the overall fairness of the grievance process but also will increase the reliability of fact-finding and the accuracy of outcomes, as well as improve party and public confidence in outcomes. Combining the investigative and adjudicative functions in a single individual may decrease the accuracy of the determination regarding responsibility, because individuals who perform both roles may have confirmation bias and other prejudices that taint the proceedings, whereas separating those functions helps prevent bias and prejudice from impacting the outcome." 30367

**B. Response to Allegations of Sexual Harassment – General Requirement/Standard:** "A recipient [school district] with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond promptly in a manner that is not deliberately indifferent." 34 CFR 106.44(a).

## 1. Actual Knowledge

### a. Regulations

**(i)** "Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to any of the following individuals:

- Any elementary or secondary school employee;
- Any Title IX Coordinator; or
- Any school official with the authority to institute corrective measures. 34 CFR 106.30(a)

**(ii)** The standard for actual knowledge is not met if the only school official with actual knowledge is the respondent.

### b. Department of Education Discussion

**(i)** "Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority: Witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (*i.e.*, a person alleged to be the victim) or a third party (*e.g.,* the complainant's parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual allegations; or by any other means." 30040.

### c. Notice of Proposed Changes

**(i)** "Under proposed § 106.44(c)(1), an elementary school or secondary school recipient would be obligated to require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX." *Unofficial Version of Proposed Rule,* p. 173.

**(ii)** Confidential Employee Exception:

- "Proposed § 106.44(d) would make clear that an employee covered by the definition of "confidential employee" in proposed § 106.2 would not be required to notify the Title IX Coordinator when a

person informs them of conduct that may constitute sex discrimination under Title IX. Instead, proposed § 106.44(d) would require a recipient to notify all participants in the recipient's education program or activity of the identity of its confidential employees, if any, and require that a confidential employee, in response to a person who informs that employee of conduct that may constitute sex discrimination under Title IX, explain their confidential status and provide that person with the contact information of the recipient's Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX." p. 189.

- The proposed definition of "confidential employee" would include employees in three categories: (1) employees whose communications are privileged under Federal or State law associated with their role or duties for the institution; (2) employees whom the recipient has designated as a confidential resource for the purpose of providing services to individuals in connection with sex discrimination. If the employee also has a role or duty that is not associated with providing these services, the employee's status as confidential would be limited to information received about sex discrimination in connection with providing these services; and (3) N/A to K-12 schools. p. 190.

**2. Sexual Harassment**

**a. Regulations**

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

**(i)** Unwelcome conduct that a reasonable person would find so severe, pervasive, *and* objectively offensive that it denies a person equal access to the recipient's education program or activity;

**(ii)** An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (i.e., q*uid pro quo* sexual harassment); or

**(iii)** Sexual assault, dating violence, domestic violence, or stalking. 34 CFR 106.30(a)

**a.** Sexual assault- rape, fondling, incest, or statutory rape.

**b.** Domestic violence-felony or misdemeanor crimes of violence committed by a current or former spouse or partner, a person with whom the victim shares a child in common, a person who is cohabiting with the victim as a spouse or partner.

**c.** Dating violence-violence committed by a person who is or has been in a social or intimate relationship with the victim.

**d.** Stalking-engaging in a course of conduct directed at a specific person that would cause the person to (1) fear for their safety or the safety of others or (2) suffer substantial emotional distress.

**b. Notice of Proposed Changes**

"The proposed definition of "sex-based harassment" would clarify that it covers sexual harassment, harassment on the bases described in proposed § 106.10, and other conduct on the basis of sex that is in one or more of the following categories:

**(i)** An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or implicitly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

**(ii)** Unwelcome sex-based conduct that is sufficiently severe ***or*** pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment);

***OR***

**(iii)** Sexual assault; dating violence; domestic violence; or stalking."

### 3. Education Program or Activity

#### a. Regulations

"'Education program or activity' includes locations, events, or circumstances over which the recipient exercised substantial control over the respondent and the context in which the sexual harassment occurs." 34 CFR 160.44(a).

#### b. Notice of Proposed Changes

**(i)** "The proposed regulations would make clear that conduct that occurs under a recipient's education program or activity includes but is not limited to conduct . . . that is subject to the recipient's disciplinary authority."

**(ii)** "It would also specify that a recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to that hostile environment occurred outside the recipient's education program or activity or outside the United States."

**(iii)** "Finally, the Department proposes eliminating the language in current § 106.44(a) that defines 'education program or activity' for purposes of sexual harassment to ensure that the term is applied uniformly throughout the regulations for all forms of sex discrimination, including sex-based harassment." Unofficial Version of Proposed Rule, p. 43.

### 4. Person in the United States

#### a. Regulations

These requirements "apply only to sex discrimination occurring against a person in the United States." 34 CFR 106.8(d).

#### b. Notice of Proposed Changes

"Would specify that a recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to that hostile environment occurred outside the recipient's education program or activity or outside the United States." *Unofficial Version of Proposed Rule,* p. 43.

**c. Department of Education Discussion**

"As a practical matter, we also note that schools may face difficulties interviewing witnesses and gathering evidence in foreign locations where sexual misconduct may have occurred. Recipients may not be in the best position to effectively investigate alleged sexual misconduct in other countries. Such practical considerations weigh in favor of the Department looking to Congress to expressly state whether Congress intends for Title IX to apply in foreign locations.

We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States. We have revised § 106.45(b)(3) to explicitly state that even if a recipient must dismiss a formal complaint for Title IX purposes because the alleged sexual harassment did not occur against a person in the U.S., such a dismissal is only for purposes of Title IX, and nothing precludes the recipient from addressing the alleged misconduct through the recipient's own code of conduct." 30206

**5. Deliberate Indifference**

**a. Regulations**

"A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances." 34 CFR 106.44(a).

**b. Notice of Proposed Changes**

"Proposed § 106.44(a) states that a recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects."

**c. Department of Education Discussion**

**(i)** "By using a deliberate indifference standard to evaluate a recipient's selection of supportive measures and remedies, and refraining from second guessing a recipient's disciplinary decisions, these final regulations leave recipients legitimate and necessary flexibility to make decisions regarding the supportive measures, remedies, and

discipline that best address each sexual harassment incident." 30044.

**(ii)** "A recipient's decision to initiate an emergency removal will also be evaluated under the deliberate indifference standard." 30046

## C. Response to Allegations of Sexual Harassment – Specific Steps/Requirements

"A recipient's response must treat complainant's and respondents equitably by offering supportive measures as defined in 106.30 to a complainant, and by following a grievance process that complies with 106.45 before the imposition of any disciplinary sanctions, or other actions that are not supportive measures as defined in 106.30, against a respondent." 106.44(a).

### 1. Report of Sexual Harassment & Supportive Measures

#### a. Regulations

**(i)** The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in 106.30, *with or without the filing of a formal complaint*, discuss the complainant's wishes with respect to supportive measures, and explain the process for filing a formal complaint.

**(ii)** Supportive measures" means non-disciplinary, non-punitive, individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant and respondent before or after the filing of a formal complaint or where no such complaint has been filed.

**(iii)** Such measures must be designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

**(iv)** Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, mutual restrictions on contact between the parties, leaves of absence, etc.

