

# Digging into the 2024 Title IX Regulations (K-12)

Bricker Graydon & BASA Dive into the  
NEW Title IX Regulations

April 29, 2024



## Disclaimers and Basics

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- This presentation does not constitute legal advice.
- Yes, we will send the slides out.
- Watch for an email after this that will have a link to the slides.
- Yes, you may post these slides. (But spoiler: you won't have to starting August 1st!)

## Our Presenters

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# Big Picture Thoughts

# Basics

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- 1,577 pages in the unofficial version
- The official version will be published in the Federal Register on April 29, 2024 (423 pages)
  - This version is shorter because of the formatting used.
  - It will be these page numbers that will be referenced in the future
- Effective August 1, 2024
- OCR offered up a resource for drafting policy

# Did They Hit The Mark?

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- In its press release, USDOE said the 2024 regs will do all of the following:
  - Restore and strengthen vital protections for students
  - Offer appropriate discretion and flexibility to account for variations in schools, student populations, and administrative structures
  - Promote accountability and fairness

# Some of the Things You Can STOP Doing

## August 1st

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- Posting training these materials (though they still must be available for inspection upon request)
- Requiring a formal complaint before engaging in informal resolution
- Employing investigators & decisionmakers
- Providing 10 day review periods
- Permitting advisors

# Sex Discrimination

**Definition: 106.10, p. 1522**



## Prohibition – 106.31

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- Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any **academic, extracurricular, research, occupational training, or other education program or activity** operated by a recipient that receives Federal financial assistance.

## Scope – 106.10

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- Discrimination on the basis of sex includes discrimination on the basis of:
  - Sex stereotypes
  - Sex characteristics
  - Pregnancy or related conditions
  - Sexual orientation
  - Gender identity

## Where an Exception Applies... 106.31

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- A recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to **more than *de minimis* harm**, except as permitted by:
  - The exceptions laid out in 20 USC 1681(a)(1) through (9) and 106.12 through 106.15  
[Religious institutions, military programs, sororities/fraternities, etc.]
  - The exceptions in 20 USC 1686 and corresponding regulations 106.32(b)(1)  
[Housing]
  - 106.41(b) [Athletics]
- Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to **more than *de minimis* harm** on the basis of sex.

## Application – 106.11

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- Applies to all sex discrimination occurring under a recipient's education program or activity in the United States
- Includes:
  - Conduct occurring in a building owned/controlled by recognized student organization; and
  - Conduct that is subject to the recipient's disciplinary authority
- Recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

# Sex-Based Harassment

**Definition: 106.2, pp. 1513-1514**

## Definition of Sex-Based Harassment – 106.2, p. 1513-1514

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

- Quid pro quo harassment
- Hostile environment harassment
- Specific offenses
  - Sexual assault
  - Dating violence
  - Domestic violence
  - Stalking

## Definition of Quid Pro Quo – 106.2, p. 1513

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

## Definition of Hostile Environment – 106.2, p. 1513-1514 (1 of 2)

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- Unwelcome sex-based conduct that, based on the totality of the circumstances, is **subjectively and objectively offensive** and is **so severe or pervasive** that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).
- Title VII standard, for reference: "must be so severe or pervasive" with reasonable-person standard for charging party



## Definition of Hostile Environment – 106.2, p. 1513-1514 (2 of 2)

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- Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
  - The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
  - The type, frequency, and duration of the conduct;
  - **The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;**
  - The location of the conduct and the context in which the conduct occurred; and
  - Other sex-based harassment in the recipient's education' program or activity

# Specific Offenses

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- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

Note: These definitions are similar to 2020 regulations, but explicitly spelled out in the new regulations.

"Actual Knowledge"

# Language in 2020 Title IX Regulations: “actual knowledge”

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- Under 2020 Title IX Regulations, notice to trigger "actual knowledge" for purposes of liability was limited to:
  - For K-12: any employee, except those deemed confidential (prior to the 2020 Title IX Regulations, "actual knowledge" had been limited to designated school employees).

