TEXAS TITLE IX

Ten Year Anniversary

ADMINISTRATOR CONFERENCE

OCTOBER 15-16, 2024

ROUND ROCK, TX

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Title IX Administrator Conference

October 15-16, 2024

Day 1		
8:00 – 9:00	Registration	
9:00 – 9:30	**Title IX Litigation in Texas** This session will address the state's litigation, the effect of the injunction, and next steps.	**Garrett Greene, Texas Attorney General's Office**
9:30 – 10:00	**Regulation Curation: 2020 v. 2024** Analyze the major rule differences in the two sets of regulations and clarify which procedures apply now.	**Holly Boyd Wardell**
10:10 – 11:10	**Under Pressure: The Title IX Coordinator's Guide to Survival** This presentation serves as a survival guide for Title IX Coordinators in Texas public schools, outlining their key responsibilities in navigating Title IX compliance. It covers practical strategies for managing investigations into sex-based discrimination, addressing complaints of sexual harassment, and ensuring schools meet state and federal guidelines. The guide also provides tips on conducting effective training and fostering an inclusive environment, tailored specifically to the unique challenges faced in Texas public schools.	**Tyler P. Ezell**
11:20 – 11:50	**Title VII & Title IX** How does Title IX apply to the employment relationship, where Title VII clearly applies? It depends on who's looking. This session will cover the differences between review by the courts as compared to OCR and how administrators should approach workplace sexual harassment.	**Heather R. Rutland**
11:50 – 1:30	Lunch (on your own)	

1:30 – 2:20	**Fostering Resilience Through Supportive Measures** This session will explore practical strategies for implementing supportive measures that enhance resilience for both complainants and respondents. Participants will also learn best practices for documenting and monitoring these initiatives.	**Dr. Cassandra Spearman, Belton ISD**
2:30 – 3:20	**Title IX Updates: Implications for Students with Disabilities** Claims under the IDEA, Section 504, and Title IX are increasingly being brought together from the same set of facts. As a result, it is critical that your special education staff are well versed in Title IX compliance. This presentation will cover the special education-specific changes under the 2024 Regulations, best practices, practical pointers, and recent cases illustrating the intersection of the IDEA and Title IX.	**Emma K. Lynch**
3:30 – 4:20	**Full Circle Investigations: Enhancing Title IX Through Data-Driven Insights** Learn how to ensure thorough completion of every step of an investigation and leverage a cutting-edge data tracking platform to identify trends and develop proactive training for administrators. Enhance your investigative process and foster a safer educational environment.	**Dr. Darwin Spiller, Richardson ISD**
4:20 – 4:30	Closing	

Day 2

8:00 – 9:00	Breakfast	
9:00 – 10:00	**Legal Update - 2023-24 Case Highlights** This session will provide you an overview of the emerging caselaw this past year, both in our Circuit and nationwide. We will also discuss the ongoing litigation regarding the new Title IX regulations and a comparison of the legal standards in the regulations and caselaw.	**Andrea L. Mooney**
10:10 – 11:10	**Investigations and Appeals** This session will focus on the differences between the 2020 and 2024 Investigative Guidelines, and the Best Practices for Your District.	**Dennis J. Eichelbaum**

11:20 – 12:00	**Ask the Attorneys** Our attorneys will be available to answer your questions. Whether seeking clarity on the law's application, enforcement, or recent changes, this is a unique opportunity to engage directly with lawyers experienced in Title IX matters. No topic is off the table.	**Andrea L. Mooney & Dennis J. Eichelbaum**
12:00 – 12:30	Lunch	
12:30 – 1:20	**Expecting Equity: Pregnancy Rights Under Title IX** An overview of how pregnancy rights protections are implemented in one K-12 public school district, focusing on policy, student protections and rights, and available supports. We will explore the legal framework that protects pregnant students and discuss the district's role in ensuring non-discriminatory access to education, accommodations, and resources. Additionally, we will highlight best practices for supporting pregnant and parenting students in their academic journey.	**Lisa Ray, Mary Garcia, and Cindy Rodriguez, Garland ISD**
1:30 – 2:20	**Interviewing and Assessing the Credibility of Children in K-12 Schools** This presentation will briefly outline the research on suggestibility, including how this shifts with age and how suggestibility might work differently for children with special needs. We will discuss the "dos and don'ts" of interviewing children and discuss how one's own personal commitment to protecting children might actually get in the way of collecting objective information. Finally, we will discuss what aspects of a child's credibility can be reliably assessed and how to present your findings in an objective, scientific manner minimizing the impact of bias in the process.	**Dr. Alissa Sherry, Munevar Sherry Consulting**
2:30 – 3:20	**Troubleshooting Real World Transgender Issues in Schools** A panel of school attorneys will discuss current and complex scenarios involving transgender staff and students.	**Holly Boyd Wardell and Emma K. Lynch**
3:20 – 3:30	Closing	

Title IX Litigation in Texas

Garrett Greene currently serves as Special Counsel in the Special Litigation Division of the Texas Attorney General's Office, where he handles high-profile cases addressing some of the most pressing legal challenges the State faces. Garrett's work centers on defending state laws, pushing back against federal overreach, and ensuring the liberty and constitutional rights of Texans. His cases often involve significant issues of constitutional and administrative law, and he has successfully argued for Texas in court, obtaining preliminary injunctions and restraining orders against federal regulations, including challenges to ATF restrictions on private firearm sales, revisions by the Department of Education to Title IX, unlawful immigration policies by DHS, and illegal employment overtime rules put forward by the Department of Labor.

Before joining the Special Litigation Division, Garrett was a Litigation Associate at a leading national litigation boutique in Austin. In this role, he represented clients in high-stakes cases involving complex medical, scientific, regulatory, and product liability issues. Garrett's work included developing and executing litigation strategies, managing expert witnesses, conducting depositions, and taking cases to trial. He contributed to successful outcomes in multi-district litigation, class actions, and product liability defense across federal and state courts nationwide.

Garrett holds a J.D. from St. Mary's University School of Law, where he served on the editorial board of the St. Mary's Law Journal. He is admitted to practice in Texas, the Fifth Circuit, and the U.S. Supreme Court, and was named a 2024 Texas Super Lawyers Rising Star during his time in private practice.

A proud sixth-generation Texan, Garrett is dedicated to public service and the defense of Texas's values. Outside of the courtroom, he enjoys spending time with his wife MiMi and exploring the Texas hill country with their two dogs, Daisy, and Lulu.

KEN PAXTON
ATTORNEY GENERAL of TEXAS

TEXAS' TITLE IX LITIGATION

State of Texas v. United States, No. 2:24-CV-86-Z (N.D. Tex.) (2024).
Presented by Garrett Greene, Special Counsel, Special Litigation Division

1

Historical Context of Title IX

- **Enactment**
  - Title IX established in 1972 to eliminate sex-based discrimination in education.
  - "Sex" originally referred to biological male-female distinctions.
- **Impact on Women Before and After Title IX**:
  - Before: 34% of working women lacked a high school diploma, 7% were varsity athletes.
  - Today: 6% lack a diploma, 43% are varsity athletes.
- **Grounded in a biology-based understanding of sex**.
  - Sex-segregated teams and facilities were allowed based on biological sex.
  - Congress included exemptions for single-sex organizations like fraternities and sororities.

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Obama and Trump Administrations' Shifts on Title IX

- Obama Administration
  - Redefined "sex" to include gender identity via a Dear Colleague Letter.
  - Schools required to allows transgender students access to sex-segregated spaces.
  - Texas challenged this directive, leading to the 2016 Guidance being enjoined.
- Trump Administration
  - Reversed Obama-era guidance, returning to a biological sex definition.
  - 2020 Rule reinforced the definition of "sex" as biological sex.
  - Strengthened protection for students accused of sexual misconduct (live hearings, cross-examination, and more)

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Bostock

- Bostock v. Clayton County (2020)
  - Firing employees for being homosexual or transgender violated Title VII.
  - Applied a "but-for" causation standard to determine that sex played a role in the firing decision.
- Biden-Harris Administration's Interpretation
  - Used Bostock to justify expanding Title IX protections to include gender identity and sexual orientation.
- Limits of Bostock
  - Bostock did not address Title IX or sex-segregated facilities.
  - Court stated that Title VII's ruling did not extend to other statutes like Title IX.

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The 2021 Guidance Documents

- Biden-Harris Administration (2021):
  - Issued guidance expanding Title IX to cover gender identity and sexual orientation.
  - Stated intent to fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive federal financial assistance.
  - Enjoined in 2022 by Eastern District of Tennessee.

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2024 Final Rule

- 2024 Final Rule:
  - Expanded Title IX's definition of "sex" to include gender identity, sexual orientation, sex stereotypes, and pregnancy-related conditions.
- Key Changes from 2020 Rule:
  - **Expansion of the definition of "Sex"**
  - **Broadened scope of Title IX protections**
  - **Revised harassment standards**
  - **Application beyond campus**
  - **Restrictions on sex-segregated programs**
  - **Impact on Athletics**
  - **Limits on verifying gender identity**

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Texas' Legal Arguments Against the 2024 Final Rule

- Main Arguments:
  - **Illegally Redefines "Sex":** Only Congress can change Title IX's definition of "sex."
  - **Arbitrary and Capricious Rulemaking:** Department of Education failed to provide a reasoned explanation for the rule changes.
  - **Abortion Mandates:** Requires schools to cover abortions, violating Texas law.
  - **First Amendment and Due Process:** Limits students' speech and procedural protections.
  - **Expanded Liability for Texas Institutions:** Increases the risk of lawsuits against schools.

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Court Ruling and Preliminary Injunction

- Preliminary Injunction (July 11, 2024)
- ***"Title IX protects women in spaces that were historically reserved to men. In stark contrast, the Final Rule inserts men into the very Title IX spaces statutorily reserved to women."***
- Key Legal Findings
  - **Violation of Title IX and APA**: The Final Rule expands the definition of "sex" beyond Congress's original intent.
  - **Bostock Misapplied**: Title VII's "but-for" causation standard doesn't apply to Title IX.
  - **First Amendment**: The Final Rule's vague language could chill speech.
  - **Abortion Coverage Conflict**: The Final Rule forces Texas schools to violate state abortion laws.

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Going Forward

- Current Status:
  - Texas school are temporarily protected from the 2024 Final Rule's mandates due to the preliminary injunction
  - Texas Schools can continue operating under traditional understanding of Title IX and Texas law, maintaining sex-segregated spaces based on biological sex.
  - Federal funding not at risk for non-compliance with the 2024 Final Rule
- Looking Ahead:
  - Litigation is ongoing, things can change.
  - The Fifth Circuit will hear a related case, *Rapides Parish School Board v. United States Department of Education* on November 4.

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Thank You!

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STATE OF TEXAS;
DANIEL A. BONEVAC;
JOHN HATFIELD,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA;
MIGUEL CARDONA, in his official capacity as Secretary of Education;
UNITED STATES DEPARTMENT OF EDUCATION; CATHERINE LHAMON, in her official capacity as Assistant Secretary for Civil Rights, Department of Education;
RANDOLPH WILLS, in his official capacity as Deputy Assistant Secretary for Enforcement, Department of Education,

Defendants.

No. 2:24-cv-86-Z

State of Texas's Amended Complaint

1. Through an exercise in notice-and-comment rulemaking ordered by President Biden, the U.S. Department of Education (the "Department") has attempted to effect radical social change in our Nation's schools by purporting to "interpret" Title IX of the Education Amendments Act of 1972 to prohibit discrimination based on sexual orientation and gender identity. Stymied in its attempts to implement this agenda through informal agency guidance, and unable to amend Title IX through the legislative process, the Department has now formally amended the Code of Federal Regulations. *Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin.*

Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt 106) (the "Final Rule"). The Final Rule tells States and other regulated parties to ignore biological sex or face enforcement actions and the loss of federal education funding.

2. Contrary to the Department's assertions, the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), does not require—or even allow—the reinterpretation of "on the basis of sex" to include to sexual orientation and gender identity. *Bostock* held only that terminating an employee "simply for being homosexual or transgender" constitutes discrimination "because of … sex" under Title VII. *Id.* at 649–51, 655 (quoting 42 U.S.C. § 2000e-2(a)(1)). The Court "assum[ed]" that the term "sex" means "biological distinctions between male and female," *id.* at 655, and it made clear that its decision did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination" or address other issues not before the Court such as "sex-segregated bathrooms, locker rooms, and dress codes." *Id.* at 681. *See also id.* at 669 ("We agree that homosexuality and transgender status are distinct concepts from sex.").

3. In addition, the Final Rule promises to repeat the disaster that was the Department's ill-advised 2011 Dear Colleague Letter, which had a detrimental impact on publicly funded education across the country, including in Texas. The Final Rule walks back many of the constitutional safeguards issued by the Trump Administration to ensure that students accused of harassment have access to a fair hearing. At the same time, the Final Rule redefines harassment to include constitutionally protected activity. Not only does this put Texas schools in a no-win situation—where adherence to the Constitution risks the loss of federal funds—but students and faculty risk having their futures upended merely for refusing to go along with the Biden Administration's radical social agenda.

4. The Final Rule violates the Administrative Procedure Act (APA). 5 U.S.C. § 706. It is substantively unlawful because its purported "interpretations" of Title IX squarely conflict with the text of that statute. Title IX, by its plain text, defines "sex" as "one sex" that is male or female. *See* 20 U.S.C. § 1681(a)(5) (describing those institutions

which have a policy of admitting "only students of one sex"). The Department, furthermore, engaged in arbitrary-and-capricious decision-making when promulgating these regulations because it failed to define the amorphous concepts of "gender identity" and "sexual orientation," failed to adequately consider all relevant factors, and failed to adequately explain its reversal of past policies.

5. Title IX does not apply to discrimination based on sexual orientation or gender identity. But even if those concepts were protected against discrimination by Title IX, the Final Rule's provisions do not faithfully implement such protections because they mark as unlawful school policies that do not discriminate based on those concepts—instead, the Final Rule *requires* schools to discriminate based on sexual orientation and gender identity by allowing single-sex programs and facilities but requiring opposite-sex access to them for only those individuals purporting to have a transgender identity.

6. The Court should postpone the effective date of the Final Rule under 5 U.S.C. § 705 (*i.e.*, stay it) and preliminarily enjoin the Defendants from implementing the Final Rule or interpreting Title IX to cover discrimination based on sexual orientation or gender identity. And the Court should ultimately declare and hold unlawful the Final Rule, set it aside under 5 U.S.C. § 706(2)(A) (*i.e.*, vacate it), and permanently enjoin the Defendants from implementing or enforcing this unlawful reinterpretation of Title IX.

I. Parties

7. Plaintiff Texas is a sovereign State of the United States.

8. Plaintiff Daniel A. Bonevac is a professor at the University of Texas at Austin, who is subject to the requirements of Title IX in his capacity as an educator and scholar.

9. Plaintiff John Hatfield is a professor at the University of Texas at Austin, who is subject to the requirements of Title IX in his capacity as an educator and a scholar.

10. Defendant the United States of America is the federal sovereign and is sued under 5 U.S.C §§ 702–03 and 28 U.S.C. § 1346.

11. Defendant Miguel Cardona is the Secretary of the Department of Education and is responsible for its administration, including the effectuation of Title IX via rulemaking. He is sued in his official capacity.

12. Defendant the Department of Education is a cabinet-level executive branch department of the United States. It issued the Final Rule challenged in this suit and is responsible for administering most federal assistance to education; it administers and enforces Title IX.

13. Defendant Catherine Lhamon is the Assistant Secretary for Civil Rights at the Department of Education and is responsible for carrying out the duties of the Office of Civil Rights, which initiates enforcement proceeding pursuant to Title IX. She is sued in her official capacity.

14. Defendant Randolph Wills is the Deputy Assistant Secretary for Enforcement at the Department of Education. He oversees the enforcement activities of the Office of Civil Rights' 12 regional offices. He is sued in his official capacity.

II. Jurisdiction and Venue

15. The Court has federal-question jurisdiction under 28 U.S.C. § 1331 because this suit concerns the scope of the Department's authority under Title IX, and it also arises under the Administrative Procedure Act., 5 U.S.C. §§ 702–703. Additionally, this court has jurisdiction under 28 U.S.C. § 1346 because this suit involves a claim against an agency and employee of the federal government.

16. Venue lies in this district under 28 U.S.C. § 1391(e)(1) because the Defendants are agencies of the United States and officers of the United States in their official capacities; Texas resides in this district; and a substantial part of the events or omissions giving rise to Texas's claims arose in this district.

III. Background

17. President Nixon signed Title IX into law on June 23, 1972. *See* Act of June 23, 1972, Pub. L. No. 92-318, 86 Stat. 235, 373–75 (codified at 20 U.S.C. §§ 1681, et seq.). Title IX provides that:

> "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(a).

A. Early Interpretations of Title IX adopted a biology-based approach.

18. The Department's predecessor agency[1] first issued regulations implementing Title IX in 1975. *See* 34 C.F.R. pt. 106. These regulations treated sex as a binary, referring multiple times to "one sex," especially versus "the other sex," using the phrase "both sexes," and referencing "boys and girls" and "male and female teams." *See, e.g.*, 34 C.F.R. 106.33, 106.34(a)(3), 106.36(c), 106.37(a)(3), 106.41(c), 106.51(a)(4), 106.58(a), 106.60(b), 106.61; *see also* 34 C.F.R. pt. 86 (1975).

19. This makes sense, as Title IX's test and structure presuppose sexual dimorphism—requiring equal treatment for each sex. *See, e.g., Neese v. Becerra*, No. 2:21-cv-163-Z, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) ("Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each 'sex.'")

20. Indeed, at the time of its enactment, the term "sex" in Title IX referred to a person's immutable biological sex—male or female. *See* Webster's Third New International Dictionary (1966) ("One of the two divisions of organic, especially human beings, respectively designated male or female."); American Heritage Dictionary (1969) ("a. The property or quality by which organisms are classified according to their

[1] *See Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities*, 40 Fed. Reg. 24, 128 (Jun. 4, 1975) (codified at 45 C.F.R. pt. 86).

reproduction functions. b. Either of two divisions, designated male and female, of this classification."); Webster's New World Dictionary (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions.").

21. The structure of Title IX underscores that "sex" means biological sex—not gender identity or any other distinct concept. The statute explicitly permits educational institutions to maintain separate living facilities for the different sexes. 20 U.S.C. § 1686. This provision only makes sense if "sex" refers to the male-female binary and the associated physiological differences. Indeed, Senator Bayh emphasized that Title IX permitted "differential treatment by sex" when necessary, such as "in sport facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807 (Feb. 28, 1972) (Statement of Sen. Birch Bayh).[2]

22. While Title IX generally prohibits discrimination based on biological sex, it recognizes situations where differentiation is appropriate. For instance, it exempts single-sex organizations like fraternities, sororities, the Boy Scouts of America, and Boy or Girl conferences to maintain their exclusivity. 20 U.S.C.A. § 1681(a)(6)-(7). Traditional single-

[2] Title IX is full of examples of "sex" being referred to as binary:

- The statute exempts a public undergraduate institution with a historic "policy of admitting only students of *one sex.*" 20 U.S.C. § 1681(a)(5) (emphasis added).
- Certain organizations whose memberships have "traditionally been limited to *persons of one sex.*" 20 U.S.C. § 1681(a)(6) (emphasis added).
- *"Father-son or mother-daughter activities,"* so long as similar opportunities provided for *"one sex"* are offered to *"the other sex."* (20 U.S.C. § 1681(a)(8) (emphasis added).
- Scholarships associated with participation in a beauty pageant "limited to individuals of *one sex only.*" (20 U.S.C. § 1681(a)(9) (emphasis added).

Title IX's explicit exclusions for sex-specific organizations further underscore this understanding. *See, e.g.,* 20 U.S.C. § 1681(a)(6) (authorizing certain groups to remain limited to one sex, including fraternities and sororities).

sex schools and certain religious schools are also exempt and may limit membership to one sex. 20 U.S.C. § 1681(a)(3), (5)).

23. The early implementing regulations in 1975 recognized that differential treatment was sometimes necessary to ensure equal opportunities based on biological differences. These regulations, which remain in effect today through the current regulations,[3] acknowledged that Title IX did not prohibit all differential treatment based on sex but aimed to provide equal opportunities for both sexes despite biological differences. Title IX and its regulations reflect Congress's policy decision to promote equal educational opportunities for both sexes while not disregarding biological differences or mandating identical treatment of males and females in all circumstances—a decision that has proven highly successful. For instance, female college attendance and participation in athletics have soared since Title IX's enactment. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818–19 (11th Cir. 2022) (Lagoa, J., concurring)).

24. For decades, the Department operated under the basic premise that "sex" means the biological male-female binary. In its 1997 guidance clarifying that Title IX covers same-sex sexual harassment, the Department affirmed that "both male and female students are protected from sexual harassment … even if the harasser and the person being harassed are members of the same sex." Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997). The same guidance stated that "Title IX does not prohibit discrimination on the basis of sexual orientation," *id.* at 12,036, because—as the Department correctly recognized— "sex" refers to the status of being male or female, not to one's heterosexual or homosexual orientation, or "gender identity."

[3] *See, e.g.*, 34 C.F.R. § 106.41(b)-(c) (allowing single-sex teams and requiring recipients to provide "equal athletic opportunity for members of both sexes").

B. The Obama Administration tries to redefine "sex" to include gender identity.

25. Following the presidential transition in January 2009, activists launched an aggressive campaign lobbying Congress and the White House to recognize gender identity as a protected class under federal civil-rights laws.

26. Those early lobbying efforts focused on democratically enacted laws. In October 2009, for example, Congress passed hate-crime legislation that included "gender identity" and "sexual orientation" as independently protected characteristics alongside other protected traits like race, religion, and national origin. 18 U.S.C. § 249(a)(2).

27. After the Republican Party won a majority of the House in 2010, however, the pressure campaign shifted to unilateral executive action. *See, e.g.*, *NCTE 2010 Annual Report* 8, Nat'l Ctr. for Transgender Equality, https://transequality.org/sites/default/files/docs/resources/NCTE_Annual_Report_2010.pdf ("While we do not anticipate significant federal legislative victories for 2011, we … are planning for key wins in several federal administrative policy areas. In particular, we wil[l] [a]dvocate with the federal government to interpret existing civil rights laws such as … Title IX … to cover transgender people.").

28. In 2013, Congress considered a bill to extend Title IX's sex-based provisions to gender identity. According to the "findings" section of that proposed law, congressional action was necessary because "federal statutory protections expressly address discrimination on the basis of race, color, sex, religion, disability, and national origin" but "do not expressly include 'sexual orientation' or 'gender identity.'" To end discrimination based on actual or perceived sexual orientation or gender identity in public schools, and for other purposes, H.R. 1652, 113th Cong. (2013). The bill failed.

29. Tellingly, the same year that it rejected the bill to expand Title IX, Congress reauthorized the Violence Against Women Act, and, in the process, amended the law to prohibit recipients of federal grants from discriminating "on the basis" of "sex" *or* "gender identity" *or* "sexual orientation." *See* 34 U.S.C. § 12291(b)(13)(A). Right after

listing "sex," "gender identity," and "sexual orientation" as distinct concepts, the law emphasizes that "nothing in this paragraph shall prevent any … program or activity from consideration of an individual's sex" if "*sex segregation* or *sex-specific programming* is necessary to the essential operation of [the] program." *Id.* § 12291(b)(13)(B) (emphasis added). And today, section 12291 also prohibits "female genital mutilation or cutting," which it defines in explicitly biological terms. *See id.* § 12291(a)(15) (incorporation definition of female genital mutilation in 18 U.S.C. § 116).

30. During the Obama Administration, the Department issued its misguided 2011 Dear Colleague Letter and 2014 Questions and Answers on Title IX Sexual Violence. *See* Russlynn Ali, U.S. Dept. of Educ., *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; Catherine E. Lhamon, U.S. Dept. of Educ., *Questions & Answers on Title IX & Sexual Violence* (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

31. These guidance documents asserted—for the first time—that "Title IX's sex discrimination prohibition extends to claims of discrimination" based solely on "gender identity." *Questions & Answers on Title IX & Sexual Violence,* at 5 (2014).

32. The Dear Colleague Letter and 2014 Questions and Answers had a detrimental impact on publicly funded education nationwide, including in Texas. Not only did the two guidance documents introduce significant confusion over academic institutions' obligations under Title IX, but they also created incentives for academic institutions to violate students' constitutional rights in order to avoid incurring liability. To offer some context, before 2011, the number of lawsuits filed against universities for failing to provide due process in Title IX cases averaged one per year—by 2019, over 100 such lawsuits were filed in that year alone. *See* Taylor Mooney, *How Betsy DeVos plans to change the rules for handling sexual misconduct on campus*, CBS NEWS (Nov. 24, 2019), https://www.cbsnews.com/news/title-ix-sexual-misconduct-on-campus-trump-administration-changing-obama-rules-cbsn-documentary/.

33. Although neither underwent notice and comment rulemaking, the two guidance documents put recipients in a no-win situation where either conforming or failing to conform to the guidance documents could expose them to significant risk of litigation.

34. In 2015, Congress considered a new bill that proposed to do what the Department claimed to have already accomplished through its 2014 letter: extend Title IX's protections to differential treatment based on gender identity. *See* S.439, 114th Cong. (2015). The bill was nearly identical to the one that Congress rejected in 2013. Once again, Congress did not pass the legislation.

35. Twice in the past decade, Congress has considered legislation to amend Title IX to apply to gender identity. *See, e.g.*, H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015). Yet "Congress has not amended the law to state as much"; so "it is questionable," to put it mildly, "whether the Secretary can alter the term 'sex' by administrative fiat." *Neese*, 2022 WL 1265925, at *13.

36. As the failed attempts to amend Title IX piled up, so did the pressure from outside groups demanding that the government change Title IX through unilateral executive action.

37. In May 2016, the Department of Education issued another *Dear Colleague* Letter, this time expanding Title IX obligations to transgender students (the "2016 Guidance"). The 2016 Guidance informed federally funded educational institutions that the Department would "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." Catherine E. Lhamon and Vanita Gupta, U.S. Dep'ts of Educ. & Justice, *2016 Dear Colleague Letter on Title IX and Transgender Students,* at 2 (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf?utm_name=.

38. The 2016 Guidance further informed schools that any attempt to restrict shower, bathroom, or locker-room use according to biological sex would be unlawful. Schools were also warned that failing to "use pronouns and names consistent with a

student's gender identity" would constitute unlawful harassment under Title IX. *Id.* at 2–3.

39. The 2016 Guidance suggested that schools needed to compel faculty and staff to "use pronouns and names consistent with a transgender student's gender identity" and permit access to previously sex-separated facilities, including restrooms, locker rooms, and shower facilities, based solely on a student's proclaimed gender identity. *Id.* at 3–4.

40. Thirteen states led by Texas sued the federal government, alleging that the 2016 Guidance was unlawful under the APA. The Northern District of Texas agreed and issued a preliminary injunction, concluding that the Department's purported interpretive guidance "failed to comply with" the APA by "contradicting the existing legislative and regulatory texts" and "was likely contrary to law." *Texas v. United States*, 201 F. Supp. 3d 810, 815, 816 n.4, 836 (N.D. Tex. 2016).

C. The Trump Administration rescinds the Obama Administration guidance.

41. In a decisive shift from previous policies, the Trump Administration rescinded the Obama-era gender identity guidance in February 2017, and the lawsuit was voluntarily dismissed. Pls.' Notice of Voluntary Dismissal, *Texas*, 2016 WL 7852331, No. 7:16-cv-00054-O (N.D. Tex. Mar. 3, 2017), ECF No. 128. This action marked a return to the pre-2014 interpretation of Title IX, where the prohibition on sex-based discrimination was understood to mean biological sex, not gender identity. This return to the longstanding interpretation was formalized through a Dear Colleague Letter issued by the U.S. Department of Justice and U.S. Department of Education, Office for Civil Rights in February 2017, explicitly withdrawing the previous administration's expansive views on gender identity under Title IX. Sandra Battle & T.E. Wheeler, II, U.S. Dep'ts of Educ. & Justice, *Dear Colleague Letter on Gender Identity Guidance* (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

42. It soon became apparent, however, that the withdrawal could not repair the damage caused by the two guidance documents on its own. *See* Candice Jackson, U.S. Dept. of Educ., *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf. As the Department later explained, neither action "require[ed] or result[ed] in wholesale changes to the set of expectations guiding recipients' responses to sexual harassment." *Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance*, 85 Fed. Reg. 30,026, 30,029 (May 19, 2020) (to be codified at 34 C.F.R. pt 106) (the "2020 Rule"). Hence, many, if not most, recipients "chose not to change their Title IX policies and procedures" as a precaution against stigma and liability. *Id.*

43. The Department, therefore, initiated a round of notice-and-comment rulemaking, after which it published a comprehensive set of regulations governing recipients' obligations to prevent sex discrimination in their programs and activities. *See* 85 Fed. Reg. 30,026. The 2020 Rule took effect on August 14, 2020.

44. The 2020 Rule addressed at least three significant ambiguities in the earlier guidance:

a. *First*, the 2020 Rule clearly demarcated, for the first time, the outer boundaries of recipients' obligations and liability under Title IX with respect to sexual harassment.

b. *Second*, the 2020 Rule clarified the standard under which conduct or speech could constitute sex-based harassment—namely, that it be "so severe, pervasive, and objectively offensive that it effectively denies a person equal access." 85 Fed. Reg. at 30,574.

c. *Third*, the 2020 Rule reaffirmed the primacy of the U.S. Constitution and adopted multiple safeguards to ensure that Title IX enforcement protected the rights and interests of all parties to a disciplinary proceeding.

45. For example, the 2020 Rule also addressed the question of whether discrimination "on the basis of sex" encompassed sexual orientation and gender identity. Although the Department declined to define "sex" in the 2020 Rule because it was not necessary to effectuate the rules and would have consequences that extended outside of the proposed rulemaking, the Department noted that "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification," and further observed that "provisions in the Department's current regulations, which the Department did not propose to revise in this rulemaking, reflect this presupposition." 85 Fed. Reg. at 30,178.

46. And the Department further amended its regulations to clarify the definition of "sexual harassment" for purposes of Title IX enforcement. *See* 85 Fed. Reg. 30,026. The Department adopted the Supreme Court's definition of harassment in *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), that is, "conduct that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education." 85 Fed. Reg. at 30,036.

47. Finally, the 2020 Rule strengthened the rights of students accused of sexual harassment under Title IX. It required schools to, among other things, provide the accused with written notice of the charges against him, 85 Fed. Reg. at 30,571, let a representative accompany him to disciplinary hearings, *id.* at 30,577, and let that counsel cross-examine witnesses. *Id.* It specified that schools could choose between a preponderance or clear-and-convincing standard to adjudicate accusations of Title IX misconduct, but only if they used the same standard for "all formal complaints of sexual harassment," including "formal complaints against employees." *Id.* at 30,575.

D. The Supreme Court decides *Bostock*.

48. In June 2020, shortly after the Department issued the 2020 Rule, the Supreme Court decided *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020). The Court held that

Title VII's prohibition on sex discrimination prevents an employer from firing an employee "for being homosexual or transgender." *Id.* at 651–52. The Court interpreted Title VII's prohibition against discrimination "because of" sex using a "but-for" causation standard, concluding that "sex plays an unmistakable and impermissible role in [a] discharge decision" based on an employee's homosexuality or transgender status. *Id.* at 660.

49. But *Bostock* explicitly assumed that "homosexuality and transgender status are distinct concepts from sex," *id.* at 669, and it assumed throughout its opinion that "sex" in Title VII referred "*only to biological distinctions between male and female*," *id.* at 655 (emphasis added). The Court refrained from extending its decision to other statutes like Title IX and declined to "prejudge" whether it would "sweep beyond Title VII" or impact "sex-segregated bathrooms, locker rooms, and dress codes." *Id.* at 681.

50. In January 2021, the Department's Office of the General Counsel issued a memo clarifying that *Bostock* did not affect the 2020 Rule. It reiterated that Title IX's "longstanding construction of the term 'sex' to mean biological sex, male or female" aligns with the ordinary public meaning of "sex" at the time of the statute's enactment. Reed D. Rubinstein, *Memorandum for Kimberly M. Richey, Acting Assistant Sec'y of the Office for Civil Rights*, *re:* Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (Jan. 8, 2021) at 1, 10, https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf. The memo also emphasized that "schools must consider students' biological sex when determining whether male and female student-athletes have equal opportunities to participate." *Id.* at 7.

E. The Biden Administration initiates efforts to redefine "sex" under Title IX.

51. Despite the well-reasoned analysis of the Department itself that *Bostock* changed nothing in the Title IX context and that "sex" means "biological sex," the Biden Administration, like the Obama Administration before it, once again moved to redefine "sex" as including gender identity.