**b. Notice of Proposed Changes**

**(i)** Proposed § 106.44(f) states that a recipient must require its Title IX Coordinator to take the following steps upon being notified of conduct that may constitute sex discrimination under Title IX:

- Treat the complainant and respondent equitably;
- Notify the complainant of the grievance procedures as described in proposed § 106.45, and if a complaint is made, notify the respondent of the applicable grievance procedures and notify the parties of the informal resolution process as described in this section if available and appropriate;
- Offer and coordinate supportive measures as described in proposed § 106.44(g), as appropriate, to the complainant and respondent to restore or preserve that party's access to the recipient's education program or activity;
- In response to a complaint, initiate the grievance procedures or informal resolution process under § 106.44(k) as described in § 106.45, and if applicable proposed § 106.46;
- In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures described in proposed § 106.45, and if applicable proposed § 106.46, if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient's program or activity; and
- Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, in addition to remedies provided to an individual complainant."

*Unofficial Version of Proposed Rule*, p. 199-200.

**(ii)** "The Department also proposes adding a requirement at § 106.44(b) that a recipient must require its Title IX Coordinator to monitor barriers in the recipient's education

program or activity to reporting information about conduct that may constitute sex discrimination under Title IX, and then the recipient must take steps reasonably calculated to address barriers that have been identified." *Unofficial Version of Proposed Rule*, p. 168.

**2. Formal Complaint Alleging Sexual Harassment**

**a. Regulations**

**(i)** "In response to a formal complaint, a recipient must follow a grievance process that complies with 106.45." 34 CFR 106.44(b).

**(ii)** "Formal complaint" means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 CFR 106.30(a).

**(iii)** At the time of filing the formal complaint, the complainant must be participating in or attempting to participate in the education program or activity of the recipient. 34 CFR 106.30(a).

**(iv)** Upon receiving a formal complaint, a recipient must provide the following written notice to the parties (if known):

- Notice of the grievance process, including any informal resolution process;
- Notice of the allegations of sexual harassment, including sufficient details known at the time, and with sufficient time to prepare a response before any initial interview. Sufficient details include the identity of the parties involved in the incident (if known), a description of the alleged conduct, and the date and location of the alleged incident (if known).
- The written notice must include a statement that the respondent is presumed to not be responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

- The written notice must inform the parties that they may have an advisor of their choice, who may be an attorney, and may inspect and respond to evidence obtained during the investigation that is directly related to the allegations.

- The written notice must inform the parties of any provision in the code of conduct that prohibits making false statements or knowingly submitting false information during the grievance process.

- If, in the course of the investigation, the recipient decides to investigate allegations that are not included in the notice, notice of the additional allegations must be provided to the parties. 34 CFR 106.45(b)(2).

**b. Proposed Changes to Written Notice Requirement**

"The Department proposes keeping the same elements currently required for written notice of the informal resolution process and would add requirements that provide the parties with more detailed information about what an informal resolution process would entail. This would include, in proposed § 106.44(k)(3), the types of potential terms that the parties might voluntarily agree to as a part of an informal resolution process, including, among others, restrictions on contact."

**c. Department of Education Discussion**

**(i) Formal Complaints Signed by Title IX Coordinator**

- "Part of whether a decision not to investigate is 'clearly unreasonable' may include a Title IX Coordinator's communication with the complainant to understand the complainant's desires with respect to a grievance process against the respondent. When a Title IX Coordinator determines that an investigation is necessary even where the complainant (i.e., the person alleged to be the victim) does not want such an investigation, the grievance process can proceed without the complainant's participation; however, the complainant will still be treated as a party in such a grievance process. The grievance process will therefore impact the complainant even if the complainant refuses to

participate. The Department desires to respect a complainant's autonomy as much as possible and thus, if a grievance process is initiated against the wishes of the complainant, that decision should be reached thoughtfully and intentionally by the Title IX Coordinator, not as an automatic result…" 30131

- "By way of further example, if a Title IX Coordinator were to receive multiple reports of sexual harassment against the same respondent, as part of a non-deliberately indifferent response the Title IX Coordinator may sign a formal complaint to initiate a grievance process against the respondent, even where no person who alleges to be the victim wishes to file a formal complaint." 30210

**(ii) Participating or attempting to participate in the recipient's education programs or activities**

"The Department appreciates commenters' questions regarding whether a complainant may file a formal complaint after the complainant has graduated. The definition of "complainant" is any individual alleged to be the victim of conduct that could constitute sexual harassment; there is no requirement that the complainant must be a student, employee, or other designated relationship with the recipient in order to be treated as a "complainant" entitled to a prompt, non-deliberately indifferent response from the recipient. To clarify the circumstances under which a complainant may file a formal complaint (thereby requiring the recipient to investigate sexual harassment allegations) we have revised the § 106.30 definition of "formal complaint" to state that a complainant must be participating in, or attempting to participate in, the recipient's education program or activity at the time of filing a formal complaint.

A complainant who has graduated may still be "attempting to participate" in the recipient's education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient's alumni programs and activities. Similarly, a complainant who is on a leave of absence may be "participating or attempting to participate" in the recipient's education program or activity; for example,

such a complainant may still be enrolled as a student even while on leave of absence, or may intend to re-apply after a leave of absence and thus is still "attempting to participate" even while on a leave of absence. By way of further example, a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is "attempting to participate" in the recipient's education program or activity. Because a complainant is entitled under these final regulations to a prompt response that must include offering supportive measures, the Department's intention is that recipients will promptly implement individualized services designed to restore or preserve the complainant's equal access to education, regardless of whether a complainant files a formal complaint, so that if a complainant later decides to file a formal complaint, the complainant has already been receiving supportive measures that help a complainant maintain educational access." 30138

**(iii) Proposed Changes:**

"Under proposed § 106.45(a)(2)(iv), a third party must be participating in or attempting to participate in the recipient's education program or activity in order to make a complaint requesting that the recipient initiate grievance procedures . . . The Department's proposed regulations would also shift the focus from whether the third party was participating or attempting to participate in the recipient's education program or activity at the time the complaint was filed to whether the third party was participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred." *Unofficial Version of Proposed Rule*, p. 75-76.

**3. Dismissal of formal complaint**

**a. Regulations**

**(i) Mandatory dismissal**

The formal complaint must be dismissed *for Title IX purposes only* if the alleged conduct:

- Would not constitute sexual harassment as defined in 106.30 even if proved;

- Did not occur in the recipient's education program or activity; or

- Did not occur against a person in the United States.

**(ii) Permissive dismissal**

The complaint may be dismissed at any time during the investigation if:

- The complainant notifies the Title IX Coordinator that they would like to withdraw the complaint or any allegations therein;

- The respondent is no longer enrolled or employed by the recipient; or

- Specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination. 34 CFR 106.45(b)(3).

**b. Notice of Proposed Changes**

**(i)** The Department proposes eliminating "mandatory dismissal," leaving all dismissals to be "permissive" for the following reasons:

- The complainant notifies the Title IX Coordinator that they would like to withdraw the complaint or any allegations therein;

- The respondent is no longer enrolled or employed by the recipient;

- Specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination; or

- Would not constitute sexual discrimination under Title IX even if proven.

## D. Informal Resolution

### 1. Regulations

**a.** Informal resolution may not be offered unless a formal complaint is filed.

**b.** Informal resolution may not be offered or facilitated if the allegations involve an employee's sexual harassment of a student.

