



Title IX and Sex- Based Harassment Administrator Training

Presented by Ross Mitchell



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Agenda

- Current Litigation
- Title IX Definition and Training Requirements
- District's Response to Sex Discrimination
- District's Grievance Process
- Impartiality and Bias
- Relevance and Evidence



Current Litigation

State of Texas v. Miguel Cardona, ---F.Supp.3d--- (N.D. Tex. June 11, 2024)

- Title IX Guidance Documents impermissibly expand the definition of sex to include sexual orientation and gender identity.
- Department of Education is enjoined from enforcing the Guidance Documents in Texas.
- Notably, the court held “*this injunction does not extend to the Final Rule* or, broadly speaking, the general Title IX interpretation that could underlie a future final rule.”

What does this mean for your District?

- It is likely that a similar ruling will enjoin the Final Rule’s application on these grounds for the reasons stated in the opinion referenced above.
- Even if the Final Rule eliminates Title IX protections and investigative authority for complaints based on sexual orientation and gender identity, the District should still respond to those complaints in the manner they are currently doing so.



What is Title IX Harassment?

- **34 C.F.R. §106.2 states:**

- Sex-based harassment 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, when it takes the form of:
 - **quid pro quo** harassment (e.g., when an employee conditions a benefit on a person's participation in unwelcome sexual conduct);
 - **specific offenses** (e.g., sexual assault, dating violence, domestic violence, and stalking); and/or
 - **hostile environment** harassment.

2024 Regulations define hostile environment harassment as 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.



Required Training

34 C.F.R. §106.8(2)

In addition to the training requirements in paragraph (d)(1) of this section, ***all investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures*** or have the ***authority to modify or terminate supportive measures*** under §106.44(g)(4) must be trained on the following topics to the extent related to their responsibilities:

- (i) The recipient's obligations under § 106.44;
- (ii) The recipient's grievance procedures under § 106.45;
- (iii) How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
- (iv) 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, and if applicable § 106.46.



(i) District's Response to Sex Discrimination

- **34 C.F.R. § 106.44(a)**

General.

- (1) A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively; and
- (2) A recipient must also comply with this section to address sex discrimination in its education program or activity.

- **34 C.F.R. § 106.44(b)**

Barrier to Reporting.

- (1) Monitor the recipient's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or this part; and
- (2) Take steps reasonably calculated to address such barriers.

- **34 C.F.R. § 106.44(c)**

Notification Requirements.

- (1) An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part.
- (4) The requirements of paragraphs (c)(1) do not apply to an employee who has personally been subject to conduct that reasonably may constitute sex discrimination under Title IX or this part.



(i) District's Response to Sex Discrimination

- **Examples**

- The Department of Education did not create a specific list of individuals but rather gave the following broad categories:
 - Employees whose communications are privileged under state or federal law; and
 - Employees designated to provide services related to sex discrimination;
- Generally, a counselor falls under this definition, though other individuals at the District may as well such as healthcare providers.



(i) District's Response to Sex Discrimination

34 C.F.R. § 106.8

- **Title IX Coordinator**

- (1) Each recipient shall designate and authorize at least one employee, referred to herein as a Title IX Coordinator, to coordinate its efforts to comply with its responsibilities under Title IX and this part. If a recipient has more than one Title IX Coordinator, it must designate one of its Title IX Coordinators to retain ultimate oversight over those responsibilities and ensure the recipient's consistent compliance with its responsibilities under Title IX and this part.

- **Title IX Coordinators are responsible for:**

- (b) Adoption, publication, and implementation of nondiscrimination policy and grievance procedures.
- (c) Providing notice of nondiscrimination to all relevant parties
- (d) Providing training to:
 - All employees
 - Investigators, Decisionmakers, and Administrators
 - Facilitators of informal resolution
 - Title IX Coordinators and Designees
- (e) Involving members of the IEP team if a complainant has a disability
- (f) recordkeeping



(i) District's Response to Sex Discrimination

34 C.F.R. § 106.44

- **Title IX Coordinator Responding Requirements (cont'd)**

(f) The Title IX Coordinator is responsible for coordinating the recipient's compliance with its obligations under Title IX and this part.