52. From the start, President Biden opposed the 2020 Rule, stating on the campaign trail that he would order the Department to put a "quick end" to it if elected. *See* Joe Biden, *Statement on the Trump Administration Rule to Undermine Title IX & Campus Safety* (May 6, 2020), https://medium.com/@JoeBiden/statement-by-vice-president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa.

53. Shortly after taking office, President Biden issued an executive order declaring that *Bostock* applied across all federal law, maintaining that under *Bostock*'s reasoning, laws prohibiting sex discrimination—including Title IX of the Education Amendments of 1972—should also prohibit discrimination based on gender identity or sexual orientation, "so long as the laws do not contain sufficient indications to the contrary." Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021). Federal agencies were directed to review their regulations and develop plans to align them with the executive order.

54. Following this directive, on June 22, 2021, the Department issued guidance interpreting Title IX's prohibition on discrimination "on the basis of sex" to encompass discrimination based on sexual orientation and gender identity. *Enf't of Title IX of the Educ. Amend. of 1972 with Respect to Discrimination Based on Sexual Orientation & Gender Identity in Light of* Bostock v. Clayton County, 86 Fed. Reg. 32,637 (June 22, 2021) ("2021 Guidance"). The Department claimed that this interpretation aligned with Title IX's purpose of "ensuring equal opportunity and protecting individuals from the harms of sex discrimination" *Id.* at 32,639. This was followed by additional guidance from the Department stating its intent to "fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive federal financial assistance." Suzanne B. Goldberg, *Dear Educator letter on Confronting Anti-LGBTQI+ Harassment in Schools*, at 2 (June 23, 2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.

55. Like the 2016 Guidance, the enforcement of the 2021 Guidance was swiftly enjoined. In *Tennessee v. United States Dep't of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022), the Eastern District of Tennessee enjoined the Department from enforcing the 2021 guidance, ruling that it likely acted unlawfully by creating "new rights and obligations" without following the APA's notice-and-comment requirements. *Id.* at 842.

56. The court identified two main issues with the 2021 Guidance: (1) It was inconsistent with existing regulations. Title IX allows for sex-separation in some cases, but the Department's guidance "appear[ed] to suggest such conduct will be investigated as unlawful discrimination," *id.* at 839; and (2) it "create[d] rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity *that appear nowhere in Bostock, Title IX, or its implementing regulations*." *Id.* (emphasis added).

F. The Biden Administration publishes the Proposed Rule to replace the 2020 Rule and overhaul Title IX.

57. Undeterred, in July 2022, the Department issued a notice of proposed rulemaking, reiterating its position from the 2021 guidance and introducing other significant revisions to Title IX. *Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance*, 87 Fed. Reg. 41,390 (July 12, 2022) (the Proposed Rule).

58. The Proposed Rule sought to formally rescind the 2020 Rule's biology-based definition of sex—based almost entirely on the supposed applicability of *Bostock*. 87 Fed. Reg. at 41,410, 41,531. It also dropped the 2020 Rule's adoption of the *Davis* standard for actionable sexual harassment, *id.* at 41,568–69, and removed procedural protections for students accused of misconduct, *id.* at 41,485, 41,488, 41,497, 41,577–78.

59. The Department received over 240,000 comments on the Proposed Rule— overwhelmingly negative. 89 Fed. Reg. at 33,477. Texas, through its Attorney

General and Governor, submitted multiple comments before the 60-day comment period for the Proposed Rule closed on September 12, 2022.

60. In its comments, Texas highlighted the burden the Proposed Rule would impose on the State, as well as the risk the regulations posed to constitutional rights. The comments explained that the combination of expanding recipients' obligation to respond to sex discrimination, while also lowering the threshold of what fell within that description, meant, in practice, that recipients would hyper-police interactions among students, parents, and faculty for fear of being found noncompliant if individuals affiliated with the recipient failed to recognize each person's highly individualized, potentially fluid, and unverifiable gender identity.

61. The Proposed Rule also weakened procedural protections for students accused of sexual harassment, such as the right to present witnesses, inspect all evidence, and have a live hearing. *Id.* at 41,485, 41,497, 41,577. It also abandoned the *Davis* standard for actionable sexual harassment, instead adopting a broader, less stringent definition. *Id.* at 41,568–69.

62. The comments added that much of Proposed Rule departed from the Department's past policies, yet the changes were neither adequately explained nor grounded in the text, structure, or purpose of Title IX. As an example, the Department hinged its redefinition of sex to include sexual orientation and gender identity almost entirely on the U.S. Supreme Court's opinion in *Bostock*. Yet as Texas pointed out in its comments, *Bostock* involved an unrelated statute that was enacted nearly a decade earlier, pursuant to a different constitutional power, and did not address questions involving "sex segregated bathrooms, locker rooms, and dress codes"—all of which appeared in the Proposed Rule.

G. The Final Rule is published in substantially the same form as the Proposed Rule.

63. Despite these deficiencies, the Biden Administration pressed on. On April 29, 2024, the Department published its Final Rule, dramatically reshaping Title IX by redefining what constitutes sex discrimination and broadening the definition of prohibited "harassment." *Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt 106).

64. Despite strong opposition and over 240,000 public comments—mostly negative—the Department published the Final Rule largely unchanged from the Proposed Rule. Set to take effect on August 1, 2024, it expands schools' liability risks and Title IX obligations by expanding the definition of sex discrimination and harassment beyond what Title IX's text and purpose originally intended.

65. The Final Rule redefines Title IX's prohibition on sex discrimination to include "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. at 33,476. It asserts that it preempts all state and local laws conflicting with its terms and applies to any school "program or activity," regardless of whether the activity occurs within the school or even within the United States. *Id.* at 33,885–86.

66. While the Final Rule allows schools to maintain sex-segregated programs, activities, and facilities, it prohibits schools from enforcing these distinctions in a way that causes "more than de minimis harm"—but the Final Rule simultaneously contends that prohibiting a person from participating in education programs or activities consistent with their gender identity *inherently* inflicts more than de minimis harm. *Id.* at 33,816, 33,819– 20. Thus, the Final Rule threatens to withhold federal funding from schools that deny students access to bathrooms and locker rooms based on their claimed gender identity or maintain dress codes based on biological sex.

67. The Final Rule claims that it does not affect athletics programs in schools because there is currently a regulation that allows sex-separated sports teams. 89 Fed. Reg. at 33,817–18, 33,839. Yet that was also true for bathrooms and locker rooms, but the Final Rule declares that invalid when exceptions are not made for those who identify as transgender. *See id.* at 33,819–21. The Final Rule claims sex-separate athletics does not suffer the same fate because of the Javits Amendment, 88 Stat. 484, 612 (1974), and because Congress reviewed the regulation that explicitly allows them before it went into effect. *See* 89 Fed. Reg. at 33,816–17. But the Javits Amendment only applies to "intercollegiate athletic activities," 88 Stat. at 612, and the bathroom regulation was part of the same set of regulations as the one relating to sports and also not disapproved by Congress. *See* 40 Fed. Reg. 24,128, 24,141 (June 4, 1975); 34 C.F.R. § 106.33. And the Department fails to address its own position taken in litigation that Title IX forbids categorically limiting sports teams to one biological sex. *See B.P.J. v. W. Virginia*, ECF 42, No. 2:21-cv-316 (S.D. W. Va. Jun. 17, 2021); United States Amicus Br. 24–27, *B.P.J. v. W.V. State Bd. of Educ.*, Nos. 23-1078, 23-1130 (4th Cir. Apr. 3, 2023).

68. The Final Rule also prohibits schools from even seeking confirmation of a student's gender identity, deeming such inquiries as causing "more than de minimis harm." *Id.* at 33,819. So schools cannot require documentary evidence confirming a student's gender dysphoria diagnoses prior to permitting their participation in sex-segregated activities or facilities of the opposite sex.

69. The Final Rule also broadens the definition of harassment by lowering the standard set by the 2020 Rule, and instead defining sex-based harassment as "subjectively and objectively offensive" and "sufficiently severe or pervasive to limit or deny a student's ability to participate in or benefit from a recipient's education program or activity." *Id.* at 33,516. This new standard does not require harassment to be both severe and pervasive, meaning a single serious incident or a pattern of non-severe incidents might qualify.

70. The Final Rule also expands the definition of harassment to cover conduct that is "subjectively and objectively" offensive from the complainant's position. For instance, referring to a transgender-identifying male using male pronouns instead of female pronouns could be considered harassment based on the individual's subjective viewpoint.

IV. The Legal Flaws of the Final Rule

71. The Final Rule is flawed from top to bottom—no aspect of it can be salvaged.

A. Redefining "On the Basis of Sex"

72. Title IX states, "[n]o 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(a).

73. For the entire half century since its enactment, both the Department and recipients have understood Title IX's prohibition on sex discrimination to refer to a person's *biological sex*. Notwithstanding this history, the Final Rule redefines Title IX's prohibition on sex discrimination to include "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. at 33,886.

74. The Final Rule threatens to withhold federal funding from schools that do not allow students access to "restrooms and locker rooms" and comply with any "appearance codes (including dress and grooming codes)" based on gender identity. *See, e.g.*, 89 Fed. Reg. at 33,816. The Final Rule dictates that a school violates Title IX's nondiscrimination mandate if a transgender student is denied access to a bathroom or locker room of the opposite biological sex. *See, e.g.*, 89 Fed. Reg. at 33,818.

75. "The Department cannot enforce Title IX in a manner that requires recipients to restrict any rights protected under the First Amendment." 2020 Rule, 85 Fed. Reg. at 30,071. But under the Final Rule, recipients have an obligation under the Final Rule to

"take specific actions … to promptly and effectively prevent sex discrimination," including what the Final Rule defines as sex-based harassment. 89 Fed. Reg. at 33,887. It follows that recipients would have an obligation under the Final Rule to confront students and employees who refuse to affirm someone's gender identity, up to and including disciplinary proceedings, or risk being found in noncompliance with Title IX.

76. The Final Rule also institutes a new, lower standard for sexual harassment. The Final Rule stipulates that "[s]ex-based harassment, including harassment predicated on sex stereotyping or gender identity, is covered by Title IX if it is sex-based, unwelcome, subjectively and objectively offensive, and sufficiently severe *or* pervasive to limit or deny a student's ability to participate in or benefit from a recipient's education program or activity." 89 Fed. Reg. at 33,516 (emphasis added).

77. In adopting this standard, the Final Rule expands Title IX's prohibition on sex-based harassment beyond that which would create liability under Supreme Court precedent.. *Compare, e.g.*, 89 Fed. Reg. at 33,498*, with Davis*, 526 U.S. at 649–50.

78. Under *Davis*, the Supreme Court held that Title IX imposes liability on schools when sexual harassment is "so severe, pervasive, and objectively offensive that it *effectively bars* the victim's access to an educational opportunity or benefit." 526 U.S. at 633 (emphasis added). The Final Rule ignores this precedent and institutes a sweeping new standard that drastically lowers the "effectively bars" access to an educational opportunity or benefits to now include *any* conduct that "limits" access—in any way and to any degree—to educational opportunities or benefits. 89 Fed. Reg. at 33,497–98. Such a standard subjects students, faculty, and staff to onerous investigations that would have would not rise to the level of actionable conduct under the *Davis* standard, such as failing to use a student's preferred pronouns.

79. The 2020 Rule purposefully adopted the *Davis* standard "to ensure that speech and expression are prohibited only when their seriousness and impact avoid First Amendment concerns." 85. Fed. Reg. at 30,142. The Final Rule departs from this policy

but fails to adequately justify the Department's about-face; nor does it explain how the looser standard conforms to the Constitution—the reason given by the Department is simply that the Defendants "believe[] a broader standard is appropriate." 89 Fed. Reg. at 33,498.

80. The Final Rule also lacks objective standards, making every complaint subjective, not limited to those who visibly identify as transgender but broadly encompassing anyone who may even only temporarily or intermittently so identify, *see* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) (defining "transgender" to include "individuals who transiently" identify one way), or those with nefarious intentions who are merely seeking access to a schoolgirls' bathroom or locker room for predatory purposes. *See* Jessica Marie Baumgartner, *Transwoman Facing Charges for Flashing Women at California Spa Is a Registered Sex Offender*, Evie Mag. (Sep. 3, 2021), https://www.eviemagazine.com/post/transwoman-flashing-women-california-spa-registered-sex-offender.

81. The Final Rule is therefore ambiguous, overbroad, and vague, and fails to adequately notify schools of adequate compliance to avoid onerous investigations.

B. The Final Rule wrongly relies on *Bostock*.

82. The Department lacks the legal justification to initiate and support such radical departures in the interpretation of Title IX. The Department rests its redefinition of sex discrimination almost entirely on the U.S. Supreme Court's opinion in *Bostock*. But that case's "reasoning applies only to Title VII, as *Bostock* itself and [] subsequent cases make clear." *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 420 (6th Cir. 2023) (Sutton, C.J.).

83. How does Title IX differ from Title VII? To start, Title VII prohibits employment discrimination "because of such individual's … sex[]," 42 U.S.C. § 2000e- 2(a), but Title IX prohibits education discrimination "on the basis of sex," 20 U.S.C. § 1681(a). The statutes thus contain different language with different results for

different contexts. *Neese v. Becerra*, 640 F. Supp. 3d 668, 675–84 (N.D. Tex. 2022) (Kacsmaryk, J.) (*Bostock* and its reasoning do not apply to Title IX). And "*Bostock* … was limited only to Title VII itself" and "d[id] not stretch to [other statutes]." *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021); *see also Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 808 (11th Cir. 2022) (en banc) (holding that *Bostock*'s reasoning applies only to Title VII, and describing the argument that it applies to Title IX as "faulty").

84. Defendants conflate Title IX's prohibition of discrimination "on the basis of sex," 20 U.S.C. § 1681(a), with Title VII's prohibition on discrimination "because of … sex," 42 U.S.C. § 2000e-2(a)(1). But the *Bostock* court ruled that the phrase "because of" in Title VII mandated a sweeping but-for causation requirement. *Bostock*, 590 U.S. at 656. The U.S. Supreme Court has tendered no such ruling regarding the phrase "on the basis of sex" as used in Title IX. 20 U.S.C. § 1681(a). To the contrary. "On the basis of sex" references to one's "biological sex"—it does not mean does not mean "on the basis of gender identity" or "on the basis of sexual orientation."

85. Indeed, even though Title IX provides that recipients of federal funding for education programs or activities shall not discriminate "on the basis of sex," 20 U.S.C. § 1681(a), Title IX explicitly authorizes separation based on sex in certain situations, including "maintaining separate living facilities for the different sexes," 20 U.S.C. § 1686, and specified single-sex educational institutions, organizations, activities, and scholarship awards, 20 U.S.C. § 1681(a). These exceptions presume—and only make sense in the context of—biological sex is the relevant category.

86. In any event, the Final Rule misinterprets the holding of *Bostock* and the definition of "sex" discrimination adopted by the *Bostock* majority. *Bostock* does not hold that discrimination on account of "sexual orientation" or "gender identity" is discrimination on account of "sex"; rather, it holds only that Title VII's prohibition on "sex" discrimination prohibits employers from firing or refusing to hire individuals "for being homosexual or transgender."

87. *Bostock* explains that an employer who fires an employee for conduct or personal attributes that it would tolerate in a person of the opposite biological sex has made the employee's sex the "but-for cause" of his discharge, and that (in the Court's view) automatically violates the statutory command of Title VII. The Court explained:

> If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Bostock, 590 U.S. at 660.

88. *Bostock* also makes clear that an employer does *not* violate Title VII or engage in "sex" discrimination if it fires an employee for conduct or personal attributes that it would not tolerate in an employee of the opposite biological sex:

> Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent.

Id.

89. *Bostock* does not prohibit employers (or anyone else) from discriminating on account of sexual orientation or gender identity, so long as they do not engage in "sex" discrimination when doing so. For example, *Bostock* does not prohibit discrimination against bisexual students or individuals, so long as the employer regards bisexual behavior or orientation as equally unacceptable in a man or a woman. *See, e.g.*, *Bostock*, 590 U.S. at 660; *see also id.* at 658 ("[F]iring [a] person for actions or attributes it would tolerate in an individual of another sex … discriminates against that person in violation of Title VII.").

90. Discrimination against bisexuals is certainly discrimination on account of "sexual orientation," but it is not discrimination on account of "sex."

91. *Bostock* allows discrimination against homosexual or transgender individuals, so long as it is done pursuant to rules or policies that apply equally to both sexes and would lead to the same result if the individual's biological different were different.

92. A teacher or professor, for example, may refuse to accommodate a transgender or nonbinary student's demands to be referred to by the singular pronoun "they"—so long as the teacher or professor refuses demands for such pronoun usage on equal terms from a biological male or a biological woman, and would equally refuse to honor the transgender or nonbinary student's request if that student's biological sex were different.

93. Even if the Department considers policies or practices of that sort to be regarded as discrimination against transgender or non-binary individuals, they do not constitute "sex" discrimination as defined in *Bostock* because the policies apply equally to both biological sexes. *See Bostock*, 590 U.S. at 669 ("We agree that homosexuality and transgender status are distinct concepts from sex.").

94. The Final Rule wrongly equates discrimination on account of sexual orientation and gender identity with "sex" discrimination. Yet there are many ways in which entities covered by Title IX could discriminate against homosexual, bisexual, transgender, or non-binary individuals without engaging in the kind of "sex"–based discrimination described in *Bostock*.

95. The Final Rule further conflicts with the reasoning of *Bostock* because that case did not find that all sex-based distinctions were prohibited. *Bostock* repeatedly cited the Court's earlier decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), as authority. *Oncale* explained that Title VII "does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex," and "requires neither asexuality nor androgyny in the workplace." *Id.* at 75, 81.

96. The *Oncale* Court noted the central concern of Title VII was not every aspect of interaction in the workplace but "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

97. The Second Circuit—in one of the cases consolidated with and affirmed in *Bostock*—also favorably cites *Oncale* as "arguably" supporting the view that "sex-specific bathroom and grooming policies [do not] impose disadvantageous terms or conditions" because not all distinctions of "'sexual content or connotations' rise to the level of discrimination." *Zarda v. Altitude Express, Inc.,* 883 F.3d 100, 119 & n.16 (2d Cir. 2018) (en banc) (quoting *Oncale*, 523 U.S. at 79–80)); *see also West v. Radtke*, 48 F.4th 836, 849 (7th Cir. 2022) (finding Title VII would not be violated by preventing transgender prison guard from performing strip searches of opposite-sex inmates).

98. Relatedly, *Bostock* also cautioned that "Title VII does not concern itself with everything that happens 'because of' sex," *Bostock*, 590 U.S. at 657—only discrimination that is "inextricably" related to sex is forbidden; distinctions "related to sex in some vague sense" or having only "some disparate impact on one sex or the other" are not reached by the statute. *Id.* at 660–61.

99. *Bostock* did not overturn any Supreme Court precedents, instead resting on those dating to the 1970s. It also did not disturb lower-court precedent that has long applied those same precedents. "[T]the Court relied in *Bostock* on the same well established Title VII principles that animated the outcome in those prior decisions [of lower courts that applied the same key precedents, so those courts] effectively anticipated *Bostock*'s rationale." *Maner v. Dignity Health*, 9 F.4th 1114, 1124 (9th Cir. 2021) (Bea, J.) (explaining *Bostock* did not overturn decades of lower-court precedents rejecting "paramour preference" theory of liability).

100. This is consistent with *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc), which upheld sex-specific grooming codes under Title VII. *Willingham* applied *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) one of the key cases the Supreme Court relied on in *Bostock*. The Second Circuit in *Zarda*— which relied on the same key precedents that the Supreme Court would later adopt in *Bostock* (*Martin Marietta* and *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978))—favorably cited *Willingham* as consistent with its analysis. *Zarda*, 883 F.3d at 118–19.

101. In short, *Bostock* did not nullify the Supreme Court's longstanding acceptance of differences between the sexes. It did not question any longstanding precedent beyond the narrow question before it: whether "[a]n employer who fires an individual *merely for being* gay or transgender defies the law." *Bostock*, 590 U.S. at 683 (emphasis added).

C. The Final Rule's expansion of Title IX's scope into sexual orientation and gender identity violates the Clear Statement Rule and the Major Questions Doctrine.

102. Even if there were ambiguity on whether Title IX adopts the Final Rule's definition of discrimination "on the basis of sex," that ambiguity must be resolved in favor of the State because conditions on federal funding must be stated clearly. *Adams*, 57 F.4th at 815.

103. Congress enacted Title IX pursuant to its powers under the Spending Clause. *Davis*, 526 U.S. at 640 ("[W]e have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause[.]"). If Congress intends to impose a condition on the grant of federal funding under Title IX, it must do so with "a clear voice," "unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

104. This clear statement rule is required when imposing a condition on federal funding because "legislation enacted pursuant to the spending power is much in the nature

of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Adams*, 57 F.4th at 815 (citing *Pennhurst*, 451 U.S. at 17). "Recipients cannot knowingly accept the deal with the Federal Government unless they would clearly understand the obligations that would come along with doing so." *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 219 (2022) (internal quotations omitted).

105. The use of the word "sex" in Title IX did not put educational institutions and programs on notice that by accepting funding from the federal government for educational services and activities, they are prohibited from providing bathrooms or other facilities for the two sexes. *See Adams,* 57 F.4th at 816. That is clear not only from historical practice but from Defendants' longstanding interpretation of Title IX and its implementing regulations, which "include provisions that presuppose sex as a binary classification." 85 Fed. Reg. at 30,178.

106. Similarly, courts will not assume that Congress has assigned questions of "deep economic and political significance" to an agency unless Congress has done so expressly. *See King v. Burwell*, 576 U.S. 473, 486 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

107. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

108. "Congress typically [does not] use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme …We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* (cleaned up); *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 160.

109. The Final Rule will affect all elementary schools, secondary schools, postsecondary institutions, and other recipients of federal financial funds with far-reaching social and economic impact. Yet Title IX's language cannot be plausibly read to smuggle in

a power for federal agencies to overturn the "unremarkable—and nearly universal—practice[s]" such as separating bathrooms by biological sex, common in States' governance of schools. *Adams*, 57 F.4th at 796.

D. In the alternative, if *Bostock* applies to Title IX, the Final Rule violates it.

110. In addition, even if Title IX covered discrimination on the bases of sexual orientation and gender identity, the Final Rule interprets Title IX's anti-discrimination provision as requiring accommodations for gender identity even though Title IX—unlike Title VII's prohibition on religious discrimination and the disability discrimination provisions of the Rehabilitation Act and the Americans with Disabilities Act—has no accommodation requirement.

111.The Final Rule requires exceptions from admittedly lawful sex-segregated policies and facilities for those whose gender identity is transgender—and only for them, as schools would still be allowed to prevent biological males who do not identify as women from entering female-only spaces and programs. *See* 89 Fed. Reg. at 33,818 (under Final Rule, "sex separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination" but when a school "denies a transgender student access to a sex-separate facility or activity consistent with that student's gender identity, this would violate Title IX's general nondiscrimination mandate"); *id.* at 33,887 (to be codified at 34 C.F.R. § 106.31: where Title IX permits "different treatment or separation in a manner that discriminates on the basis of sex," the Final Rule requires "sex" to be determined by gender identity); *id.* at 33,820 (reasoning that non-transgender students are not harmed by being denied access to sex-separated facilities such as restrooms and locker rooms, so only transgender students are protected by the new 34 C.F.R. § 106.31(a)(2) that prohibits "more than de minimis harm").

112. The types of school policies targeted by the Final Rule do not discriminate based on gender identity. While *Bostock* held that "discrimination based on homosexuality

or transgender status necessarily entails discrimination based on sex," 590 U.S. at 669, the Final Rule instead addresses "the converse question: whether discrimination on the basis of sex necessarily entails discrimination based on transgender status." *Adams v. Sch. Bd. of St. Johns Cty.*, 3 F.4th 1299, 1332 (11th Cir. 2021) (Pryor, C.J., dissenting), *rev'd by Adams.*, 57 F.4th 791.

113. The Final Rule never addressed the question of whether the policies "impose[d] disadvantageous terms or conditions" based on sex. The Second Circuit ruling affirmed in *Bostock* left this question open but indicated the serious possibility that such policies were not covered by Title VII even if discrimination based on sexual orientation and gender identity were forbidden. *Zarda*, 883 F.3d at 118–19 (favorably citing on this ground *Oncale,* 523 U.S. 75, and *Willingham*, 507 F.2d 1084). This distinction is alluded to in *Bostock* itself. *See Bostock*, 590 U.S. at 681 (after noting that its reasoning does not settle the issue of "bathrooms, locker rooms, or anything else of the kind," referring to Title VII's limitation to "distinctions or differences in treatment that injure protected individuals"; while "firing employees surely counts other policies and practices might or might not qualify as unlawful discrimination") (cleaned up). But if such policies *are* covered by Title IX, then the Final Rule violated the prohibition on treating employees and students differently based on gender identity.

114. Consider standard bathroom norms. All biological males, regardless of their gender identity, may use the men's bathroom; all biological females, regardless of their gender identity, may use the women's bathroom. "Separating bathrooms based on sex dates back as far as written history will take us," long before the concept of gender identity even existed. *Adams*, 3 F.4th at 1328 (Pryor, C.J., dissenting) (cleaned up), *rev'd*, 57 F.4th 791. These policies do not even consider "gender identity," and therefore cannot be described as discriminating based on that category. *Cf. Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 n.7 (2003) ("[I]f no part of the hiring decision turned on [the applicant's] status as disabled, he cannot, *ipso facto,* have been subject to disparate treatment"). "Separating

bathrooms by sex treats people differently on the basis of sex … [but] the mere act of determining an individual's sex, using the same rubric for both sexes, does not treat anyone differently on the basis of sex." *Adams*, 3 F.4th at 1325–26 (Pryor, C.J., dissenting), *rev'd*, 57 F.4th 791.

115. The Final Rule purports to allow sex-specific bathrooms, locker rooms, and showers (explicitly) and sex-specific dress codes and pronoun usage policies (implicitly) as a general matter. But it then "tr[ied] to work around [those concessions] with a linguistic device." *Doe 2 v. Shanahan*, 917 F.3d 694, 723 (D.C. Cir. 2019) (Williams, J., concurring in the result) (criticizing plaintiffs' concession that military may have sex-specific standards while arguing that "sex" should be determined by subjective gender identity). It is no consolation to tell schools they can still have sex-specific bathrooms (or dress codes or pronoun usage) so long as they allow exceptions for individuals who subjectively identify as the opposite sex.

116. If schools may have separate facilities or policies for men and women, as the Final Rule concedes, then they may also require compliance with those policies. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 30, at 192–93 (2012) ("[W]henever a power is given by a statute, everything necessary to making it effectual or requisite to attaining the end is implied.") (citation omitted). The same is true for sex-specific dress codes or allowing the use of gendered pronouns as part of standard English in schools; such policies do not classify based on the gender identity of anyone but disregard that concept altogether, exactly as *Bostock* requires. Indeed, to allow schools to have sex-specific policies, but then require them to have exemptions only for transgender employees or students, violates *Bostock* because such a rule discriminates based on gender identity.

V. The Final Rule's Irreparable Harm to Texas

Texas is harmed by the Final Rule in several ways.

A. Texas is the object of the Final Rule and faces compliance costs.

117. Texas administers numerous education programs and operates thousands of educational institutions through its constituent agencies and political subdivisions, including programs and institutions that receive federal funding and are subject to Title IX and its effectuating regulations.

118. The Texas Constitution charges the Texas Legislature "to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Tex. Const. art. VII, § 1.

119. Pursuant to this charge, Texas funds, regulates, and oversees the Nation's second-largest K–12 public education system, serving over 5.4 million students across 1,200 school districts. Tex. Educ. Agency, *Enrollment in Texas Public Schools 2021-22* at ix (June 2022), https://tea.texas.gov/reports-and-data/school-performance/accountability-research/enroll-2021-22.pdf.

120. The Texas Education Agency ("TEA") is a state agency charged by State law to oversee the State's public school system's compliance with Title IX. *See* Tex. Educ. Code § 7.021. As part of its mandate, TEA allocates the majority of federal funding for Texas K-12 education. *See* Ex. A, Decl. Michael Meyer ¶ 6.

121. In the 2021–2022 biennium, Texas received approximately $6.6 billion dollars in federal funds for its K-12 education. Tex. Educ. Agency, 2022 *Comprehensive Biennial Report on Texas Public Schools* at 239 (Dec. 2020), https://tea.texas.gov/reports-and-data/school-performance/accountability-research/comp-annual-biennial-2022.pdf.

122. In fiscal year 2023, Texas public schools received approximately $9.4 billion in federal funding distributed by TEA and an additional $4.8 billion in federal disbursements that were allocated by the federal government directly or another intermediary. *See* Ex. A ¶¶ 4–5.

123. State statute requires TEA to operate a number of educational programs directly. These include "regional day programs" for deaf students and a school network for students with "visual impairments." Tex. Educ. Code 7.021(b)(10), (11).

124. The Texas School for the Deaf is a state agency that provides educational services, on a day and residential basis, to students who are deaf or hard of hearing. Tex. Educ. Code § 30.051; Ex. B, Decl. of Peter L. Bailey ¶ 3. The school's dormitories, athletic teams, and locker rooms are separated by biological sex. *Id.* at ¶¶ 3–4.

125. The Texas School for the Deaf relies on federal funding for the services it provides to students and their families. *Id.* at ¶ 5. The school received $1,261,735.00 in federal funds for fiscal year 2024. *Id.*

126. Texas also funds, supports, and administers a robust higher education network. Texas is home to 119 public postsecondary institutions, including 37 universities and 82 two-year colleges and technical schools. *See* Tex. Higher Educ. Coordinating Bd., *2020 Texas Public Higher Education Almanac* at 28, 47 (Sept. 28, 2020), https://reportcenter.highered.texas.gov/agency-publication/almanac/2020-texas-public-higher-education-almanac/.

127. While most States have just one or two public university systems, Texas has six. The largest of these systems—the University of Texas—has 14 separate locations that educate approximately 256,000 students each year. *See About The University of Texas System*, THE UNIVERSITY OF TEXAS SYSTEM, https://www.utsystem.edu/about. All told, the State's entire higher education network includes 148 public institutions and currently enrolls approximately 1.4 million students. *See* Ex. C, Decl. of Sarah Keyton ¶ 3.

128. Public postsecondary education institutions in Texas received approximately $2.5 billion in federal funding during fiscal year 2022.

129. As a condition of receiving federal funding, Title IX protections against sex-based discrimination apply to state educational institutions. *See* 20 U.S.C. § 1681. Hence, should Texas, or any of Texas's affiliated academic institutions, deviate from the Department's guidance effectuating Title IX, that departure would invite enforcement actions at the risk of significant monetary penalties, up to and including the loss of federal money.

130. Public education in Texas depends on federal funds. Institutions that lose their federal funding will need to eliminate certain educational services if they cannot find alternative funding sources. *See* Exs. A ¶ 8, B ¶¶ 6–7, C ¶ 7.

131. Texas educational institutions rely on federal funding and will be irreparably harmed if they lose their funding because of their reliance on 50 years of Title IX practice and legal precedent interpreting "on the basis of sex" to mean biological sex, *not* "sexual orientation" and "gender identity." *Id.*

132. It is a "fundamental canon of statutory construction" that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" at the time of enactment. *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); Scalia & Garner, *supra*, at 16 (same).

133. No dictionary at the time Title IX was enacted defined "sex" to include "gender identity" or "sexual orientation." *Adams*, 57 F.4th at 812–13.

134. Texas, relying on the contemporary (and etymological) meaning of "sex" when Title IX was enacted, adopted laws, policies, and procedures, and significantly invested in an entire infrastructure to implement its education systems. The Final Rule upends these important reliance interests and usurps Texas's sovereignty by adding "gender identity" and "sexual orientation."

135. The Final Rule refuses to define "gender identity" and "sexual orientation," nor whether both fixed and fluid identities and orientations are protected.

136. The Final Rule's protections for an ever-fluctuating number of gender identities and sexual orientations, which individuals can allegedly change at any time, anywhere, and for any (or no) reason, undermines Title IX's original sex-based protections. *See United States v. Varner*, 948 F.3d 250, 256–58 (5th Cir. 2020) (examining bewildering assortment of purported gender identities and bespoke pronouns).

137. Texas independent school districts and Texas public universities are instrumentalities of the State. *See, e.g., Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008).

138. Federal funding allocated to Texas's post-secondary public universities, technical educational institutions, health-related educational institutions, and community colleges is managed by the Texas Higher Education Coordinating Board ("THECB"). Ex. C ¶ 3.

139. In fiscal year 2022, Texas public universities received more than $3.8 billion in federal funding; Texas community colleges received more than $2.1 billion in federal funds; Texas technical educational institutions received more than $100 million in federal funds; and Texas health-related educational institutions received more than $1.5 billion in federal funds. *See* Tex. Higher Educ. Coordinating Bd., Sources and Uses Report, at https://www.highered.texas.gov/our-work/supporting-our-institutions/institutional-funding-resources/sources-and-uses/.