**c.** The parties may not be required to participate in informal resolution or waive their right to an investigation and adjudication under the grievance process.

**d.** At any time prior to reaching a determination regarding responsibility, the recipient may facilitate an informal resolution process (e.g., mediation or restorative justice) that does not involve a full investigation and adjudication, provided that the recipient:

**(i)** Provides to the parties a written notice disclosing:

- The allegations, the requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;
- That at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint; and
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

**(ii)** Obtains the parties' voluntary, written consent to the informal resolution process. 34 CFR 106.45(b)(9)

### 2. Department of Education Discussion

**a.** "The recipient's determination about the confidentiality of informal resolutions may be influenced by the model(s) of informal resolution a recipient chooses to offer; for example, a mediation model may result in a mutually agreed upon resolution to the situation without the respondent admitting responsibility, while a restorative justice model may reach a mutual resolution that

involves the respondent admitting responsibility. The final regulations permit recipients to consider such aspects of informal resolution processes and decide to offer, or not offer, such processes, but require the recipient to inform the parties of the nature and consequences of any such informal resolution processes." 30404

**b.** "The Department agrees that informal resolution should not be mandatory, and the final regulations explicitly prohibit recipients from requiring students or employees to waive their right to a § 106.45 investigation and adjudication of formal complaints as a condition of enrollment or continuing enrollment, or employment or continuing employment with the recipient. Recipients cannot force individuals to undergo informal resolution under the final regulations. Furthermore, the Department reiterates that nothing in the final regulations requires recipients to offer an informal resolution process. Recipients remain free to craft or not craft an informal resolution process that serves their unique educational needs; therefore, smaller recipients that may not have adequate resources or staff to handle informal resolution need not offer such processes." *Id.*

### 3. Notice of Proposed Changes

**a.** The Department proposes adding § 106.44(k)(1), which would specify that a recipient may offer an informal resolution process at any time prior to determining whether sex discrimination occurred, unless there are allegations that an employee engaged in sex discrimination toward a student or such a process would conflict with Federal, State, or local law.

**b.** Proposed § 106.44(k)(1) would also state that a recipient that provides an informal resolution process must, to the extent necessary, also require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.

## E. Grievance Process - Basic Requirements

### 1. Regulations

**a.** The grievance process must be followed before imposition of any disciplinary sanctions or other actions that are not supportive measures.

**b.** Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. The remedies may overlap with the supportive measures, but the remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.

**c.** Must require the objective evaluation of all relevant evidence—inculpatory and exculpatory.

**d.** Must provide that credibility determinations may not be based on a person's status as complainant, respondent, or witness.

**e.** Must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

**f.** Must include reasonably prompt time frames for the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes, if the recipient offers informal resolution. Must also include a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities." 34 CFR 106.45(b)(1).

**g.** Must describe the range of possible disciplinary sanctions and remedies following any determination of responsibility.

**h.** Must state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or clear and convincing standard.

**i.** Must describe the range of supportive measures available to both parties.

**j.** Must include the procedures and permissible bases for the complainant or respondent to appeal.

**2. Notice of Proposed Changes**

**a.** Under the proposed regulations, all recipients would be required to adopt grievance procedures in writing (proposed § 106.45(a)(1))

that incorporate the requirements of proposed § 106.45, including the following:

**(i)** Equitable treatment of complainants and respondents. (Proposed § 106.45(b)(1))

**(ii)** Title IX Coordinator, investigators, and decisionmakers must not have conflicts of interest or bias. (Proposed § 106.45(b)(2))

**(iii)** Decisionmaker may be the same person as the Title IX Coordinator or investigator. (Proposed § 106.45(b)(2))

**(iv)** A presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance procedures. (Proposed § 106.45(b)(3))

**(v)** Reasonably prompt timeframes for all major stages. (Proposed § 106.45(b)(4))

**(vi)** Reasonable steps to protect privacy of parties and witnesses. (Proposed § 106.45(b)(5))

**(vii)** Objective evaluation of relevant and not otherwise impermissible evidence. (Proposed § 106.45(b)(6)- (7))

**(viii)** Notice of the allegations to the parties. (Proposed § 106.45(c))

**(ix)** Dismissals permitted in certain circumstances, but not required. (Proposed § 106.45(d))

**(x)** Consolidation permitted for complaints arising out of the same facts or circumstances. (Proposed § 106.45(e))

**(xi)** A process that enables the decisionmaker to assess the credibility of the parties and witnesses when credibility is in dispute and relevant. (Proposed § 106.45(g))

**(xii)** Clear processes for the determination of whether sex discrimination occurred (Proposed § 106.45(h))

**(xiii)** Parties are permitted to choose to participate in an informal resolution process if one is provided by the recipient. (Proposed § 106.45(j))

**(xiv)** Grievance procedures must describe the range of possible supportive measures and a range or list of disciplinary sanctions and remedies for sex-based harassment complaints. (Proposed § 106.45(k))

## F. Investigation Stage

### 1. Regulations

**a.** Both parties must be provided with an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

**b.** The parties' ability to discuss the allegations under investigation or gather relevant evidence may not be restricted.

**c.** The parties must be provided with the same opportunity to have others present during any grievance proceeding and any related meeting, including an attorney.

**d.** The parties and witnesses must be provided with written notice of the date, time, location, participants, and purpose of investigative interviews or other meetings, with sufficient time for the party to prepare.

**e.** Both parties must be provided with an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

**f.** 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 in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response. The investigator must consider the response of both parties prior to completion of the investigative report.

**g.** The investigator must prepare an investigative report that fairly summarizes relevant evidence. At least 10 days prior to a hearing (if applicable) or other time of determination regarding responsibility, the report must be sent to each party and the party's advisor, if any, in an electronic format or a hard copy, for their review and written response.

### 2. Department of Education Discussion

#### a. No "Gag Orders"

"As to this provision's requirement that a recipient not restrict a party's ability to discuss the allegations under investigation, the Department believes that a recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization. Many commenters have observed that the grievance process is stressful, difficult to navigate, and distressing for both parties, many of whom in the postsecondary institution context are young adults "on their own" for the first time, and many of whom in the elementary and secondary school context are minors.

The Department does not believe recipients should render parties feeling isolated or alone through the grievance process by restricting parties' ability to seek advice and support outside the recipient's provision of supportive measures. Nor should a party face prior restraint on the party's ability to discuss the allegations under investigation where the party intends to, for example, criticize the recipient's handling of the investigation or approach to Title IX generally. The Department notes that student activism, and employee publication of articles and essays, has spurred many recipients to change or improve Title IX procedures, and often such activism and publications have included discussion by parties to a Title IX grievance process of perceived flaws in the recipient's Title IX policies and procedures. The Department further notes that § 106.45(b)(5)(iii) is not unlimited in scope; by its terms, this provision stops a recipient from restricting parties' ability to discuss "the allegations under investigation." This provision does not, therefore, apply to discussion of information that does not consist of "the allegations under investigation" (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under § 106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii)).