## Section 106.44's Notice Requirements – Elementary or Secondary School Recipients

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Must require **all of its employees who are not confidential employees** to notify the Title IX Coordinator when employee has information about conduct that **reasonably may constitute sex discrimination under Title IX**

(106.44(c)(1))

# Reporting Requirements & Confidential Employees

**Definition: 106.2, p. 1506-1507 ; p. 1530**

# Definition of "Confidential Employees"

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- Confidential/privileged under state law – only applies to information received while functioning in that confidential/privileged role
- Confidential/privileged as designated by policy

# Confidential employee requirements

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- A recipient must notify all participants in the recipient's education program or activity how to contact its confidential employees
- A recipient must require confidential employee to explain to any person who informs them of conduct that reasonably may constitute sex discrimination under Title IX:
  - Employee is a confidential employee and not required to notify Title IX Coordinator about conduct that reasonably may constitute sex discrimination
  - How to contact Title IX Coordinator and make a complaint
  - That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate informal resolution or formal grievance process



# Jurisdiction

# Language in 2020 Title IX Regulations

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- Under 2020 regulations, we knew Title IX extended to a recipient's education programs or activities, against a person in the United States
- We also knew that a recipient's education programs and activities could extend to some off-campus locations where the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and any building owned or controlled by a student organization that is officially recognized by a post-secondary institution. (2020 Title IX Regulations 106.30(a) - the 2024 Title IX Regulations remove 106.30(a).)

# Clarification of extra-jurisdictional conduct



- Section 106.11 application contemplates when conduct outside of the United States fall under Title IX.
- The regulations apply "to every recipient and to all sex discrimination occurring under a recipient's **education program or activity in the United States**" (as in the 2020 Regulations)....

## AND

- "A recipient **has an obligation to address a sex-based hostile environment** under its education program or activity, **even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.**"

## Obligation to address

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- To be clear the 2024 regulations still do not extend Title IX to conduct outside of the United States, or in scenarios outside of the educational program or activities of a recipient (e.g., in a private residence).
- The 2024 regulations obligate a recipient to consider the extra-jurisdictional conduct to the extent it contributes to a sex-based hostile environment under a recipient's education program or activity in the United States.
- This does not mean the recipient has to make a Title IX determination about that extra-jurisdictional contributing conduct.

# Why it matters in sex-based hostile environments

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- Extra-jurisdictional conduct can impact the elements in sex-based harassment (106.2 definition, addressed above):
  1. The **degree** to which the **conduct affected the complaint's ability to access** the recipient's education program or activity;
  2. The type, **frequency**, and **duration** of the conduct;
  3. The parties' ages, roles within the recipient's education program or activity, **previous interactions**, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  4. The location of the conduct and the **context** in which the conduct occurred; and
  5. Other sex-based harassment in the recipient's education program or activity.

## Definition of "Complainant" - 106.2, p. 1506

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- Student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX
- A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination

## Definition of "Student" - 106.2, p. 1515

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- Student is "a person who has gained admission."
- Admission is defined to include "selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient." (p. 208)

## Definition of "Respondent" - 106.2, p. 1512

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- A person who is alleged to have violated the recipient's prohibition on sex discrimination



## Definition of "Complaint" - 106.2, p. 1506

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- An oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX

# Duties of a Title IX Coordinator

# What have Title IX duties been?

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## Duties have included:

- Receiving any/all complaints
- Ensuring prompt and equitable resolution of the complaint
- Implementing grievance process/procedures per Board policy
  - Offering informal resolution
  - Investigating the complaint or delegating investigation
  - Appointing a decision-maker to issue determination of responsibility
- Ensuring all notices/documentation is completed

→ *New regulations organize duties and clarify them further*

## Duties Outlined in 106.44(f)

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- (i) Treat the complainant and respondent equitably;
- (ii) Offer and coordinate supportive measures (as appropriate)
- (iii) Notify complainant/respondent of grievance procedures and informal resolution process (if applicable/appropriate)
- (iv) Initiate grievance procedures (or informal resolution process if applicable/appropriate/requested)
- (v) Determine whether to initiate complaint in absence of complaint or withdrawal of allegations
- (vi) If self-initiating, notify complainant prior and address reasonable concerns about safety
- (vii) Take steps to ensure that sex discrimination does not continue

→ *These are not new responsibilities – just re-organized and more clearly delineated*

→ *If conduct as alleged could not constitute sex discrimination, actions are not required*