140. The Final Rule threatens to withdraw federal funding from Texas educational institutions. The Department may pursue enforcement actions against educational facilities that are out of compliance with its aberrant interpretation of Title IX and penalize any institution deemed non-compliant by withholding funds. *See* U.S.C. §§ 1681, 1682; Exs. A ¶¶ 7–8, B ¶¶ 6–8, C ¶¶ 6–7.

141. Complying with Title IX costs Texas money. Texas educational institutions undertake internal efforts to ensure compliance with Title IX, including federal regulations promulgated pursuant to Title IX. These efforts involve but are not exhausted by hiring

staff to perform compliance reviews, facilitate the Title IX grievance process, and respond to lawsuits that stem from allegations of liability under Title IX protections. *See* Ex. D, Decl. of Rick Olshak ¶¶ 4–5.

142. These and other compliance efforts incur considerable expense to state educational facilities. The costs of complying with Title IX will likely increase when the Department of Education adopts new regulations that create additional requirements or make existing requirements more demanding. *See id.* These include the administrative costs due to the increased caseload caused by the Final Rule's lower standard for harassment, the extension of coverage to off-campus behavior, regulating covered third-party entities, increased referrals to the Title IX Coordinators, updating training and educational materials for employees, and maintaining two different complaint processes. *Id.*

143. Even the Department's low regulatory cost estimates reveal a substantial monetary burden on state educational facilities. Overall, the Department estimates more than $98 million in short-term compliance costs, some of which will fall on Texas schools. *See* 89 Fed. Reg. at 33,861.

144. Further aspects of the Department's regulatory burden analysis reflect an arbitrary and capricious consideration of relevant information. The Department failed to adequately consider how expanding Title IX to apply to gender identity would impose new regulatory burdens on recipients. With no reasonable explanation, the Department asserts that extending Title IX protections to an entirely new class will not add new compliance costs or create additional liability. *See id.* at 33,876.

145. Contrary to the Department, responsible deliberation during the rulemaking phase would have concluded that expanding Title IX's anti-discrimination mandate to cover gender identity will likely increase costs for recipients, including Texas educational institutions.

146. Nor could the Department have reasonably concluded that the new rule would not interfere with local and State governments "in the exercise of their governmental functions." *Id*. at 33,859.

B. The Final Rule expands liability to Texas and other recipients of federal education funds.

147. Educational institutions are subject to liability for alleged violations of Title IX. *See generally, Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, (2009). The Final Rule forces a waiver of Texas's sovereign immunity as to certain regulatory requirements without its consent.

148. The Final Rule rolls back constitutional safeguards for students while expanding recipients' liability far beyond what title IX allows. These changes are unconstitutional.

149. Indeed, the Final Rule goes so far as to reinterpret the word "sex" to include "sexual orientation" and "gender identity."

150. Not only does it reinvent the definition of "sex discrimination" to include "sexual orientation" and "gender identity" impermissibly, but the Final Rule also expands when, where, and how recipients must respond to claims of sexual harassment—extending to conduct that occurs online, off campus, outside the United States, or even before the relevant individuals attended the school. 89 Fed. Reg. at 33,386, 33,527.

151. Additionally, the Final Rule amends the definition of "sexual harassment" in 34 C.F.R. § 106.2 to include unwelcome sex-based conduct (1) "that is sufficiently severe *or* pervasive," and (2) "that based on the totality of the circumstances and evaluated *subjectively and objectively*, denies or *limits* a person's ability to participate in" the recipient's education program or activity. 89 Fed. Reg. at 33,517 (emphasis added).

152. On its own, the redefinition of "sex discrimination" to include sexual orientation and gender identity increases the odds of academic institutions intruding on

protected rights when seeking to enforce Title IX. But when combined with the other listed changes, the danger becomes especially acute.

153. For example, the Final Rule directly curtails First Amendment and Due Process protections for Texas students. It does this by lowering he standard for sex-based harassment to a "preponderance-of-the-evidence" standard; barring accused students from access to evidence, offering them instead a mere "description" of "relevant" evidence; and permitting recipients to adopt the investigator model, in which a single "decisionmaker" adjudicates the proceedings as prosecutor, judge, and jury. *See* 89 Fed. Reg. at 33,891–95.

154. These weakened standards are introduced at the same time the recipient's liability expands. The Department thus gives recipients cause to initiate more zealous Title IX enforcement proceedings, reducing students' access to a fair hearing when accused of harassment.

155. Additionally, compared to the 2020 Rule, the standards advanced by the Final Rule would create far more opportunities for recipients to inadvertently fall out of compliance. The previous version of § 106.44(a) required recipients to "respond promptly in a manner that is not deliberately indifferent"—something they could achieve if their response was not "clearly unreasonable in light of the known circumstances." 2020 Rule, 85 Fed. Reg. at 30,574. Recipients therefore had more flexibility in how to craft a response that was appropriate to the facts and parties involved. Recipients were also judged based on the information they had on hand without the benefit of hindsight, which the Final Rule could allow.

156. But the language in the Final Rule unlawfully shifts from the deliberate indifference standard which requires institutions to take actions reasonably calculated to address allegations to a standard that requires their actions to be "effective."[4]

157. Yet institutions do not have an obligation under Title IX to eliminate discrimination; they are merely obligated to respond in a manner that is not clearly unreasonable.[5]

158. The Final Rule greatly expands the scope of Title IX protections, thereby expanding the range of conduct that could give rise to a lawsuit against Texas educational institutions. *See, e.g.*, 89 Fed. Reg. at 33,563 ("the recipient need not have incontrovertible proof that conduct violates Title IX for it to have an obligation to respond," but rather "if the conduct reasonably *may* be sex discrimination, the recipient must respond in accordance with § 106.44" (emphasis added)).

159. Because the Final Rule contradicts existing case law, including the departure from *Davis,* grants institutions the permission to ditch live hearings, permits a single-investigator model, and revokes the right to cross-examination—the likelihood that Texas institutions will get sued and lose lawsuits is significant. Texas schools are placed in a no-win situation—where adherence to the Constitution risks the loss of federal funds.

C. The Final Rule infringes on Texas's sovereignty.

160. The Final Rule injures Texas by obstructing its sovereign authority to enforce and administer its laws and by imposing substantial pressure on Texas to change

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[4] "§ 106.44(a) (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." 89 Fed. Reg. at 33563 (emphasis added).

[5] *See Davis*, 526 U.S. at 648–49 ("[C]ourts should refrain from second guessing the disciplinary decisions made by school administrators," who "must merely respond to known peer harassment in a manner that is not clearly unreasonable.") (citations omitted).

its laws and policies. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (impeding a state's sovereign interest in creating and enforcing a legal code was an injury-in-fact sufficient to find standing); *see also Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015) ("[S]tates may have standing based on (1) federal assertions of authority to regulate matters they believe they control, (2) federal preemption of state law, and (3) federal interference with the enforcement of state law[.]").

161. The Final Rule conflicts with Texas law governing school athletics programs.

162. Texas has enacted laws to protect sex separation in K-12 and higher education athletics programs.

163. Texas law provides that "an interscholastic athletic competition team sponsored or authorized by a school district or open-enrollment charter school may not allow [] a student to compete in an interscholastic athletic competition sponsored or authorized by the district or school that is designated for the biological sex opposite to the student's biological sex." Tex. Educ. Code § 33.0834; *see also* University Interscholastic League Non-Discrimination Policy, Const. sub. J (accessed May 12, 2024) (policy segregating certain school sports based on sex), https://www.uiltexas.org/policy/constitution/general/nondiscrimination.

164. The Final Rule prohibits separation based on biological sex in K-12 athletics teams, which indicates that the Department will investigate K-12 schools for following Texas law and provides that the Department may sanction the schools by withholding federal funding for complying with Texas law. *See* 89 Fed. Reg. at 33,886.

165. Texas law also provides that "an intercollegiate athletic team sponsored or authorized by an institution of higher education may not allow a student to compete on the team in an intercollegiate athletic competition sponsored or authorized by the institution that is designated for the biological sex opposite to the student's biological sex." Tex. Educ. Code. § 51.980.

166. The Final Rule's prohibition on the separation of education athletics teams based on biological sex will subject institutions of higher education to investigation (and possibly sanctions) by the Department merely for complying with Texas law. *See* 89 Fed. Reg. at 33,886.

167. The Final Rule also conflicts with the policies adopted by some of Texas's political subdivisions—pursuant to authority granted by state law—regarding separating school bathrooms and locker rooms by biological sex. For example, the Carroll, Frisco, and Grapevine–Colleyville Independent School Districts require schools owned or operated by the districts to separate bathrooms, locker rooms, shower rooms, and other similar facilities based on biological sex determined at birth and correctly identified on a person's birth certificate.

168. Under Texas statute, independent school districts are expressly authorized to exercise State power by implementing local policies; the trustees of ISDs "have the exclusive power and duty to govern and oversee the management of the public schools of the district." Tex. Educ. Code § 11.151(b).The Final Rule conflicts with each of these policies by treating them as unlawful sex discrimination and by requiring school districts to change their policies to separate bathrooms, locker rooms, showers, and changing facilities based on gender identity instead of biological sex to remain in compliance with the Rule. *See* 89 Fed. Reg. at 33,886.

169. The Final Rule requires using pronouns that are consistent with a person's gender identity rather than biological sex, which conflicts with policies adopted by some of Texas's political subdivisions and is not required by Texas state law. For example, the Carroll and Grapevine–Colleyville Independent School Districts have adopted policies that prohibit district employees from requiring the use of pronouns that are inconsistent with a person's biological sex as correctly identified on a person's birth certificate or other government-issued record.

170. The Final Rule conflicts with these policies by treating them as unlawful sex discrimination and by requiring school districts to change their policies to use pronouns based on a person's gender identity instead of biological sex to remain in compliance with the Final Rule. *See* 89 Fed. Reg. at 33,886. Compliance with the Final Rule would expose the school districts to liability for violating district employees' and students' religious freedom and free speech rights, despite district policies protecting those rights.

171. The Final Rule explicitly preempts contrary state laws and directs recipients of Title IX funding to comply with the Final Rule in the event of a conflict with state law. *See* 89 Fed. Reg. at 33,885. These injuries are sufficient to establish Texas's standing.

172. The Final Rule also purports to override Texas's abortion prohibitions.

173. The Final Rule purports to protect women who abort their pregnancies, even when doing so violates Texas law.

174. The Final Rule purports to ban "discrimination" against anyone who has had an abortion, even if the abortion was illegal.

175. The Final Rule defines "pregnancy or related conditions" to include "termination of pregnancy." 89 Fed. Reg. at 33,883 (to be codified at 34 C.F.R. § 106.2).

176. The Final Rule stipulates that every recipient of federal funds, including educational institutions, must treat abortion on the same terms as "any other temporary medical condition." *See* 89 Fed. Reg. at 33,887–888 (to be codified at 34 C.F.R. § 106.40(b)(6)(vi)(4) ("[A] recipient must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions.").

177. Accordingly, the Final Rule requires all healthcare plans offered by every educational institution to cover abortion on the same terms as "any other temporary medical condition." *Id.*

178. The Final Rule also requires schools to excuse a student's absence for "terminat[ing] [her] pregnancy" even when doing so violates Texas law. *See id.*

179. This provision of the Final Rule is another attempt by the Biden Administration to nullify *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). The Supreme Court has held that "the Constitution does not confer a right to abortion" and "does not prohibit the citizens of each State from regulating or prohibiting abortion." *Id.* at 2279, 2284.

180. In accordance with *Dobbs*, Texas regulates and prohibits abortions.

181. Under Texas's Human Life Protection Act, "[a] person may not knowingly perform, induce, or attempt an abortion." Tex. Health & Safety Code § 170A.002. That prohibition does not apply if the woman on whom the abortion is performed "has a life-threatening physical condition" arising from a pregnancy that places her "at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed." Tex. Health & Safety Code § 170A.002(b)(2). Texas law imposes criminal and civil penalties for violation of this law. *See* Tex. Health & Safety Code §§ 170A.004–.005; Tex. Penal Code § 12.32–.33.

182. In addition to the Human Life Protection Act, Texas statutes predating *Roe v. Wade* also address the subject of abortion. *See* Tex. Rev. Civ. Stat. arts. 4512.1–.4, .6 Under those statutes, any person who causes an abortion is guilty of an offense and shall be confined in a penitentiary. *Id.* at 4512.1. Moreover, an individual may not act as an accomplice to abortion or an attempted abortion. *Id.* at 4512.2–.3. However, it is not an offense if the abortion is performed under "medical advice for the purpose of saving the life of the mother." *Id.* at 45.12.6.

183. The Texas pre-*Roe* statutes also impose felony criminal liability on any person who engages in conduct in Texas that "procures" an abortion, as well as any person who aids or abets this procuring conduct. *See* Tex. Rev. Civ. Stat. arts. 4512.1.

184. Plaintiffs Hatfield and Bonevac do not intend to accommodate student absences from class to obtain abortions—including illegal abortions and purely elective abortions that are not medically required. Nor will Plaintiffs Hatfield and Bonevac hire a

teaching assistant who has violated the abortion laws of Texas or the federal-law prohibitions on the shipment or receipt of abortion pills and abortion-related paraphernalia. *See* 18 U.S.C. § 1461–1462.

185. The Final Rule purports to preempt Texas' laws by requiring its schools to protect actions that would otherwise violate State law. This violates Texas's "sovereign interest in the power to create and enforce a legal code." *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015) (quotation omitted).

186. Texas's injuries are directly traceable to the Final Rule. They would be redressed by the relief sought in this case, *see Texas v. EEOC*, 933 F.3d 433, 449 (5th Cir. 2019), which includes staying and ultimately vacating the Final Rule under the APA, and preliminarily and permanently enjoining its enforcement, as well as any further attempts to interpret, apply, or enforce Title IX as including sexual orientation or gender identity in its anti-discrimination mandate.

187. Likewise, an injunction restraining the Department from applying the Final Rule to the State would also restrain the Department from applying the Rule to subdivisions of the State, including Texas ISDs, thereby redressing injuries caused by depriving ISDs of policies based on respecting biological sex differences. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362-64 (2009); *see also Commonwealth v. Biden*, 57 F.4th 545, 557 (6th Cir. 2023) ("An injunction barring the federal government from enforcing the mandate against the States would also run to the States' subdivisions and thus would not encroach on the States' own vaccination policies for state employees)".

VI. Claims

Count I
The Final Rule Exceeds Statutory Authority and is Not in Accordance with Law 5 U.S.C. § 706

188. Plaintiff incorporates by reference all other paragraphs.

189. The Final Rule is a final agency action within the meaning of 5 U.S.C. 704 because it was published in the Federal Register following notice-and-comment. 89 Fed. Reg. at 33,474. Texas lacks another adequate remedy by which to challenge the Final Rule, and no legal authority requires that Texas appeal to a superior agency prior to seeking judicial review. 5 U.S.C. § 704.

190. Under the APA, a court must "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of statutory… authority, or limitations, or short of statutory right." 5 U.S.C. 706(2)(A), (C). This is because "[a]dministrative agencies are creatures of statute" and "accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022).

191. The Final Rule is not in accordance with law and exceeds the Department's statutory authority because the plain language of Title IX and its implementing regulations allow recipients of federal education funds to distinguish between biological males and biological females in situations the Final Rule condemns. And the correct interpretation of Title IX's prohibition on discrimination "on the basis of sex" does not include protections for the concepts of sexual orientation or gender identity. Nor does Title IX reach issues of pregnancy discrimination or require professors to accommodate students who skip class to obtain abortions. *See Geduldig v. Aiello*, 417 U.S. 484 (1974). Nor does Title IX require professors and universities to accommodate or employ students who have engaged in the shipment or receipt of abortion pills and abortion-related paraphernalia in violation of federal law. *See* 18 U.S.C. § 1461–1462. And Title IX does not require educational institutions that receive federal funds to cover abortions in student health-insurance plans.

See 34 C.F.R. § 106.40(b)(6)(vi)(4). Even if *Bostock* applied to Title IX, the Final Rule must still be vacated as "not in accordance with law" because its requirements extend far beyond *Bostock*'s interpretation of "sex" discrimination.

192. The Final Rule effectively rewrites the statute from one requiring equal opportunity for both sexes (often through the explicit consideration of biologically based sex differences) into one that requires recipients to engage in sex discrimination in order to accommodate someone's internal sense of gender identity. Indeed, the Final Rule flips Title IX on its head by closing off opportunities to women—the very group the statute was designed to protect. *See, e.g., Soule v. Connecticut Ass'n of Sch., Inc.*, No. 3:20-cv-201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021) (dismissing as moot a suit brought by a group of high school female track athletes seeking to stop two biological males from participating in girls' track competitions), *aff'd*, 57 F.4th 43 (2d Cir. 2022) *and vacated and remanded sub nom.* 90 F.4th 34 (2d Cir. 2023).

193. As a result of the Final Rule, women, among other things, (a) will be deprived of equal athletic opportunities, such as scholarships; (b) will be forced to accept claims about what makes a person a woman that often rely on sex stereotypes and caricatures; (c) will be put in situations that compromise their bodily privacy; and (d) will likely suffer increased sexual violence since the Final Rule fails to provide any safeguards against sexual predators who claim a female gender identity in order to gain access to women-only spaces.

194. The Final Rule is not in accordance with law and exceeds the Department's statutory authority because it relies upon the interpretation of Title VII described in *Bostock* and applies it to Title IX, despite the textual and structural differences between the two statutes and the express disclaimer in *Bostock* that its holding did not apply to other federal or state laws. *See Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) (observing that "Title VII differs from Title IX in important respects").

195. Defendants lack authority to issue, implement, enforce, or rely on regulations that undermine the purpose of Title IX and are contrary to its text and structure. They cannot circumvent these limitations by citing to a narrow Supreme Court holding involving the interpretation of an unrelated statute that was enacted nearly a decade later, pursuant to a different constitutional power.

196. The Final Rule is not in accordance with law and exceeds the Department's statutory authority because it expands recipients' liability beyond the scope of the statute. The Final Rule expands Title IX to include "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Id*. These other grounds, however, are not interchangeable with sex.

197. In addition, Title IX limits recipients' obligations to discrimination that occur "under" their "education programs or activities." 20 U.S.C. § 1681(a); *see also id.*at § 1687 (defining programs and activities). This means that the discrimination or harassment "must take place in a context subject to the school district's control." *Davis*, 526 U.S. at 645.

198. The Final Rule nevertheless obliges recipients to "promptly and effectively" address "conduct that occurs in a building owned or controlled by a student organization," 89 Fed. Reg. at 33,886 (34 C.F.R. § 106.11), 33,888 (34 C.F.R. § 106.44); misconduct occurring off campus (online or otherwise) or even "outside the United States," *id*.; and activities that occurred before any of the individuals attended the academic, *id*. at 33,527.

199. The combination of recipients' heightened liability under the Final Rule, the redefinition of "on the basis of sex" to include sexual orientation and gender identity, and the rejection of the *Davis* standard for determining sex-based harassment, will force recipients, including Texas, to intrude on individuals' free speech and due process rights if they are to remain compliant with the regulations. Defendants lack authority under Title IX to induce public institutions to violate the U.S. Constitution.

200. The Final Rule is also not in accordance with law and exceeds the Department's statutory authority because Title IX demands that recipients provide equal treatment to both sexes, yet the Final Rule instructs recipients to establish grievance procedures that treat respondents "equitably." See, *e.g.*, 89 Fed. Reg. at 33891 (34 C.F.R. 106.45(b)(1)).

201. The Final Rule does not define "equity" or "equitably," but Defendants have interpreted the terms elsewhere as necessitating the disparate treatment of individuals based their perceived privilege—the determination of which partially turns on an individual's sex. To the extent that the Final Rule permits disparate treatment on the basis of sex, it contradicts the text, structure, and purpose of Title IX.

202. The Final Rule attempts to impose a legal duty on recipients of federal funds to protect women who abort their pregnancies even when that abortion violates State law. *See* 88 Fed. Reg. 33,887–888.

203. Defendants did not act in accordance with the law and exceeded their statutory and regulatory authority when promulgating the Final Rule, and they do not act in accordance with the law and exceed their statutory and regulatory authority when enforcing the policies set forth in these regulations. "Vacatur is the normal remedy under the APA, which provides that a reviewing court 'shall ... set aside' unlawful agency action." *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022) (quoting 5 U.S.C. § 706(2)).

Count II
The Final Rule is Contrary to U.S. Constitution
5 U.S.C. § 706

204. Plaintiff incorporates by reference all other paragraphs.

205. The Final Rule is a final agency action within the meaning of 5 U.S.C. 704 because it was published in the Federal Register following notice-and-comment. 89 Fed. Reg. 33,474 (Apr. 29, 2024). Texas lacks another adequate remedy by which to challenge the Final Rule, and no legal authority requires that Texas appeal to a superior agency prior to seeking judicial review. 5 U.S.C. § 704.

206. Under the APA, a court must "hold unlawful and set aside agency action" that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

FREE SPEECH RESTRICTIONS

207. The Final Rule violates the First and Fourteenth Amendments because it imposes viewpoint-based and content-based restrictions on students and employees affiliated with recipients and compels public entities, like Texas, to enforce said restrictions at risk of the federal funds. Specifically, the Final Rule deliberately discards the standard for actionable sexual harassment articulated by the Supreme Court in *Davis* and adopted by the Department in its 2020 rulemaking, in favor of a weaker standard that requires schools to police wide swaths of constitutionally protected activity.

208. In *Davis*, the Court held that recipients can violate Title IX only if they have "actual knowledge" of sexual harassment and are "deliberately indifferent" to it. 526 U.S. at 650. And the harassment in question must be "so severe, pervasive, *and* objectively offensive that it *denies* its victims the equal access to education." *Id.* at 652 (emphases added). This standard intentionally excludes "a single instance of one-on-one peer harassment," even if "sufficiently severe," and harassment that has only negative effects like "a mere 'decline in grades.'" *Id.* at 652-53.

209. When crafting the *Davis* standard, the Supreme Court made clear that it chose this stringent definition in part to avoid constitutional concerns. *E.g.*, *id.* at 648-49, 652-53. In the dissent, Justice Kennedy had argued that, if schools are liable for student-on-student harassment, then they will adopt "campus speech codes" that "may infringe students' First Amendment rights." *Id.* at 682; *see id.* at 667 (noting that schools' "power to discipline its students" for harassment is "circumscribed by the First Amendment"). In response, the majority explained that its narrow definition accounts for "the practical realities of responding to student behavior." *Id.* at 652-53 (citing the dissent). Those "practical realities," the Court agreed, include the need to comply with the First Amendment. *See id.* at 649 (agreeing with the dissent that schools face "legal constraints on their disciplinary authority" and explaining that its interpretation of Title IX would not require universities to risk "liability" via "constitutional … claims").

210. Notably, *Davis* refused to adopt the definition of harassment that governs the workplace under Title VII. While actionable harassment under Title VII can be "severe *or* pervasive," students are not employees and Title IX's "severe *and* pervasive" standard reflects the greater First Amendment concerns that arise in the educational context. *See id.* at 651 (emphases added; distinguishing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). In short, "the school is not the workplace." *Adams*, 57 F.4th at 808 (discussing *Davis*).

211. Hence why the Trump administration "adopt[ed]" the *Davis* standard "verbatim." 85 Fed. Reg. at 30,036; *accord id.* at 30,151-52, 30,164-65 & nn.738-39; 34 C.F.R. §106.30(a). Broader definitions of harassment, the Department found, have "infringed on constitutionally protected speech" and have led "'many potential speakers to conclude that it is better to stay silent.'" 85 Fed. Reg. at 30,164-65 & nn.738-39. According to the Department then, the *Davis* standard "ensures that speech … is not peremptorily chilled or restricted" because it applies only when harassment rises to the

level of "serious *conduct* unprotected by the First Amendment." *Id.* at 30,151-52 (emphasis added); *accord id.* at 30,162-63.

212. The Department now thinks the Supreme Court's definition isn't good enough; its new definition deviates from *Davis* in several key ways

213. The Final Rule expands Title IX to cover harassment that's "severe *or* pervasive," 89 Fed. Reg. at 33,884, rather than "severe *and* pervasive," *Davis*, 526 U.S. at 652–53. And the Final Rule applies even if the harassment merely "limits" a person's "ability to participate in or benefit from" a program or activity, 89 Fed. Reg. at 33,884, rather than "denies" a person "access to the educational opportunities or benefits provided by the school," *Davis*, 526 U.S. at 651–53. Broader still, the rule requires recipients to "promptly and effectively end any sex discrimination," regardless whether they were deliberately indifferent to it. *See* 89 Fed. Reg. at 33,889 (Proposed 34 C.F.R. §106.44(f)(1)); *contra Davis*, 526 U.S. at 650–52. As a result, the Final Rule's new hostile-environment definition thus covers a single or isolated incident and all negative effects like a choice to skip class, or a decision not to attend a campus activity. *Davis*, 526 U.S. at 652–53; *accord* 89 Fed. Reg. at 33,511 ("[A] complainant must demonstrate some impact on their ability to participate or benefit from the education program or activity, but the definition does not specify any particular limits or denials."). And the Final Rule's new definition would force students and teachers to, for example, use someone's "preferred pronouns." What's worse, the Final Rule extends to conduct that occurs online, off campus, outside the United States, or even before the relevant individuals attended the school. 89 Fed. Reg. at 33,886, 33,527.

214. At the same time, the Final Rule expands recipients' obligations far beyond what Title IX allows, such as by reinterpreting the word "sex" to include "sexual orientation" and "gender identity." Hence, not only does the Final Rule fundamentally rewrite Title IX's prohibition on sex-based discrimination, but the failure to affirm a student's gender identity would constitute "sex-based harassment" under the new

regulations since it could have negative effects that constitute more than a de minimis harm.

215. Recipients have an obligation under the Final Rule to "take specific actions … to promptly and effectively prevent sex discrimination," including what the Final Rule defines as sex-based harassment. 89 Fed. Reg. at 33,887. It follows that recipients would have an obligation under the Final Rule to confront students and employees who refuse to affirm someone's sexual orientation or gender identity, up to and including disciplinary proceedings, or risk enforcement proceedings against them for noncompliance.

OVERBREADTH

216. The Final Rule violates the First and Fourteenth Amendments because it is vague and overbroad. The Final Rule promulgates an expansive definition of "sex-based harassment" that covers all "unwelcome" expression—even personal speech made in online forums off campus—that might be deemed (1) "subjectively and objectively offensive" and (2) "so severe or pervasive" that the expressive activity "limits" students' educational participation even slightly. 89 Fed. Reg. at 33,884 (amending 34 C.F.R. § 106.02).

217. In addition, the Final Rule enlarged the range of subjects in which expressive conduct may cause offense to include sex stereotypes, sex characteristics, pregnancy or related conditions, as well as sexual orientation and gender identity. This broad framework inhibits First Amendment rights by chilling, or risking liability over, students' expression on deeply held views regarding significant moral and political issues that in no way resemble the hostile environment that these regulations allegedly target.

218. In short, a substantial number of the Final Rule's applications are unconstitutional, when judged in relation to the regulations legitimate sweep. *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

VOID FOR VAGUENESS

219. The Final Rule violates the Fifth and Fourteenth Amendment because it (1) "fails to provide those targeted by the [regulations] a reasonable opportunity to know what conduct is prohibited," *Moore v. Brown*, 868 F.3d 398, 406 (5th Cir. 2017), and (2) "authorizes" and "even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

220. Although "'perfect clarity and precise guidance' are not required," *Doe I v. Landry*, 909 F.3d 99, 117 (5th Cir. 2018) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)), laws and regulations must provide "sufficient definiteness" that ordinary people can understand what is being prohibited, *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 552 (5th Cir. 2008) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

221. The Final Rule, however, demarcates permissible and impermissible conduct based on a complainant's subjective and idiosyncratic response, which is unknowable beforehand. *See*, *e.g.*, 89 Fed. Reg. at 33,510 (noting that subjective standard is based on the complainant's perspective). The Department likewise concedes that "gender identity" turns on "an individual's sense of their gender," which the Final Rule neither explains nor defines. 89 Fed. Reg. at 33,809.

222. Not only do these regulations deny ordinary persons fair notice of what speech and conduct would cause more than a de minimis harm, but their broad sweep allows recipients, coordinators, investigators, and OCR's enforcement division "to pursue their personal predilections" when carrying out the law. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). The result will be a regime that falls more heavily on unpopular and controversial opinions while giving orthodox positions a pass.

DUE PROCESS RIGHTS

223. The Final Rule violates the Fifth and Fourteenth Amendments by inducing recipients, including public entities like Texas, to deny students and employees due process protections when accused of sex-based harassment. Circuit courts across the country

recognize that students have protected constitutional interests in their pursuit of higher education. *See*, *e.g.*, *Plummer v. Univ. of Hous.*, 860 F.3d 767, 774 & n.6 (5th Cir. 2017). And the Supreme Court has assumed such rights in deciding due process cases in the higher education context. *See Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 222–23 (1985).

224. The fundamental tenets of due process require public schools to avoid arbitrary decision making and reduce the risk of erroneous deprivations of protected rights by balancing the individual's interests with the cost of additional due process measures that would guard against that risk. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The 2020 Rule established a procedural due process standard that would pass constitutional muster in most, if not all, cases. But instead of preserving this benchmark, the Final Rule eliminated or made discretionary many of the safeguards that protected students and employees accused of harassment from arbitrary decision-making.

225. Although the specific requirements of constitutional due process vary on a case-by-case basis, including in the Title IX context, the Final Rule's overhaul of Title IX grievance procedures has serious implications for individual due process rights. The Texas Attorney General explained during the notice-and-comment period that the Department was reducing protections at the same time it was amplifying recipients' liability. The combination will pressure recipients to curtail the rights of the accused below the constitutional minimum, as it did when the Department issued its 2011 Dear Colleague Letter.

Count III
Arbitrary and Capricious Agency Action
5 U.S.C. § 706

226. Plaintiff incorporates by reference all other paragraphs.

227. The Final Rule is a final agency action within the meaning of 5 U.S.C. 704 because it was published in the Federal Register following notice-and-comment. 89 Fed. Reg. at 33,474. Texas lacks another adequate remedy by which to challenge the Final Rule, and no legal authority requires that Texas appeal to a superior agency prior to seeking judicial review. 5 U.S.C. § 704.

228. Under the APA, a court must "hold unlawful and set aside agency action" that is "arbitrary," "capricious," or "an abuse of discretion." 5 U.S.C. § 706(2)(A). This means if an agency action is not "reasonable and reasonably explained," it must be vacated. *Wages & White Lion Investments, L.L.C. v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021) (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)); *see Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016) ("[A] lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law.").

229. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

230. Defendants did not engage in reasoned decision-making, but instead acted arbitrarily and capriciously in issuing the Final Rule.

231. To summarize a few flaws, the Rule is internally inconsistent, fails to define key terms, disregards evidence submitted, makes decisions that are counter to the evidence before the Department, fails to properly balance all the relevant interests that would be affected by the Department's changed position, and routinely offers "conclusory statements" rather than real responses to valid and serious concerns submitted by commenters. *See Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 473 (5th Cir. 2024).

232. The Final Rule fails arbitrary-and-capricious review because the Department neglected to offer a reasoned explanation for the Final Rule's departure from the historic understanding—including within previous Title IX regulations—of Title IX's prohibition on "sex" discrimination. The Department noted during its 2020 regulations that "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification." It further observed that provisions in the Department's then-existing regulations reflected that premise. 85 Fed. Reg. at 30,178.

233. Instead of confronting this history, the Department deflected by referencing the Supreme Court's decision in *Bostock*, but that is insufficient given the textual and structural differences between the two statutes and the express disclaimer in *Bostock* that its holding did not apply to other laws. The Department compounds the problems with its analysis by dismissing multiple court opinions, including from this Court, that recognized "*Bostock* … was limited only to Title VII itself" and "does not stretch to [other statutes]." *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021); *Neese*, 640 F. Supp. 3d 668; *compare* 89 Fed. Reg. at 33,806.

234. In addition, when an agency changes its position, the agency must "recognize[ ] the change, reason[ ] through it without factual or legal error, and balance[ ], all relevant interests affected by the change." *Louisiana*, 90 F.4th at 469. The Department, however, refused to dutifully consider the reliance interest Texas and other recipients had with respect to the Department's historic understanding of Title IX.

235. Nor did the Department address the States' practical concerns about authenticating gender identity or the risk that the Department's policy would pose to student safety and privacy. The Department had before it significant evidence that permitting individuals who identify as transgender to use bathrooms or locker rooms associated with their gender identity, as opposed to their biological sex, subjected students to distress and embarrassment as well as an increased risk of harassment or assault. Yet, its response simply stated that the Department "does not agree." 89 Fed. Reg.at 33,820.