As to the requirement in § 106.45(b)(5)(iii) that recipients must not restrict parties' ability "to gather and present evidence," the purpose of this provision is to ensure that parties have equal opportunity to participate in serving their own respective interests in affecting the

outcome of the case. This provision helps ensure that other procedural rights under § 106.45 are meaningful to the parties; for example, while the parties have equal opportunity to inspect and review evidence gathered by the recipient under § 106.45(b)(5)(vi), this provision helps make that right meaningful by ensuring that no party's ability to gather evidence (e.g., by contacting a potential witness, or taking photographs of the location where the incident occurred) is hampered by the recipient.

Finally, the two requirements of this provision sometimes overlap, such as where a party's ability to "discuss the allegations under investigation" is necessary precisely so that the party can "gather and present evidence," for example to seek advice from an advocacy organization or explain to campus security the need to access a building to inspect the location of an alleged incident.

The Department appreciates the opportunity to clarify that this provision in no way immunizes a party from abusing the right to "discuss the allegations under investigation" by, for example, discussing those allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation. In response to many commenters concerned that the proposed rules did not address retaliation, the final regulations add § 106.71 prohibiting retaliation and stating in relevant part (emphasis added): "No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part[.]" The Department thus believes that § 106.45(b)(5)(iii) – permitting the parties to discuss the allegations under investigation, and to gather and present evidence – furthers the Department's interest in promoting a fair investigation that gives both parties meaningful opportunity to participate in advancing the party's own interests in case, while abuses of a party's ability to discuss the allegations can be addressed through tort law and retaliation prohibitions.

The Department recognizes commenters' concerns that some discussion about the allegations under investigation may fall short of retaliation or tortious conduct, yet still cause harmful effects. For example, discussion and gossip about the allegations may negatively impact a party's social relationships. For the above reasons, the Department believes that the benefits of § 106.45(b)(5)(iii), for both parties, outweigh the harm that could result from this provision. This provision, by its terms, applies only to discussion of "the allegations under investigation," which means that where a complainant reports sexual harassment but no formal complaint is filed,

§ 106.45(b)(5)(iii) does not apply, leaving recipients discretion to impose non-disclosure or confidentiality requirements on complainants and respondents." 30296.

### 3. Notice of Proposed Changes

**a.** Burden is on the recipient to gather sufficient evidence. (Proposed § 106.45(f)(1)).

**b.** Equal opportunity for all parties to present relevant fact witnesses and other evidence. (Proposed § 106.45(f)(2)).

**c.** Determination by the decisionmaker of what evidence is relevant and what evidence is impermissible. (Proposed § 106.45(f)(3)).

**d.** A description provided to the parties by the recipient of the relevant and not otherwise impermissible evidence, as well as a reasonable opportunity to respond. (Proposed § 106.45(f)(4)).

## G. Optional Live Hearing & Written Cross-Examination Stage

### 1. Regulations

**a.** For recipients that are elementary and secondary schools, the grievance process may, but need not, provide for a live hearing. Most policies do not include a hearing process.

**b.** With or without a hearing, after the recipient has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. This has to be done even though the District does not have a hearing process.

**c.** With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions

any decision to exclude a question as not relevant. 34 CFR 106.45(b)(6).

**2. Department of Education Discussion**

**a.** "The Department appreciates commenters' support for § 106.45(b)(6)(ii) making hearings optional for elementary and secondary schools while providing opportunity for the parties to submit written questions and follow-up questions to other parties and witnesses with or without a hearing. The Department agrees that this provision ensures due process protections and fairness while taking into account that students in elementary and secondary schools are usually under the age of majority. Thus, the Department declines to mandate hearings and cross-examination for elementary and secondary schools, including only as applied to allegations of peer-on-peer harassment, or to high schools. Even where the parties are in a peer age group, parties in elementary and secondary schools generally are not adults with the developmental ability and legal right to pursue their own interests on par with adults. The Department is persuaded by commenters' concerns that the language in this provision should state even more clearly that hearings are optional and not required, and has revised this provision to state that 'the recipient's grievance process may, but need not, provide for a hearing.'"

**H. Decision-Making/Determination of Responsibility Stage**

**1. Regulations**

**a.** The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.

**b.** The written determination must include:

**(i)** A description of the allegations potentially constituting sexual harassment as defined in 106.30;

**(ii)** A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

**(iii)** Findings of fact supporting the determination;

**(iv)** Conclusions regarding the application of the recipient's code of conduct to the facts;

**(v)** The decision and rationale as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and the recipient's procedures and permissible bases for the complainant and respondent to appeal.

**(vi)** The written determination must be provided to the parties simultaneously.

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

**(viii)** The Title IX Coordinator is responsible for effective implementation of any remedies.

### 2. Notice of Proposed Changes

"Proposed § 106.45(f)(3) would require a recipient to review all evidence gathered through the investigation and determine which evidence is relevant and which evidence is impermissible regardless of relevance, consistent with proposed §§ 106.2 and 106.45(b)(7)."

## I. Appeals

### 1. Regulations

#### a. Circumstances in which an opportunity to appeal *must* be offered:

A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

**(i)** Procedural irregularity that affected the outcome of the matter;

**(ii)** New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

**(iii)** The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

**b. Circumstances in which an opportunity to appeal *may* be offered:**

A recipient may offer an appeal equally to both parties on additional bases.

**c. As to all appeals, the recipient must:**

**(i)** Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

**(ii)** Ensure that the decision-maker(s) for the appeal is not the same person(s) as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

**(iii)** Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

**(iv)** Issue a written decision describing the result of the appeal and the rationale for the result; and

**(v)** Provide the written decision simultaneously to both parties. 34 CFR 106.45(b)(8).

## J. Emergency Removal

### 1. Regulations

**a.** "Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment

justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1972, or the Americans with Disabilities Act." 34 CFR 106.44(c).

**b.** "Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process . . ." *Id.*

### 2. Department of Education Discussion

**a.** "Changing a respondent's class schedule . . . may be a permissible supportive measure depending on the circumstances. By contrast, removing a respondent from the entirety of the education program or activities (such as removal from a team, club, or extracurricular activity), likely would constitute an unreasonable burden on the respondent or be deemed disciplinary or punitive, and therefore would not likely qualify as a supportive measure. Until or unless the recipient has followed the § 106.45 grievance process (at which point the recipient may impose any disciplinary sanction or other punitive or adverse consequence of the recipient's choice), removals of the respondent from the recipient's education program or activity970 need to meet the standards for emergency removals under § 106.44(c)." 30231.

**b.** "Nothing in 106.44(c) prevents a recipient from involving a student's IEP team before making an emergency removal decision, and § 106.44(c) does not require a recipient to remove a respondent where the recipient has determined that the threat posed by the respondent, arising from the sexual harassment allegations, is a manifestation of a disability such that the recipient's discretion to remove the respondent is constrained by IDEA requirements." 30229.

## K. Application to Employees and Overlap with Title VII

### 1. Regulations

"Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964 . . ." 34 CFR 106.6(f).

**2. Department of Education Discussion**

**a.** "The Department appreciates support for its final regulations, which apply to employees. Congress did not limit the application of Title IX to students. Title IX, 20 U.S.C. 1681, expressly states, '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 . . .' Title IX, thus, applies to any person in the United States who experiences discrimination on the basis of sex in any education program or activity receiving federal financial assistance. Similarly, these final regulations, which address sexual harassment, apply to any person, including employees, in an education program or activity receiving Federal financial assistance." 30439.

