

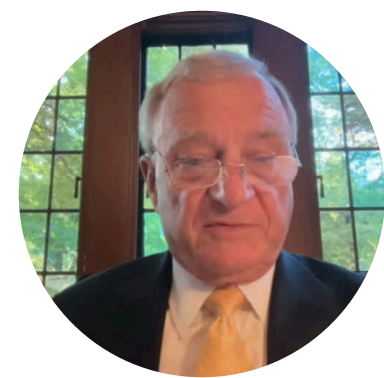


# DEFINING SEX DISCRIMINATION & SEX-BASED HARASSMENT

PATRICK MATHIS



# Title IX of the Education Amendments of 1972

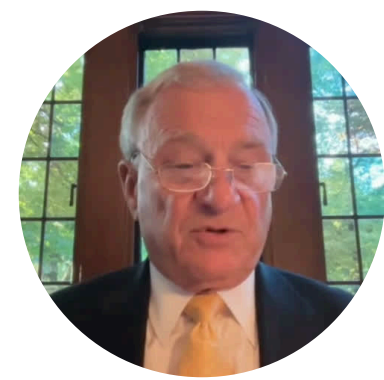


“

“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[.]”

”

# EVOLUTION OF TITLE IX



**JUNE 23, 1972**

Title IX becomes law and addresses sex-based discrimination



**MAY 6, 2020**

"Final Rule" or "Regulations" are released, requiring all educational institutions to follow specific procedures in response to sexual harassment



**APRIL 19, 2024**

Biden administration releases a new "Final Rule," amending the scope, application, and grievance procedures for both sex discrimination and sex-based harassment.



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# 2024 TITLE IX TERMS

WHAT'S BEEN ADDED OR  
REVISED FROM 2020



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# 2024 TITLE IX TERMS

WHAT'S BEEN ADDED OR  
REVISED FROM 2020

# 106.2 – DEFINITIONS



## 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.”

### Noted Changes:

- Focus on **sex discrimination** not just sex-based harassment
- Express reference to **student** or **employee**
- Express reference to **person other than a student or employee** who was participating or attempting to participate in recipient’s education program or activity

# COMMENTS

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Covers former students or employees



Covers volunteers, guest speakers or public attending events



Opens statute of limitations for reporting sex discrimination if it was a violation of Title IX regulations at the time of the incident



If respondent no longer participating recipient may dismiss complaint under 106.45(d)

# COMMENTS

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Covers former students or employees



Covers volunteers, guest speakers or public attending events



Opens statute of limitations for reporting sex discrimination if it was a violation of Title IX regulations at the time of the incident



If respondent no longer participating recipient may dismiss complaint under 106.45(d)





Note the limitations under 106.45(a) whereunder only a “complainant” or parent, guardian or authorized legal representative may make a complaint regarding sex-based harassment while any student or employee or “(a)ny person other than a student or employee who was participating or attempting to participate in the recipient’s education program or activity at the time of the alleged sex discrimination” may make a complaint regarding sex discrimination other than sex-based harassment.



# POLICY POINT

Policy will need to reflect focus on sex discrimination and potential complaints by former students, employees and others



# 106.2 – DEFINITIONS



## COMPLAINT

“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.”

### Noted Changes:

- Oral or written
- Objectively can be understood to be a request for investigation and determination

### Best Practices :

- Evaluate oral and written notice
- Convert oral request to written form

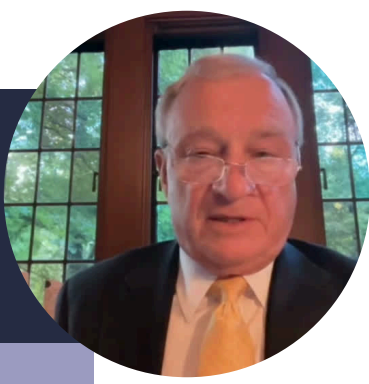


# POLICY POINT

Oral complaints are now covered under the new regulations. Make sure you have language in your policy to address complaints made orally.



# 106.2 – DEFINITIONS



## CONFIDENTIAL EMPLOYEE

(1) An employee of a recipient whose communications are privileged or confidential under **Federal or State law**. The employee's confidential status, for purposes of this part, is only with respect to information received while the **employee is functioning within the scope of their duties to which privilege or confidentiality applies**;

(2) An employee of a recipient whom the **recipient has designated as confidential** under this part for the purpose of **providing services to persons related to sex discrimination**. If the employee also has a duty not associated with providing those services, the employee's confidential status is only with respect to information received about sex discrimination in connection with providing those services;

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

### Comments

- Federal or State law
- Designated by recipient to provide services related to sex discrimination
- Related to acting in confidential employee role



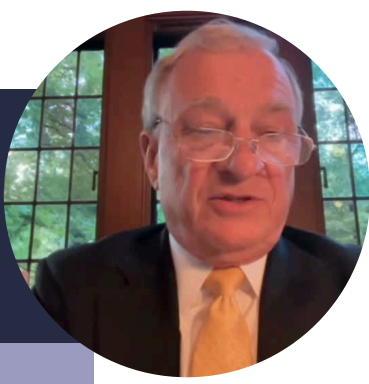
# POLICY POINT

Include identification of confidential employees in policy and limit when acting in that role



Note requirements under §106.44 (d) regarding notifying participants how to contact confidential employees and obligations of employee to advise person upon contact.