236. This dismissal of commenters' substantive concerns characterized the entire rulemaking process.

237. The Final Rule also fails arbitrary-and-capricious review because it is contradictory, failing to reasonably explain treating like circumstances differently. It declines to apply its gender-identity mandate to "living facilities" by pointing to the statutory exceptions in 20 U.S.C. § 1681(1)-(9). 89 Fed. Reg. at 33,816, 33,818–19. But it applies its mandate to "toilet, locker room, and shower facilities," permitted to be sex-separated by rule, 34 C.F.R. § 106.33.

238. The Final Rule also fails the test of reasoned decision-making by failing to address how its gender-identity mandate applies to "nonbinary," "bisexual," or "questioning individuals."

239. The Final Rule's cost-benefit analysis is also wholly deficient. The Final Rule assumes the average time to read and understand the final, 423-page regulation will be 4 hours for a Title IX Coordinator and lawyers, which defies belief. *See* 89 Fed. Reg at 33,867. The Rule's other cost-and-benefit assumptions are equally absurd, including its failure to include any construction costs based on Defendants' refusal to acknowledge the Final Rule will require schools to modify bathrooms and locker rooms. *See*, *e.g.*, 89 Fed. Reg. at 33,876.

240. Turning to the Final Rule's other changes, the Final Rule fails arbitrary-and-capricious review because the Department neglected to reasonably consider the constitutional concerns raised by its new definition of sex-based harassment, its new geographic scope, and the reduction of due process protections for those accused of misconduct—let alone taken together. The Department likewise failed to consider how these new provisions affect recipients' liability.

241. Take, for example, the Final Rule's new definition of sex-based harassment. The Department first contends that it "is not required to adopt the *Gebser*/*Davis* standard" at all because those cases were private lawsuits, not "administrative enforcement." 89 Fed.

Reg. at 33,560. This reasoning makes no sense. The Supreme Court was interpreting Title IX. Whether a private plaintiff is bringing a lawsuit or the Department is bringing an enforcement action, the language of Title IX is the same. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (courts cannot construe the same statute one way in one factual context and another way in another factual context). As are the concerns that the Court articulated in *Davis*, including the First Amendment concerns that arise by overly broad definitions of harassment. Title IX is not "a chameleon" whose "meaning [is] subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.* at 382. *Davis* based its standard on what Title IX "makes clear," yet the Department deviates from *Davis*'s clear instruction without a reasoned justification. *Davis*, 526 U.S. at 650. Here, *Davis*'s "lowest common denominator," which takes account for the constitutional concerns, must control. *Clark*, 543 U.S. at 380.

242. Unlike the 2020 Rule, the Final Rule contradicts *Davis* when it expands Title IX to cover harassment that's "severe *or* pervasive," 89 Fed. Reg. at 33,884, rather than "severe *and* pervasive," *Davis*, 526 U.S. at 652–53. And the Final Rule applies even if the harassment merely "limits" a person's "ability to participate in or benefit from" a program or activity, 89 Fed. Reg. at 33,884, rather than "denies" a person "access to the educational opportunities or benefits provided by the school," *Davis*, 526 U.S. at 651–53. Broader still, the rule requires recipients to "promptly and effectively end any sex discrimination," regardless of whether they were deliberately indifferent to it. *See* 89 Fed. Reg. at 33,889 (Proposed 34 C.F.R. §106.44(f)(1)); *contra Davis*, 526 U.S. at 650–52. As a result, the Final Rule's new hostile-environment definition thus covers a single or isolated incident and all negative effects like a choice to skip class, or a decision not to attend a campus activity. *Davis*, 526 U.S. at 652–53; *accord* 89 Fed. Reg. at 33,511 ("[A] complainant must demonstrate some impact on their ability to participate or benefit from the education program or activity, but the definition does not specify any particular limits or denials."). And the Final Rule's new definition would force students and teachers to, for example, use

someone's "preferred pronouns." What's worse, the Final Rule extends to conduct that occurs online, off campus, outside the United States, or even before the relevant individuals attended the school. 89 Fed. Reg. at 33,886, 33,527. And because the Final Rule thus raises First Amendment and other constitutional concerns, Defendants acted arbitrarily and capriciously when they failed to engage in reasoned decisionmaking in addressing these concerns.

243. Defendants also acted arbitrarily and capriciously when they failed to reasonably consider the lose-lose situation the Final Rule places on funding recipients through its illegal redefinition of "sex-based harassment." Justice Kennedy warned in his dissent for four Justices that "[o]n college campuses, and even in secondary schools, a student's claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser's claim that his speech, even if offensive, is protected by the First Amendment. In each of these situations, the school faces the risk of suit, and maybe even multiple suits, regardless of its response." *Davis*, 526 U.S. at 682–83 (Kennedy, J., dissenting). The majority avoided this problem by stressing the deliberate-indifference requirement to liability and the stringent definition of actionable harassment. By abandoning the deliberate-indifference requirement, the Department unravels *Davis*'s reasoning.

244. The Department's hostile-environment definition is also internally inconsistent, rendering the rule arbitrary and capricious. It stresses a "totality of circumstances" test that considers, among other things, "[t]he degree to which the conduct affected the complainant's ability to access the recipient's education program or activity." 89 Fed. Reg. at 33,884 (34 C.F.R. §106.2). But that factor is in tension with the Department's other statement that "sex-based conduct meets the 'severe or pervasive' standard of sex-based harassment if it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." 89 Fed. Reg. at 33,508. The Department reads out "severe or pervasive" from its definition. It is not clear why the

degree of harm matters if the only requirement is that the harassment "limits" the individuals' ability to participate in education, and the Department provides no reasonable explanation justifying this tension.

245. Further, the Department's action is arbitrary and capricious because it fails to reasonably address comments on misgendering. The Department noted that a commenter raised the Department's "recent resolution letter finding that a school district violated Title IX when it failed to effectively respond to a misgendering of a student." 89 Fed. Reg. at 33,516. Other commentators also "urged" the Department to state that "misgendering is a form of sex-based harassment that can create a hostile environment." 89 Fed. Reg. at 33,516. Many commentators also raised the notice of proposed rulemakings seeming approval of the 2016 Dear Colleague Letter, stating that misgendering is punishable harassment. Rather than address these comments or the 2016 letter, the Department did not meaningfully engage with either comment or even cite the 2016 letter, but merely stated that the issue "is necessarily fact-specific" and that "a stray remark, such as a misuse of language, would not constitute harassment under this standard." 89 Fed. Reg. at 33,516. The terse statement is hardly "'reasoned decisionmaking.'" *Michigan*, 576 U.S. at 750. Commentators put the Department on notice of the 2016 letter and the resolution, so the Department was obligated to address those "relevant authorit[ies]" and explain any "inconsistencies" or differences in position. *Data Mktg.*, 45 F.4th at 857.

246. The Texas Attorney General alerted the Department during the notice-and-comment period that the combination of heighten liability and diminished safeguards would pressure recipients into violating the constitutional rights of students and employees, as demonstrated by the aftermath of the 2011 Dear Colleague Letter. The Department's response was simply that "nothing in the regulations requires or authorizes a recipient to violate anyone's [constitutional] rights." 89 Fed. Reg. at 33,516.

247. "[B]are acknowledgement" of a concern "is no substitute for reasoned consideration." *Louisiana*, 90 F.4th at 473. The Final Rule charges recipients to "promptly

and effectively" respond to "conduct that reasonably may constitute sex discrimination." 89 Fed. Reg. at 33,888. It then defines sex discrimination so broadly that recipients would be in violation of their obligations if they did not step in to "end" protected activity, "prevent its recurrence, and remedy its effects." *Id.* at 33,592.

248. Indeed, the Final Rule's boilerplate denials of authorizing violations of the First Amendment are contradictory and omit discussion of relevant factors. The Final Rule incorporates EEOC gender-identity guidance, 89 Fed. Reg. at 33,516, which states that "intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful work environment." EEOC, *Sexual Orientation and Gender Identity (SOGI) Discrimination*, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination#:~:text=Although%20accidental%20misuse%20of%20a,an%20unlawful%20hostile%20work%20environment. But requiring employees to use pronouns based on gender identity rather than biological sex is unconstitutional.

249. It is not enough for the Department to say that the Final Rule accommodates recipients' constitutional limits when a fair (and more natural) reading of the regulations lead to an opposite result. Furthermore, courts have recognized a private right of action. Even if the Department elects not to initiate enforcement proceedings in such circumstances, Texas and other public recipients would still be subject to litigation from private individuals.

250. Texas should not have to risk liability for respecting the rights of its students and employees.

251. The Department also failed to adequately articulate its departure from established Supreme Court precedent governing Title IX, as well as policies adopted by the Department in previous rulemakings. For example, the 2020 Rule adopted the Supreme Court's deliberate-indifference requirement for liability because "the recipient cannot commit its own misconduct unless the recipient first knows of the sexual harassment that needs to be addressed." 87 Fed. Reg. at 41,432. The Department now changes course,

asserting that it "is not required to adopt the *Gebser*/*Davis* standard" because "the standard for administrative enforcement is not derived from the same implied remedy discussed in *Gebser* and *Davis*." 89 Fed. Reg. at 33,560.

252. This reasoning is arbitrary and capricious. Not only does it fail to explain the reason for the about face, but the agency has no authority to override the Supreme Court's interpretations of Title IX. Whether a private plaintiff is bringing a lawsuit, or the Department is bringing an enforcement action, the language of Title IX is the same. The Supreme Court in *Davis* determined when a school could be liable for sex-based harassment and articulated a definition of actionable harassment standard that balanced the objectives of Title IX with the constitutional interests of respondents, which the Department adopted in the 2020 Rule. The Department has no right to define actionable harassment differently from the Supreme Court. The Final Rule also fails to recognize how its standard regarding gender-identity discrimination undercuts its separate ongoing rulemaking process specific to athletics. *Cf. Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) ("an agency must have a similar obligation to acknowledge and account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking"); *Office of Commc'n of the United Church of Christ v. FCC,* 707 F.2d 1413, 1441–42 (D.C. Cir. 1983) (finding it "seriously disturbing" and "almost beyond belief" that an agency would take rulemaking action undercutting another "concurrent" rulemaking process).

253. Finally, the Department repeatedly failed to adequately consider the effects of its terms on the States and their reliance interests of over 50 years of Title IX and its regulations. When commentators raised concerns about preemption, Defendants expressly "decline[d] to opine on how [the Final Rule] interacts or conflicts with any specific State laws because it would require a fact-specific analysis," and instead "refer[red] the public to § 106.6(b), which affirms that a [school's] obligation to comply with Title IX and the regulations is not obviated or alleviated by any State or local law." 89 Fed. Reg. at 33,822.

This does not satisfy Defendants' obligation to "adequately assess reliance interests" or "reasonably consider[] the relevant issues and reasonably explain[] the decision." *Texas v. Biden*, 10 F.4th 538, 552, 555 (5th Cir. 2021).

Count IV
Declaratory Judgment
28 U.S.C. § 2201 and 5 U.S.C. § 706

254. Plaintiff incorporates by reference all other paragraphs.

255. "In a case of actual controversy within its jurisdiction … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a).

256. This case presents an actual controversy because the Final Rule directly regulates the States as recipients of Title IX funds. Enforcement of the Final Rule would force recipients to violate State laws and alter school facilities and policies, or otherwise risk losing billions of dollars of education funds they depend on.

257. This Amended Complaint is an appropriate pleading, and this Court has jurisdiction over this case. And the Court can resolve the controversy over the legality of the Final Rule by declaring that Title IX does not authorize the mandates of the Final Rule.

VII. Demand for Relief

This Court is authorized to award the requested vacatur and declaratory and injunctive relief under the APA, 5 U.S.C. §§ 702, 705, and 706; 28 U.S.C. § 1361; the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202; Federal Rules of Civil Procedure 57 and 65; and the general and legal equitable powers of the Court. For these reasons, Texas respectfully requests that the Court:

i. Postpone the effective date of (*i.e.,* stay) the Final Rule under 5 U.S.C. § 705 and hold unlawful and set aside (*i.e.*, vacate) the Final Rule under 5 U.S.C. § 706(2);

ii. Enter a judgment declaring that (1) the Final Rule is contrary to law and exceeds the agency's statutory authority; (2) the Final Rule was not a result of reasoned decisionmaking but is instead arbitrary and capricious; (3) the Final Rule is contrary to a constitutional right, power, privilege or immunity; and (4) the State of Texas, including all of Texas's instrumentalities, agencies, and political subdivisions, may continue to receive Title IX funding notwithstanding any failure to adhere to the Final Rule's unlawful requirements;

iii. Issue preliminary and permanent injunctive relief prohibiting Defendants from interpreting or enforcing Title IX as barring discrimination based on sexual orientation or gender identity—including by denying federal financial assistance or by otherwise pursuing, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions—against the State of Texas, including all of Texas's instrumentalities, agencies, and political subdivisions;

iv. Issue preliminary and permanent injunctive relief prohibiting Defendants from interpreting, enforcing, or relying on any portion of the Final Rule that violates Title IX, the APA, or the federal Constitution—including by denying federal financial assistance or by otherwise pursuing, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions—against the State of Texas, including all of Texas's instrumentalities, agencies, and political subdivisions;

v. Award such other relief as the Court deems equitable and just.

Dated: May 13, 2024.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on May 13, 2024, this document was filed through the Court's CM/ECF system, which served it upon all counsel of record.

/s/ Ryan D. Walters
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STATE OF TEXAS, ET AL., *PLAINTIFFS*,	
V.	NO. 2:24-CV-86-Z
THE UNITED STATES OF AMERICA, ET AL., *DEFENDANTS*.	

PLAINTIFFS' MOTION FOR STAY OF AGENCY ACTION AND PRELIMINARY INJUNCTION

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INTRODUCTION

In 1972, Congress enacted Title IX, which provides that "[n]o 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(a).

Through an exercise in notice-and-comment rulemaking ordered by President Biden, the U.S. Department of Education (the "Department") has attempted to effect radical social change in our Nation's schools by purporting to "interpret" Title IX to prohibit discrimination based on sexual orientation and gender identity. Stymied in its attempts to implement this agenda through informal agency guidance, and unable to amend Title IX through the legislative process, the Department has now formally amended the Code of Federal Regulations. *Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt 106) (the "Final Rule"). The Final Rule tells States and other regulated parties to ignore biological sex or face enforcement actions and the loss of federal education funding.

Contrary to the Department's assertions, the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), does not require—or even allow—the reinterpretation of "on the basis of sex" to include to sexual orientation and gender identity. *Bostock* held only that terminating an employee "simply for being homosexual or transgender" constitutes discrimination "because of … sex" under Title VII. *Id.* at 649–51, 655 (quoting 42 U.S.C. § 2000e-2(a)(1)). The Court "assum[ed]" that the term "sex" means "biological distinctions between male and female," *id.* at 655, and it made clear that its decision did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination" or address other issues not before the Court such as "sex-segregated bathrooms, locker rooms, and dress codes." *Id.* at 681; *see also id.* at 669 ("We agree that homosexuality and transgender status are distinct concepts from sex.").

In addition, the Final Rule promises to repeat the disaster that was the Department's ill-advised 2011 Dear Colleague Letter, which had a detrimental impact on publicly funded education across the country, including in Texas. The Final Rule walks back many of the constitutional safeguards issued

by the Trump Administration to ensure that students accused of harassment have access to a fair hearing. At the same time, the Final Rule redefines harassment to include constitutionally protected activity. Not only does this put Texas schools in a no-win situation—where adherence to the Constitution risks the loss of federal funds—but students and faculty risk having their futures upended merely for refusing to go along with the Biden Administration's radical social agenda.

The Final Rule violates the Administrative Procedure Act (APA). 5 U.S.C. § 706. It is substantively unlawful because its purported "interpretations" of Title IX squarely conflict with the text of that statute. Title IX, by its plain text, defines "sex" as "one sex" that is male or female. *See* 20 U.S.C. § 1681(a)(5) (describing those institutions which have a policy of admitting "only students of one sex"). The Department, furthermore, engaged in arbitrary-and-capricious decisionmaking when promulgating these regulations because it failed to define the amorphous concepts of "gender identity" and "sexual orientation," failed to adequately consider all relevant factors, and failed to adequately explain its reversal of past policies.

Title IX does not apply to discrimination based on sexual orientation or gender identity. But even if those concepts were protected against discrimination by Title IX, the Final Rule's provisions do not faithfully implement such protections because they mark as unlawful school policies that do not discriminate based on those grounds—instead, the Final Rule *requires* schools to discriminate based on sexual orientation and gender identity by allowing single-sex programs and facilities but requiring opposite-sex access to them for only those individuals purporting to have a transgender identity.

Texas and two Private Plaintiffs employed at the University of Texas seek preliminary relief to prevent irreparable injury from the Final Rule before it goes into effect August 1, 2024. The Court should postpone the effective date of the Final Rule under the stay provision of the APA. 5 U.S.C. § 705. It should also preliminarily enjoin the application and enforcement of the Final Rule against Texas, including its instrumentalities, agencies, and political subdivisions. Preliminary injunctive relief should also preclude Defendants from interpreting, applying, or enforcing Title IX as prohibiting discrimination on the bases of sexual orientation or gender identity.

As indicated in the certificate of conference, Defendants are unable at this time to state

whether or not they oppose this motion.

BACKGROUND

A. Early Interpretations of Title IX adopted a biology-based approach.

The Department's predecessor agency[1] first issued regulations implementing Title IX in 1975. *See* 34 C.F.R. § 106. These regulations treated sex as a binary, referring multiple times to "one sex," especially versus "the other sex," using the phrase "both sexes," and referencing "boys and girls" and "male and female teams." *See, e.g.*, 34 C.F.R. §§ 106.33, 106.34(a)(3), 106.36(c), 106.37(a)(3), 106.41(c), 106.51(a)(4), 106.58(a), 106.60(b), 106.61; *see also* 34 C.F.R. pt. 86 (1975).

This makes sense, as Title IX's test and structure presuppose sexual dimorphism—requiring equal treatment for each sex. *See, e.g., Neese v. Becerra*, No. 2:21-cv-163-Z, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) (Kacsmaryk, J.) ("Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each 'sex.'")

Indeed, at the time of its enactment, the term "sex" in Title IX referred to a person's immutable biological sex—male or female. *See* Webster's Third New International Dictionary (1966) ("One of the two divisions of organic, especially human beings, respectively designated male or female."); American Heritage Dictionary (1969) ("a. The property or quality by which organisms are classified according to their reproduction functions. b. Either of two divisions, designated male and female, of this classification."); Webster's New World Dictionary (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions.").

The structure of Title IX underscores that "sex" means biological sex—not gender identity or any other distinct concept. The statute explicitly permits educational institutions to maintain separate living facilities for the different sexes. 20 U.S.C. § 1686. This provision only makes sense if "sex" refers to the male-female binary and the associated physiological differences. Indeed, Senator Bayh emphasized that Title IX permitted "differential treatment by sex" when necessary, such as "in sport

[1] See Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities, 40 Fed. Reg. 24, 128 (Jun. 4, 1975) (codified at 45 C.F.R. pt. 86).

facilities or other instances where personal privacy must be preserved." 118 Cong. Rec. 5807 (Feb. 28, 1972) (Statement of Sen. Birch Bayh).[2]

While Title IX generally prohibits discrimination based on biological sex, it recognizes situations where differentiation is appropriate. For instance, it exempts single-sex organizations like fraternities, sororities, the Boy Scouts of America, and Boy or Girl conferences to maintain their exclusivity. 20 U.S.C. § 1681(a)(6)-(7). Traditional single-sex schools and certain religious schools are also exempt and may limit membership to one sex. 20 U.S.C. § 1681(a)(3), (5)).

The early implementing regulations in 1975 recognized that differential treatment was sometimes necessary to ensure equal opportunities based on biological differences. These regulations, which remain in effect as of now,[3] acknowledged that Title IX did not prohibit all differential treatment based on sex but aimed to provide equal opportunities for both sexes despite biological differences. Title IX and its regulations reflect Congress's policy decision to promote equal educational opportunities for both sexes while not disregarding biological differences or mandating identical treatment of males and females in all circumstances. For instance, female college attendance and participation in athletics have soared since Title IX's enactment. *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818–19 (11th Cir. 2022) (Lagoa, J., concurring)).

For decades, the Department operated under the basic premise that "sex" means the

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[2] Title IX is full of examples of "sex" being referred to as binary:

- The statute exempts a public undergraduate institution with a historic "policy of admitting only students of *one sex.*" 20 U.S.C. § 1681(a)(5) (emphasis added).
- Certain organizations whose memberships have "traditionally been limited to *persons of one sex.*" 20 U.S.C. § 1681(a)(6) (emphasis added).
- *"Father-son or mother-daughter activities,"* so long as similar opportunities provided for *"one sex"* are offered to *"the other sex."* (20 U.S.C. § 1681(a)(8) (emphasis added).
- Scholarships associated with participation in a beauty pageant "limited to individuals of *one sex only."* (20 U.S.C. § 1681(a)(9) (emphasis added).

Title IX's explicit exclusions for sex-specific organizations further underscore this understanding. *See, e.g.,* 20 U.S.C. § 1681(a)(6) (authorizing certain groups to remain limited to one sex, including fraternities and sororities).

[3] *See, e.g.*, 34 C.F.R. § 106.41(b)-(c) (allowing single-sex teams and requiring recipients to provide "equal athletic opportunity for members of both sexes").

biological male-female binary. In its 1997 guidance clarifying that Title IX covers same-sex sexual harassment, the Department affirmed that "both male and female students are protected from sexual harassment … even if the harasser and the person being harassed are members of the same sex." *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997). The same guidance stated that "Title IX does not prohibit discrimination on the basis of sexual orientation," *id.* at 12,036, because "sex" refers to the status of being male or female, not to one's heterosexual or homosexual orientation, or "gender identity."

B. The Obama Administration tries to redefine "sex" to include gender identity.

Following the presidential transition in January 2009, activists launched an aggressive campaign lobbying Congress and the White House to recognize gender identity as a protected class under federal civil-rights laws. Those early lobbying efforts focused on democratically enacted laws. In October 2009, for example, Congress passed hate-crime legislation that included "gender identity" and "sexual orientation" as independently protected characteristics alongside other protected traits like race, religion, and national origin. 18 U.S.C. § 249(a)(2).

In 2013, Congress considered a bill to extend Title IX to gender identity. According to the findings of that proposed law, congressional action was necessary because "federal statutory protections expressly address discrimination on the basis of race, color, sex, religion, disability, and national origin" but "do not expressly include 'sexual orientation' or 'gender identity.'" *To end discrimination based on actual or perceived sexual orientation or gender identity in public schools, and for other purposes*, H.R. 1652, 113th Cong. (2013). The bill failed.

Tellingly, the same year that it rejected the bill to expand Title IX, Congress reauthorized the Violence Against Women Act, and, in the process, amended the law to prohibit recipients of federal grants from discriminating "on the basis" of "sex" *or* "gender identity" *or* "sexual orientation." *See* 34 U.S.C. § 12291(b)(13)(A). Right after listing "sex," "gender identity," and "sexual orientation" as distinct concepts, the law emphasizes that "nothing in this paragraph shall prevent any … program or activity from consideration of an individual's sex" if "*sex segregation* or *sex-specific programming* is necessary

to the essential operation of [the] program." *Id.* §12291(b)(13)(B) (emphasis added). And today, section 12291 also prohibits "female genital mutilation or cutting," which it defines in explicitly biological terms. *See id.* § 12291(a)(15) (incorporation definition of female genital mutilation in 18 U.S.C. § 116).

During the Obama Administration, the Department issued its misguided 2011 Dear Colleague Letter and 2014 Questions and Answers on Title IX Sexual Violence. *See* Russlynn Ali, U.S. Dept. of Educ., *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; Catherine E. Lhamon, U.S. Dept. of Educ., *Questions & Answers on Title IX & Sexual Violence* (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

These guidance documents asserted—for the first time—that "Title IX's sex discrimination prohibition extends to claims of discrimination" based solely on "gender identity." *Questions & Answers on Title IX & Sexual Violence*, at 5 (2014).

The Dear Colleague Letter and 2014 Questions and Answers had a detrimental impact on publicly funded education nationwide, including in Texas. Not only did the two guidance documents introduce significant confusion over academic institutions' obligations under Title IX, but they also created incentives for academic institutions to violate students' constitutional rights in order to avoid incurring liability. To offer some context, before 2011, the number of lawsuits filed against universities for failing to provide due process in Title IX cases averaged one per year—by 2019, over 100 such lawsuits were filed in that year alone. *See* Taylor Mooney, *How Betsy DeVos plans to change the rules for handling sexual misconduct on campus*, CBS NEWS (Nov. 24, 2019), https://www.cbsnews.com/news/title-ix-sexual-misconduct-on-campus-trump-administration-changing-obama-rules-cbsn-documentary/.

Although neither underwent notice-and-comment rulemaking, the two guidance documents put recipients in a no-win situation where either conforming or failing to conform to the guidance documents could expose them to significant risk of litigation.

Twice in the past decade, Congress has considered legislation to amend Title IX to apply to gender identity. *See, e.g.*, H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015). Yet "Congress

has not amended the law to state as much"; so "it is questionable," to put it mildly, "whether the Secretary can alter the term 'sex' by administrative fiat." *Neese*, 2022 WL 1265925, at *13.

As the failed attempts to amend Title IX piled up, so did the pressure from outside groups demanding that the government change Title IX through unilateral executive action. In May 2016, the Department of Education issued another *Dear Colleague* Letter, this time expanding Title IX obligations to transgender students (the "2016 Guidance"). The 2016 Guidance informed federally funded educational institutions that the Department would "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." Catherine E. Lhamon & Vanita Gupta, U.S. Dep'ts of Educ. & Justice, *2016 Dear Colleague Letter on Title IX and Transgender Students,* at 2 (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf?utm_name=.

The 2016 Guidance further informed schools that any attempt to restrict shower, bathroom, or locker-room use according to biological sex would be unlawful. *Id.* at 3–4. Schools were also warned that failing to "use pronouns and names consistent with a student's gender identity" would constitute unlawful harassment under Title IX. *Id.* at 2–3.

Thirteen states led by Texas sued the federal government, alleging that the 2016 Guidance was unlawful under the APA. The Northern District of Texas agreed and issued a preliminary injunction, concluding that the Department's purported interpretive guidance "failed to comply with" the APA by "contradicting the existing legislative and regulatory texts" and "was likely contrary to law." *Texas v. United States*, 201 F. Supp. 3d 810, 815, 816 n.4, 836 (N.D. Tex. 2016).

C. The Trump Administration rescinds the Obama Administration guidance.

In a decisive shift from previous policies, the Trump Administration rescinded the Obama-era gender identity guidance in February 2017, and the lawsuit was voluntarily dismissed. Pls.' Notice of Voluntary Dismissal, *Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 7852331, (N.D. Tex. Mar. 3, 2017), ECF No. 128. This action marked a return to the pre-2014 interpretation of Title IX, where the prohibition on sex-based discrimination was understood to mean biological sex, not gender

identity. This return to the longstanding interpretation was formalized through a Dear Colleague Letter issued by the U.S. Department of Justice and U.S. Department of Education, Office for Civil Rights in February 2017, explicitly withdrawing the previous administration's expansive views on gender identity under Title IX. Sandra Battle & T.E. Wheeler, II, U.S. Dep'ts of Educ. & Justice, *Dear Colleague Letter on Gender Identity Guidance* (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

It soon became apparent, however, that the withdrawal could not repair the damage caused by the two guidance documents on its own. *See* Candice Jackson, U.S. Dept. of Educ., *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf. As the Department later explained, neither action "require[ed] or result[ed] in wholesale changes to the set of expectations guiding recipients' responses to sexual harassment." *Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance*, 85 Fed. Reg. 30,026, 30,029 (May 19, 2020) (to be codified at 34 C.F.R. pt 106) (the "2020 Rule"). Hence, many, if not most, recipients "chose not to change their Title IX policies and procedures" as a precaution against stigma and liability. *Id.*

The Department, therefore, initiated a round of notice-and-comment rulemaking, after which it published a comprehensive set of regulations governing recipients' obligations to prevent sex discrimination in their programs and activities. *See* 85 Fed. Reg. 30,026. The 2020 Rule took effect on August 14, 2020.

The 2020 Rule addressed at least three significant ambiguities in the earlier guidance. *First*, the 2020 Rule clearly demarcated, for the first time, the outer boundaries of recipients' obligations and liability under Title IX with respect to sexual harassment. *Second*, the 2020 Rule clarified the standard under which conduct or speech could constitute sex-based harassment—namely, that it be "so severe, pervasive, and objectively offensive that it effectively denies a person equal access." 85 Fed. Reg. at 30,574. *Third*, the 2020 Rule reaffirmed the primacy of the U.S. Constitution and adopted multiple safeguards to ensure that Title IX enforcement protected the rights and interests of all parties to a disciplinary proceeding.

For example, the 2020 Rule also addressed the question of whether discrimination "on the basis of sex" encompassed sexual orientation and gender identity. Although the Department declined to define "sex" in the 2020 Rule because it was not necessary to effectuate the rules and would have consequences outside of the proposed rulemaking, it noted that "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification," and further observed that "provisions in the Department's current regulations, which the Department did not propose to revise in this rulemaking, reflect this presupposition." 85 Fed. Reg. at 30,178.

And the Department further amended its regulations to clarify the definition of "sexual harassment" for purposes of Title IX enforcement. *See* 85 Fed. Reg. 30,026. The Department adopted the Supreme Court's definition of harassment in *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), that is, "conduct that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education." 85 Fed. Reg. at 30,036.

Finally, the 2020 Rule strengthened the rights of students accused of sexual harassment under Title IX. It required schools to, among other things, provide the accused with written notice of the charges against him, 85 Fed. Reg. at 30,571, let a representative accompany him to disciplinary hearings, *id.* at 30,577, and let that counsel cross-examine witnesses. *Id.* It specified that schools could choose between a preponderance or clear-and-convincing standard to adjudicate accusations of Title IX misconduct, but only if they used the same standard for "all formal complaints of sexual harassment," including "formal complaints against employees." *Id.* at 30,575.

D. The Supreme Court decides *Bostock*.

In June 2020, shortly after the Department issued the 2020 Rule, the Supreme Court decided *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020). The Court held that Title VII's prohibition on sex discrimination prevents an employer from firing an employee "for being homosexual or transgender." *Id.* at 651–52. The Court interpreted Title VII's prohibition against discrimination "because of" sex using a "but-for" causation standard, concluding that "sex plays an unmistakable and impermissible role in [a] discharge decision" based on on employee's homosexuality or transgender status. *Id.* at 660.

But *Bostock* specifically held that "homosexuality and transgender status are distinct concepts from sex," *id.* at 669, and it assumed throughout its opinion that "sex" in Title VII referred "*only to biological distinctions between male and female,*" *id.* at 655 (emphasis added). The Court refrained from extending its decision to other statutes like Title IX and declined to "prejudge" whether it would "sweep beyond Title VII" or impact "sex-segregated bathrooms, locker rooms, and dress codes." *Id.* at 681.

In January 2021, the Department's Office of the General Counsel issued a memo clarifying that *Bostock* did not affect the 2020 Rule. It reiterated that Title IX's "longstanding construction of the term 'sex' to mean biological sex, male or female" aligns with the ordinary public meaning of "sex" at the time of the statute's enactment. Reed D. Rubinstein, *Memorandum for Kimberly M. Richey, Acting Assistant Sec'y of the Office for Civil Rights*, *re:* Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (Jan. 8, 2021) at 1, 10, https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf. The memo also emphasized that "schools must consider students' biological sex when determining whether male and female student-athletes have equal opportunities to participate." *Id.* at 7.

E. The Biden Administration initiates efforts to redefine "sex" under Title IX.

Despite the well-reasoned analysis of the Department itself that *Bostock* changed nothing in the Title IX context and that "sex" means "biological sex," the Biden Administration, like the Obama Administration before it, once again moved to redefine "sex" as including gender identity.

From the start, President Biden opposed the 2020 Rule, stating on the campaign trail that he would order the Department to put a "quick end" to it if elected. *See* Joe Biden, *Statement on the Trump Administration Rule to Undermine Title IX & Campus Safety* (May 6, 2020), https://medium.com/@JoeBiden/statement-by-vice-president-joe-biden-on-the-trump-administration-rule-to-undermine-title-ix-and-e5dbc545daa._Shortly after taking office, President Biden issued an executive order declaring that *Bostock* applied across all federal law, maintaining that under *Bostock*'s reasoning, laws prohibiting sex discrimination—including Title IX of the Education

Amendments of 1972—should also prohibit discrimination based on gender identity or sexual orientation, "so long as the laws do not contain sufficient indications to the contrary." Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021). Federal agencies were directed to review their regulations and develop plans to align them with the executive order.