**b.** "The Department acknowledges that Title VII, [which prohibits sex discrimination, including sexual harassment, in the employment context], and Title IX impose different requirements and that some recipients will need to comply with both Title VII and Title IX. Although recipients have noted that Title VII and Title IX have different standards for sexual harassment, recipients have not explained why they cannot comply with both standards. The Department's view is that there is no inherent conflict between Title VII and Title IX, including these final regulations. For example, Title VII defines sexual harassment as severe *or* pervasive conduct, while Title IX defines sexual harassment as severe *and* pervasive conduct. Nothing in these final regulations precludes a recipient-employer from addressing conduct that is severe or pervasive, and 106.45(b)(3)(i) provides that a mandatory dismissal under these final regulations does not preclude action under another provision of the recipient's code of conduct. Thus, a recipient-employer may address conduct that is severe or pervasive under a code of conduct for employees to satisfy its Title VII obligations." 30443.

**c.** "The Department acknowledges, as has the Supreme Court, that both Title VII and Title IX prohibit sex discrimination . . . The Department disagrees with commenters who asserted that an identical standard for prohibited conduct in the workplace and in an educational environment is the appropriate outcome. In the elementary and secondary school context, students and recipients benefit from an approach to nondiscrimination law that distinguishes between school and workplace settings . . . allowing for social and developmental growth of young students learning how to interact with peers in the elementary and secondary school context." 30151.

**d.** "The Department agrees that students and employees, including faculty and student workers, should not be treated differently under its final regulations. Employees should receive the same benefits and due process protections that students receive under these final regulations, and these final regulations, including the due process protections in 106.45, apply to employees."

**e.** "Subpart D applies to all sex discrimination on the basis of sex and not just sex discrimination on the basis of sex with respect to students." 30440.

## L. Application of and Overlap with Other Employee and/or Student Discrimination, Harassment, and Bullying Policies and Procedures

"The Department does not view a difference between how 'sexual harassment' is defined under these regulations and a different or broader definition of sexual harassment under various State laws as creating undue confusion for recipients or a conflict as to how recipients must comply with Title IX and other laws. While Federal Title IX regulations require a recipient to respond to sexual harassment as defined in 106.30, a recipient may also need to respond to misconduct that does not meet that definition, pursuant to a State law." 30146.

## M. Law Enforcement Investigations

"Section 106.45(b)(1)(v) provides that the recipient's designated reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for good cause, which may include concurrent law enforcement activity. Section 106.45(b)(6)(i) provides that the decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party's failure to appear or answer cross-examination questions at a hearing; this provision applies where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal proceeding. Further, subject to the requirements in 106.45, such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory or exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a 106.45 grievance process." 30099 fn 466.

## N. Harassing Conduct Outside of School or on Social Media

"The Department appreciates commenters' concerns about whether Title IX applies to sexual harassment that occurs electronically or online. We emphasize that the education program or activity jurisdictional condition is a fact-specific inquiry

applying existing statutory and regulatory definitions of "program or activity" to the situation; however, for recipients who are postsecondary institutions or elementary and secondary schools as those terms are used in the final regulations, the statutory and regulatory definitions of "program or activity" encompass "all of the operations of" such recipients, and such "operations" may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient. Furthermore, the final regulations revise § 106.44(a) to specify that an education program or activity includes circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurred, such that the factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity. For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.

Contrary to the claims made by some commenters, the approach to "education program or activity" contained in the final regulations, and in particular its potential application to online harassment, would not necessarily conflict with the Department's previous 2010 Dear Colleague Letter addressing bullying and harassment. The Department's 2010 guidance made a passing reference that harassing conduct may include "use of cell phones or the internet," and the Department's position has not changed in this regard. These final regulations apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the recipient's education program or activity. As explained in the "Adoption and Adaption of the Supreme Court's Framework to Address Sexual Harassment" section of this preamble, these final regulations adopt and adapt the Gebser/Davis framework of actual knowledge and deliberate indifference, in contrast to the rubric in the 2010 Dear Colleague Letter on bullying and harassment; however, these final regulations appropriately address electronic, digital, or online sexual harassment by not making sexually harassing conduct contingent on the method by which the conduct is perpetrated. Additionally, even if a recipient is not required to address certain misconduct under these final regulations, these final regulations expressly allow a recipient to address such misconduct under its own code of conduct. Accordingly, there may not be any conflict between these final regulations with respect to State laws that explicitly cover online harassment."

## O. Timeframes

"The Department acknowledges that withdrawn Department guidance referred to a 60-day time frame for sexual harassment complaints. For recipients who determine that 60 days represents a reasonable time frame under which that recipient can conclude a grievance process that complies with § 106.45, a recipient has discretion to include that time frame under the final regulations. For recipients who determine that a shorter or longer period of time represents the time frame under which the

recipient can conclude a grievance process, the recipient has discretion to include that time frame. The Department emphasizes that what a recipient selects as a "reasonable" time frame is judged in the context of the recipient's obligation to provide students and employees with education programs and activities free from sex discrimination, so that the recipient's selection of time frames must reflect the goal of resolving a grievance process as quickly as possible while complying with the procedures set forth in § 106.45 that aim to ensure fairness and accuracy. Because the final regulations allow short-term delays and extensions for good cause, recipients need not base designated time frames on, for example, the most complex, time-consuming investigation that a formal complaint of sexual harassment might present. Rather, the recipient may select time frames under which the recipient is confident it can conclude the grievance process in most situations, knowing that case-specific complexities may be accounted for with factually justified short-term delays and extensions." 30269.

## III. Title IX's Application to LGBTQI+ Individuals

### A. Current Regulations

"When the Department amended Title IX regulations in May 2020, it declined to address Title IX's coverage of discrimination on the basis of gender identity or sexual orientation." 85 FR at 30178. *Unofficial Version of Proposed Rule*, p. 514-515.

### B. Notice of Proposed Changes

**1.** The proposed regulations would address discrimination based on sexual orientation, gender identity, and sex characteristics by:

**a.** Prohibiting . . . policies and practices that prevent a student from participating in a recipient's education program or activity consistent with their gender identity. This rule would not apply in contexts in which a particular practice is otherwise permitted by Title IX, such as admissions practices of traditionally single-sex postsecondary institutions or when permitted by a religious exemption. (Proposed § 106.31(a)(2)).

**b.** The Department will engage in a separate rulemaking to address Title IX's application to the context of athletics and, in particular, what criteria recipients may be permitted to use to establish students' eligibility to participate in a particular male or female athletic team.

**c.** Title IX's broad prohibition on discrimination "on the basis of sex" under a recipient's education program or activity encompasses, at a minimum, discrimination against an individual because, for

example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming. All such classifications depend, at least in part, on consideration of a person's sex. Unofficial Version of Proposed Rule, 522.

**2.** ***Gender Identity***. "Proposed § 106.10 would also clarify that Title IX prohibits discrimination on the basis of an individual's gender identity . . . The proposed regulations are consistent with OCR's 2021 Bostock Notice of Interpretation and the interpretation of Federal courts that have applied Bostock to Title IX." 525.