# Initiation of Complaint by TIXC

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- 8 Considerations for initiation by TIXC (§ 106.44(f)(1)(v) – (vi))
  - (1) Complainant's request not to proceed
  - (2) Complainant's reasonable safety concerns re: initiation
  - (3) Risk that additional acts of sex discrimination might occur w/out a complaint
  - (4) Severity of the alleged sex discrimination
    - Would a finding of responsibility result in removal/imposition of another sanction?)
  - (5) Age and Relationship of the parties
    - Was Respondent an employee of the recipient?
  - (6) Scope of the alleged sex discrimination
    - Information suggesting a pattern? Ongoing sex discrimination? Impacting multiple individuals?
  - (7) Availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred
  - (8) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures

# Initiation of Complaint by TIXC – tell Complainant

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- If initiating, notify Complainant and address reasonable concerns
- Regardless of initiating:
  - Take other appropriate prompt and effective steps to ensure sex discrimination does not continue
- NOTE: TIXCs are not required to analyze the 8 considerations if the conduct, as alleged, could not constitute sex discrimination

# Pregnancy Discrimination and Title IX

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- Scope of sex discrimination now includes discrimination based on sex stereotypes, sex characteristics, **pregnancy or related conditions**, sexual orientation, and gender identity. (§ 106.10). If initiating, notify Complainant and address reasonable concerns
- Pregnancy or related conditions includes: (106.2, p. 1510)
  - Pregnancy, childbirth, termination of pregnancy, or lactation;
  - Medical conditions related to above; or
  - Recovery from above

# Pregnancy Discrimination and Title IX, cont.

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- Proactive actions include:
  - Providing reasonable modifications for students;
  - Reasonable break time for lactation for employees; and
  - Lactation space for students and employees. (§§ 106.40(b)(3) and 106.57(e)).
- Also, duty to inform students of rights related to pregnancy or related conditions. (§ 106.40(b)(2) and (b)(3)(i))



# Student with a Disability

**Definition: 106.2, p. 1515**

***See also* 106.8(e), p. 1521**

# Definition of Student with a Disability – 106.2, p. 1515

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- A student who is an individual with a disability under Section 504, or a child with a disability as defined by the IDEA
- TIXC “must” consult with one or more members, as appropriate, of the IEP or Section 504 team 106.8(e)
- Preamble clarifies that consultation with one or more members of the team does not “require” a meeting
- Preamble further clarifies that the purpose of the consultation is to determine how to comply with both the relevant special education and TIX legal obligations

# Students with Disabilities

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"The rights of students with disabilities warrant the attention and concern demonstrated by the obligations set forth in § 106.8(e), and the inclusion of this provision in the final regulations will provide clarity for students with disabilities about what to expect from their educational institutions when they are involved in Title IX grievance procedures as complainants or respondents." (p. 284)

# Supportive Measures

**Definition: 106.2, p. 1515**

***See also* 106.44(g)**

# Definition of Supportive Measures – 106.2, p. 1515

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

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

# List of Example Supportive Measures – 106.44(g)

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- Counseling
- Extensions of deadlines and other course-related adjustments
- Campus escort services
- Increased security and monitoring of certain areas of the campus
- Restrictions on contact **applied to one or more parties** (“mutual” has been deleted).
- Leaves of absence
- Changes in class, work, housing, or extracurricular or any other activity, **regardless of whether there is or is not a comparable alternative**
- **Training and education programs** related to sex-based harassment

## More on Supportive Measures – 106.44

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- Subsection (g)(2) expressly states that a school may not impose supportive measures for punitive or disciplinary reasons
- Subsection (g)(5) requires that school maintain supportive measure as confidential unless necessary to preserve access

## Appeal of Supportive Measures – 106.44

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- 106.44 (f) provides that the TIXC still offers and coordinates supportive measures, but language from the 2020 regulations that the TIXC has to “consider” complainant’s wishes has been eliminated
- Subsection (g)(4) (**NEW**) school must now extend a due process appeal mechanism for supportive measures.
  - A recipient must provide a complainant or respondent with a timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the recipient’s decision to provide, deny, modify, or terminate supportive measures applicable to them



## Consult with Disability Services re: Supportive Measures

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- If a party is a student with a disability under IDEA or Section 504, the Title IX Coordinator **must** consult with one or more members of the student's IEP or Section 504 team about IDEA or Section 504 compliance and the implementation of supportive measures. See 106.44(g)(6)(i)

# Emergency Removal

*See* 106.44(h) and (i)