Following this directive, on June 22, 2021, the Department issued guidance interpreting Title IX to prohibit discrimination based on sexual orientation and gender identity. *Enf't of Title IX of the Educ. Amend. of 1972 with Respect to Discrimination Based on Sexual Orientation & Gender Identity in Light of* Bostock v. Clayton County, 86 Fed. Reg. 32,637 (June 22, 2021) ("2021 Guidance"). The Department claimed that this interpretation aligned with Title IX's purpose of "ensuring equal opportunity and protecting individuals from the harms of sex discrimination" *Id.* at 32,639. This was followed by additional guidance from the Department stating its intent to "fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive federal financial assistance." Suzanne B. Goldberg, *Dear Educator letter on Confronting Anti-LGBTQI+ Harassment in Schools*, at 2 (June 23, 2021), https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.

Like the 2016 Guidance, the enforcement of the 2021 Guidance was swiftly enjoined. In *Tennessee v. United States Dep't of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022), the Eastern District of Tennessee enjoined the Department from enforcing the 2021 guidance, ruling that it likely acted unlawfully by creating "new rights and obligations" without following the APA's notice-and-comment requirements. *Id.* at 842.

The court identified two main flaws in the 2021 Guidance: (1) It was inconsistent with existing regulations. Title IX allows for sex-separation in some cases, but the Department's guidance "appear[ed] to suggest such conduct will be investigated as unlawful discrimination," *id.* at 839; and (2) it "create[d] rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity *that appear nowhere in Bostock, Title IX, or its implementing regulations*." *Id.* (emphasis added).

F. The Biden Administration publishes the Proposed Rule to replace the 2020 Rule and overhaul Title IX.

Undeterred, in July 2022, the Department issued a notice of proposed rulemaking, reiterating its position from the 2021 Guidance and introducing other significant revisions to Title IX. *Nondiscrimination on the Basis of Sex in Educ. Programs or Activities Receiving Fed. Fin. Assistance*, 87 Fed. Reg. 41,390 (July 12, 2022) (the "Proposed Rule").

The Proposed Rule sought to formally rescind the 2020 Rule's biology-based definition of sex—based almost entirely on the supposed applicability of *Bostock*. 87 Fed. Reg. at 41,410, 41,531. It also dropped the 2020 Rule's adoption of the *Davis* standard for actionable sexual harassment, *id.* at 41,568–69, and removed procedural protections for students accused of misconduct, *id.* at 41,485, 41,488, 41,497, 41,577–78.

The Department received over 240,000 comments on the Proposed Rule—overwhelmingly negative. 89 Fed. Reg. at 33,477. Texas, through its Attorney General and Governor, submitted multiple comments before the 60-day comment period for the Proposed Rule closed on September 12, 2022. App.028–112.

In its comments, Texas highlighted the burden the Proposed Rule would impose on the State, as well as the risk the regulations posed to constitutional rights. The comments explained that the combination of expanding recipients' obligation to respond to sex discrimination, while also lowering the threshold of what fell within that description, meant, in practice, that recipients would hyper-police interactions among students, parents, and faculty for fear of being found noncompliant if individuals affiliated with the recipient failed to recognize each person's highly individualized, potentially fluid, and unverifiable gender identity.

The Proposed Rule also weakened procedural protections for students accused of sexual harassment, such as the right to present witnesses, inspect all evidence, and have a live hearing. *Id.* at 41,485, 41,497, 41,577. It also abandoned the *Davis* standard for actionable sexual harassment, instead adopting a broader, less stringent definition. *Id.* at 41,568–69.

The comments added that much of Proposed Rule departed from the Department's past

policies, yet the changes were neither adequately explained nor grounded in the text, structure, or purpose of Title IX. As an example, the Department hinged its redefinition of sex to include sexual orientation and gender identity almost entirely on the U.S. Supreme Court's opinion in *Bostock*. Yet as Texas pointed out in its comments, App.034, *Bostock* involved an unrelated statute that was enacted nearly a decade earlier, pursuant to a different constitutional power, and did not address questions involving "sex segregated bathrooms, locker rooms, and dress codes"—all of which appeared in the Proposed Rule.

G. The Final Rule is published in substantially the same form as the Proposed Rule.

Despite these deficiencies, the Biden Administration pressed on. On April 29, 2024, the Department published its Final Rule, dramatically reshaping Title IX by redefining what constitutes sex discrimination and broadening the definition of prohibited "harassment." 89 Fed. Reg. 33,474.

Despite strong opposition and over 240,000 public comments—mostly negative—the Department published the Final Rule largely unchanged from the Proposed Rule. Set to take effect on August 1, 2024, it expands schools' liability risks and Title IX obligations by expanding the definition of sex discrimination and harassment beyond what Title IX's text and purpose originally intended.

The Final Rule redefines Title IX's prohibition on sex discrimination to include "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. at 33,476. It asserts that it preempts all state and local laws conflicting with its terms and applies to any school "program or activity," regardless of whether the activity occurs within the school or even within the United States. *Id.* at 33,885–86.

While the Final Rule allows schools to maintain sex-segregated programs, activities, and facilities, it prohibits schools from enforcing these distinctions in a way that causes "more than de minimis harm"—but the Final Rule simultaneously contends that prohibiting a person from participating in education programs or activities consistent with their gender identity *inherently* inflicts more than de minimis harm. *Id.* at 33,816, 33,819–20. Thus, the Final Rule threatens to withhold

federal funding from schools that deny students access to bathrooms and locker rooms based on their claimed gender identity or maintain dress codes based on biological sex.

The Final Rule claims that it does not affect athletics programs in schools because there is currently a regulation that allows sex-separated sports teams. 89 Fed. Reg. at 33,817–18, 33,839. Yet that was also true for bathrooms and locker rooms, but the Final Rule declares that invalid when exceptions are not made for those who identify as transgender. *See id.* at 33,819–21. The Final Rule claims sex-separate athletics does not suffer the same fate because of the Javits Amendment, 88 Stat. 484, 612 (1974), and because Congress reviewed the regulation that explicitly allows them before it went into effect. *See* 89 Fed. Reg. at 33,816–17. But the Javits Amendment only applies to "intercollegiate athletic activities," 88 Stat. at 612, and the bathroom regulation was part of the same set of regulations as the one relating to sports and also not disapproved by Congress. *See* 40 Fed. Reg. 24,128, 24,141; 34 C.F.R. § 106.33. And the Department fails to address its own position taken in litigation that Title IX forbids categorically limiting sports teams to one biological sex. *See B.P.J. v. W. Virginia*, ECF 42, No. 2:21-cv-316 (S.D. W. Va. Jun. 17, 2021); United States Amicus Br. 24–27, *B.P.J. v. W.V. State Bd. of Educ.*, Nos. 23-1078, 23-1130 (4th Cir. Apr. 3, 2023).

The Final Rule also prohibits schools from even seeking confirmation of a student's gender identity, deeming such inquiries as causing "more than de minimis harm." 89 Fed. Reg. at 33,819. So schools cannot require documentary evidence confirming a student's gender dysphoria diagnoses prior to permitting their participation in sex-segregated activities or facilities of the opposite sex.

The Final Rule also broadens the definition of harassment by lowering the standard set by the 2020 Rule, moving away from the Supreme Court's standard in *Davis* and instead defining sex-based harassment as "subjectively and objectively offensive" and "sufficiently severe or pervasive to limit or deny a student's ability to participate in or benefit from a recipient's education program or activity." *Id.* at 33,516. This new standard does not require harassment to be both severe and pervasive, meaning a single serious incident or a pattern of non-severe incidents might qualify.

The Final Rule also expands the definition of harassment to cover conduct that is "subjectively and objectively" offensive from the complainant's position—so referring to a

transgender-identifying male using male pronouns instead of female pronouns could be considered harassment based on the individual's eccentric, subjective viewpoint.

STANDARD

The issuance of a preliminary injunction is appropriate when the movant shows (1) a likelihood of success on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and that (4) an injunction is in the public interest. *Valley v. Rapides Parish School Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997) (citing *Roho Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990)). The final two elements merge when the opposing party is the government.[4] *Nken*, 556 U.S. at 435.

Section 705 of the APA, meanwhile, "authorizes reviewing courts to stay agency action pending judicial review."[5] *Affinity Healthcare Servs., Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010) (citing 5 U.S.C. § 705). "Motions to stay agency action pursuant to these provisions are reviewed under the same standards used to evaluate requests for interim injunctive relief." *Id.* (citing *Cuomo v. U.S. Nuclear Regulatory Comm'n,* 772 F.2d 972, 974 (D.C. Cir. 1985)); s*ee also Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (granting stay of agency action under 5 U.S.C. § 705 and applying preliminary injunction factors).

While "[a] stay [of an agency action] pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one … [due to both having] the practical effect of preventing

[4] This Court should consider this motion for preliminary relief without waiting for Defendants to produce an administrative record for the Final Rule. See, e.g., *Franciscan All., Inc. v. Burwell*, 7:16-cv-10, 2016 WL 9281524, at *3 (N.D. Tex. Nov. 1, 2016) (O'Connor, J.) (setting a briefing schedule "to consider the pending motion for preliminary injunction" despite "no administrative record" and deferring consideration of summary judgment so that the court could consider the "administrative record in the normal course of this litigation"); *Doe v. Trump*, 3:19-cv-1743, 2020 WL 1853657, at *3 (D. Or. Apr. 13, 2020) (noting that the court relied on a "partial record produced before the preliminary injunction" and then set a later deadline "to supplement the administrative record" after the preliminary injunction decision).

[5] The stay provision of the APA provides that: "On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process *to postpone the effective date of an agency action* or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. §705 (emphasis added).

some action before the legality of that action has been conclusively determined," *Nken v. Holder*, 556 U.S. 418, 428 (2009), "a stay achieves this result by temporarily suspending the source of authority to act—the order or judgment in question—not by directing an actor's conduct." *Id.* at 428–29.

"In the same way that a preliminary injunction is the temporary form of a permanent injunction, a stay [under section 705] is the temporary form of vacatur." *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 254 (5th Cir. 2023). "Under 5 U.S.C. § 705, [courts] may, under 'certain conditions[,] ... and to the extent necessary to prevent irreparable injury, ... issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." *Wages & White Lion Invs., L.L.C. v. United States Food & Drug Admin.*, 16 F.4th 1130, 1143 (5th Cir. 2021) (quoting 5 U.S.C. § 705).

Texas and the Private Plaintiffs easily satisfy these standards.

ARGUMENT

This Court should postpone the Final Rule's effective date (*i.e.*, stay it), and preliminarily enjoin Defendants from interpreting, applying, or enforcing Title IX to apply to discrimination based on sexual orientation or gender identity. For either form of relief, the relevant factors are the same: likely success, irreparable harm, the balance of equities, and the public interest. Plaintiffs satisfy all factors for both forms of preliminary relief.

I. Texas is Likely to Prevail on the Merits.

The likelihood of success on the merits "is arguably the most important" factor for preliminary relief. *Career Colleges & Sch. of Texas v. United States Dep't of Educ.*, 98 F.4th 220, 239 (5th Cir. 2024); *see also Mock v. Garland*, 75 F.4th 563, 587 n.60 (5th Cir. 2023) ("There is authority" that "likelihood of success on the merits ... is the most important of the preliminary injunction factors.").

The Final Rule violates the APA. It unlawfully redefines discrimination on the basis of sex to include sexual orientation and gender identity, exceeds the limits of how the Supreme Court has defined sexual harassment, and removes protections for those accused of misconduct. It does all of this contrary to the text, structure, and purpose of Title IX, and through arbitrary-and-capricious

decioonamking. The Final Rule is "arbitrary," "capricious," "not in accordance with law," "in cexcess of statutory … authority," and "contrary to constitutional right." 5 U.S.C. § 706(2).

A. The Rule illegally redefines Title IX's prohibition on "sex" discrimination.

The Final Rule's application of Title IX's anti-discrimination mandate to sexual orientation and gender identity is both contrary to law and arbitrary and capricious.

1. The Final Rule illegally redefines "sex."

In deciding whether the Final Rule is consistent with Title IX, "[w]e start where we always do: with the text of the statute." *Career Colleges & Sch. of Texas*, 98 F.4th at 240 (quoting *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023)). "Other sources that are helpful in determining what Congress meant when it passed [Title IX in 1972] include contemporaneous dictionaries, related statutes, and past statements of the Department." *Id.*

For almost a half century since its enactment, both the Department and recipients have understood Title IX's prohibition on sex discrimination to refer to a person's *biological sex*. Notwithstanding this history, the Final Rule redefines Title IX's prohibition on sex discrimination to include "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. at 33,886.

The Final Rule threatens to withhold federal funding from schools that do not allow students access to "restrooms and locker rooms" and comply with any "appearance codes (including dress and grooming codes)" based on gender identity. See, e.g., 89 Fed. Reg. at 33,816. The Final Rule dictates that a school violates Title IX's nondiscrimination mandate if a transgender student is denied access to a bathroom or locker room of the opposite biological sex. *See, e.g.*, 89 Fed. Reg. at 33,818.

a. The Final Rule wrongly relies on *Bostock*.

The Department lacks the legal justification to initiate and support such radical departures in the interpretation of Title IX. It rests its redefinition of sex discrimination almost entirely on the U.S. Supreme Court's opinion in *Bostock*. But that case's "reasoning applies only to Title VII, as *Bostock* itself and [] subsequent cases make clear." *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 420 (6th Cir.

2023) (Sutton, C.J.).

How does Title IX differ from Title VII? To start, Title VII prohibits employment discrimination "because of such individual's … sex[]," 42 U.S.C. § 2000e- 2(a), but Title IX prohibits education discrimination "on the basis of sex," 20 U.S.C. § 1681(a). The statutes thus contain different language with different results for different contexts. *Neese v. Becerra*, 640 F. Supp. 3d 668, 675–84 (N.D. Tex. 2022) (Kacsmaryk, J.) (*Bostock* and its reasoning do not apply to Title IX). And "*Bostock* … was limited only to Title VII itself" and "d[id] not stretch to [other statutes]." *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021); *see also Adams v. Sch. Bd. of St. Johns County*, 57 F.4th 791, 808 (11th Cir. 2022) (en banc) (holding that *Bostock*'s reasoning applies only to Title VII, and describing the argument that it applies to Title IX as "faulty").

Defendants conflate Title IX's prohibition of discrimination "on the basis of sex," 20 U.S.C. § 1681(a), with Title VII's prohibition on discrimination "because of … sex," 42 U.S.C. § 2000e-2(a)(1). But the *Bostock* court ruled that the phrase "because of" in Title VII mandated a sweeping but-for causation requirement. *Bostock*, 590 U.S. at 656. The U.S. Supreme Court has tendered no such ruling regarding the phrase "on the basis of sex" as used in Title IX. 20 U.S.C. § 1681(a). To the contrary. "On the basis of sex" references to one's "biological sex"—it does not mean does not mean "on the basis of gender identity" or "on the basis of sexual orientation."

Indeed, even though Title IX provides that recipients of federal funding for education programs or activities shall not discriminate "on the basis of sex," 20 U.S.C. § 1681(a), Title IX explicitly authorizes separation based on sex in certain situations, including "maintaining separate living facilities for the different sexes," 20 U.S.C. § 1686, and specified single-sex educational institutions, organizations, activities, and scholarship awards, 20 U.S.C. § 1681(a). These exceptions presume—and only make sense in the context of—biological sex as the relevant category.

In any event, the Final Rule misinterprets the holding of *Bostock* and the definition of "sex" discrimination adopted there. *Bostock* does not hold that discrimination on account of "sexual orientation" or "gender identity" is discrimination on account of "sex"; rather, it holds only that Title VII's prohibition on "sex" discrimination prohibits employers from firing or refusing to hire

individuals "for being homosexual or transgender."

Bostock explains that an employer who fires an employee for conduct or personal attributes that it would tolerate in a person of the opposite biological sex has made the employee's sex the "but-for cause" of his discharge, and that (in the Court's view) automatically violates the statutory command of Title VII. The Court explained:

> If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Bostock, 590 U.S. at 660.

Bostock also makes clear that an employer does *not* violate Title VII or engage in "sex" discrimination if it fires an employee for conduct or personal attributes that it would not tolerate in an employee of the opposite biological sex:

> Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent.

Id.

Bostock does not prohibit employers (or anyone else) from discriminating on account of sexual orientation or gender identity, so long as they do not engage in "sex" discrimination when doing so. For example, *Bostock* does not prohibit discrimination against bisexual students or individuals, so long as the employer regards bisexual behavior or orientation as equally unacceptable in a man or a woman. *See, e.g.*, *Bostock*, 590 U.S. at 660; *see also id.* at 658 ("[F]iring [a] person for actions or attributes it would tolerate in an individual of another sex … discriminates against that person in violation of Title VII."). Discrimination against bisexuals is certainly discrimination on account of "sexual orientation," but it is not discrimination on account of "sex." *Bostock* allows discrimination against homosexual or transgender individuals, so long as it is done pursuant to rules or policies that apply equally to both

sexes and would lead to the same result if the individual's biological different were different. A teacher or professor, for example, may refuse to accommodate a transgender or nonbinary student's demands to be referred to by the singular pronoun "they"—so long as the teacher or professor refuses demands for such pronoun usage on equal terms from a biological male or a biological woman, and would equally refuse to honor the transgender or nonbinary student's request if that student's biological sex were different.

Even if the Department considers policies or practices of that sort to be regarded as discrimination against transgender or non-binary individuals, they do not constitute "sex" discrimination as defined in *Bostock* because the policies apply equally to both biological sexes. *See Bostock*, 590 U.S. at 669 ("We agree that homosexuality and transgender status are distinct concepts from sex."). The Final Rule wrongly equates discrimination on account of sexual orientation and gender identity with "sex" discrimination. Yet there are many ways in which entities covered by Title IX could discriminate against homosexual, bisexual, transgender, or non-binary individuals without engaging in the kind of "sex"–based discrimination described in *Bostock*.

The Final Rule further conflicts with the reasoning of *Bostock* because that case did not find that all sex-based distinctions were prohibited. *Bostock* repeatedly cited the Court's earlier decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), as authority. *Oncale* explained that Title VII "does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex," and "requires neither asexuality nor androgyny in the workplace." *Id.* at 75, 81.

The *Oncale* Court noted the central concern of Title VII was not every aspect of interaction in the workplace but "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

The Second Circuit—in one of the cases consolidated with and affirmed in *Bostock*—also favorably cites *Oncale* as "arguably" supporting the view that "sex-specific bathroom and grooming policies [do not] impose disadvantageous terms or conditions" because not all distinctions of "'sexual

content or connotations' rise to the level of discrimination." *Zarda v. Altitude Express, Inc.,* 883 F.3d 100, 119 & n.16 (2d Cir. 2018) (en banc) (quoting *Oncale*, 523 U.S. at 79–80)); *see also West v. Radtke*, 48 F.4th 836, 849 (7th Cir. 2022) (finding Title VII would not be violated by preventing transgender prison guard from performing strip searches of opposite-sex inmates).

Relatedly, *Bostock* also cautioned that "Title VII does not concern itself with everything that happens 'because of' sex," *Bostock*, 590 U.S. at 657—only discrimination that is "inextricably" related to sex is forbidden; distinctions "related to sex in some vague sense" or having only "some disparate impact on one sex or the other" are not reached by the statute. *Id.* at 660–61.

Bostock did not overturn any Supreme Court precedents, instead resting on those dating to the 1970s. It also did not disturb lower-court precedent that has long applied those same precedents. "[T]the Court relied in *Bostock* on the same well established Title VII principles that animated the outcome in those prior decisions [of lower courts that applied the same key precedents, so those courts] effectively anticipated *Bostock*'s rationale." *Maner v. Dignity Health*, 9 F.4th 1114, 1124 (9th Cir. 2021) (Bea, J.) (explaining *Bostock* did not overturn decades of lower-court precedents rejecting "paramour preference" theory of liability).

This is consistent with *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc), which upheld sex-specific grooming codes under Title VII. *Willingham* applied *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) one of the key cases the Supreme Court relied on in *Bostock*. The Second Circuit in *Zarda*— which relied on the same key precedents that the Supreme Court would later adopt in *Bostock* (*Martin Marietta* and *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978))—favorably cited *Willingham* as consistent with its analysis. *Zarda*, 883 F.3d at 118–19. In short, *Bostock* did not nullify the Supreme Court's longstanding acceptance of differences between the sexes. It did not question any longstanding precedent beyond the narrow question before it: whether "[a]n employer who fires an individual *merely for being* gay or transgender defies the law." *Bostock*, 590 U.S. at 683 (emphasis added).

b. The Final Rule's expansion of Title IX's scope into sexual orientation and gender identity violates the Clear Statement Rule

and the Major Questions Doctrine.

Even if there were ambiguity on whether Title IX adopts the Final Rule's definition of discrimination "on the basis of sex," that ambiguity must be resolved in favor of the State because conditions on federal funding must be stated clearly. *Adams*, 57 F.4th at 815.

Congress enacted Title IX pursuant to its powers under the Spending Clause. *Davis*, 526 U.S. at 640 ("[W]e have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause[.]"). If Congress intends to impose a condition on the grant of federal funding under Title IX, it must do so with "a clear voice," "unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

This clear statement rule is required when imposing a condition on federal funding because "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Adams*, 57 F.4th at 815 (citing *Pennhurst*, 451 U.S. at 17). "Recipients cannot knowingly accept the deal with the Federal Government unless they would clearly understand the obligations that would come along with doing so." *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 219 (2022) (internal quotations omitted).

The use of the word "sex" in Title IX did not put educational institutions and programs on notice that by accepting funding from the federal government for educational services and activities, they are prohibited from providing bathrooms or other facilities for the two sexes. *See Adams,* 57 F.4th at 816. That is clear not only from historical practice but from Defendants' longstanding interpretation of Title IX and its implementing regulations, which "include provisions that presuppose sex as a binary classification." 85 Fed. Reg. at 30,178.

Similarly, courts will not assume that Congress has assigned questions of "deep economic and political significance" to an agency unless Congress has done so expressly. *See King v. Burwell*, 576 U.S. 473, 486 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). "Congress typically [does not]

use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme …We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* (cleaned up); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120,160 (2000).

The Final Rule will affect all elementary schools, secondary schools, postsecondary institutions, and other recipients of federal financial funds with far-reaching social and economic impact. Yet Title IX's language cannot be plausibly read to smuggle in a power for federal agencies to overturn the "unremarkable—and nearly universal—practice[s]" such as separating bathrooms by biological sex, common in States' governance of schools. *Adams*, 57 F.4th at 796.

c. In the alternative, if *Bostock* applies to Title IX, the Final Rule violates it.

In addition, even if Title IX covered discrimination on the bases of sexual orientation and gender identity, the Final Rule interprets Title IX's anti-discrimination provision as requiring accommodations for gender identity even though Title IX—unlike Title VII's prohibition on religious discrimination and the disability discrimination provisions of the Rehabilitation Act and the Americans with Disabilities Act—has no accommodation requirement.

The Final Rule requires exceptions from admittedly lawful sex-segregated policies and facilities for those whose gender identity is transgender—and only for them, as schools would still be allowed to prevent biological males who do not identify as women from entering female-only spaces and programs. *See* 89 Fed. Reg. at 33,818 (under Final Rule, "sex separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination" but when a school "denies a transgender student access to a sex-separate facility or activity consistent with that student's gender identity, this would violate Title IX's general nondiscrimination mandate"); *id.* at 33,887 (to be codified at 34 C.F.R. § 106.31: where Title IX permits "different treatment or separation in a manner that discriminates on the basis of sex," the Final Rule requires "sex" to be determined by gender identity); *id.* at 33,820 (reasoning that non-transgender students are not harmed by being denied access to sex-separated facilities such as restrooms and locker

rooms, so only transgender students are protected by the new 34 C.F.R. § 106.31(a)(2) that prohibits "more than de minimis harm").

The types of school policies targeted by the Final Rule do not discriminate based on gender identity. While *Bostock* held that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex," 590 U.S. at 669, the Final Rule instead addresses "the converse question: whether discrimination on the basis of sex necessarily entails discrimination based on transgender status." *Adams v. Sch. Bd. of St. Johns County*, 3 F.4th 1299, 1332 (11th Cir. 2021) (Pryor, C.J., dissenting), *rev'd by Adam.*, 57 F.4th 791.

The Final Rule never addressed the question of whether the policies "impose[d] disadvantageous terms or conditions" based on sex. The Second Circuit ruling affirmed in *Bostock* left this question open but indicated the serious possibility that such policies were not covered by Title VII even if discrimination based on sexual orientation and gender identity were forbidden. *Zarda*, 883 F.3d at 118–19 (favorably citing on this ground *Oncale,* 523 U.S. 75, and *Willingham*, 507 F.2d 1084). This distinction is alluded to in *Bostock* itself. *See* 590 U.S. at 681 (after noting that its reasoning does not settle the issue of "bathrooms, locker rooms, or anything else of the kind," referring to Title VII's limitation to "distinctions or differences in treatment that injure protected individuals"; while "firing employees surely counts other policies and practices might or might not qualify as unlawful discrimination") (cleaned up). But if such policies *are* covered by Title IX, then the Final Rule violates the prohibition on treating people differently based on gender identity.

Consider standard bathroom norms. All biological males, regardless of their gender identity, may use the men's bathroom; all biological females, regardless of their gender identity, may use the women's bathroom. "Separating bathrooms based on sex dates back as far as written history will take us," long before the concept of gender identity even existed. *Adams*, 3 F.4th at 1328 (Pryor, C.J., dissenting) (cleaned up), *rev'd*, 57 F.4th 791. These policies do not even consider "gender identity," and therefore cannot be described as discriminating based on that category. *Cf. Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 n.7 (2003) ("[I]f no part of the hiring decision turned on [the applicant's] status as disabled, he cannot, *ipso facto,* have been subject to disparate treatment"). "Separating

bathrooms by sex treats people differently on the basis of sex … [but] the mere act of determining an individual's sex, using the same rubric for both sexes, does not treat anyone differently on the basis of sex." *Adams*, 3 F.4th at 1325–26 (Pryor, C.J., dissenting), *rev'd*, 57 F.4th 791.

The Final Rule purports to allow sex-specific bathrooms, locker rooms, and showers (explicitly) and sex-specific dress codes and pronoun usage policies (implicitly) as a general matter. But it then "tr[ied] to work around [those concessions] with a linguistic device." *Doe 2 v. Shanahan*, 917 F.3d 694, 723 (D.C. Cir. 2019) (Williams, J., concurring in the result) (criticizing plaintiffs' concession that military may have sex-specific standards while arguing that "sex" should be determined by subjective gender identity). It is no consolation to tell schools they can still have sex-specific bathrooms (or dress codes or pronoun usage) so long as they allow exceptions for individuals who subjectively identify as the opposite sex.

If schools may have separate facilities or policies for men and women, as the Final Rule concedes, then they may also require compliance with those policies. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 30, at 192–93 (2012) ("[W]henever a power is given by a statute, everything necessary to making it effectual or requisite to attaining the end is implied.") (citation omitted). The same is true for sex-specific dress codes or allowing the use of gendered pronouns as part of standard English in schools; such policies do not classify based on the gender identity of anyone but disregard that concept altogether, exactly as *Bostock* requires. Indeed, to allow schools to have sex-specific policies, but then require them to have exemptions only for transgender employees or students, violates *Bostock* because such a rule discriminates based on gender identity.

The Final Rule's transformation of "sex" is arbitrary and capricious.

Under the APA, a court must "hold unlawful and set aside agency action" that is "arbitrary," "capricious," or "an abuse of discretion." 5 U.S.C. § 706(2)(A). This means if an agency action is not "reasonable and reasonably explained," it must be vacated. *Wages & White Lion Invs.L.L.C v. FDA*, 16 F.4th 1130, 1136 (C.A.5, 2021) (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)); *see*

Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 224 (2016) ("[A] lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law.").

"Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Defendants did not engage in reasoned decision-making, but instead acted arbitrarily and capriciously in issuing the Final Rule.

To summarize a few flaws, the Rule is internally inconsistent, fails to define key terms, disregards evidence submitted, makes decisions that are counter to the evidence before the Department, fails to properly balance all the relevant interests that would be affected by the Department's changed position, and routinely offers "conclusory statements" rather than real responses to valid and serious concerns submitted by commenters. *See Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 473 (5th Cir. 2024).

The Final Rule fails arbitrary-and-capricious review because the Department neglected to offer a reasoned explanation for the Final Rule's departure from the historic understanding—including within previous Title IX regulations—of Title IX's prohibition on "sex" discrimination. The Department noted during its 2020 regulations that "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification." It further observed that provisions in the Department's then-existing regulations reflected that premise. 85 Fed. Reg. at 30,178.

Instead of confronting this history, the Department deflected by referencing the Supreme Court's decision in *Bostock*, but that is insufficient given the textual and structural differences between the two statutes and the express disclaimer in *Bostock* that its holding did not apply to other laws. The Department compounds the problems with its analysis by dismissing multiple court opinions, including from this Court, that recognized "*Bostock* … was limited only to Title VII itself" and "does

not stretch to [other statutes]." *Pelcha*, 988 F.3d at 324; *Neese*, 640 F. Supp. 3d 668; *compare* 89 Fed. Reg. at 33,806.

In addition, when an agency changes its position, the agency must "recognize[ ] the change, reason[ ] through it without factual or legal error, and balance[ ], all relevant interests affected by the change." *Louisiana*, 90 F.4th at 469. The Department, however, refused to dutifully consider the reliance interest Texas and other recipients had with respect to the Department's historic understanding of Title IX.

Nor did the Department address the States' practical concerns about authenticating gender identity or the risk that the Department's policy would pose to student safety and privacy. The Final Rule also fails the test of reasoned decision-making by failing to address how its gender-identity mandate applies to "nonbinary," "bisexual," or "questioning individuals."The Department had before it significant evidence that permitting individuals who identify as transgender to use bathrooms or locker rooms associated with their gender identity, as opposed to their biological sex, subjected students to distress and embarrassment as well as an increased risk of harassment or assault. Yet, its response simply stated that the Department "does not agree." 89 Fed. Reg.at 33,820. This dismissal of commenters' substantive concerns characterized the entire rulemaking process.

The Final Rule also fails arbitrary-and-capricious review because it is contradictory, failing to reasonably explain treating like circumstances differently. It declines to apply its gender-identity mandate to "living facilities" by pointing to the statutory exceptions in 20 U.S.C. § 1681(1)-(9). 89 Fed. Reg. at 33,816, 33,818–19. But it applies its mandate to "toilet, locker room, and shower facilities," permitted to be sex-separated by rule, 34 C.F.R. § 106.33.

The Final Rule's cost-benefit analysis is also wholly deficient. The Final Rule assumes the average time to read and understand the final, 423-page regulation will be 4 hours for a Title IX Coordinator and lawyers, which defies belief. *See* 89 Fed. Reg at 33,867. The Rule's other cost-and-benefit assumptions are equally absurd, including its failure to include any construction costs based on Defendants' refusal to acknowledge the Final Rule will require schools to modify bathrooms and locker rooms. *See*, *e.g.*, 89 Fed. Reg. at 33,876.

The Final Rule also fails to recognize how its standard regarding gender-identity discrimination undercuts its separate ongoing rulemaking process specific to athletics. *Cf. Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) ("an agency must have a similar obligation to acknowledge and account for a changed regulatory posture the agency creates—especially when the change impacts a contemporaneous and closely related rulemaking"); *Office of Commc'n of the United Church of Christ v. FCC,* 707 F.2d 1413, 1441–42 (D.C. Cir. 1983) (finding it "seriously disturbing" and "almost beyond belief" that an agency would take rulemaking action undercutting another "concurrent" rulemaking process).

Finally, the Department repeatedly failed to adequately consider the effects of its terms on the States and their reliance interests of over 50 years of Title IX and its regulations. When commentators raised concerns about preemption, Defendants expressly "decline[d] to opine on how [the Final Rule] interacts or conflicts with any specific State laws because it would require a fact-specific analysis," and instead "refer[red] the public to § 106.6(b), which affirms that a [school's] obligation to comply with Title IX and the regulations is not obviated or alleviated by any State or local law." 89 Fed. Reg. at 33,822. This does not satisfy Defendants' obligation to "adequately assess reliance interests" or "reasonably consider[] the relevant issues and reasonably explain[] the decision." *Texas v. Biden*, 10 F.4th 538, 552, 555 (5th Cir. 2021).

B. The Final Rule wrongfully protects abortion.

The Final Rule also purports to override Texas's abortion prohibitions. The Final Rule purports to protect women who abort their unborn children, even when doing so violates State law. It also purports to protect women who engage in the shipment or receipt of abortion pills and abortion-related paraphernalia. *See* 18 U.S.C. § 1461–462. The Final Rule defines "pregnancy or related conditions" to include "termination of pregnancy." 89 Fed. Reg. at 33,883 (to be codified at 34 C.F.R. § 106.2). The Final Rule stipulates that every recipient of federal funds, including educational institutions, must treat abortion on the same terms as "any other temporary medical condition." *See* 89 Fed. Reg. at 33,887–888 (to be codified at 34 C.F.R. § 106.40(b)(6)(vi)(4) ("[A] recipient must treat

pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions."). Accordingly, the Final Rule requires all healthcare plans offered by every educational institution to cover abortion on the same terms as "any other temporary medical condition." *Id.*

The Final Rule also requires schools to excuse a student's absence for "terminat[ing] [her] pregnancy" even when doing so violates Texas law. *See id.* This provision of the Final Rule is another attempt by the Biden Administration to nullify *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). The Supreme Court has held that "the Constitution does not confer a right to abortion" and "does not prohibit the citizens of each State from regulating or prohibiting abortion." *Id.* at 2279, 2284.