**3.** ***Sex Stereotypes***. Proposed § 106.10 would clarify that discrimination based on sex stereotypes, i.e., fixed or generalized expectations regarding a person's aptitudes, behavior, self-presentation, or other attributes based on sex, is prohibited under Title IX. The proposed regulations would codify the long-recognized principle that Title IX and other sex discrimination laws prohibit harassment and other forms of discrimination based on a person's conformity or nonconformity to stereotypical notions of masculinity and femininity. As the Supreme Court explained in Price Waterhouse v. Hopkins, the assumption that persons must act and dress in a particular way based on expectations related to a person's sex is a form of discrimination on the basis of sex. 526.

## Part Two: How to Conduct Investigations and Remain Impartial

### A. How to Conduct an Investigation

#### 1. Who Conducts an Investigation

**a.** The Title IX Coordinator may begin the investigation or will designate a specific individual to conduct the investigation.

**b.** Thoughtful consideration should be given to who conducts the investigation. Whether internal or external, impartiality and open-mindedness is crucial.

**c.** Depending on the individuals involved and the nature/complexity of the complaint, consider using a third party or legal counsel to conduct the investigation. When the investigator is an attorney retained to provide legal advice, witnesses must be advised of this fact, and told that the investigator represents the employer only and that the investigation is being conducted for the purpose of obtaining or rendering legal advice.

**d.** Conduct may need to be reported to the police under mandatory reporting laws, or to DPI under Wis. Stat. § 115.31. The District should still conduct its own investigation even if law enforcement is involved.

**2. Who to Interview**

**a.** Interview the Complainant (generally done when obtaining the complaint, but follow up may be needed).

**b.** Interview the Accused/Respondent (usually last).

**c.** Interview any other witnesses who may reasonably be expected to have any information relevant to the allegations.

**d.** Do not necessarily have to interview everyone identified by Complainant and Respondent.

**e.** The more people spoken to, the higher risk of privacy interests being affected, but there should be sufficient interviews of witnesses in order to fairly assess the situation and corroborate the statements of parties and witnesses.

**3. General Guidelines for Conducting Interviews**

**a.** It is important to set the appropriate tone and maintain control over the flow of the interview. The first few minutes and what is said are critical to achieving these goals. Investigators should not "wing it," but should carefully craft or script the introduction. Explain your role in the process as a fact finder and that no conclusions of any kind have been initiated or made.

**b.** Conduct the interview in private.

**c.** Consider having a second individual in the room to confirm what was said.

**d.** Take detailed notes of the interview or have someone else take the notes. Explain that notes will be taken and used to create a final report.

**e.** Ask if the person has any questions and confirm an understanding of what has been shared before proceeding. It is important to ask throughout the interview, especially lengthier ones, if there are any questions.

**f.** Ask the following types of questions and remind the witness that detailed, accurate information is necessary for a thorough investigation.

**(i)** Who was involved in the conduct?

**(ii)** What did he/she witness first hand?

**(iii)** When (date and time)?

**(iv)** Where did the alleged conduct occur?

**(v)** How many times did the conduct occur?

**(vi)** Where there any other witnesses?

**(vii)** What led up to the incident?

**(viii)** Were others involved?

**(ix)** Have witnesses discussed the incident with anyone else or reported the incident to anyone else? If so, to whom and with what result?

**(x)** Is there any physical evidence?

**(xi)** Is there anything else I should know or be aware of?

**(xii)** Is there anyone else I should talk to? Any documents, emails, or other physical information I should see?

**(xiii)** Is there anything you thought I would ask today, but didn't?

**g.** Avoid leading questions.

**h.** Avoid asking multiple choice (i.e., either or questions). Ask what happened. "Can you describe?). Start open ended and then narrow down based on what you know.

**i.** Focus on factual matters; find out if any information from the witness is based on rumor or hearsay.

**j.** If new information is presented, follow it. Ask questions. Go off script.

**k.** At the conclusion of the interview, summarize what the witness told you. (So, what I'm hearing you say…) Ask if your reiteration is accurate. Depending on situation ask witness to put statement in writing or provide written summary and ask witness to sign as accurate. (e.g., if worried about changing story).

**l.** Inform the witness that the information discussed during the interview must be kept confidential.

**m.** Let the witness know that a second conversation may be required depending on how the investigation unfolds. Similarly, provide contact information for the witness to use should additional recollections occur after the interview.

**n.** Advise the witness that they cannot be retaliated against for participation in an investigation, and that any such retaliation should be reported immediately.

**4. Gathering Relevant Information**

**a.** "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Wis. Stat. 904.01.

**b.** Relevant questions are designed to draw out facts.

**c.** Questions or evidence related to the complainant's prior sexual history ("rape shield protections") are not relevant unless otherwise offered to prove (1) that someone other than the respondent committed the alleged conduct or (2) consent.

**5. Interviewing the Complainant**

**a.** Obtain a detailed account of all conduct that the reporting party is concerned about:

**(i)** Who is the subject of the report?

**(ii)** What was the conduct?

**(iii)** When did the conduct occur?

**(iv)** Where did the conduct occur?

**(v)** Who else was present?

**(vi)** How did the reporting party become aware of the alleged misconduct? Does the reporting party have first-hand knowledge or is their knowledge based on hearsay?

**(vii)** Does the reporting party have any documentation pertaining to the alleged misconduct?

**b.** Advise the reporting party that you take such concerns seriously (even if you think there is little or no validity to the complaint).

**c.** Advise the reporting party that you cannot guarantee absolute confidentiality, including that the subject of the report has the right to respond to allegations. You may note that you will keep things as confidential as practicable, given your responsibility to investigate and take any necessary action.

**d.** Inform the reporting party that even if s/he does not want you to pursue anything that you may have to investigate the matter, especially in the case of alleged discrimination, harassment or retaliation.

**e.** Let the reporting party know that you will get back in touch with them if/when you need additional information or when the investigation is completed.

**6. Interviewing the Respondent**

**a.** Determine whether s/he has representation and describe the role of representation in the interview as an observer and consultant who is not permitted to interfere with or disrupt the interview BUT may advise the respondent as to how and whether to answer specific questions.

**b.** Garrity Warning: If the alleged misconduct involves possible criminal conduct by an employee who is the subject of the investigation, this warning should be given to the employee, and signed by the employee prior to conducting the investigatory interview. The Garrity warning assures the employee that the answers/responses that are given during the investigation cannot be used in any criminal investigation unless the disclosure of the answers/responses is compelled by a court. As a result, the employee cannot invoke the Fifth Amendment and refuse to answer questions which are asked during the interview.

**c.** Have the employee sign the Garrity warning and provide a copy to the employee.

**d.** Tell the individual the nature of the alleged complaint/concern/ behavior/allegations.

**e.** Provide the respondent with the opportunity to tell his/her side and respond to all allegations.

**f.** If the respondent claims that the allegations are false, ask why the complainant might lie.

**g.** Observe subject's reaction/demeanor.

**h.** Be direct and fair.

**i.** Remain objective, seek facts.

**j.** Subject may ask questions that pertain to his/her own situation.

**k.** Tone of meeting should be formal.

**l.** What to **avoid** when meeting with the subject.

**(i)** Sympathizing or becoming ally of the subject of the investigation. ("You don't have anything to worry about." "This is just a formality.")

**(ii)** Interrupting person during his/her response.

**(iii)** Becoming confrontational/argumentative/defensive.

**(iv)** Focusing on feelings rather than fact. It is easy to become distracted by tears or anger. Allow the person time to compose themselves and then continue with the interview.