## Emergency Removal from educational program or activity (Slide 1 of 2)

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- Removal of the word “physical” which was in the 2020 regulations
- Must still undertake an individualized safety and risk analysis
- Must determine that an **"imminent and serious threat** to the health or safety of **a complainant or any students, employees, or other persons** arising from the allegations of sex discrimination justifies removal"
- Must still provide respondent with notice and an opportunity to challenge

## Emergency Removal from educational program or activity (Slide 2 of 2)

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- The Preamble addressed confusion over when a school uses ER under 106.44(h) and when school might use a supportive measure consistent with 106.44(g).
  - “In some cases, a partial removal may be appropriate as a supportive measure.” (p. 532)
- The regulation retains the notion that this provision does not modify any rights of student with disabilities under the IDEA or Section 504
- Schools still have the right to put employee respondents on administrative leave. See 106.44(I)

# Informal Resolution

*See* 106.44(k)

# Informal Resolution (IR) 106.44(k) - Expanded

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**Formal complaint no longer required.** IR is permitted when a recipient

- Receives a formal complaint of sex discrimination, or
- Receives information about conduct that reasonably may constitute sex discrimination.

**Expanded to higher ed student/employee claims.** IR is not permitted

- For complaints that include allegations that an employee engaged in sex-based harassment of an elementary or secondary school student, or
- When such a process would conflict with federal, state or local law.

# Training Requirements

See 106.8(d)

# Overview of Changes in TIX Training Requirements

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## Training for All Employees

- Necessary to implement obligation of employees to notify TIXC
  - Employees defined by state law and policy
  - Does not include contractors, parents, or students
  - Method of training (i.e. live or online) not specified
  - Includes language for timing of training – “promptly upon a change of position that alters Title IX duties” or “annually”



## Overview (slide 2)

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- Change to structure and location of Title IX Team training
  - Previously in 34 CFR 106.45 with grievance procedures
  - Now in 34 CFR 106.8
- People with authority to grant or decline supportive measures added to Title IX team
- Additional training regarding expanded procedures around pregnancy and pregnancy-related conditions

## Overview (slide 3)

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- Removal of Posting Requirement for Training Materials
  - 34 CFR 106.8(f) – now available on request
  - Change made to avoid burdens of posting and concerns about proprietary content

Note: proprietary content is not a basis for declining the request to obtain the training materials; if it is proprietary and can't be provided then it won't satisfy training requirement

# Training Requirements (Slide 1)

## All employees to receive training - 34 CFR 106.8(d) - pp. 1535

- Recipient's **obligation** to address sex discrimination in its education program or activity
- The **scope** of conduct that constitutes sex discrimination under Title IX and this part, including the definition of sex-based harassment; and
- All applicable **notifications and information requirements** under 106.40(b)(2) and 106.44

## Timing/frequency of training

- Training must be done "**promptly** upon hiring or change of position that alters their duties under Title IX" or this part
- or **annually**"

## Training Requirements (Slide 2)

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- Investigators, decisionmakers, and **other persons** who are responsible for implementing the grievance procedures or have the authority to modify or terminate supportive measures need training:
  - Obligations under 106.44 - response requirement
  - Grievance procedures under 106.45
  - How to serve impartially, including avoiding prejudgment of the facts at issue, COI, and bias
  - The **meaning and application of the term "relevant"** in relation to questions and evidence, and **the types of evidence that are impermissible** regardless of relevance under 106.45

106.8(d)(2)

## Training Requirements (Slide 3)

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- Facilitators of informal resolution process – 106.8(d)(3)
  - Same training for all employees
  - Rules and practices associated with the recipient’s informal resolution process; and
  - How to serve impartially, including avoiding conflict of interest and bias

## Training Requirements (Slide 4)

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### Title IX Coordinators and designees – 106.8(d)(4)

- Everything for people above
- Specific responsibilities of 106.40(b)(3), 106.44(f) and (g)
  - **Actions to prevent discrimination and ensure equal access for students with pregnancy related conditions**
  - Title IX Coordinator requirements 106.44(f)
  - Supportive measures 106.44 (g)
  - Any other training necessary to coordinate Title IX compliance
- Record Keeping
  - **Training materials must be made available to the public “upon request.”** 106.8(f)(3)