– (1) A recipient must require its Title IX Coordinator, when notified of conduct that reasonably may constitute sex discrimination under Title IX or this part, to take the following actions to promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects:

- **(i) Treat the complainant and respondent equitably;**
- **(ii) Offer and coordinate supportive measures under paragraph (g) of this section, as appropriate, for the complainant. In addition, if the recipient has initiated grievance procedures under §106.45 or offered an informal resolution process under paragraph (k) of this section to the respondent, offer and coordinate supportive measures under paragraph (g) of this section, as appropriate, for the respondent;**
- **iii)(A) Notify the complainant or, if the complainant is unknown, the individual who reported the conduct, of the grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process under paragraph (k) of this section, if available and appropriate; (B) If a complaint is made, notify the respondent of the grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process under paragraph (k) of this section, if available and appropriate**



(i) District's Response to Sex Discrimination

34 C.F.R. § 106.44

• Title IX Coordinator Responding Requirements (cont'd)

- (iv) In response to a complaint, initiate the grievance procedures under §106.45, and if applicable § 106.46, or the informal resolution process under paragraph (k) of this section, if available and appropriate and requested by all parties;
- (v) In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures under §106.45, and if applicable § 106.46.
- (vi) If initiating a complaint under paragraph (f)(1)(v) of this section, notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others, including by providing supportive measures consistent with paragraph (g) of this section; and
- (vii) Regardless of whether a complaint is initiated, take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.



(i) District's Response to Sex Discrimination

34 C.F.R. § 106.44(f)(v)(a)

- **Factors for Title IX Coordinators to Consider if there is no Complainant**
 - (1) The complainant's request not to proceed with initiation of a complaint;
 - (2) The complainant's reasonable safety concerns regarding initiation of a complaint;
 - (3) The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
 - (4) The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
 - (5) The age and relationship of the parties, including whether the respondent is an employee of the recipient;
 - (6) The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
 - (7) The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
 - (8) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46.



(i) District's Response to Sex Discrimination

34 C.F.R. § 106.44(g)

- **Supportive Measures**

A recipient must offer and coordinate supportive measures, as appropriate, for allegations of sex discrimination other than sex-based harassment or retaliation.

- (1) Supportive measures may include but are not limited to: *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; 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; and training and education programs related to sex-based harassment.*
- (2) Supportive measures must not unreasonably burden either party and must be designed to protect the safety of the parties or to provide support during the recipient's grievance procedures, or during the informal resolution process. **A recipient must not impose such measures for punitive or disciplinary reasons.**
- (3) A recipient may modify or terminate supportive measures at the conclusion of the grievance procedures or at the conclusion of the informal resolution process or the recipient may continue them beyond that point.



(i) District's Response to Sex Discrimination

34 C.F.R. § 106.44(g)

- **Supportive Measures (cont'd)**

- (4) 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.
- 5) A recipient must not disclose information about any supportive measures to persons other than the person to whom they apply, including informing one party of supportive measures provided to another party, unless necessary to provide the supportive measure or restore or preserve a party's access to the education program or activity, or when an exception in §106.44(j)(1) through (5) applies.
- (6)(i) If the complainant or respondent is an elementary or secondary student with a disability, the recipient must require the Title IX Coordinator to consult with one or more members of the student's IEP team.
- **At EMS:** Ms. Chandra Turrentine and/or Dr. Maria Gamell must be involved in any discussions concerning supportive measures.



(i) District's Response to Sex Discrimination

Other Interim Measures

34 C.F.R. § 106.44(h)

- **Emergency Removal**

- Districts may remove 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 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, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

34 C.F.R. § 106.44(i)

- **Administrative Leave**

- Districts can place an employee respondent on administrative leave during the pendency of the recipient's grievance procedures.

NOTE: *These provisions must not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq.*



(i) District's Response to Sex Discrimination

34 C.F.R. § 106.44(j)

- **Disclosure of Personally Identifiable Information Prohibited During Title IX Unless:**
 - (1) The District has obtained prior written consent from a person with the legal right to consent to the disclosure;
 - (2) The information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue;
 - (3) The information is used to carry out the purposes of this part, including action taken to address conduct that reasonably may constitute sex discrimination under Title IX in the recipient's education program or activity;
 - (4) Required by Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement; or
 - (5) To the extent such disclosures are not otherwise in conflict with Title IX or this part, disclosure is required by State or local law or when permitted under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.



(i) District's Response to Sex Discrimination

34 C.F.R. § 106.44(k)

• **Informal Resolution**

- (1) At any time prior to determining whether sex discrimination occurred a recipient may offer to a complainant and respondent an informal resolution process.
 - No informal process can occur if the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student or such a process would conflict with Federal, State or local law.
 - Title IX Coordinator must 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 during the pendency of an informal resolution process.
- (i) Districts must determine whether it is appropriate to offer an informal resolution process and may decline to offer informal resolution despite one or more of the parties' wishes.
- (ii) Districts may decline to allow informal resolution if Title IX coordinator determines the alleged conduct would present a future risk of harm to others.
- (2) Districts must not require or pressure the parties to participate in an informal resolution process and must obtain the parties' voluntary consent to the informal resolution process.
 - Informal resolution cannot require waiver of the right to an investigation and determination of a complaint.