**(v)** Bargaining with the individual.

**(vi)** Discussing side issues or motives.

**(vii)** Discussing other individuals. Subject will often want to ask "Why me?"

**7. Interviewing Third Parties**

**a.** What did you see or hear? When did this occur? Describe the respondent's behavior toward the complainant and toward others.

**b.** What did the complainant tell you? When did s/he tell you this?

**c.** Do you know of any other relevant information?

**d.** Are there other persons who have relevant information?

**8. Review other documents**.

**a.** Prior disciplinary action

**b.** Applicable student records

**c.** Employee performance evaluations.

**d.** Any acknowledgment of receipt of rules or handbooks

**e.** Identify documents that confirm facts (time cards, computer records, attendance records, email records)?

**9. Drafting the Investigation Report**

**a.** Date and description of the complaint/allegations.

**b.** A summary of the scope of the investigation and relevant policies/procedures.

**c.** Summarize investigation process, including what was said to witnesses in the introductory and concluding remarks.

**d.** The report should also include an explanation for any delays, supporting rationales in determining who to interview or not interview, and whether other allegations were revealed and how they were handled.

**e.** A summary of the evidence gathered through the interviews and review of documentation and other tangible evidence.

**f.** A summary of findings, explanation of how credibility disputes were resolved, and a final conclusion based on the investigator's application of the preponderance of evidence standard.

**g.** Explain the reasoning behind findings and credibility factors.

**h.** The report may note that conclusion can be reached. Allegations are substantiated or not substantiated. This is NOT a determination of responsibility though. Only the decision-maker's written determination is final.

**i.** The investigation report may contain recommendations as to remedies, disciplinary sanctions, and other corrective measures, but will not be final until the decision-maker drafts a written determination.

**10. Confidentiality**

**a.** The District is prohibited from issuing "gag orders" to the parties

**(i)** A recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.

**(ii)** This provision applies only to discussion of "the allegations under investigation," which means that where a complainant reports sexual harassment but no formal complaint is filed, the District has discretion to impose non-disclosure or confidentiality requirements on complainants and respondents

**11. Assessing Credibility**

**a.** Standard of analysis

**(i)** Investigations should conclude when a sufficient amount of information has been gathered to permit the investigator to make a conclusion. Abandon the notion that the truth will always be uncovered.

**(ii)** Generally, "preponderance of the evidence" is the appropriate standard. Is it more likely than not that the complained of conduct occurred? If a quality investigation has been conducted, a reasonable, fair, and good faith conclusion can be made.

**(iii)** A conclusion can and, in most cases should, still be reached even if the accused does not admit to the conduct or if there are no witnesses other than the complainant. The credibility of statements made by the complainant and the accused can and should be weighed against each other. Circumstantial evidence and factors impacting the parties' credibility should be considered.

**b.** Factors to Assess Credibility:

**(i)** Corroboration: Reliable documents, physical evidence, statements made by others.

**(ii)** Observations.

**(iii)** Quality of recollection.

**(iv)** Statements: Consistency, reliability, credibility, contradictions.

**(v)** Bias/Interests/Motives.

**(vi)** Plausibility.

**(vii)** Background, history, pattern.

**(viii)** Character/reputation.

**(ix)** Demeanor/attitude.

## B. How to Serve Impartially

**1.** Avoid prejudgment of the facts at issue.

**2.** Avoid conflicts of interest.

**3.** Fairly and objectively gather and consider evidence.

**4.** Make a decision based on the evidence gathered during the investigation, not preconceptions or predeterminations.

**5.** Treat all witnesses with the same amount of respect, regardless of their position as complainant, respondent, or third party.

## C. Conclusion and Questions

## Part Three: Title IX and Transgender Students

**A. What's Next from the Biden Administration Regarding Transgender Students?**

"Ensure young LGBTQ+ people are supported and protected in our schools and college campuses by:

Guaranteeing transgender students have access to facilities based on their gender identity. On his first day in office, Biden will reinstate the Obama-Biden guidance revoked by the Trump-Pence Administration, which will restore transgender students' access to sports, bathrooms, and locker rooms in accordance with their gender identity. He will direct his Department of Education to vigorously enforce and investigate violations of transgender students' civil rights." *The Biden Plan to Advance LGBTQ+ Equality in America and Around the Word*, https://joebiden.com/lgbtq-policy/

**B. United States Department of Education Notice of Interpretation (June 16, 2021).**

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

The Department's interpretation is largely based on the U.S. Supreme Court's decision in *Bostock v. Clayton*. In *Bostock*, the Supreme Court ruled that Title VII, which prohibits sex discrimination in employment, covers discrimination based on sexual orientation and gender identity. The Court reasoned that discrimination on the basis of sexual orientation or gender identity involves treating individuals differently because of their sex.

**C. *Whitaker v. Kenosha Unified School District et al.*, Case 2:16-cv-00943-PP.**

**(i)** A transgender boy high school student and his parents filed a lawsuit against the Kenosha Unified School District, alleging that the school district's practice of not treating the student consistent with his gender identity, including the decision not to permit the student to access the boys' restrooms, violated Title IX. The student requested a preliminary and permanent injunction directing the district to permit the student to use the boys' restrooms at school and otherwise treat the student consistent with his gender identity. The school district filed a motion to dismiss, arguing that Title IX's protections did not apply to transgender students.

**(ii)** The Court found that the student demonstrated a likelihood of success on his Title IX claim, concluding that "the School District denied him access to the boys' restroom because he is transgender. A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance,

which in turn violates Title IX." The Court went on to conclude that providing a transgender student with an alternative single-user/gender neutral bathroom is not sufficient to relieve a school district from liability, due to the increased stigmatization.

**(iii)** The Court also concluded that the student was likely to succeed on his Equal Protection Clause claim, finding that the School District treated transgender students, who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. The school district had the burden of demonstrating that its justification for its bathroom policy was not only genuine, but also "exceedingly persuasive." The Court found the school district had failed to provide evidence that the district, its students, or the public would be harmed as a result of allowing the student to use the boys' restroom. While the Court recognized that the school district had a legitimate interest in protecting the privacy rights of other students in the restrooms, the Court concluded that a transgender student's presence in the restroom provided no more risk to other students' privacy rights than any other student present in the restroom. In addition, the Court highlighted the fact that the before the school district implemented its bathroom policy, the student had used the boys' restroom for nearly six months without incident or complaint from another student.

**D.** ***John and Jane Doe 1, et al. v. Madison Metropolitan School District*, Case No. 20-CV-454.**

**(i)** The Wisconsin Institute for Law & Liberty (WILL) filed a lawsuit in Dane County Circuit Court on behalf of Madison parents challenging the District's policies implemented to support transgender, Non-binary & gender-expansive students. The policies included the following provisions:

**1.** Children of any age can transition to a different gender identity at school, by changing their name and pronouns, without parental notice or consent.

**2.** District employees are prohibited from notifying parents, without the child's consent, that their child has or wants to change gender identity at school, or that their child may be dealing with gender dysphoria.

**3.** District employees are even instructed to deceive parents by using the child's legal name and pronouns with family, while using the different name and pronouns adopted by the child in the school setting.