In accordance with *Dobbs*, Texas regulates and prohibits abortions. Under Texas's Human Life Protection Act, "[a] person may not knowingly perform, induce, or attempt an abortion." Tex. Health & Safety Code § 170A.002. That prohibition does not apply if the woman on whom the abortion is performed "has a life-threatening physical condition" arising from a pregnancy that places her "at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed." Tex. Health & Safety Code § 170A.002(b)(2). Texas law imposes criminal and civil penalties for violation of this law. *See* Tex. Health & Safety Code §§ 170A.004–.005; Tex. Penal Code § 12.32–.33.

In addition to the Human Life Protection Act, Texas statutes predating *Roe v. Wade* also address the subject of abortion. *See* Tex. Rev. Civ. Stat. arts. 4512.1–.4, .6 Under those statutes, any person who causes an abortion is guilty of an offense and shall be confined in a penitentiary. *Id.* at 4512.1. Moreover, an individual may not act as an accomplice to abortion or an attempted abortion. *Id.* at 4512.2–.3. However, it is not an offense if the abortion is performed under "medical advice for the purpose of saving the life of the mother." *Id.* at 45.12.6. The Final Rule purports to preempt Texas's laws by requiring schools and professors to protect actions that would otherwise violate State or federal law. Plaintiffs Bonevac and Hatfield, both of whom are professors at the University of Texas at Austin, have no intention to accommodate students who obtain an illegal abortion or a purely

elective abortion, nor do they intend to hire teaching assistants who have violated the abortion laws of Texas or the federal-law prohibitions on the mailing of abortifacients. *See* Declarations of Bonevac and Hatfield at ¶¶ 11, 13, App.10–17.

C. The Final Rule illegally redefines "sex-based harassment."

In direct contradiction to Supreme Court precedent, and in service of the Biden Administration's radical political agenda, the Final Rule unlawfully redefines what constitutes "sex-based harassment" under Title IX. Specifically, the Final Rule now prohibits "[u]nwelcome 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." 89 Fed. Reg. at 33,517 (emphases added). By drafting this new standard for sex-based harassment, the Final Rule becomes contrary to law and arbitrary and capricious.

1. The Final Rule's unlawful redefinition of sex-based harassment is contrary to law.

To start, the Final Rule violates the First and Fourteenth Amendments because it imposes viewpoint-based and content-based restrictions on students and employees affiliated with recipients and compels public entities, like Texas, to enforce said restrictions at risk of the federal funds. Specifically, the Final Rule deliberately discards the definition of sexual harassment articulated by the Supreme Court in *Davis* and adopted by the Department in its 2020 rulemaking, in favor of a weaker standard that encompasses wide swaths of constitutionally protected activity.

The Final Rule accomplishes this because it expands Title IX to cover harassment that's "severe *or* pervasive," 89 Fed. Reg. at 33,884, rather than "severe *and* pervasive," *Davis*, 526 U.S. at 652–53. And the Final Rule applies even if the harassment merely "limits" a person's "ability to participate in or benefit from" a program or activity, 89 Fed. Reg. at 33,884, rather than "denies" a person "access to the educational opportunities or benefits provided by the school," *Davis*, 526 U.S. at 651–53. Broader still, the rule requires recipients to "promptly and effectively end any sex discrimination," regardless whether they were deliberately indifferent to it. *See* 89 Fed. Reg. at 33,889

(Proposed 34 C.F.R. §106.44(f)(1)); *contra Davis*, 526 U.S. at 650–52. As a result, the Final Rule's new hostile-environment definition thus covers a single or isolated incident and all negative effects like "a mere 'decline in grades,'" a choice to skip class, or a decision not to attend a campus activity. *Davis*, 526 U.S. at 652–53; *accord* 89 Fed. Reg. at 33,511 ("[A] complainant must demonstrate some impact on their ability to participate or benefit from the education program or activity, but the definition does not specify any particular limits or de-nials."). And the Final Rule's new definition would force students and teachers to, for example, use someone's "preferred pronouns." What's worse, the Final Rule extends to conduct that occurs online, off campus, outside the United States, or even before the relevant individuals attended the school. 89 Fed. Reg. at 33,886, 33,527.

At the same time, the Final Rule expands recipients' obligations far beyond what Title IX allows, such as by reinterpreting the word "sex" to include "sexual orientation" and "gender identity." Hence, not only does the Final Rule fundamentally rewrite Title IX's prohibition on sex-based discrimination, but the failure to affirm a student's gender identity would constitute "sex-based harassment" under the new regulations since it could have negative effects that constitute more than a de minimis harm.

2. The Final Rule's unlawful redefinition of sex-based harassment is also arbitrary and capricious.

On top of contravening the law, the Final Rule further fails arbitrary-and-capricious review because the Department neglected to reasonably consider the constitutional concerns raised by its new definition of sex-based harassment. Specifically, because the Final Rule thus raises First Amendment and other constitutional concerns, Defendants acted arbitrarily and capriciously when they failed to engage in reasoned decisionmaking in addressing these concerns.

Defendants also acted arbitrarily and capriciously when they failed to reasonably consider the lose-lose situation the Final Rule places on funding recipients through its illegal redefinition of "sex-based harassment." Justice Kennedy warned in his dissent for four Justices that "[o]n college campuses, and even in secondary schools, a student's claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser's claim that his speech, even if offensive, is

protected by the First Amendment. In each of these situations, the school faces the risk of suit, and maybe even multiple suits, regardless of its response." *Davis*, 526 U.S. at 682–83 (Kennedy, J., dissenting). The majority avoided this problem by stressing the deliberate-indifference requirement to liability and the stringent definition of actionable harassment. By abandoning the deliberate-indifference requirement, the Department unravels *Davis*'s reasoning.

The Department's hostile-environment definition is also internally inconsistent, rendering the rule arbitrary and capricious. It stresses a "totality of circumstances" test that considers, among other things, "[t]he degree to which the conduct affected the complainant's ability to access the recipient's education program or activity." 89 Fed. Reg. at 33,884 (34 C.F.R. §106.2). But that factor is in tension with the Department's other statement that "sex-based conduct meets the 'severe or pervasive' standard of sex-based harassment if it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." 89 Fed. Reg. at 33,508. The Department reads out "severe or pervasive" from its definition. It is not clear why the degree of harm matters if the only requirement is that the harassment "limits" the individuals' ability to participate in education, and the Department provides no reasonable explanation justifying this tension.

Further, the Department's action is arbitrary and capricious because it fails to reasonably address comments on so-called "misgendering." The Department noted that a commenter raised the Department's "recent resolution letter finding that a school district violated Title IX when it failed to effectively respond to a misgendering of a student." 89 Fed. Reg. at 33,516. Other commentators also "urged" the Department to state that "misgendering is a form of sex-based harassment that can create a hostile environment." 89 Fed. Reg. at 33,516. Many commentators also raised the notice of proposed rulemakings seeming approval of the 2016 Dear Colleague Letter, stating that misgendering is punishable harassment. Rather than address these comments or the 2016 letter, the Department did not meaningfully engage with either comment or even cite the 2016 letter, but merely stated that the issue "is necessarily fact-specific" and that "a stray remark, such as a misuse of language, would not constitute harassment under this standard." 89 Fed. Reg. at 33,516. The terse statement is hardly "reasoned decisionmaking." *Michigan v. EPA*, 576 U.S. 743, 750 (2015). Commentators put the

Department on notice of the 2016 letter and the resolution, so the Department was obligated to address those "relevant authorit[ies]" and explain any "inconsistencies" or differences in position. *Data Mktg. v. United States Dep't of Labor*, 45 F.4th 846,857 (C.A.5 (Tex.), 2022).

D. The Final Rule illegally changes procedural safeguards in the Title IX grievance process.

For students accused of sex-based harassment, the Title IX grievance process can have life-altering consequences. At the very least, a finding of guilt places a black mark on a student's record. At its most extreme, it can topple any chance a student has at a successful career. Despite these stakes, the Department has elected to roll back many of due process protections promulgated during the 2020 rulemaking that guaranteed students a fair opportunity to defend themselves. These changes were not backed by reasoned decision-making. The Department failed to consider how the amended procedures interacted, first, with each other and, second, with other provisions in the Final Rule that expand recipients' liability. The Department also failed to reasonably justify its departure from past policy or reasonably consider the relevant issues. The changes thesefore represent an arbitrary and capricious action by the Department and should be enjoin and/or have the effective postponed.

1. The Department only considered the changes in isolation.

The Final Rule creates a litigation trap, as explained above. If recipients comply with the Department's new regulations, they risk civil rights lawsuits and litigation expenses. If they side with the constitutional rights of their students and employees, they invite federal or private enforcement actions, jeapordizing not only their reputation but their access to federal funds. The Department's decision to remove or diminish procedural safeguards in the Title IX grievance process exacerbates this problem. *See generally* 89 Fed. Reg. 33,891–96 (34 C.F.R. §§ 106.45, 106.46). The 2020 Rule established a baseline that would pass constitutional muster in most, if not all cases. That baseline provided recipients cover from accusations that recipients were falling short of their Title IX obligations if they offered due process protections to those accused of sex-based harassment. By amending the 2020 Rule, the Department eliminated that safe harbor. This reintroduced uncertainty, exposing recipients to possible enforcement actions.

The Texas Attorney General alerted the Department to this complication during the notice-and-comment period and explained that the additional exposure to enforcement actions would pressure recipients, including those in Texas, to revert to the kangaroo courts that plagued Title IX proceedings prior to the 2020 rulemaking. *See* App.030–033; Brian A. Pappas, *Procedural Convergence*, 55 Law & Soc'y Rev. 381, 391 (2021) (concluding that "Universities faced a choice of what constituted the larger risk: OCR enforcement or civil lawsuits?"). He noted that the 2011 Dear Colleage Letter bred similar incentives, which resulted in a record number of lawsuits and judgments against public universities for failing to abide by students' constutional rights. *See* App.031; *see also* Jonathan Taylor, *Milestone: 700+ Title IX/Due Process Lawsuits by Accused Students*, Title IX for All (May 11, 2021), https://titleixforall.com/milestone-700-title-ix-due-process-lawsuits-by-accused-students/.

Instead of responding to this concern, the Department emphasized that the new standards gave schools discretion over the procedures they adopted during the grievance process. However, this assertion is neither accurate nor on point. Not only do many of the changes further restrict recipients' options, *see*, *e.g.*, 89 Fed. Reg. 33,893 (34 C.F.R § 106.45(h)(1)) (burden of proof), but the Department failed to take into account that other parts of the Final Rule push recipients towards a specific outcome. The Final Rule charges recipients to "promptly and effectively" respond to "conduct that reasonably may constitute sex discrimination." 89 Fed. Reg. at 33,888. It then defines sex discrimination so broadly that recipients would be in violation of their obligations if they did not step in to "end" even protected activity, "prevent its recurrence, and remedy its effects." *Id.* at 33,592; *see supra* (discussing rejection of the *Davis* standard). The combination imposes serious pressure on recipients to curtail due process rights lest they be found deficient in their response to alleged harassment.

In other words, the Department considered the effect of watering down each procedural protection separately; it did not consider how these procedures would interact with other changes introduced by the Final Rule. This is not reasoned decisionmaking. The Department must consider the regulations as a whole if it is to have complete picture of the Final Rule's benefits and costs. *See* *State Farm*, 463 U.S. at 43. Furthermore, the Texas Attorney General notified the Department that

the totality of its proposed regulations would incentive recipients to offer the least amount of process possible. The failure to adequately consider and respond to significant comments received during the period for public comment demonstrates that the agency's decision was not based on a consideration of the relevant factors. *See*, *e.g.*, *Mexican Gulf Fishing Co. v. U.S. Dep't of Com.*, 60 F.4th 956, 973 (5th Cir. 2023) (citing failure to respond as reason for finding regulation unlawful).

To make matters worse, the Department did not consider the cumulative effect the diluted procedures would have on the accused's ability to offer a meaningful defense. For example, the risk of bias and unreliable outcomes from the single-investigator model is especially pronounced when the rule also gives the school officials the power to prosecute even "[i]n the absence of a complaint." 89 Fed. Reg. 33,889 (34 C.F.R. §106.44(f)(1)(v)). Courts have long recognized that students subject to disciplinary hearings are entitled to due process. *See Goss v. Lopez*, 419 U.S. 565,581 (1975). And although the "specific dictates" of that process may vary depending on the ccircumstances, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the grievance process at public institutions must meet a constitutional minimum, in that it gives students a reasonable and fair opportunity to answer the charges levied against them. Accordingly, the Department had a duty to assess whether the combined changes made to Title IX grievance process brought recipients' due process protections beneath that threshold. Its failure to do so is evidence of arbitrary-and-capricious rulemaking and violates the APA.

2. The Department's reasoning was flawed even when the changes are considered one-by-one.

In addition to its failure to consider the changes the Final Rule made to Title IX's grievance process in context, the Department erred when assessing the procedures individually. This is because the Department, among other things, neglected to adequately explain its rejection of the factual findings it published following the 2020 rulemaking. The Department at that time understood that promises of fair process were empty without real procedural and structural safeguards. The Final Rule, however, retracts many of these practices without ever really addressing the evidence before the

Department in 2020 or the consequence such revisions have on the accused. To offer a handful of examples:

Single Investigator Model: The Final Rule reverses the policy promulgated by the 2020 Rule and permits recipients to once again adopt the single investigator model, in which a single school employee—often the Title IX coordinator—adjudicates disciplinary proceedings as prosecutor, judge, and jury. This change threatens to inject bias into the proceedings. As the Department previously found, "[I]ndividuals 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." 85 Fed. Reg. at 30,367. The Department, however, now says this reasoning from just a few years ago was wrong. 89 Fed. Reg. at 33,857. But when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," agencies must "provide a more detailed justification." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Department fails to do that here, despite the "obvious" dangers the single investigator model engenders. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 606 (D. Mass. 2016).

The Department attempts to downplay negative ramifications that will result from its policy by pointing out that the single investigators are instructed by the Final Rule to treat the participants "equitably" and not be "biased" or have a "conflict of interest." 89 Fed. Reg. at 33,662–63. However, these protections are not reasonably connected to the stated concerns. A simple directive to be unbiased does nothing concrete to protect parties or ensure reliability. And an opportunity to appeal is no solace to the accused, where a finding of guilt can exact severe monetary and reputational costs on students, ranging anywhere from expulsion and academic suspension to loss tuition, housing, scholarships, and job opportunities. *See Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) At the very least, it places a black mark on a student's record—at its most extreme, it can topple any chance a student has at a successful career.

The 2020 Rule eliminated the single investigator because it found that a "follow the law" directive did not work in practice and real protections were necessary. The Department neither reasonably addressed the relevant issues nor "provide[d] a more detailed justification" explaining this

reversal. *Fox*, 556 U.S. at 515 .

Notice of Charges: The challenged regulations allow an investigation to begin without any formal written complaint. The accused need only receive an "oral" statement that a person would "objectively"understand as a "request" to "investigate." 89 Fed. Reg. 33,882 (proposed 34 C.F.R. § 106.2). Verbal complaints, however, are often vague and imprecise, making it difficult (if not impossible) to provide accurate and adequate notice. Perhaps worse, the rule now permits the Title IX coordinator to initiate a grievance procedure even in "the absence of a complaint or the withdrawal of any or all of the allegations in a complaint." *Id.* at 33,889 (34 C.F.R. § 106.44(f)(1)(v)). The Fianl Rule thus empowers Title IX coordinators to go beyond their mandatory reporting duties and to police activities on campus that they think constitute sex discrimination. Given the overall breadth of "sex discrimination" and "sex-based harassment" under the rule, this provision gives Title IX coordinators and other employees the power to open investigations and start proceedings based solely on what they have heard. The Department failed to reasonably address the extraordinary implications of these changes or reasonably explain why a formal written complaint is unfair, impractical, or unwise.

Access to Evidence: The Final Rule removes the right of students to inspect all the evidence against them. Recipients have the option of offering students a mere "description" of the "relevant and not otherwise impermissible evidence," unless students go out of their way to request an "equal opportunity to access the evidence." 89 Fed. Reg. 33,892 (proposed 34 C.F.R. § 106.45(f)). The accused, however, has no way of knowing what relevant evidence was missing (or incompletely summarized in) the report. And because the Final Rule lets the decisionmaker and the investigator be the same person, the decisionmaker could know and base his decision on information that the parties never got a fair opportunity to contextualize or challenge. This limited access to the evidence raises more due-process concerns, which the Department does not reasonably address in its analysis. *See, e.g.*, *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019); *Averett v. Hardy*, 2020 WL 1033543, *5–8 (W.D. Ky. Mar. 3, 2020). The Department likewise failed to reasonably explain why providing the accused the evidence without a request, along with a description, is impractical or unwise and why the broader scope of evidence available under the 2020 Rule is problematic.

Live Cross Examination: The Final Rule eliminates the right to a live hearing at postsecondary institutions. Even if some form of live hearing is offered, the accused still lacks the right to directly cross-examine witnesses through a chosen representative. 89 Fed. Reg. at 33895 (34 C.F.R. § 106.46(g)). Setting due process concerns aside, the Department failed to provide a "detailed justification" for adopting "findings that contradict" the ones underlying the 2020 Rule. *Fox*, 556 U.S. at 515. The Department previously found that the alternatives it now champions were problematic,[6] *see* 85 Fed. Reg. at 30,330–31, and "stifled the value of cross-examination" if, for example, the recipient "refus[ed] to ask relevant questions posed by a party, chang[ed] the wording of a party's question, or refus[ed] to allow follow-up questions." *Id.* at 30,313; *accord id.* at 30,316, 30,330, 30,340.

Lacking evidence to refute its prior finding, the Department claims that "live hearings with advisor-conducted cross-examination" can be "burdensome" and these "resources … could have been spent on other things, including additional training for decisionmakers." 89 Fed. Reg. at 33732. But "cheapness alone cannot save an arbitrary agency policy." *Judulang v. Holder*, 565 U.S. 42, 64 (2011). The Department, in any event, does not explain how a single live hearing is more burdensome than multiple individual meetings with each witness where credibility might be an issue and there are follow-up questions. 89 Fed. Reg. at 33,894. Nor does the Department reasonably explain why the many benefits of a live hearing with adversarial cross-examination are outweighed by increased administrative burdens—an omission all the more striking given the Department's previous finding that cross-examination by the parties "appropriately and reasonably balances the truth-seeking function of" the the grievance process. 85 Fed. Reg. at 30,330.

Burden of Proof: The Final Rule limits recipients' discretion to require a higher burden of proof before punishing the accused under Title IX. The Department lets recipients use a higher burden of proof (clear and convincing, rather than a preponderance) only if they use that higher

[6] For example, the Department determined that "require[ing] a recipient to step into the shoes of an advocate by asking each party cross-examination questions designed to challenge that party's plausibility, credibility, reliability, motives, and consistency would place the recipient in the untenable position of acting partially (rather than impartially) toward the parties, or else failing to fully probe the parties' statements for flaws that reflect on the veracity of the party's statements." *Id.* at 30,331 (cleaned up).

burden "in all other comparable proceedings, including proceedings relating to other discrimination complaints." 89 Fed. Reg. 33,893 (34 C.F.R. § 106.45(h)(1)). Though the Department claims to care about "flexibility," this change is mandatory, and the Department does not provide an adequate explanation why it gives recipients less discretion. Additionally, the Department nowhere explains what constitutes a "comparable proceedin[g]." *Id.*; *see id.* at 33,704 ("declin[ing] to define that term"). This uncertainty makes the Department's rule a de facto ban on the clear-and-convincing-evidence standard without ever having to justify such a rule.

E. The Final Rule illegally expands scope of recipients' liability beyond the scope of the statute.

The Final Rule's redefinition of "sex" discrimination is not the only instance where the Department attempts to illegally expand when, where, and how recipients must act to remain in compliance its regulations. For instance, Title IX limits recipients' obligations to discrimination that occur "under" their "education programs or activities." 20 U.S.C. § 1681(a); *see also id.*at § 1687 (defining programs and activities). This means that the discrimination or harassment "must take place in a context subject to the school district's control." *Davis*, 526 U.S. at 645. Nevertheless, the Final Rule obliges recipients to "promptly and effectively" address "conduct that occurs in a building owned or controlled by a student organization," 89 Fed. Reg. at 33,886 (34 C.F.R. § 106.11), 33,888 (34 C.F.R. § 106.44); misconduct occurring off campus (online or otherwise) or even "outside the United States," *id.*; and activities that occurred before any of the individuals attended the academic, *id.* at 33,527. The Department does not have authority to inflate recipients' liability beyond the plain text of the statute.

II. Texas will suffer irreparable harm if the Final Rule takes effect, as will other recipients.

"To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). Instead, "[t]he plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Id.* (footnote omitted). "When determining whether injury is irreparable, it is not so much the magnitude but the irreparability that counts." *Id.* at 433–34 (cleaned up). Irreparable

injury includes "increased costs of compliance, necessary alterations in operating procedures, and immediate threats of costly and unlawful adjudications of liability all inflicted by the Rule's new provisions." *Career Colleges & Sch. of Texas*, 98 F.4th at 235.

Because the federal government "generally enjoy[s] sovereign immunity for any monetary damages," *Wages & White Lion Invs., L.L.C.*, 16 F.4th at 1142, Texas cannot compel the federal government to reimburse it. Without immediate judicial intervention, the Final Rule will inflict irreparable harm on Texas, its school systems, and its citizens.

F. Texas is the object of the Final Rule and faces compliance costs.

Texas suffer the irreparable harm of nonrecoverable compliance costs. *Career Colleges & Sch. of Texas*, 98 F.4th at 235. "[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment)).

A plaintiff "need not convert each allegation of harm into a specific dollar amount," *Career Colleges & Sch. of Texas*, 98 F.4th at 236 (cleaned up)—"alleged compliance costs need only be more than de minimis." *Id.* (cleaned up). Even the Department admits that the gender-identity mandate would require many schools to "updat[e] policies or training materials" and host trainings for employees and Title IX coordinators at substantial expense, among other compliance-related costs. 89 Fed. Reg. at 33,867, 33,876 (discussing 34 C.F.R. § 106.31(a)(2)); *see also Career Colleges & Sch. of Texas*, 98 F.4th at 236 (crediting evidence that plaintiffs would have to "expend more time and resources to train their staff due to the Rule"). Texas's declarations confirm the Final Rule would require it to undertake significant and costly compliance activities to prepare for the August 1, 2024 effective date.

Texas administers numerous education programs and operates thousands of educational institutions through its constituent agencies and political subdivisions, including programs and institutions that receive federal funding and are subject to Title IX and its effectuating regulations.

Texas independent school districts and Texas public universities are instrumentalities of the State. *See, e.g., Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008).

The Texas Constitution charges the Texas Legislature "to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Tex. Const. art. VII, § 1. Pursuant to this charge, Texas funds, regulates, and oversees the Nation's second-largest K–12 public education system, serving over 5.4 million students across 1,200 school districts. Tex. Educ. Agency, *Enrollment in Texas Public Schools 2021-22* at ix (June 2022), https://tea.texas.gov/reports-and-data/school-performance/accountability-research/enroll-2021-22.pdf. The Texas Education Agency ("TEA") is a state agency charged by State law to oversee the State's public school system's compliance with Title IX. *See* Tex. Educ. Code § 7.021. As part of its mandate, TEA allocates the majority of federal funding for Texas K-12 education. *See* Decl. of Michael Meyer ¶ 6, App.001.

In the 2021–2022 biennium, Texas received approximately $6.6 billion dollars in federal funds for its K-12 education. Tex. Educ. Agency, 2022 *Comprehensive Biennial Report on Texas Public Schools* at 239 (Dec. 2020), https://tea.texas.gov/reports-and-data/school-performance/accountability-research/comp-annual-biennial-2022.pdf. In fiscal year 2023, Texas public schools received approximately $9.4 billion in federal funding distributed by TEA and an additional $4.8 billion in federal disbursements that were allocated by the federal government directly or another intermediary. *See* Decl. of Michael Meyer ¶¶ 4–5, App.001.

State statute requires TEA to operate a number of educational programs directly. These include "regional day programs" for deaf students and a school network for students with "visual impairments." Tex. Educ. Code 7.021(b)(10), (11). The Texas School for the Deaf is a state agency that provides educational services, on a day and residential basis, to students who are deaf or hard of hearing. Tex. Educ. Code § 30.051; Decl. of Peter L. Bailey ¶ 3, App.003–004. The school's dormitories, athletic teams, and locker rooms are separated by biological sex. *Id.* at ¶¶ 3–4, App.003–004. The Texas School for the Deaf relies on federal funding for the services it provides to students and their families. *Id.* at ¶ 5, App.004. The school received $1,261,735.00 in federal funds for fiscal

year 2024. *Id.*

Texas also funds, supports, and administers a robust higher education network. Texas is home to 119 public postsecondary institutions, including 37 universities and 82 two-year colleges and technical schools. *See* Tex. Higher Educ. Coordinating Bd., *2020 Texas Public Higher Education Almanac* at 28, 47 (Sept. 28, 2020), https://reportcenter.highered.texas.gov/agency-publication/almanac/2020-texas-public-higher-education-almanac/.

While most States have just one or two public university systems, Texas has six. The largest of these systems—the University of Texas—has 14 separate locations that educate approximately 256,000 students each year. *See About The University of Texas System*, The University of Texas System, https://www.utsystem.edu/about. All told, the State's entire higher education network includes 148 public institutions and currently enrolls approximately 1.4 million students. *See* Decl. of Sarah Keyton ¶ 3, App.006–007. Public postsecondary education institutions in Texas received approximately $2.5 billion in federal funding during fiscal year 2022.

As a condition of receiving federal funding, Title IX protections against sex-based discrimination apply to state educational institutions. *See* 20 U.S.C. § 1681. Hence, should Texas, or any of Texas's affiliated academic institutions, deviate from the Department's guidance effectuating Title IX, that departure would invite enforcement actions at the risk of significant monetary penalties, up to and including the loss of federal money.

Public education in Texas depends on federal funds. Institutions that lose their federal funding will need to eliminate certain educational services if they cannot find alternative funding sources. *See* Decl. of Michael Meyer ¶ 8, App.002; Decl. of Peter L. Bailey ¶¶ 6–7, App.004–005; Decl. of Sarah Keyton ¶ 7, App.007. Texas educational institutions rely on federal funding and will be irreparably harmed if they lose their funding because of their reliance on 50 years of Title IX practice and legal precedent interpreting "on the basis of sex" to mean biological sex, *not* "sexual orientation" and "gender identity." *Id.*

It is a "fundamental canon of statutory construction" that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" at the time of

enactment. *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); Scalia & Garner, *supra*, at 16 (same). No dictionary at the time Title IX was enacted defined "sex" to include "gender identity" or "sexual orientation." *Adams*, 57 F.4th at 812–13.

Texas, relying on the contemporary (and etymological) meaning of "sex" when Title IX was enacted, adopted laws, policies, and procedures, and significantly invested in an entire infrastructure to implement its education systems. The Final Rule upends these important reliance interests and usurps Texas's sovereignty by adding "gender identity" and "sexual orientation."

The Final Rule refuses to define "gender identity" and "sexual orientation," nor whether both fixed and fluid identities and orientations are protected. Its protections for an ever-fluctuating number of gender identities and sexual orientations, which individuals can allegedly change at any time, anywhere, and for any (or no) reason, undermines Title IX's original sex-based protections. *See United States v. Varner*, 948 F.3d 250, 256–58 (5th Cir. 2020) (examining bewildering assortment of purported gender identities and bespoke pronouns).

Federal funding allocated to Texas's post-secondary public universities, technical educational institutions, health-related educational institutions, and community colleges is managed by the Texas Higher Education Coordinating Board ("THECB"). Decl. of Sarah Keyton ¶ 3, App.006–007. In fiscal year 2022, Texas public universities received more than $3.8 billion in federal funding; Texas community colleges received more than $2.1 billion in federal funds; Texas technical educational institutions received more than $100 million in federal funds; and Texas health-related educational institutions received more than $1.5 billion in federal funds. *See* Tex. Higher Educ. Coordinating Bd., Sources and Uses Report, at https://www.highered.texas.gov/our-work/supporting-our-institutions/institutional-funding-resources/sources-and-uses/.

The Final Rule threatens to withdraw federal funding from Texas educational institutions. The Department may pursue enforcement actions against educational facilities that are out of compliance with its aberrant interpretation of Title IX and penalize any institution deemed non-compliant by withholding funds. *See* U.S.C. §§ 1681, 1682; Decl. of Michael Meyer ¶¶ 7–8, App.002; Decl. of Peter L. Bailey ¶¶ 6–8, App.004–005; Decl. of Sarah Keyton ¶¶ 6–7, App.007.

Complying with Title IX costs Texas money. Texas educational institutions undertake internal efforts to ensure compliance with Title IX, including federal regulations promulgated pursuant to Title IX. These efforts involve but are not exhausted by hiring staff to perform compliance reviews, facilitate the Title IX grievance process, and respond to lawsuits that stem from allegations of liability under Title IX protections. *See* Decl. of Rick Olshak ¶¶ 4–5, App.008–009. These and other compliance efforts incur considerable expense to state educational facilities. The costs of complying with Title IX will likely increase when the Department adopts new regulations that create additional requirements or make existing requirements more demanding. *See id.* These include the administrative costs due to the increased caseload caused by the Final Rule's lower standard for harassment, the extension of coverage to off-campus behavior, regulating covered third-party entities, increased referrals to the Title IX Coordinators, updating training and educational materials for employees, and maintaining two different complaint processes. *Id.*

Even the Department's low regulatory cost estimates reveal a substantial monetary burden on state educational facilities. Overall, the Department estimates more than $98 million in short-term compliance costs, some of which will fall on Texas schools. *See* 89 Fed. Reg. at 33,861.

G. The Final Rule expands liability to Texas and other recipients of federal education funds.

Enforcement of the Final Rule threatens to strip Texas and their Title IX recipients of billions of dollars in federal support—endangering important programs that serve attendees of the State's public schools, special schools, and higher education institutions. The Final Rule makes clear that its gender-identity mandate and other provisions displace contrary state and school policies. 89 Fed. Reg. at 33,542. Because Texas has and allows policies that conflict with the Final Rule, it and its components face Title IX funding losses should the Final Rule remain in place.

Educational institutions are subject to liability for alleged violations of Title IX. *See generally, Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, (2009). The Final Rule forces a waiver of Texas's sovereign immunity as to certain regulatory requirements without its consent. The Final Rule rolls back constitutional safeguards for students while expanding

recipients' liability far beyond what title IX allows. These changes are unconstitutional.

Not only does it reinvent the definition of "sex discrimination" to include "sexual orientation" and "gender identity" impermissibly, but the Final Rule also expands when, where, and how recipients must respond to claims of sexual harassment—extending to conduct that occurs online, off campus, outside the United States, or even before the relevant individuals attended the school. 89 Fed. Reg. at 33,386, 33,527.

Additionally, the Final Rule amends the definition of "sexual harassment" in 34 C.F.R. § 106.2 to include unwelcome sex-based conduct (1) "that is sufficiently severe *or* pervasive," and (2) "that based on the totality of the circumstances and evaluated *subjectively and objectively*, denies or *limits* a person's ability to participate in" the recipient's education program or activity. 89 Fed. Reg. at 33,517 (emphasis added).

On its own, the redefinition of "sex discrimination" to include sexual orientation and gender identity increases the odds of academic institutions intruding on protected rights when seeking to enforce Title IX. But when combined with the other listed changes, the danger becomes especially acute.

For example, the Final Rule directly curtails First Amendment and Due Process protections for Texas students. It does this by lowering he standard for sex-based harassment to a "preponderance-of-the-evidence" standard; barring accused students from access to evidence, offering them instead a mere "description" of "relevant" evidence; and permitting recipients to adopt the investigator model, in which a single "decisionmaker" adjudicates the proceedings as prosecutor, judge, and jury. *See* 89 Fed. Reg. at 33,891–95.

These weakened standards are introduced at the same time the recipient's liability expands. The Department thus gives recipients cause to initiate more zealous Title IX enforcement proceedings, reducing students' access to a fair hearing when accused of harassment.

Additionally, compared to the 2020 Rule, the standards advanced by the Final Rule would create far more opportunities for recipients to inadvertently fall out of compliance. The previous version of § 106.44(a) required recipients to "respond promptly in a manner that is not deliberately

indifferent"—something they could achieve if their response was not "clearly unreasonable in light of the known circumstances." 2020 Rule, 85 Fed. Reg. at 30,574. Recipients therefore had more flexibility in how to craft a response that was appropriate to the facts and parties involved. Recipients were also judged based on the information they had on hand without the benefit of hindsight, which the Final Rule could allow.