# Title IX Team

## Training Requirement Summary



Title IX Role	All Employee Topics	Recipient's Response to Sex Disc. (106.44)	Recipients Grievance Procedures (106.45)	What is Relevant? What is Impermissible Evidence?	Serve impartially; Without Conflict of Interest and Bias.	Avoiding Prejudgment of Facts	Rules and Practices re: Informal Resolution (106.44(k))
Investigators	X	X	X	X	X	X	
Decisionmakers	X	X	X	X	X	X	
Resp. For Grievance Proc./Mod. Sup. Measures	X	X	X	X	X	X	
Informal Res.	X				X		X
Title IX Cord.*	X	X	X	X	X	X	X

\*Title IX Coordinators and Designees have even more training requirements (106.8(d)(4))

# Grievance Process

*See* 106.45



# Application of Grievance Process

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- Filing a complaint triggers the grievance process
  - **Complaint** is defined as an **oral** or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.
- Grievance process only applies to complaints against a Respondent
  - **Respondent** is defined as a person who is alleged to have violated the recipient's prohibition on sex discrimination
  - Grievance process does not apply to the recipient as a respondent (i.e., allegations of discriminatory policies or practices)

# 106.45(a)(2) - Who can file a complaint of sex-based harassment?

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- **Sex-Based Harassment** complaints can be filed by:
  - Complainant
  - Parent/guardian or other authorized legal representative with the legal right to act on behalf of a Complainant
  - Title IX Coordinator
- **Complainant**
  - (1) A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; or
  - (2) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.

## 106.45(a)(2) – Who can file a complaint of sex discrimination?

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- **Sex Discrimination** (non SBH) complaints can be filed by:
  - Anyone who can file a complaint of sex-based harassment (See previous slide);
  - Any student or employee; and
  - Any other person who was participating or attempting to participate in the institution's education program or activity at the time of the alleged sex discrimination

# 106.45(b) – Basic Requirements for Grievance Procedures

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- Treat Complainants and Respondents equitably
- TIX-C, Investigator, Decision-Maker – serve without conflict of interest or bias for or against Complainants or Respondents generally or against individual Complainant or Respondent
- **Decision-Maker MAY be TIX-C or Investigator**
- Presumption that Respondent is not responsible until determination at conclusion of grievance process
- **Reasonably prompt timeframes for major stages of process**
- **Extensions – “reasonable,” case-by-base, good cause, with notice/reason**

## 106.45(b) – Basic Requirements for Grievance Procedures, cont.

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- Must take reasonable steps to **protect privacy**
- Objectively evaluate relevant evidence
- Exclude impermissible evidence and questions
  - Privileged Information (unless waived)
  - Medical Records (without voluntary written consent to use in process)
  - Evidence of Complainant's **sexual interests**
  - Evidence of Complainant's **prior sexual conduct** UNLESS
    - Offered to prove someone other than Respondent committed conduct; OR
    - Evidence about prior conduct with Respondent, offered to prove consent to sex-based harassment
- If procedures apply to resolution of some, but not all complaints, articulate consistent principles for determining which procedures apply

# 106.45(I) – Additional Requirements for Sex-Based Harassment Complaints

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- Grievance procedures must :
  - Describe of range of supportive measures available
  - List or describe the range of possible disciplinary sanctions that may be imposed
  - List or describe the range of possible remedies the recipient may provide
- Required for complaints of sex-based harassment only

## 106.45(c) – Notice of Allegations

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- Upon initiation of grievance procedures, provide notice to the parties whose identities are known:
  - Grievance procedures including informal resolution process if applicable
  - Sufficient information to allow parties to respond
    - Identity of parties involved
    - Description of Conduct
    - Date(s)/Location(s) of alleged incident
  - Statement that retaliation is prohibited
  - Statement that parties are entitled to equal opportunity to access evidence or a description of evidence
    - If a description – statement that parties are entitled to access evidence upon request
- Notice must be updated before investigating any additional allegations of sex discrimination by Respondent toward Complainant

# 106.45(d)(1) and (4) – Dismissal of a Complaint

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- No more mandatory dismissal
- Discretionary dismissal if:
  - Unable to identify Respondent (requires reasonable steps)
  - Respondent not participating in program or activity and not employed by school
  - Complainant withdraws allegations, TIXC declines to initiate, AND remaining allegations not withdrawn would not constitute sex discrimination
  - The conduct alleged would not constitute sex discrimination if true
    - Requires taking reasonable steps to clarify allegations
- Must still offer supportive measures to Complainant (and Respondent if notified) as appropriate
- Take other “prompt and effective steps” to ensure sex discrimination doesn’t continue or recur