(i) District's Response to Sex Discrimination

34 C.F.R. § 106.44(k)

Informal Resolution (cont'd)

- (3) Before initiation of an informal resolution process, the recipient must provide to the parties notice that explains:
 - (i) The allegations; (ii) The requirements of the informal resolution process; (iii) Notification that parties can withdraw and initiate or resume the recipient's formal grievance procedures; (iv) That resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures; (v) The potential terms that may be requested or offered in an informal resolution agreement; and (vi) What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45 if grievance procedures are initiated or resumed.
- (4) The facilitator must not be the same person as the investigator or the decisionmaker in the recipient's grievance procedures. The facilitator must not have a conflict of interest or bias for or against complainants or respondents. Any person facilitating informal resolution must receive training under § 106.8(d)(3).
- (5) Potential terms that may be included in an informal resolution but are not limited to:
 - (i) Restrictions on contact; and
 - (ii) Restrictions on the respondent's participation in one or more of the recipient's programs or activities or attendance at specific events, including restrictions the recipient could have imposed as remedies or disciplinary sanctions had the recipient determined at the conclusion of the recipient's grievance procedures that sex discrimination occurred.



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(g)

General

- A recipient's grievance procedures must be in writing and include provisions that incorporate the requirements of this section.

Complaint

- The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment:
 - (i) A complainant;
 - (ii) A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant;
 - (iii) The Title IX Coordinator, after making the determination specified in § 106.44(f)(1)(v);
 - (iv) With respect to complaints of sex discrimination other than sex-based harassment, in addition to the persons listed in paragraphs (a)(2)(i) through (iii) of this section,
 - (A) Any student or employee; or
 - (B) Any 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.



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(b)

- **Basic Requirement for Grievance Procedure:**

- (1) Treat complainants and respondents equitably;
- (2) Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents. **The decisionmaker may be the same person as the Title IX Coordinator or investigator;**
- (3) Presumption that respondent is not responsible until a determination is made;
- (4) Establish reasonably prompt timeframes for the major stages of the grievance that allows for reasonable extension of timeframes for good cause.
 - Major stages are defined as evaluation, investigation, determination, and appeal.
- (5) Require reasonable steps to protect the privacy of the parties and witnesses during pendency of grievance procedures so long as they do not restrict the parties ability to obtain and present evidence
- (6) Require objective evaluation of all relevant evidence including both inculpatory and exculpatory evidence.
- (7) Excluded evidence (*see next slide*)
- (8) If a grievance procedure applies to the resolution of some but not all complaints, communicate how the District will determine which procedures apply.



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(b)(7)

Excluded evidence

- The following types of evidence and questions seeking this type of evidence are impermissible and must not be accessed or considered:
 - (i) evidence that is privileged under federal or state law or provided to a confidential employee unless that privilege is waived.
 - (ii) records that are made or maintained by a physician, psychologist, or other professional with the provision of treatment of the party or witness unless the party gives written consent.
 - (iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred; and



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(c)

- **Notice of Allegations provided to known parties:**
 - (1) Notice must include:
 - (i) The District's grievance procedures under 106.45 and informal resolution processes under 106.44(k).
 - (ii) Sufficient information to allow the parties to respond to the allegations such as:
 - Identities of parties, conduct alleged, dates of alleged incidents
 - (iii) Statement that retaliation is prohibited
 - (iv) Statement that the parties are entitled to an equal opportunity to access the relevant, permissible evidence or an accurate description of the evidence as set out in 106.45(f)(4)
 - (2) If the recipient decides to investigate additional allegations by the respondent that are not included in the notice, the District must provide notice of the additional allegations



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(d)

- **Dismissal of Complaint**

- (1) The recipient may dismiss a complaint of sex discrimination for any of the following reasons:
 - (i) Unable to identify respondent after taking reasonable steps to do so
 - (ii) Respondent is not participating in the recipient's education program or activity and is not employed by recipient
 - (iii) Complainant voluntarily withdraws any or all allegations and Title IX Coordinator declines to initiate a complaint
 - (iv) The conduct, even if true as alleged, would not constitute Title IX sex discrimination
- (2) District must notify complainant and respondent of dismissal (if respondent has been notified)
- (3) District must notify the complainant and respondent that dismissal may be appealed (if respondent has been notified). If dismissal is appealed, the District must:
 - Implement appeal procedures equally for the parties;
 - Ensure the decisionmaker for the appeal was not involved in the original investigation or dismissal and has been trained according to 106.8(d)(2)
 - Provide the parties a reasonable and equal opportunity to make a statement of their position
 - Notified the parties of the result of the appeal and the rationale