But the language in the Final Rule unlawfully shifts from the deliberate indifference standard which requires institutions to take actions reasonably calculated to address allegations to a standard that requires their actions to be "effective."[7] Yet institutions do not have an obligation under Title IX to eliminate discrimination; they are merely obligated to respond in a manner that is not clearly unreasonable.[8]

The Final Rule greatly expands the scope of Title IX protections, thereby expanding the range of conduct that could give rise to a lawsuit against Texas educational institutions. *See, e.g.*, 89 Fed. Reg. at 33,563 ("the recipient need not have incontrovertible proof that conduct violates Title IX for it to have an obligation to respond," but rather "if the conduct reasonably *may* be sex discrimination, the recipient must respond in accordance with § 106.44" (emphasis added)).

Because the Final Rule contradicts existing case law, including the departure from *Davis,* grants institutions the permission to ditch live hearings, permits a single-investigator model, and revokes the right to cross-examination—the likelihood that Texas institutions will get sued and lose lawsuits is significant. Texas schools are placed in a no-win situation—where adherence to the Constitution risks the loss of federal funds.

H. The Final Rule infringes on Texas's sovereignty.

The Final Rule derogates Texas's sovereign interests in enforcing duly enacted state laws. *See*

7 "§ 106.44(a) (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." 89 Fed. Reg. at 33563 (emphasis added).

8 *See Davis*, 526 U.S. at 648–49 ("[C]ourts should refrain from second guessing the disciplinary decisions made by school administrators," who "must merely respond to known peer harassment in a manner that is not clearly unreasonable.") (citations omitted).

Cameron v. EMW Women's Surgical Ctr., P.S.C., 595 U.S. 267, 277 (2022) (describing this power as "[p]aramount among the States' retained sovereign powers"). Texas's "inability to enforce its duly enacted" laws "inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *see also Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015) ("[S]tates may have standing based on (1) federal assertions of authority to regulate matters they believe they control, (2) federal preemption of state law, and (3) federal interference with the enforcement of state law[.]"). Together, therefore, the injuries to Texas's financial and sovereign interests are irreparable and should be protected pending a merits determination.

Texas has enacted laws to protect sex separation in K-12 and higher education athletics programs. Texas law provides that "an interscholastic athletic competition team sponsored or authorized by a school district or open-enrollment charter school may not allow [] a student to compete in an interscholastic athletic competition sponsored or authorized by the district or school that is designated for the biological sex opposite to the student's biological sex." Tex. Educ. Code § 33.0834; *see also* University Interscholastic League Non-Discrimination Policy, Const. sub. J (accessed May 12, 2024) (policy segregating certain school sports based on sex), https://www.uiltexas.org/policy/constitution/general/nondiscrimination.

The Final Rule prohibits separation based on biological sex in K-12 athletics teams, which indicates that the Department will investigate K-12 schools for following Texas law and provides that the Department may sanction the schools by withholding federal funding for complying with Texas law. *See* 89 Fed. Reg. at 33,886. Texas law also provides that "an intercollegiate athletic team sponsored or authorized by an institution of higher education may not allow a student to compete on the team in an intercollegiate athletic competition sponsored or authorized by the institution that is designated for the biological sex opposite to the student's biological sex." Tex. Educ. Code. § 51.980. The Final Rule's prohibition on the separation of education athletics teams based on biological sex will subject institutions of higher education to investigation (and possibly sanctions) by the Department merely for complying with Texas law. *See* 89 Fed. Reg. at 33,886.

The Final Rule also conflicts with the policies adopted by some of Texas's political

subdivisions—pursuant to authority granted by state law—regarding separating school bathrooms and locker rooms by biological sex. For example, the Carroll, Frisco, and Grapevine–Colleyville Independent School Districts require schools owned or operated by the districts to separate bathrooms, locker rooms, shower rooms, and other similar facilities based on biological sex determined at birth and correctly identified on a person's birth certificate. App.018, 020, 027.

Under Texas statute, independent school districts are expressly authorized to exercise State power by implementing local policies; the trustees of ISDs "have the exclusive power and duty to govern and oversee the management of the public schools of the district." Tex. Educ. Code § 11.151(b).The Final Rule conflicts with each of these policies by treating them as unlawful sex discrimination and by requiring school districts to change their policies to separate bathrooms, locker rooms, showers, and changing facilities based on gender identity instead of biological sex to remain in compliance with the Rule. *See* 89 Fed. Reg. at 33,886.

The Final Rule requires using pronouns that are consistent with a person's gender identity rather than biological sex, which conflicts with policies adopted by some of Texas's political subdivisions and is not required by Texas state law. For example, the Carroll and Grapevine–Colleyville Independent School Districts have adopted policies that prohibit district employees from requiring the use of pronouns that are inconsistent with a person's biological sex as correctly identified on a person's birth certificate or other government-issued record. App.019, 021–026.

The Final Rule conflicts with these policies by treating them as unlawful sex discrimination and by requiring school districts to change their policies to use pronouns based on a person's gender identity instead of biological sex to remain in compliance with the Final Rule. *See* 89 Fed. Reg. at 33,886. Compliance with the Final Rule would expose the school districts to liability for violating district employees' and students' religious freedom and free speech rights, despite district policies protecting those rights.The Final Rule explicitly preempts contrary state laws and directs recipients of Title IX funding to comply with the Final Rule in the event of a conflict with state law. *See* 89 Fed. Reg. at 33,885. These injuries are sufficient to establish Texas's standing.

III. The public interest and balance of equities favors Plaintiffs.

For the reasons given above, Plaintiffs have a strong likelihood of success on the merits and confront substantial, imminent irreparable harm—the two most important factors in the analysis for preliminary relief. *See Career Colleges & Sch. of Texas*, 98 F.4th at 239 (likelihood of success on the merits); *Mock*, 75 F.4th at 587 n.60 (same); *Spectrum WT v. Wendler*, ---F.Supp.3d---, No. 2:23-cv-48, 2023 WL 6166779, at *14 (N.D. Tex. Sept. 21, 2023) (Kacsmaryk, J.) (irreparable harm). The Defendants thus "face[] a high hurdle" in establishing that the remaining two factors weigh against granting relief. *Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023). Granting a stay and preliminary injunction would serve the public interest by ensuring that Texas may continue to enforce its laws and policies without risking the loss of Title IX funding. And the public interest would be served by preventing the loss of federal funds to Texas's educational institutions. *See Career Colleges & Sch. of Texas*, 98 F.4th at 254–55 (5th Cir. 2024) ("Evidence CCST points to in the record shows that a failure to stay the Rule would significantly constrain schools' operations and prevent them from devoting resources to educating their students, upgrading facilities, and constructing new ones. The only alternative to incurring these costs is for the school to withdraw from Title IV entirely, which would be to the detriment of students who rely on the availability of Direct Loans. Such a consequence would harm the public at large.").

Moreover, granting a stay will merely preserve the status quo pending review. The "status quo" is "the last peaceable uncontested status existing between the parties before the dispute developed." Wright & Miller, *11A Fed. Prac. & Proc. Civ.* § 2948 (3d ed.) (cleaned up). The Fifth Circuit has held that staying an agency action—even *after* the effective date—preserves the *status quo ante* and is properly imposed via Section 705. *Wages & White Lion Invs.*, 16 F.4th at 1143–44.

"[T]he maintenance of the *status quo* is an important consideration in granting a stay." *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quotation omitted). And the "public interest is in having governmental agencies abide by the federal laws that govern their existence and operations," *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (quotation omitted), because "there is generally no public interest in the perpetuation of unlawful agency action." *Id.* at 560 (cleaned up); *BST Holdings, L.L.C.*

v. OSHA, 17 F.4th 604, 618 (5th Cir. 2021). If Defendants failed to satisfy the requirements of reasoned decisionmaking and abiding the the law, the public interest lies in staying their action. Defendants may claim fighting discrimination is an important public interest, "[b]ut our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Wages & White Lion Invs., LLC,* 16 F.4th at 1143 (citation omitted).

Defendants also cannot cannot credibly claim that a delay of the effective date of the Final Rule is a harm sufficient to outweigh those imposed on Texas, after taking nearly two years to complete this rulemaking and half a century to reach the novel conclusion that Title IX's prohibition of discrimination based on "sex" refers to sexual orientation and gender identity.

CONCLUSION

The Court should grant this Motion, stay the Final Rule, preliminarily enjoin its application to Palintiffs, and preliminarily enjoin Defendants from interpreting, applying, or enforcing Title IX consistent with the Final Rule.

Dated: May 13, 2024.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

I certify that around 10:45 am CT on May 13, 2024, I conferred by telephone and email with George Padis, Assistant U.S. Attorney for the Northern District of Texas, about this motion. Via email at 4:44 pm CT, he forwarded my email request to Elizabeth Tulis at DOJ, the attorney assigned to this case. At 8:32 pm CT on May 13, 2024, Ms. Tulis informed me that she could not give me an answer regarding this motion until May 14, 2024.

/s/ Ryan D. Walters
RYAN D. WALTERS

CERTIFICATE OF SERVICE

I certify that on May 13, 2024, this document was filed through the Court's CM/ECF system, which served it upon all counsel of record. The U.S. Attorney for the Northern District of Texas accepted service of process on that office via email today, and I served this document via email to Elizabeth.Tulis@usdoj.gov and George.Padis@usdoj.gov on May 13, 2024.

/s/ Ryan D. Walters
RYAN D. WALTERS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STATE OF TEXAS, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	2:24-CV-86-Z

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiffs' Motion for Stay of Agency Action and Preliminary Injunction ("Motion") (ECF No. 16), filed May 14, 2024. Based on the reasons discussed *infra*, it is **GRANTED IN PART**. Pending final resolution of this case, Defendants are hereby **ENJOINED** from implementing, enacting, enforcing, or taking any action in any manner to enforce the Final Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) ("Final Rule"), which is scheduled to take effect on August 1, 2024. This preliminary injunction is limited to Plaintiffs Daniel A. Bonevac, John Hatfield, and the State of Texas.

SUMMARY

The Final Rule inverts the text, history, and tradition of Title IX: the statute protects women in spaces historically reserved to men; the Final Rule inserts men into spaces reserved to women. Defendants invoke *Bostock v. Clayton County*, 590 U.S. 644 (2020) to rationalize the Final Rule's inversion of the statutory text but do not adequately explain why that Title VII employment case controls this Title IX education case, which instead implicates *women*'s athletics, safety, and sex-specific facilities in a different setting: schools, colleges, and universities.

BACKGROUND

I. Title IX promotes opportunities for women.[1]

Title IX of the Education Amendments, enacted in 1972, forbids education programs or activities receiving federal financial assistance from discriminating "on the basis of sex." 20 U.S.C. § 1681(a). Before its enactment, nearly thirty-four percent of working women lacked high school diplomas and only seven percent of high school varsity athletes were women. Roughly fifty years later, only six percent of working women lack high school diplomas and forty-three percent of high school varsity athletes are women.[2] In short, Title IX is succeeding: women and girls across America now benefit from opportunities to pursue advanced education, attend college, and develop athletic skills.

That is because Title IX recognizes the "enduring" differences "between men and women." *United States v. Virginia*, 518 U.S. 515, 533 (1996). For example, Title IX exempts traditional single-sex institutions and programs like "fraternities or sororities"; "Boy or Girl conferences"; "Father-son or mother-daughter activities"; and "'beauty' pageants" from its requirements. 20 U.S.C. § 1681(a)(6)–(9). Congress, in other words, peppered Title IX with explicit references to the biological and binary categories of two sexes with repeated references to "one sex" and "both sexes." 118 CONG. REC. 5,807 (1972) (Sen. Bayh). As such, it does not "require[] integration of dormitories between the sexes" or mandate co-ed locker rooms or football teams. 117 CONG. REC. 30,407 (1971) (Sen. Bayh).[3]

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[1] *I.e.*, biological women. *See Bostock*, 590 U.S. at 655 ("[F]or argument's sake, we proceed on the assumption that 'sex' signifie[s] . . . only . . . biological distinctions between male and female.").

[2] U.S. Bureau of Labor Statistics, TED, https://perma.cc/EH4F-2CYD; 50 Years of Title IX, WSF (May 2022), https://perma.cc/TN72-PJ4S.

[3] Here, legislative history is evidence of contemporaneous public meaning — not a search for legislative "intent." *Cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 394 (2012).

The first Title IX regulations further codified the "enduring" differences between men and women. In 1975, the Department of Education's ("Department" or "government") predecessor promulgated regulations that "required" a school "to provide separate teams for men and women in situations where the provision of only one team would not 'accommodate the interests and abilities of members of both sexes.'" Nondiscrimination on the Basis of Sex, 40 Fed. Reg. 24,128, 24,134 (June 4, 1975) (codified at 34 C.F.R. § 106.41(c)(1)). Texas recipients relied on this understanding for fifty years, investing billions of dollars to extend equal educational and athletic opportunities to women.

II. The Final Rule relies on untenable readings of Title IX.

The Department now upends a half-century of reliance interests through its newest regulation, Nondiscrimination on the Basis of Sex, 89 Fed. Reg. 33,474 (Apr. 29, 2024).

First, the Final Rule reads sexual orientation and gender identity into Title IX's anti-discrimination principle in violation of that statute and the Administrative Procedure Act ("APA"). It provides that "[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Id.* at 33,886 (to be codified at 34 C.F.R. § 106.10). The Department explains that "discrimination on each of those bases is sex discrimination because each necessarily involves consideration of a person's sex, even if that term is understood to mean only physiological or 'biological distinctions between male and female.'" *Id.* at 33,802 (quoting *Bostock*, 590 U.S. at 655). The Final Rule also understands "sex discrimination" to be "any discrimination that depends" even "in part on consideration of a person's sex." *Id.* at 33,803.

Now, Texas recipients cannot employ sex-based distinctions to deny "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity."

Id. at 33,818. And any policy or practice that "prevents a person from participating in an education program or activity consistent with the person's gender identity" causes more than *de minimis* harm and is prohibited absent a statutory or regulatory exception. 89 Fed. Reg. at 33,818.

Second, the Final Rule imposes a "hostile environment harassment" rule that will likely chill student and professor speech on recipient campuses. Said harassment covers:

> [u]nwelcome 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 . . . . Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of [five separate factors].

89 Fed. Reg. at 33,884 (to be codified at 34 C.F.R. § 106.2). The "subjective[]," ambiguous, and "fact-specific" nature of these inquiries likely chill campus speech.

Third, the Final Rule requires Plaintiffs to cover abortions in their student health insurance plans. The Final Rule specifically requires Texas recipients to:

> treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions with respect to any medical or hospital benefit, service, plan, or policy the recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's education program or activity.

89 Fed. Reg. at 33,888 (to be codified at 34 C.F.R. § 106.40(b)(4)); *see* 89 Fed. Reg. at 33,883 (to be codified at 34 C.F.R. § 106.2) ("pregnancy or related conditions" include "termination of pregnancy"). This regulation implicates Texas's sovereign interests in enforcing its duly enacted laws, which prohibit exactly this conduct. *See* TEX. HEALTH & SAFETY CODE § 171.208(a)(2) (imposing civil liability on anyone who "knowingly engages in conduct that *aids or abets* the performance of inducement of an abortion, *including paying for or reimbursing the costs of an abortion through insurance or otherwise* . . . .") (emphasis added).

Fourth, the Final Rule eviscerates procedural safeguards for the Title IX grievance process. In sum and substance, it requires the use of a single-investigator model (34 C.F.R. § 106.45(b)(2)); barriers to the accused for accessing relevant evidence (34 C.F.R. § 106.45(f)(4)(i)); and unfair limits on live hearing procedures for postsecondary institutions (34 C.F.R. § 106.46(g)).

III. Texas must either comply or adopt policies violating State law.

The State of Texas "administers numerous education programs and operates thousands of educational institutions through its constituent agencies and political subdivisions, including programs and institutions that receive federal funding and are subject to Title IX and its effectuating regulations." ECF No. 16 at 48. The Texas Education Agency ("TEA") manages some education programs directly, like the Texas School for the Deaf, whose dormitories, athletic teams, and locker rooms are separated by biological sex. ECF No. 16-1 at 7. Others it manages indirectly, like Texas's six public university systems which "invested an entire infrastructure to implement its education systems" on the basis of sex-based distinctions. ECF No. 16 at 51.

Indeed, Texas law protects sex separation in K–12 and higher education athletic programs. *See* TEX. EDUC. CODE § 33.0834 ("[A]n interscholastic athletic competition team sponsored or authorized by a school district or open-enrollment charter school may not allow . . . a student to compete in an interscholastic athletic competition . . . that is designated for the biological sex opposite to the student's biological sex."). Political subdivisions extend this biological-sex mandate into intimate facilities. For example, the Carroll, Frisco, and Grapevine–Colleyville Independent School Districts require schools owned or operated by the districts to separate bathrooms, locker rooms, shower rooms, and other similar facilities based on biological sex (1) determined at birth and (2) correctly identified on a person's birth certificate. ECF No.

16-1 at 21, 23, 30. Other school districts prohibit district employees from applying pronouns inconsistent with the student's biological sex. *Id.* at 22, 24–29

Under Texas law, the TEA oversees Title IX compliance within the State. ECF No. 16 at 49. "As part of its mandate, TEA allocates the majority of federal funding for Texas K–12 education." *Id.* Texas received nearly $6.6 billion in federal funding for K–12 education for 2021–2022.[4] For fiscal year 2023, the TEA distributed roughly $9.4 billion in federal funding and an additional $4.8 billion in federal disbursements. ECF No. 16-1 at 4.

In summary, the State of Texas and its political subdivisions are on a collision course with the Final Rule. Texas can either (1) comply and violate State law, local policy, and many of its employees' rights of conscience or (2) reject the Final Rule and lose billions in federal funding for its K–12 and higher-education systems.

LEGAL STANDARD

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits[.]" *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Plaintiffs must demonstrate (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) that the injunction will not disserve the public interest. *Robinson v. Ardoin*, 86 F.4th 574, 587 (5th Cir. 2023); *Air Prod. & Chemicals, Inc. v. Gen. Servs. Admin.*, No. 2:23-CV-147-Z, 2023 WL 7272115, at *2 (N.D. Tex. Nov. 2, 2023).

The first two factors are most critical, and the latter two merge when the government is an opposing party. *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020); *Nken v. Holder*, 556 U.S.

[4] Tex. Educ. Agency, 2022 *Comprehensive Biennial Report on Texas Public Schools* at 239 (Dec. 2020), https://tea.texas.gov/reports-and-data/school-performance/accountability-research/comp-annual-biennial-2022.pdf.

418, 435 (2009). That said, no factor has a "fixed quantitative value." *Mock v. Garland*, 75 F.4th 563, 587 (5th Cir. 2023). On the contrary, "a sliding scale is utilized, which takes into account the intensity of each in a given calculus." *Id.* In sum, "[t]he decision to grant or deny a preliminary injunction lies within the sound discretion of the trial court[.]" *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989).

ANALYSIS

I. Plaintiffs are substantially likely to prevail on the merits.

The likelihood of success on the merits "is arguably the most important" factor for preliminary relief. *Career Colleges & Sch. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 233 (5th Cir. 2024) (citations omitted); *accord Mock*, 75 F.4th at 587 n.60. Here, Plaintiffs argue that the Final Rule (1) violates Title IX's prohibition against "sex" discrimination; (2) illegally redefines "sex-based harassment"; (3) illegally protects abortion; and (4) illegally changes procedural safeguards in the Title IX grievance process, thereby violating Title IX, the APA, and the Constitution.

The APA generally requires courts to "hold unlawful and set aside agency action" that is "arbitrary and capricious, an abuse of discretion, . . . otherwise not in accordance with law," or "in excess of statutory . . . authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A), (C). This standard of review requires courts to assess only whether the Final Rule was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Those factors include when an agency (1) has relied on factors Congress has not intended it to consider; (2) entirely failed to consider an important aspect of the regulatory problem; (3) justified its conduct counter to the evidence before it; or (4) reached a determination that "is so implausible .

. . it could not be ascribed to a difference in view or . . . agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Once a court determines that the contested agency action falls short of the APA's substantive or procedural requirements, it "shall" set aside the unlawful agency action. 5 U.S.C. § 706(2); *Data Mktg. P'ship, L.P. v. United States Dep't of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022).

A. The anti-discrimination regulation violates Title IX and the APA.

The Final Rule interprets Title IX to provide that "[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. at 33,886 (to be codified at 34 C.F.R. § 106.10). The Department explains that "discrimination on each of those bases is sex discrimination because each necessarily involves consideration of a person's sex, even if that term is understood to mean only physiological or 'biological distinctions between male and female.'" *Id.* at 33,802 (quoting *Bostock*, 590 U.S. at 655). Further, the Final Rule understands "sex discrimination" to be "any discrimination that depends" even "in part on consideration of a person's sex." 89 Fed. Reg. at 33,803.

1. Title VII does not govern Title IX.

The government interprets Title IX in light of *Bostock* — a Title VII case. ECF No. 41 at 17–24. That comparison begs the question whether Title VII caselaw governs Title IX. The government claims that "[t]he Supreme Court has long used the phrase 'on the basis of' [in Title IX] interchangeably with Title VII's 'because of' language when discussing Title VII's causation standard, including in *Bostock* itself." ECF No. 41 at 18 (citing *Bostock*, 590 U.S. at 650; *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64 & n.14 (2007); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992);

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986); *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 248 (5th Cir. 1997); *Lakoski v. James*, 66 F.3d 751, 756 & n.3 (5th Cir. 1995); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 337 (5th Cir. 2019) (Ho, J., concurring)).

However, *Bostock*'s but-for causation standard dramatically altered Title VII. *See Bostock*, 590 U.S. at 688 (Alito, J., dissenting) ("The arrogance of [the majority's] argument is breathtaking."). Hence, it does not follow that these pre-*Bostock* cases would have made the same comparison today.

The government cites the opening line of one post-*Bostock* case to support its reading of Title IX. ECF No. 41 at 22–23 (citing *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 918 (5th Cir. 2023)). That case provides that *Bostock* "determined that Title VII of the Civil Rights Act of 1964 forbids employers from discriminating against homosexuals and transgender persons, holding that such discrimination is 'on the basis of sex.'" *EEOC*, 70 F.4th at 918. But *EEOC* does not support the government's reading here. First, the foregoing statement is dicta and not relevant to the Court's holding. Second, *EEOC* misstated *Bostock*'s holding, which interpreted "because of . . . sex" under Title VII. Third, *EEOC* was not a Title IX case. *EEOC*, in other words, offers no guidance for this Court's reading of Title IX.

2. *Bostock*'s "but-for" causation does not apply to Title IX.

Instead of pre-*Bostock* cases, "[w]e [should] start where we always do: with the text of the statute." *Career Colleges*, 98 F.4th at 240 (quoting *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023)); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69–92 (2012). Essential to the Court's "job is to interpret the words consistent with their 'ordinary meaning' . . . at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

That requires, *inter alia*, reading the statute in context and "not in isolation." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022). "Other sources . . . include contemporaneous dictionaries, related statutes, and past statements of the Department." *Career Colleges*, 98 F.4th at 240.

Title IX's general provision on "sex" provides:

> 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(a).

The government argues that the foregoing text demands consideration of gender identity and sexual orientation. ECF No. 41 at 18. Section 1681(a) is so clear, it says, that courts need not look beyond the text to statutory context or ordinary public meaning. *See Bostock*, 590 U.S. at 593 (because "the express terms of [Title VII] give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is law, and all persons are entitled to its benefit"); *see also* ECF No. 41 at 24 ("The Final Rule explains the application of *Bostock*'s reasoning in detail . . . ."); 89 Fed. Reg. at 33,805 ("The Department's interpretation of Title IX flows from the statute's 'plain terms' . . . .").

Bostock concluded that Title VII's prohibition of sex discrimination "because of . . . sex" covers discrimination based on gender identity and sexual orientation. *Bostock*, 590 U.S. at 660. Because "sex is necessarily a but-for cause" of transgender discrimination, "it is impossible" to discriminate against transgender individuals "without discriminating against that individual based on sex." *Id.* at 660, 661. For example, if an employer "fires a transgender person who was identified as a male at birth but who now identifies as a female," but "retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as

female at birth." *Id.* at 660. So "the individual employee's sex plays an unmistakable and impermissible role in the discharge decision." *Id.*

The foregoing argument "is wrong" in the Title IX context. *Id.* at 689 (Alito, J., dissenting); *see L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 420 (6th Cir. 2023) (explaining that *Bostock*'s "reasoning applies only to Title VII, as *Bostock* itself and . . . subsequent cases make clear"). It does not follow that because sexual orientation and gender identity are related to biological sex that discrimination "because of" the former amounts to discrimination "on the basis of" the latter. But that is exactly what the Final Rule assumes.

However, neither sexual orientation nor gender identity are logical predicates to discrimination "on the basis" of biological sex. "[I]t is quite possible," for example, for a Title IX school "to discriminate on those grounds without taking the sex of an individual [student] into account." *Id.* at 690. It can have a policy that states: "No transgender students of either sex may participate on athletic teams of the opposite sex." This policy discriminates, but not "on the basis of sex," because it governs transgender students of *either* sex. Gender identity is the dispositive factor — not biological sex. *See id.* (A school "can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender" students.).

This is fatal to the Final Rule. "[I]f a [Title IX school] discriminates against individual [students] without even knowing whether they are male or female, it is impossible to argue that the [school] intentionally discriminated because of sex." *Id.* at 691. That is because a Title IX school cannot "intentionally discriminate on the basis of a characteristic of which [the school] has no knowledge." *Id.* And if that is true, sex discrimination does not reduce to gender-identity discrimination simply because a school might know the individual student's sex. Sex is not the dispositive factor — gender identity is.

Fair enough that "[m]any things are related to sex." *Id.* at 694. But what matters for purposes of Title IX is whether it prohibits discrimination because of *biological sex itself* — "not everything that is related to, based on, or defined with reference to, 'sex.'" *Id.* Of course, textualism considers not only the language itself, but also the statutory context and original public meaning. *See Wis. Cent. Ltd.*, 585 U.S. at 277 (explaining that the Court's essential "job is to interpret the words consistent with their 'ordinary meaning' . . . at the time Congress enacted the statute"). But to the extent that the Court divorces the text from these relevant considerations, *Bostock*'s but-for causation reading of Title VII fails on its own terms in the Title IX context.

3. Title IX does not address gender identity or sexual orientation.

Proper textualism — accounting for ordinary public meaning and statutory context — illustrates the chasm between Title IX and the Final Rule. Consider the words themselves. The term "sex," as of 1972, bore no logical relationship to notions of "gender identity." At that time, "sex" meant only a person's biological sex — male or female — which "is an immutable characteristic determined solely" at "birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J.) (plurality op.). And "[r]eputable dictionary definitions of 'sex' from the time of Title IX's enactment" reinforce what the public understood in 1973: "when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., [sic] discrimination between males and females." *Adams by & through Kasper Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc); *see Sex*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971) ("The sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic

segregation and recombination which underlie most evolutionary change . . . .").[5]

The text, after a court analyzes its individual words, should be "interpreted in its statutory and historical context and with appreciation for its importance to the [statute] as a whole." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001). That is because "context always includes evident purpose," SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63, especially when Title IX itself identifies purposes inherent to the statute, 20 U.S.C. § 1682 (explaining that federal agencies must issue rules, regulations, or orders "consistent with achievement of the *objectives of the statute* . . . .") (emphasis added); *see also* James C. Phillips, *The Overlooked Evidence In the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality* (May 11, 2020) (unpublished manuscript); *see also Bostock*, 590 U.S. at 709 n.22 (Alito, J., dissenting) (citing Phillips, *supra*).

Statutory context illustrates Title IX's overarching objectives: to prevent discrimination against women in public and higher education. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) ("Congress enacted Title IX in 1972 with two principal objectives in mind: 'to avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices.'") (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979)); *see also Neese v. Becerra*, 640 F. Supp. 3d 668, 681–82 (N.D. Tex. 2022) ("Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities.") (quoting *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004)); 118 CONG. REC. 5,804 (1972) (Sen. Bayh)

[5] *See also Sex*, AMERICAN HERITAGE DICTIONARY 1187 (1976) ("The propriety of quality by which organisms are classified according to their reproductive functions."); *Sex*, 9 OXFORD ENGLISH DICTIONARY 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these.").

(noting that the hearings included "[o]ver 1,200 pages of testimony document[ing] the massive, persistent patterns of discrimination against women in the academic world").

For example, while Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), it authorizes numerous carve-outs for sex-specific organizations, events, and spaces. *See id.* §§ 1681(a)(6) (excepting "a social fraternity or social sorority," "the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls . . . the membership of which has traditionally been limited to persons of one sex and principally to persons less than nineteen years of age"), (7)(B)(i) (excepting "any Boys State conference, Boys Nation conference, or Girls Nation conference"), (8) (excepting "[f]ather–son or mother–daughter activities at educational institutions," explaining that "if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of the *other sex*") (emphasis added), (9) (excepting "'beauty' pageants . . . in which participation is limited to individuals of one sex only"); *see also id.* § 1686 ("nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes"). In summary, the statute expressly protects female-specific spaces and opportunities in education.[6]

4. The Final Rule is arbitrary and capricious.

Once a court determines the contested agency action falls short of the APA's substantive or procedural requirements, it "shall" set aside the unlawful agency action. 5 U.S.C. § 706. Here, the Final Rule violates Section 706(2) because the government misapplied Title VII to

[6] Neither the Final Rule nor the parties address these statutory "exceptions," but the Department's reading would likely produce a statutorily absurd result that violates several canons: Sections 1681(a)(6), (7)(B)(i), (8), and (9) expressly allow a women-centric sorority or pageant to *exclude* men while the Final Rule for Section 1681(a) requires such organizations to *include* men – *if* they identify as women. *See, e.g.*, SCALIA & GARNER, *supra* note 3, at 63–65 ("Presumption Against Ineffectiveness"), 69-77 ("Ordinary Meaning"); 78–92 ("Fixed Meaning"), 174–79 ("Surplusage"), 180–88 ("Harmonious Reading").

misread Title IX. *See* 89 Fed. Reg. at 33,801–11 (explaining the Final Rule's reliance on *Bostock*). Whatever can be said about Title VII, Title IX is different. First, the statutes use different words; regardless of how courts used to conflate them, *Bostock* unsettled those long-held assumptions. Second, courts predicated those long-held assumptions on the ordinary public meaning of both Title VII and Title IX. *See Bostock*, 590 U.S. at 704–720 (Alito, J., dissenting) (discussing the ordinary public meaning of Title VII). And the ordinary public meaning of both statutes *never* grouped sexual orientation or gender identity under the concept of sex-based discrimination. Third, and perhaps most importantly, Title IX's function was — and is — to provide equality for women in education. *See* 20 U.S.C. § 1682 (mandating agencies to promulgate rules "consistent with achievement of the objectives of [Title IX] . . . ."); *see also* Phillips, *supra* at 3 ("And read as a composite, the phrase had more semantic content than one could glean from separately analyzing and then amalgamating its three parts ('discriminate,' 'against,' and 'sex').").

Title IX protects women in spaces that were historically reserved to men. In stark contrast, the Final Rule inserts men into the very Title IX spaces statutorily reserved to women. Consequently, Title IX differs from Title VII in both the forest and the trees under every granular and capacious canon of statutory construction. The Final Rule, in other words, attempts exactly the kind of interpretation that "is so implausible . . . it could not be ascribed to a difference in view or . . . agency expertise." *State Farm*, 463 U.S. at 43. The Court therefore **FINDS** that it is arbitrary and capricious.

B. The sex-based harassment rules likely violate the First Amendment.

Title IX provides that no person "on the basis of sex" may be "subjected to discrimination." 20 U.S.C. § 1681(a). The Final Rule imposes new regulations stating that "[s]ex-based harassment . . . is a form of sex discrimination and means sexual harassment and other

harassment on the basis of sex . . . .” 89 Fed. Reg. at 33,884 (to be codified at 34 C.F.R. § 106.2). Under this scheme, “hostile environment harassment” covers the following:

> [u]nwelcome 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 . . . Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of [five separate factors].