**(ii)** WILL argued that the District's policies violated parents' rights to make healthcare decisions and pursue treatment options for their children,

violated the state requirement that parents must consent to medical treatment for their children, and interfered with parents' ability to provide proper support for their children.

**(iii)** On September 28, 2020, the Circuit Court issued an injunction against the District, enjoining it from applying or enforcing its policies "in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school, including information about the name and pronouns being used to address their child at school. This injunction does not create an affirmative obligation to disclose information if that obligation does not already exist at law and shall not require or allow District staff to disclose any information that they are otherwise prohibited from disclosing to parents by any state or federal law or regulation."

**E. *Kluge v. Brownsburg Community School Corporation*, No. 1:19-cv-2462-JMS-DLP, Southern District of Indiana (2021).**

**(i)** Plaintiff John Kluge was formerly employed as a teacher by Brownsburg Community School Corporation ("BCSC"), but was eventually forced to resign after refusing to refer to transgender students by the names selected by the students, their parents, and their healthcare providers due to his religious objections to affirming transgenderism. Pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., Mr. Kluge asserts two claims against BCSC related to the end of his employment: (1) discrimination based on failure to accommodate his religious beliefs; and (2) retaliation.

**(ii)** BCSC implemented a policy ("the Name Policy"), which took effect in May 2017 and required all staff to address students by the name in the student information system. Transgender students could change their first names or gender pronouns in the system if they presented a letter from a parent and a letter from a healthcare professional regarding the need for a name change. In addition to the Name Policy, transgender students were permitted to use the restrooms of their choice and dress according to the gender with which they identified, including wearing school-related uniforms associated with the gender with which they identified.

**(iii)** Due to his religious beliefs, the District granted Kluge a religious accommodation, permitting him to call all students by their last names only. The District received various complaints regarding this process, so the accommodation was withdrawn.

**(iv)** The Court held that Kluge's "religious opposition to transgenderism is directly at odds with [the district's] policy of respect for transgender students, which is grounded in supporting and affirming those students."

The Court also found that Kluge was not forced to resign nor was the acceptance of his resignation retaliatory, due to his failure to offer an alternative accommodation.

**F. *Bostock v. Clayton County, GA*, 590 U. S. ____ (2020).**

**(i) Majority Opinion:**

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

"[H]omosexuality and transgender status are inextricably bound up with sex."

**(ii) Justice Alito's Dissent:**

"What the Court has done today—interpreting discrimination because of "sex" to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. See Appendix C, infra; e.g., 20 U. S. C. §1681(a) (Title IX); 42 U. S. C. §3631 (Fair Housing Act); 15 U. S. C. 1691(a)(1) (Equal Credit Opportunity Act). The briefs in these cases have called to our attention the potential effects that the Court's reasoning may have under some of these laws, but the Court waves those considerations aside. As to Title VII itself, the Court dismisses questions about "bathrooms, locker rooms, or anything else of the kind." Ante, at 31. And it declines to say anything about other statutes whose terms mirror Title VII's."

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"…transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify, and while the Court does not define what it means by a transgender person, the term may apply to individuals who are "gender fluid," that is, individuals whose gender identity is mixed or changes over time. Thus, a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed.

A similar issue has arisen under Title IX, which prohibits sex discrimination by any elementary or secondary school and any college or university that

receives federal financial assistance. In 2016, a Department of Justice advisory warned that barring a student from a bathroom assigned to individuals of the gender with which the student identifies constitutes unlawful sex discrimination, and some lower court decisions have agreed. See Whitaker v. Kenosha Unified School Dist. No. 1 Bd. of Ed., 858 F. 3d 1034, 1049 (CA7 2017); G. G. v. Gloucester Cty. School Bd., 822 F. 3d 709, 715 (CA4 2016), vacated and remanded, 580 U. S. ___ (2017); Adams v. School Bd. of St. Johns Cty., 318 F. Supp. 3d 1293, 1325 (MD Fla. 2018); cf. Doe v. Boyertown Area School Dist., 897 F. 3d 518, 533 (CA3 2018), cert. denied, 587 U. S. ___ (2019).

**G. *G.G. v. Gloucester County School Board* (4th Cir. 2020).**

"After the Supreme Court's recent decision in Bostock v. Clayton County, 140 S. Ct. 1731 (2020), we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him "on the basis of sex." Although Bostock interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX. See Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007); cf. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 258 (2009) ("Congress modeled Title IX after Title VI . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." (citation omitted)). In Bostock, 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." Bostock, 140 S. Ct. at 1741. That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions. See id. at 1741–42. As explained above in the equal protection discussion, the Board could not exclude Grimm from the boys bathrooms without referencing his "biological gender" under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's actions. Therefore, the Board's policy excluded Grimm from the boys restrooms "on the basis of sex."

**H. *Adams by and through Kasper v. School Board of St. Johns County,* 968 F. 3d 1286 (11th Cir. 2020).**

"Mr. Adams also prevails on his Title IX claim. Title IX mandates that no person '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(a).

There is only one dispute about Mr. Adams's Title IX claim: whether excluding Mr. Adams from the boys' bathroom amounts to sex discrimination in violation of

the statute. We conclude that this policy of exclusion constitutes discrimination. First, Title IX protects students from discrimination based on their transgender status. And second, the School District treated Mr. Adams differently because he was transgender, and this different treatment caused him harm. Finally, nothing in Title IX's regulations or any administrative guidance on Title IX excuses the School Board's discriminatory policy.

Our analysis of Mr. Adams's Title IX claim benefits from the Supreme Court's recent decision in *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731 (2020). *Bostock* announced that Title VII's prohibition on sex discrimination also forbids discrimination based on transgender status. Id. at 1737. The Court instructed that 'it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.' Id. at 1741.

*Bostock* has great import for Mr. Adams's Title IX claim. Although Title VII and Title IX are separate substantive provisions of the Civil Rights Act of 1964, both titles prohibit discrimination against individuals on the basis of sex. 42 U.S.C. § 2000e-2(a)(1) (Title VII); 20 U.S.C. § 1681(a) (Title IX). Both titles also employ a 'but-for causation standard,' which *Bostock* found critical to its expansive interpretation of sex discrimination. Given these similarities, it comes as no surprise that the Supreme Court has 'looked to its Title VII interpretations of discrimination in illuminating Title IX' and its antidiscrimination provisions.

The School Board argues that Title IX does not proscribe discrimination against transgender people, because the statute was only 'intended to address discrimination plaguing biological women.' Appellant's Br. at 39. However, Bostock teaches that, even if Congress never contemplated that Title VII could forbid discrimination against transgender people, the 'starkly broad terms' of the statute require nothing less. 140 S. Ct. at 1753. This reasoning applies with the same force to Title IX's equally broad prohibition on sex discrimination.

Still, the School Board argues that Title IX's ban on sex discrimination is somehow different from Title VII's because 'schools are a wildly different environment than the workplace" and education "is the province of local governmental officials.' Appellant's Br. at 43–44. We are not persuaded. Congress saw fit to outlaw sex discrimination in federally funded schools, just as it did in covered workplaces. And, as we have explained, the Supreme Court's interpretation of discrimination based on sex applies in both settings. With *Bostock's* guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex."

**I.** Also consider Wis. Stats. § 118.13 which prohibits discrimination in educational programs and activities on the basis of sexual orientation. This law is implemented by PI9.