# 106.2 – DEFINITIONS



## PARENTAL STATUS

“The status of a person who, with respect to another person who is **under the age of 18** or who is **18 or older but is incapable of self-care** because of a physical or mental disability, is:

(1) A biological parent; (2) An adoptive parent; (3) A foster parent; (4) A stepparent; (5) A legal custodian or guardian; (6) In loco parentis with respect to such a person; or (7) Actively seeking legal custody, guardianship, visitation, or adoption of such a person.”

### Noted Changes:

- Definition of the term is new
- Persons under 18
- Persons 18 or older and incapable of self-care

### Comments:

- Broad definition and application in the regulations



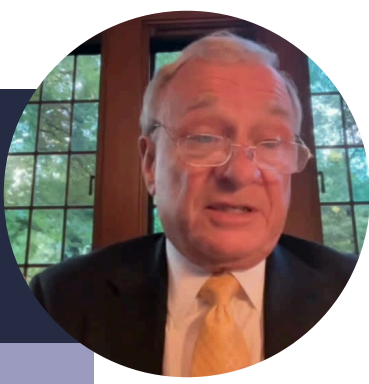
# POLICY POINT

Parental Status definition  
will need to be included  
in your policy.





# 106.2 – DEFINITIONS



## PREGNANCY OR RELATED CONDITIONS

“(1) Pregnancy, childbirth, termination of pregnancy, or lactation;  
(2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or  
(3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.”

### Noted Changes:

- Definition is now in the regulations

### Comments:

- Lots of discussion in the regulations about this topic.
- Kathryn will go into detail in a later lesson!



# POLICY POINT

Pregnancy and related conditions will need to be included in your Title IX policy, including a process for how to respond to reports and meet the requirements under the regulations.

# 106.2 – DEFINITIONS



## RELEVANT

“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.”

### Comments:

- Intended to assist a recipient with relevance determinations and clarify the term for those who may not have substantial experience applying the legal concept
- Ensure that investigators and decision makers are familiar with the definition.



# POLICY POINT

The definition of relevant  
must now be included in  
your policy.



# SEX-BASED HARASSMENT



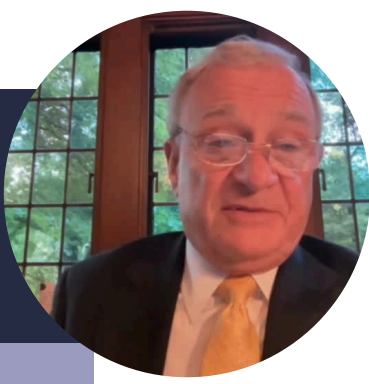
## 2020 Sexual Harassment

- ① Quid Pro Quo
- ② Davis Standard
- ③ Specific Offenses

## 2024 Sex-Based Harassment

- ① Quid Pro Quo
- ② Hostile Environment
- ③ Specific Offenses

# 106.2 – DEFINITIONS



## SEX-BASED HARASSMENT - QUID PRO QUO

“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”

### Noted Changes:

- Agent or other person authorized by the recipient
- Explicitly or Impliedly

### Comments:

- Extends to outside contractors providing an aid, benefit or service under the education program or activity



# POLICY POINT

The definition of quid pro quo sex-based harassment has been revised. Make sure the definition is correct in your policy.

# 106.2 – DEFINITIONS



## SEX-BASED HARASSMENT - HOSTILE ENVIRONMENT

“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). Whether a **hostile environment** has been created is a fact-specific inquiry that includes consideration of the following: (i) The degree to which the conduct affected the complainant’s ability to access the recipient’s education program or activity; (ii) The type, frequency, and duration of the conduct; (iii) 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; (iv) The location of the conduct and the context in which the conduct occurred; and (v) Other sex-based harassment in the recipient’s education program or activity”

### Comments

- Former Davis Standard
- Totality of the circumstances
- Subjectively and objectively offensive
- Severe **or** pervasive
  - 2020: and
- Limits or denies
  - 2020: Effectively denies



# FACT-SPECIFIC INQUIRY FACTORS



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



Other sex-based harassment in the recipient's education program or activity

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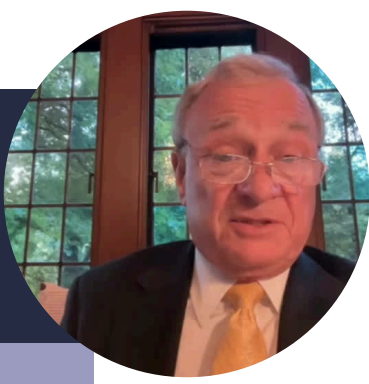
Other sex-based harassment in the recipient's education program or activity



# POLICY POINT

The definition of hostile environment has been significantly revised. Make sure the definition is correct in your policy and your policy includes the fact-specific inquiry factors.

# 106.2 – DEFINITIONS



## SEX-BASED HARASSMENT - SPECIFIC OFFENSES

### **Sexual Assault:**

“An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation”

### **Dating Violence:**

“Violence committed by a person: (A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) Where the existence of such a relationship shall be determined based on a consideration of the following factors: (1) The length of the relationship; (2) The type of relationship; and (3) The frequency of interaction between the persons involved in the relationship”

### **Domestic Violence:**

“Felony or misdemeanor crimes committed by a person who: (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim; (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) Shares a child in common with the victim; or (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction”

### **Stalking:**

“Engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) Fear for the person’s safety or the safety of others; or (B) Suffer substantial emotional distress.”



# POLICY POINT

No changes to the definitions of sexual assault, dating violence, domestic violence, and stalking.