# 106.45(d)(2)-(3) – Notice and Appeal of Dismissal

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- Notify Complainant; notify Respondent if notified of allegations
  - Give basis for dismissal
  - Notify of appeal right on same basis as provided for in 2020 regulations
- Appeal Process for Dismissal
  - Notify of appeal including notice of allegations if not previously provided to Respondent
  - Implement procedures equally
  - New Decision-Maker
  - Provide reasonable and equal opportunity to make statement in support/challenging outcome
  - Notify parties of appeal decision and rationale

## 106.45(e) – Consolidation

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- A recipient may consolidate complaints of sex discrimination against more than one respondent, or by one or more complainant against one or more respondents, or by one party against another party (e.g., by one complainant against another complainant), when the allegations of sex discrimination **arise out of the same facts and circumstances**.
- FERPA considerations: “If consolidation of certain complaints means that a recipient is unable to comply with FERPA, the recipient is not permitted to exercise its discretion to consolidate those complaints.” (p. 800).

## 106.45(f) – Investigation Process

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- Burden of gathering evidence is on the school
- Equal opportunity to present fact witnesses and other evidence (relevant and not otherwise impermissible)
- **No right to advisor**
- **No written/advance notice of interviews**
- Review evidence gathered, determine what is relevant and what is impermissible
- Provide access – **no prescribed timeline**
  - Either evidence or description (but allow access to evidence upon request)
  - Provide opportunity to respond
  - Prevent unauthorized disclosure of evidence obtained solely through grievance process
  - Disclosures for admin proceeding or litigation ok

## 106.45(g) – Questioning to Assess Credibility

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- Process must enable decisionmaker to question parties and witnesses in order to assess credibility
- Only to the extent credibility is both in dispute and **relevant**
- *Consider combining the role of investigator and decisionmaker*

## Definition of Relevant – 106.2, p. 1511-1512

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- Related to the allegations of sex discrimination under investigation as part of the grievance procedures under 106.45, and if applicable 106.46.
- Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

## 106.45(h) – Written Determination

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- Preponderance of the evidence standard
  - Can use clear and convincing if used in all other proceedings including other discrimination complaints
- Presumption that Respondent is not responsible unless supported by evidentiary standard
- Notify Parties of determination in writing
  - Include rationale
  - Include procedures and bases for appeal (if applicable)

## 106.45(h)(3)-(5) – Imposition of Discipline

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- Cannot impose discipline unless/until a determination of responsibility at the conclusion of the grievance process
- Notify Complainant of any such disciplinary sanctions\*
- Prohibited from imposing discipline for providing false information or engaging in consensual sexual conduct based solely on recipient's determination whether sex discrimination occurred

*\*Balance against competing obligation to protect privacy and comply with FERPA*

## Definition of Remedies – 106.2, p. 1512

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- Measures provided, as appropriate, to a complainant or any other person the recipient identifies as having had their equal access to the recipient's education program or activity limited or denied by sex discrimination.
- These measures are provided to restore or preserve that person's access to the recipient's education program or activity after a recipient determines that sex discrimination occurred.



## 106.45(i) – Appeals

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- Must offer an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings related to other discrimination complaints.
- Review your District’s Board policies on other types of discrimination and discriminatory harassment.

# Retaliation

**Definition: 106.2, pp. 1512-1513**

***See also* 106.71**

## Retaliation – how was it defined?

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- 2020 amendments prohibited retaliation but did not define it
- Board policies generally defined retaliation:
  - Example: “Intimidation, threats, coercion, or discrimination...for purpose of of interfering with any right or privilege secured by Title IX, its implementing regulations, or this policy, constitutes retaliation.” (Board Policy 2266)
  - Example: “Intimidation, threats, coercion or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX or this policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation proceeding or hearing, if applicable” (Board Policy ACAA)

# Definition of Retaliation, 106.2, p. 1512 – 1 of 2

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- Intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity,
  - For the purpose of interfering with any right or privilege secured by Title IX or this part, or
  - Because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including an information resolution process, in grievance procedures, and in any other actions taken by a recipient [to eliminate the discrimination, prevent its recurrence, and remedy its effects]