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(d)

- **Dismissal of Complaint (cont'd)**

- (4) Districts dismissing a complaint must:
 - (i) offer supportive measures to the complainant;
 - (ii) offer supportive measure to the respondent if the dismissal is under (d)(1)(iii) or (iv) of 106.45; and
 - Require its Title IX Coordinator to take other steps to ensure sex discrimination does not happen in its program.
 - (iv) The conduct, even if true as alleged, would not constitute Title IX sex discrimination

34 C.F.R. § 106.45(d)

- **Consolidation of Complaints**

- A recipient may consolidate complaints of sex discrimination when the allegations arise out of the same facts circumstances.



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(f)

- **Complaint Investigation**

- Districts must provide adequate, reliable and impartial investigation of complaints by:
 - (1) Ensuring the burden is on the District to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;
 - (2) Provide and equal opportunity to present fact witnesses and other inculpatory and exculpatory evidence that is relevant and not otherwise impermissible;
 - (3) Review evidence and determine what is relevant and what is impermissible; and
 - Provide each party with equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible in the following manner:
 - Must provide equal opportunity to access relevant evidence or an accurate description of the evidence. If an accurate description of the evidence is provided, must provide equal access to the relevant evidence upon request;
 - Must provide reasonable opportunity to respond to the evidence; and
 - Must take reasonable steps to prevent unauthorized disclosure of information and evidence discovered through the grievance procedure.



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(g)

- **Questioning Parties and Witnesses:**
 - Districts must provide a process that enables the decisionmaker to question parties and witnesses to assess credibility if it relevant to evaluation of allegations.



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(h)

- **Making a Determination:**

- Following an investigation and evaluation of all evidence, Districts must:
 - (1) use the preponderance of the evidence standard of proof unless the District elects to use the clear and convincing standard in other comparable proceedings such as other discrimination complaints.
 - (2) notify the parties in writing of the determination and the procedures for appealing the decision
 - (3) If a determination has been made in the affirmative, require the Title IX Coordinator to provide and implement remedies and disciplinary sanctions
 - (4) Comply with this grievance process prior to imposing discipline against a respondent.
 - (5) Not discipline a party for making a false statement or engaging in consensual sexual conduct based solely on the District's determination whether sex discrimination occurred.
 - **Note:** Section 106.45(h)(5) allows schools to discipline those who make false statements, including materially false statements made in bad faith, based on evidence other than the outcome of its Title IX grievance procedures. Similarly, students engaging in consensual sexual activity may be disciplined based on evidence other than the final determination in a Title IX case.

34 C.F.R. § 106.45(i)

- **Appeals:**

- The appeal process must be similar to that in other comparable proceedings, including those related to other discrimination complaints.



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(l)

- **Provisions limited to sex-based harassment complaints:**
 - The grievance procedure must:
 - (1) Describe the range of supportive measures available to complainants and respondents under 106.44(g); and
 - (2) List, or describe the range of, the possible disciplinary sanctions that the recipient may impose and remedies that the recipient may provide following a determination that sex-based harassment occurred.



(iii) Impartiality

34 C.F.R. § 106.8(2)

- **Impartiality**

- (iii) Decisionmakers must be trained on serving impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - How do you ensure decisionmakers are free from bias?
 - What other bias related trainings does your team undergo?



(iv) Relevance

34 C.F.R. § 106.8(2)

- All evidence is relevant unless it is excluded or not instructive in making a determination as to whether sex based discrimination or harassment occurred.
 - Reminder that excluded evidence is defined in **34 C.F.R. § 106.45(b)(7)** as:
 - (i) evidence that is privileged under federal or state law or provided to a confidential employee unless that privilege is waived.
 - (ii) records that are made or maintained by a physician, psychologist, or other professional with the provision of treatment of the party or witness unless the party gives written consent.
 - (iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred; and



(ii) District's Grievance Procedure

34 C.F.R. § 106.45(b)(7)

Excluded evidence

- The following types of evidence and questions seeking this type of evidence are impermissible and must not be accessed or considered:
 - (i) evidence that is privileged under federal or state law or provided to a confidential employee unless that privilege is waived.
 - (ii) records that are made or maintained by a physician, psychologist, or other professional with the provision of treatment of the party or witness unless the party gives written consent.
 - (iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred; and

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Questions?



CONTACT INFORMATION

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Thank you

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QR Code?