## Definition of Retaliation, 106.2, p. 1512 – 2 of 2

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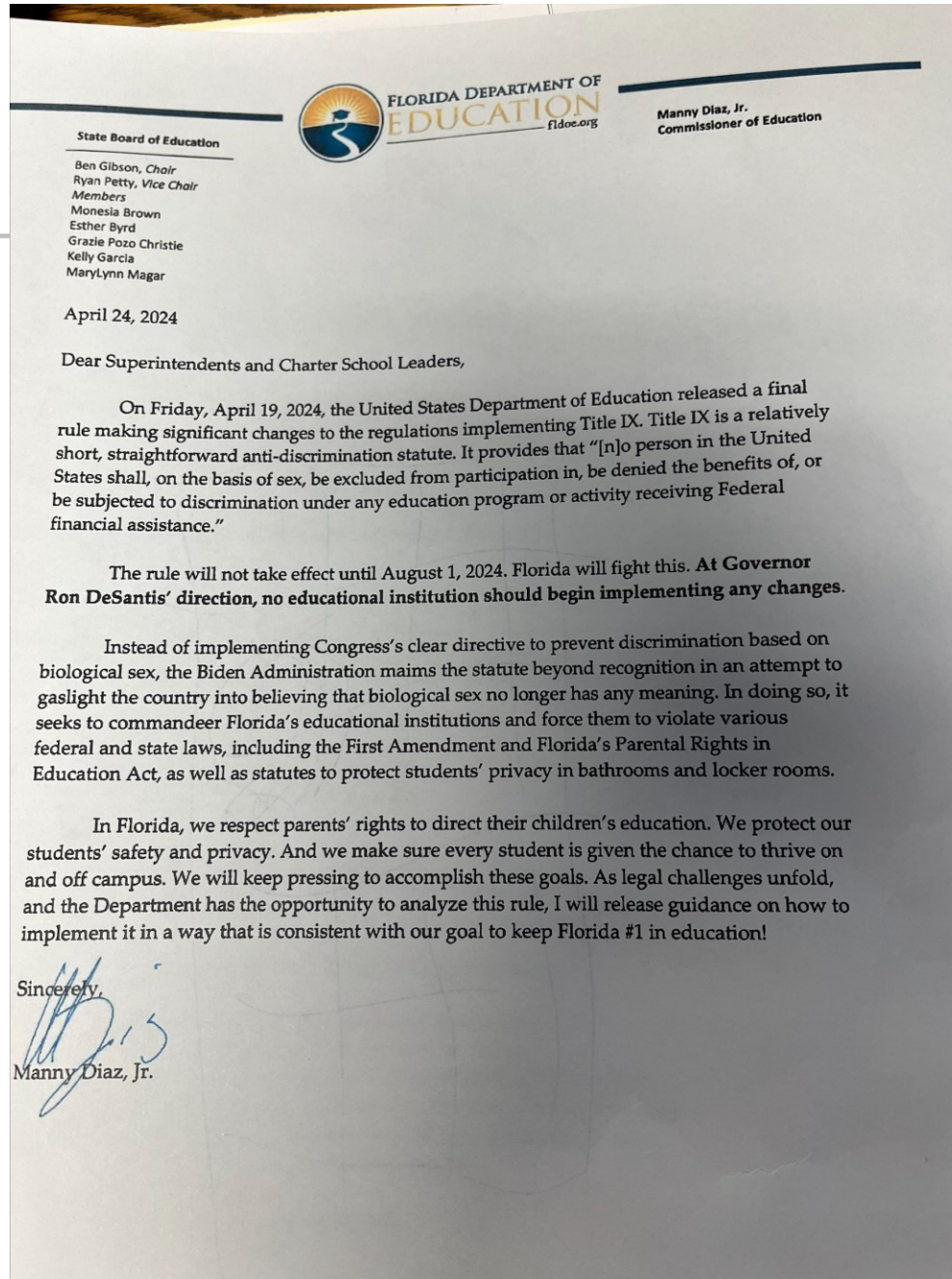


- Nothing in this definition or this part precludes a recipient from **requiring an employee** or other person authorized by a recipient to provide aid, benefit, or service under the recipient's education program or activity **to participate** as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.

# What is Next?

# Your Next Steps

- Develop the necessary policy by August 1.
  - Does your Board need to approve?
  - Consider OCR's Policy Resource in development?
- Stay tuned for updates!



## Our Next Steps

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We intend to update our Title IX Toolkit, so stayed tuned for that as well

If you want to join our newsletter to make sure you don't miss out on future trainings, go to [www.brickergraydon.com/subscribe](http://www.brickergraydon.com/subscribe)



**Thank you!**