Id. Plaintiffs argue that the foregoing regulations violate the First Amendment.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. CONST. amend. I. It specifically forbids chilled speech. *See United States v. Hansen*, 599 U.S. 762, 769–70 (2023) (clarifying that “[o]verbroad laws ‘may deter or “chill” constitutionally protected speech,’ and if would-be speakers remain silent, society will lose their contributions to the ‘marketplace of ideas’”) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). And “[n]arrow tailoring is crucial where First Amendment activity is chilled — even if indirectly — ‘[b]ecause First Amendment freedoms need breathing space to survive.’” *Ams. For Prosperity Found. v. Bonta*, 594 U.S. 595, 609 (2021) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Plaintiffs are correct. The Department did not narrowly tailor the Final Rule and therefore chilled Plaintiffs’ speech. *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (identifying a regulation as impermissibly vague if it “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” or “if it authorizes or even encourages arbitrary and discriminatory enforcement”) (citing *Chicago v. Morales*, 527 U.S. 41, 56–57 (1999)). For instance, the Department equivocates on whether “misgendering” fits within its “hostile environment harassment” scheme. While “[m]any commentators . . . believe that misgendering is one form of sex-based harassment,” the Final Rule is less clear. 89 Fed. Reg. at

33,516. It provides that "whether verbal conduct constitutes sex-based harassment is necessarily fact-specific." *Id.* And Title IX coordinators must afford credence to an individual claimant's "subjective" sense of "offensive[ness]." *Id.* at 33,884 (to be codified at 34 C.F.R. § 106.2).

Plaintiffs are apprehensive about the reach of sex-based harassment under the Final Rule. Daniel A. Bonevac, a philosophy professor at the University of Texas at Austin, assumes that he should use subjective gender terms to avoid discipline under the Final Rule. *See* ECF No. 16-1 at 14 (assuming he should use the singular pronoun "they" and other "'made-up' pronouns"). In short: Texas recipients, students, and employees (like Plaintiffs) do not know, based on the Final Rule, whether misgendering constitutes "hostile environment harassment."

Defendants do not contest that "misgendering" language is otherwise protected speech under the First Amendment. *Cf. Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571–72 (1942) (explaining that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem"). The Court therefore **FINDS** that the Final Rule's harassment regulations likely chill Plaintiffs' First Amendment speech.

C. The Final Rule wrongfully requires Texas insurers to cover abortions.

Plaintiffs argue that the Final Rule wrongfully requires them to violate Texas abortion laws. ECF No. 16 at 36–38. Title IX's "Neutrality with respect to abortion" provision states:

> Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.
>
> Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

20 U.S.C. § 1688.

The Department regulations implemented in 1975 prohibit discrimination on the basis of "termination of pregnancy." *Compare* 40 Fed. Reg. 24,128 (codified at 45 C.F.R. § 86.21(c)(2)) (prohibiting discrimination in admissions based on "termination of pregnancy or recovery therefrom"), 86.57(b) ("A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of . . . termination of pregnancy, or recovery therefrom.") (1975) *with* 34 C.F.R. §§ 106.21(c) (prohibiting discrimination in admissions based on "termination of pregnancy, or recovery therefrom"), 106.40(b)(1) (prohibiting a recipient from discriminating "against any student, or exclud[ing] any student from its education program or activity" based on "termination of pregnancy, or recovery therefrom"), 106.57(b) (recipients may not discriminate against or exclude a person from employment based on "termination of pregnancy, or recovery therefrom") (current).

Defendants are correct that the foregoing provisions do not conflict with Title IX. *See* ECF No. 41 at 32 ("At most, the Rule [referring to the above] merely confirms these longstanding protections . . . ."). Taken together, they ensure equal admissions and employment opportunities for women who have terminated their pregnancies. But Plaintiffs take no issue with these provisions. Instead, Plaintiffs argue that "the Final Rule requires all healthcare plans offered by every educational institution to cover abortion on the same terms as 'any other temporary medical condition.'" ECF No. 16 at 37.

The Final Rule defines "pregnancy or related conditions" to include "termination of pregnancy," 89 Fed. Reg. at 33,883 (to be codified at 34 C.F.R. § 106.2), requiring recipients to:

> treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions *with respect to any medical or hospital benefit, service, plan, or policy the recipient administers, operates, offers, or participates in* with respect to students admitted to the recipient's education program or activity.

Id. at 33,888 (to be codified at 34 C.F.R. § 106.40(b)(4)) (emphasis added). Because "termination of pregnancy" is a "pregnancy or related condition" that recipient plans now must cover, the Final Rule requires Texas recipients to cover abortions for students who enroll in their medical plans.

Meanwhile, Texas law regulates and prohibits abortion. *See* TEX. HEALTH & SAFETY CODE § 170A.002(a) ("A person may not knowingly perform, induce, or attempt an abortion."); *see also id.* § 171.208(2) (subjecting to civil liability anyone who "knowingly engages in conduct that aids or abets the performance of inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise"). Texas imposes both criminal and civil penalties for violations of this law. *Id.* §§ 170A.004–.005; *id.* § 171.208(2); TEX. PENAL CODE §§ 12.32–.33.

Defendants respond that (1) the Final Rule does not require Texas recipients to cover abortions through health insurance and (2) Plaintiffs lack standing to challenge the Final Rule anyways.

1. The Final Rule requires recipient insurers to cover abortion.

First, the Final Rule plainly requires Texas recipients to cover abortion through their student health insurance plans. Defendants cite the Final Rule, which states that "nothing in Title IX or these final regulations requires recipients to pay for abortions either directly or through health insurance." 89 Fed. Reg. at 33,761 (citing 20 U.S.C. § 1688) (prohibiting any Title IX construction that "require[s] or prohibit[s] any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion"). The Department asserts that any contrary reading is "mistaken." 89 Fed. Reg. at 33,760. Not so.

The Department's contradictory statements cannot both be true. On the one hand, it explicitly requires Texas recipients to cover abortions in their student health insurance plans.

89 Fed. Reg. at 33,888 (to be codified at 34 C.F.R. § 106.40(b)(4)). On the other, it disclaims this provision and states that it would violate Title IX. 89 Fed. Reg. at 33,760–61. The latter disclaimer is of little comfort when the Final Rule requires Texas recipients to cover abortions.

In essence, the Department admits that its own provisions violate Title IX and contradict the Final Rule. *Id.* Thus, the Final Rule's abortion protections are arbitrary and capricious. *See State Farm*, 463 U.S. at 43 (labeling arbitrary and capricious a regulation that "is so implausible . . . it could not be ascribed to a difference in view or . . . agency expertise").

2. Plaintiffs have standing to challenge the abortion regulations.

Second, Defendants argue that a Texas student seeking medical coverage for an abortion "relies on a highly attenuated chain of possibilities," ECF No. 41 at 34 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)), including the assumption "that individuals will engage in illegal conduct," ECF No. 41 at 34 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)). As such, they conclude that Plaintiffs lack standing to challenge the termination-of-pregnancy regulations.

To establish standing, a plaintiff must show that it has suffered or will imminently suffer an "injury in fact" that was "caused" by the challenged government action that a favorable decision would likely "redress." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–62 (1992). To satisfy the injury-in-fact requirement, a plaintiff must allege an invasion of a "legally protected interest" that is "concrete," "particularized," and "actual or imminent." *Id.* at 560 (citations omitted). "[S]tanding is not dispensed in gross." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). "Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis*, 554 U.S. at 734 (internal marks omitted).

The Final Rule expressly requires Texas recipients to cover abortions in their student health insurance plans, 89 Fed. Reg. at 33,888 (to be codified at 34 C.F.R. § 106.40(b)(4)), but Texas law prohibits that exact conduct. Under the Health and Safety Code, the following are subject to civil liability:

> [anyone who] knowingly engages in conduct that *aids or abets* the performance of inducement of an abortion, *including paying for or reimbursing the costs of an abortion through insurance or otherwise*, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter.

TEX. HEALTH & SAFETY CODE § 171.208(a)(2) (emphasis added); *see id.* § 245.002 (defining "abortion"). Thus, any Texas recipient who complies with the Final Rule must violate Texas law.

That violation infringes upon Texas's sovereign interest in enforcing its duly enacted laws. *See Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277 (2022) (describing this power as "[p]aramount among the States' retained sovereign powers"). States may have standing "based on (1) federal assertions of authority to regulate matters they believe they control, (2) federal preemption of state law, and (3) federal interference with the enforcement of state law . . . ." *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015).

Each condition obtains here: Texas law subjects insurance providers to civil liability for abortion coverage and the Final Rule requires Texas recipients to subject themselves to this liability. These conditions create an obvious conflict between the enforcement of federal and state law. *See* 89 Fed. Reg. at 33,885 (to be codified at 34 C.F.R. § 106.8) (declaring that the Final Rule preempts state law). Based on Plaintiffs' standing and the foregoing analysis, the Court **FINDS** that these regulations are arbitrary and capricious.

D. Some grievance procedures are arbitrary and capricious.

Plaintiffs challenge the Final Rule's update in procedural safeguards for the Title IX grievance process. ECF No. 16 at 39–47. They specifically challenge provisions concerning use of a single-investigator model (34 C.F.R. § 106.45(b)(2)); initiation of a complaint by the Title IX Coordinator (34 C.F.R. § 106.44(f)(1)(v)); the manner in which a recipient may allow parties to a complaint to access the relevant evidence (34 C.F.R. § 106.45(f)(4)(i)); live hearing procedures for postsecondary institutions (34 C.F.R. § 106.46(g)); and the recipient's options for the standard of proof to be applied in proceedings (34 C.F.R. § 106.45(h)(1)). Defendants respond (1) that Plaintiffs lack standing to challenge the grievance procedures and (2) that the Final Rule's changes are not arbitrary and capricious. ECF No. 41 at 42–52.

1. Plaintiffs have standing to challenge the grievance procedures.

"[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis*, 554 U.S. at 734 (internal marks omitted). Here, the government argues that the State of Texas lacks standing because individual schools can *choose* to implement policies the State deems acceptable. ECF No. 41 at 44.

This mischaracterizes Texas's standing injury. Properly understood, "[i]f recipients comply with the Department's new regulations, they risk civil rights lawsuits and litigation expenses." ECF No. 16 at 41. But "[i]f they side with the constitutional rights of their students and employees, they invite federal or private enforcement actions, jeopardizing not only their reputation but their access to federal funds." *Id.*

The government responds that Texas impermissibly speculates about potential future lawsuits. ECF No. 41 at 45 (citing *Sullo & Bobbitt P.L.L.C. v. Abbott*, 536 F. App'x 473, 477 (5th Cir. 2013) (unpublished) (stating that a plaintiff's alleged injury of being "subject to potential

lawsuits with minimal chances of success" is "not certainly impending")). But little speculation is necessary when prior Department initiatives with similar incentives "resulted in a record number of lawsuits and judgments against public universities . . . ." ECF No. 16 at 42 (citing Jonathan Taylor, *Milestone: 700+ Title IX/Due Process Lawsuits by Accused Students*, Title IX for All (May 11, 2021), https://titleixforall.com/milestone-700-title-ix-due-process-lawsuits-by-accused-students/); *see also* Brian A. Pappas, *Procedural Convergence*, 55 LAW & SOC'Y REV. 381, 391 (2021) (concluding that "[u]niversities faced a choice of what constituted the larger risk: OCR enforcement or civil lawsuits?").

2. Some grievance procedures are arbitrary and capricious.

The Department's changes must be "the product of reasoned decisionmaking." *State Farm*, 463 U.S. at 52. Because the "new policy rests on factual findings that contradict those which underlay its prior policy," the Department must "provide a more detailed justification." *FCC v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 515 (2009).

a. Single-Investigator Model

Accused students at public institutions "must, at a minimum, receive protections consistent with the Due Process Clause of the Fourteenth Amendment." *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 602 (D. Mass. 2016) (citing *Goss v. Lopez*, 419 U.S. 565, 574–85 (1975)). For the first time, the Department provided "schools the option of using a single-investigator model." ECF No. 41 at 46 (citing 89 Fed. Reg. at 33,660–64). The Department explains that "requiring separate staff members to handle investigations and adjudication is burdensome for some recipients in a way that undermines their ability to ensure their education programs or activities are free from sex discrimination under Title IX." 89 Fed. Reg. at 33,662. And "permitting, but not requiring, the single-investigator model . . . in conjunction with the other

measures designed to ensure equitable treatment of the parties . . . offer[s] recipients reasonable options to structure their grievance procedures in compliance with Title IX . . . ." *Id.*

The Court is not persuaded. Other courts have already explained that the "dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious." *Brandeis*, 177 F. Supp. 3d at 606. Not to the Department, apparently. But "[n]o matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions." *Id.* Indeed, vesting one individual with such power in criminal proceedings violates due process. *See In re Oliver*, 333 U.S. 257, 278–79 (1948) (Rutledge, J., concurring) (noting that a one-man grand jury "takes away the security against being twice put in jeopardy for the same offense and denies the equal protection of the laws by leaving to the committing functionary's sole discretion the scope and contents of the record on appeal").

It does not matter that each recipient is "permit[ed], but not require[ed]" to adopt the single-investigator model. 89 Fed. Reg. at 33,662. That is because the single-investigator model itself lacks justification and therefore cannot be considered a product of reasoned decisionmaking. *State Farm*, 463 U.S. at 52; *Fox*, 556 U.S. at 515. Permitting — not requiring — the model is the problem that the Department has failed to justify.

b. Access to Evidence

The Final Rule provides: "A recipient must provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence." 89 Fed. Reg. at 33,892 (to be codified at 34 C.F.R. § 106.45(f)(4)(i)). In the latter case, a school "must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon request of any party." *Id.*; *see id.* at 33,682

(to be codified at 34 C.F.R. § 106.45(c)(1)(iv)) (notice of the right).

Thus, a student accused of a Title IX violation might face circumstances where he can access only an "accurate description" of the evidence against him. The Department justifies this change because "the description option may be more appropriate for complaints involving younger students and individuals facing less severe consequences, allowing the recipient to streamline the investigation process while ensuring that the parties have a meaningful opportunity to be heard." *Id.* at 33,695. The Final Rule notably does not explain what constitutes "less severe consequences." Individual recipients presumably make this *ad hoc* determination.

"When a right is protected by the Due Process Clause, a state 'may not withdraw [it] on the grounds of misconduct absent[] fundamentally fair procedures to determine whether the misconduct occurred." *Doe v. Purdue University*, 928 F.3d 652, 663 (7th Cir. 2019) (Barrett, J.) (quoting *Goss*, 419 U.S. at 574). In *Doe*, then-Judge Barrett held that Purdue University violated a student's due process rights when it "did not disclose its evidence" to him. *Doe*, 928 F.3d at 663. She explained that "withholding the evidence on which it relied in adjudicating [the student's] guilt was itself sufficient to render the process fundamentally unfair." *Id.* (quoting *Goss*, 419 U.S. at 580 (stating that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights")).

The Final Rule is too ambiguous and discretionary to satisfy due process. First, it allows individual recipients to choose whether a student can access the evidence or only an accurate description. Second, individual recipients get to decide what's "relevant" evidence and what isn't. That ambiguity invites abuse. Third, if a recipient does provide an "accurate description" of the evidence (whatever that is), it must provide "an equal opportunity to access" relevant evidence. The Supreme Court's due process jurisprudence demands more — that the student actually access

the evidence. The Final Rule imposes unfair barriers between students and their due process rights. This provision lacks rational justification and is therefore arbitrary and capricious.

c. Live Hearings and Questioning

The Final Rule "will allow schools to decide whether to provide live questioning through a live hearing or through separate meetings with the parties." ECF No. 41 at 50; 89 Fed. Reg. at 33,894–95 (to be codified at 34 C.F.R. § 106.46(f)). The Department justifies stripping the accused of his right to confront live witnesses because "nothing . . . precludes a postsecondary institution from choosing to use a live hearing with questioning by an advisor, either because it is required under applicable Federal or State case law or for any other reason." 89 Fed. Reg. at 33,737.

The Department contradicts its prior 2020 Rule, which upheld the importance of live cross examination. *See, e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 33,331 ("requir[ing] a recipient to step into the shoes of an advocate by asking each party cross-examination questions designed to challenge that party's plausibility, credibility, reliability, motives, and consistency" would place the recipient in the "untenable position of acting partially (rather than impartially) toward the parties, or else failing to probe the parties' statements for flaws the reflect on the veracity of the party's statements").

The Department argues that this contradiction is reasonable because individual recipients can still utilize live cross examination. ECF No. 41 at 49–51. But it does not explain how this proposal safeguards the accused's right to challenge the accuser's credibility. In short, the Final Rule did not justify its "findings that contradict" the 2020 Rule. *Fox*, 556 U.S. at 515.

d. Standard of Proof

The Final Rule permits recipients to utilize the preponderance of the evidence standard of proof for the following purposes:

> to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred.

89 Fed. Reg. at 33,893 (to be codified at 34 C.F.R. § 106.45(h)(1)). While some Fifth Circuit judges understandably disapprove of the preponderance standard in the Title IX context, *Plummer v. University of Houston*, 860 F.3d 767, 782 n.11 (5th Cir. 2017) (Jones, J., dissenting), no majority has disallowed it. And the Final Rule correctly states that many other courts approve. *See* 89 Fed. Reg. 33,701 (citing cases). Applying the preponderance standard here cannot be said to be so unreasonable as to be arbitrary and capricious.

e. Initiation of Complaint

A Title IX coordinator may consider "eight non-exhaustive factors" in determining whether specific facts warrant an investigation in the absence of a complaint. ECF No. 41 at 48 (citing 89 Fed. Reg. at 33,889 (to be codified at 34 C.F.R. § 106.44(f)(1)(v)(A)(1)–(8))). On these bases, the Department admits that "a school may initiate a complaint based on an oral complaint or, under extraordinary circumstances, no complaint at all." ECF No. 41 at 48.

Plaintiffs argue that the foregoing "allow[s] an investigation to begin without any formal written complaint," which "empowers Title IX coordinators to go beyond their mandatory reporting duties and to police activities on campus that they think constitute sex discrimination." ECF No. 16 at 45. This is arbitrary and capricious, per Plaintiffs, because the Department "failed to reasonably address the extraordinary implications of these changes . . . ." *Id.*

Not so. As the Department explains, "the Rule and its eight non-exhaustive factors provide more clarity than the 2020 Amendments about the circumstances in which a Title IX Coordinator should initiate the grievance process, which is one reason the Department decided to make this change." ECF No. 41 at 48 (citing 89 Fed. Reg. at 33,594). Plaintiffs may disfavor this change, but the Department reasonably addressed these concerns and erected safeguards regarding when a complaint may be brought. This specific rule is not arbitrary and capricious.

II. Plaintiffs will suffer irreparable injury without injunctive relief.

"To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that the harm is inevitable and irreparable." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). Instead, a plaintiff "need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Id.*

Plaintiffs allege irreparable injury based on (1) compliance costs and (2) loss of federal funding. ECF No. 16 at 48–52. Defendants summarily respond that these alleged injuries are "speculat[ive]," rest on "unfounded fears," and are neither "realistic" nor "imminent." ECF No. 41 at 55–56 (internal marks and citations omitted).

Defendants are mistaken because at least one of these injuries must occur. On the one hand, Plaintiffs insist that they will not comply with the Final Rule. *See* ECF No. 16 at 52 ("Because Texas has and allows policies that conflict with the Final Rule, it and its components face Title IX funding losses should the Final Rule remain in place."); *see also* Letter from Greg Abbott, Governor of Texas, to Chairman and Regents of the University of Texas (May 8, 2024) (on file at https://gov.texas.gov/uploads/files/press/Texas_Regents_Title_IX.pdf) ("As I have already made clear, Texas will not comply with President Joe Biden's rewrite of Title IX . . .

I instructed the Texas Education Agency to ignore President Biden's illegal dictate of Title IX. Today, I am instructing every public college and university in the State of Texas to do the same."); *cf.* 89 Fed. Reg. at 33,542 (stating that the Final Rule displaces contrary state and recipient laws and policies). That would trigger the Final Rule's disciplinary provisions that will strip Texas recipients of federal funding. *See* 20 U.S.C. § 1681 (conditions on federal financial assistance).

Loss of federal funding would devastate the State of Texas. In the 2021–2022 biennium, Texas received roughly $6.6 billion in federal funds for K–12 education. ECF No. 16 at 49. In 2022, Texas postsecondary educational institutions received roughly $2.5 billion in federal funding; public universities received $3.8 billion; community colleges received $2.1 billion; technical educational institutions received over $100 million; and health-related educational institutions received more than $1.5 billion. *Id.* at 50–51. In fiscal year 2023, Texas public schools received roughly $9.4 billion in federal funding distributed by the TEA and an additional $4.8 billion in federal disbursements. *Id.* at 49. The government plans to enforce the Final Rule and Texas refuses to follow it.

The foregoing — billions of dollars per year — will likely cripple "the State's entire higher education network [which] includes 148 public institutions and currently enrolls approximately 1.4 million students." *Id.* at 50. For example, "[i]nstitutions that lose their federal funding will need to eliminate certain educational services if they cannot find alternative funding sources." *Id.* (citing ECF No. 16-1 at 5, 7–8, 10). To continue operations in accordance with its intention to ignore the Final Rule, Texas would need at least $13 billion per year to cover its losses in federal funding. "Irreparable injury" here is an understatement — not hyperbole.

On the other hand, Plaintiffs can expect irreparable compliance costs if they follow the Final Rule. *See Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) ("complying with a regulation

later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs") (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment)). A Plaintiff "need not convert each allegation of harm into a specific dollar amount." *Career Colleges*, 98 F.4th at 236 (internal marks omitted). And "alleged compliance costs need only be more than *de minimis*." *Id.* (internal marks omitted).

The Department acknowledges that recipients must "updat[e] policies or training materials" and host trainings for employees and Title IX coordinators. 89 Fed. Reg. at 33,867, 33,876 (discussing 34 C.F.R. § 106.31(a)(2)). These updates and training sessions necessitate "substantial expense" and "other compliance-related costs." ECF No. 16 at 48 (citing 89 Fed. Reg. at 33,867, 33,876). Plaintiffs' efforts here must "involve but [would] not [be] exhausted by hiring staff to perform compliance reviews, facilitate the Title IX grievance process, and respond to lawsuits that stem from allegations of liability under Title IX protections." ECF No. 16 at 52 (citing ECF No. 16-1 at 11–12). These costs "will likely increase when the Department adopts new regulations that create additional requirements or make existing requirements more demanding." *Id.* Overall, "the Department estimates more than $98 million in short-term compliance costs, some of which will fall on Texas schools." *Id.* (citing 89 Fed. Reg. at 33,861).

But "[a]t most," per the government, "these generic statements state the obvious: a new regulation will likely require regulated parties to undertake *some* activities to assure compliance." ECF No. 41 at 56. Where a regulation is otherwise valid, the government has a point. But not here, because the Final Rule is arbitrary and capricious on the numerous grounds explained *supra*. Hence, Plaintiffs would likely have to "comply[] with a regulation later held invalid." *EPA*, 829 F.3d at 433. Such compliance "almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Id.*

Irreparable harm is almost always the case because Plaintiffs would suffer a double-compliance cost. Because this Court finds that the Final Rule is likely arbitrary and capricious, the Final Rule is likely to be held invalid. Thus, should the Court offer no relief at this juncture, and Plaintiffs did comply, they would overhaul their Title IX infrastructure on August 1, 2024. But if the Final Rule is potentially held invalid, Texas would need to reverse course, which would likely require equal if not greater compliance costs. Without relief, a compliant Texas would suffer messaging dysfunction throughout its recipient institutions in addition to millions of wasted compliance dollars.

In conclusion, Plaintiffs *must* suffer at least one form of irreparable injury. If they don't comply — they intend not to — they must produce at least $13 billion per year to uphold Texas's current education system. Or millions of Texas students suffer the consequences. If they do comply, and the Final Rule is later held invalid, they suffer double compliance costs — likely millions in total. Hence, Plaintiffs have demonstrated irreparable injury at this stage.

III. The public interest and balance of equities favor Plaintiffs.

The balance of equities and the public interest "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. Likelihood of success on the merits and irreparable harm are the two most important factors in the analysis for preliminary relief. *See Career Colleges*, 98 F.4th at 239 (likelihood of success on the merits); *Mock*, 75 F.4th at 587 n.60 (same). Defendants thus "face[] a high hurdle" in establishing that the remaining two factors weigh against granting relief. *Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023).

Granting a preliminary injunction here would ensure "that Texas may continue to enforce its laws and policies without risking the loss of Title IX funding." ECF No. 16 at 57. And the public interest would be served "by preventing the loss of federal funds to Texas's educational

institutions." *Id.*; *see Career Colleges*, 98 F.4th at 254–55 ("Evidence . . . shows that a failure to stay the Rule would significantly constrain schools' operations and prevent them from devoting resources to educating their students, upgrading facilities, and constructing new ones . . . . Such a consequence would harm the public at large."). And "there is generally no public interest in the perpetuation of unlawful agency action." *Texas v. Biden*, 10 F.4th 538, 560 (5th Cir. 2021) (internal marks omitted); *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021).

CONCLUSION

Based on the foregoing review, the Court **GRANTS** Plaintiffs' Motion **IN PART**. Pending final resolution of this case, Defendants are therefore **ENJOINED** from implementing, enacting, enforcing, or taking any action in any manner to enforce the Final Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024), which is scheduled to take effect on August 1, 2024. This preliminary injunction is limited to Plaintiffs Daniel A. Bonevac, John Hatfield, and the State of Texas.

It is **FURTHER ORDERED** that no security is required to be posted by Texas or individual Plaintiffs under Federal Rule of Civil Procedure 65.

SO ORDERED.

July 11, 2024

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

Regulation Curation: 2020 v. 2024

Presented by:
Holly Boyd Wardell

October 15, 2024

Holly Boyd Wardell

Holly is the managing shareholder of our Austin office. She is licensed to practice law in all Texas state courts; the United States District Courts for the Northern, Eastern, Southern, and Western Districts of Texas; the United States Court of Appeals for the Fifth Circuit; and the United States Supreme Court.

Holly is a member of the Austin Bar Association, National School Boards Association Council of School Attorneys; School Law, Litigation, Administrative and Public Law, and Labor and Employment Law sections of the Texas Bar, Texas Council of School Attorneys, and the Texas Association of Defense Counsel. Holly has also served on the State Bar's Disabilities Issues Committee and the Texas Education Agency's State Supervision Committee & Complaints Management System. Holly graduated cum laude from Texas Wesleyan University in 1992 and earned her Juris Doctorate from The University of Texas School of Law in 1996.

Holly has an impressive litigation background in whistleblower cases and civil rights cases including gender, race, and national origin, and disability discrimination claims. Her work on position statements, motions, and briefs has resulted in numerous victories for school districts at every level conceivable. Additionally, she regularly attends ARD and Section 504 Committee meetings and represents clients at due process hearings.

Holly's outgoing personality, enthusiasm, and thoroughness combine to make her a popular lecturer. She is a frequent guest speaker for school districts, regional education service centers, special education cooperatives, state organizations, and universities on a variety of topics related to school law, including special education, Section 504, education records, sexual harassment, student discipline, and search and seizure. Holly has published numerous articles for state and firm publications on special education and other issues.

Holly’s email address is hwardell@edlaw.com.

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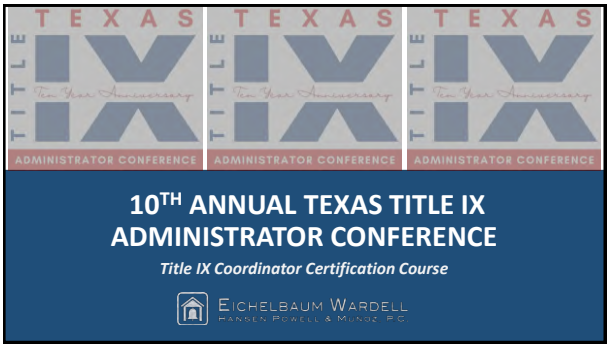
TEXAS TITLE IX
Ten Year Anniversary
ADMINISTRATOR CONFERENCE
10TH ANNUAL TEXAS TITLE IX ADMINISTRATOR CONFERENCE
Title IX Coordinator Certification Course
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1

Regulation Curation
2020 v. 2024

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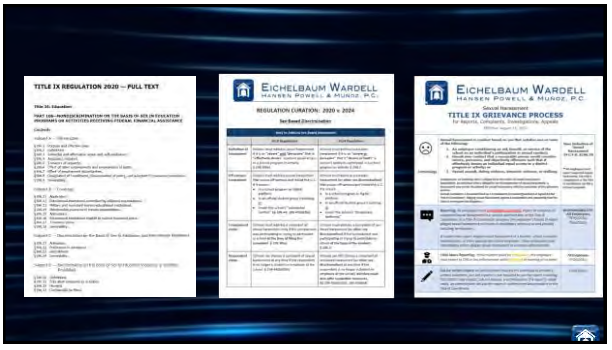
TITLE IX REGULATION 2020 — FULL TEXT
EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.
REGULATION CURATION: 2020 v. 2024
TITLE IX GRIEVANCE PROCESS

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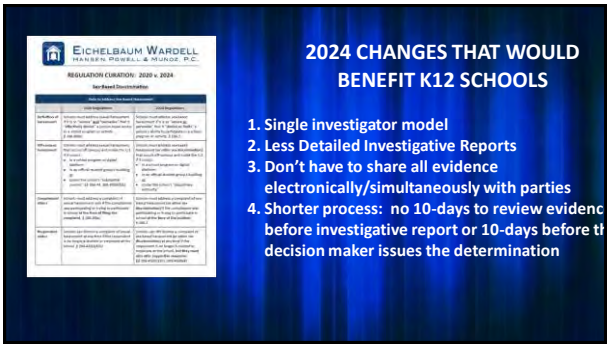
EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.
REGULATION CURATION: 2020 v. 2024
2024 CHANGES THAT WOULD BENEFIT K12 SCHOOLS
1. Single investigator model
2. Less Detailed Investigative Reports
3. Don't have to share all evidence electronically/simultaneously with parties
4. Shorter process: no 10-days to review evidenc
before investigative report or 10-days before th
decision maker issues the determination

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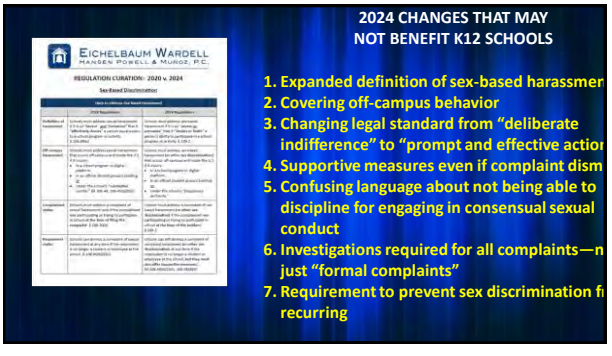
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HANSEN POWELL & MUÑOZ, P.C.
REGULATION CURATION: 2020 v. 2024
2024 CHANGES THAT MAY NOT BENEFIT K12 SCHOOLS
1. Expanded definition of sex-based harassmer
2. Covering off-campus behavior
3. Changing legal standard from "deliberate
indifference" to "prompt and effective actio
4. Supportive measures even if complaint dism
5. Confusing language about not being able to
discipline for engaging in consensual sexual
conduct
6. Investigations required for all complaints—n
just "formal complaints"
7. Requirement to prevent sex discrimination fi
recurring

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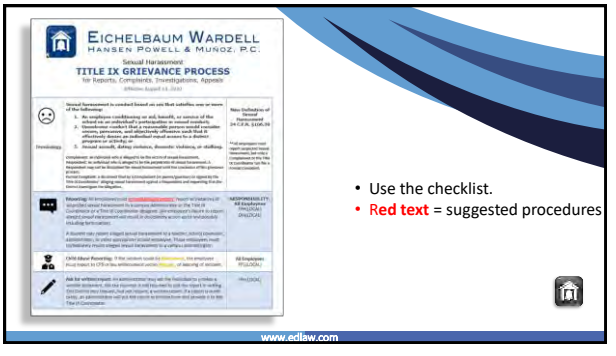
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TITLE IX GRIEVANCE PROCESS
• Use the checklist.
• Red text = suggested procedures
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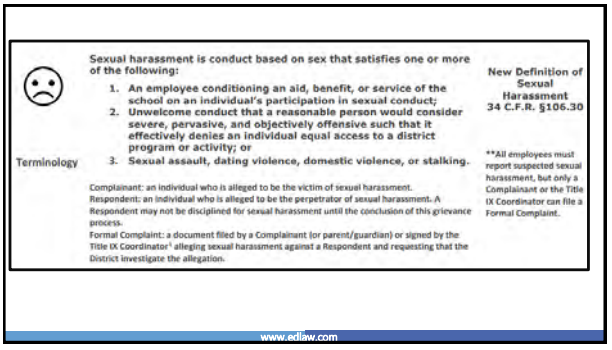
Terminology
Sexual harassment is conduct based on sex that satisfies one or more of the following:
1. An employee conditioning an aid, benefit, or service of the school on an individual's participation in sexual conduct;
2. Unwelcome conduct that a reasonable person would consider severe, pervasive, and objectively offensive such that it effectively denies an individual equal access to a district program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking.
Complainant: an individual who is alleged to be the victim of sexual harassment.
Respondent: an individual who is alleged to be the perpetrator of sexual harassment. A Respondent may not be disciplined for sexual harassment until the conclusion of this grievance process.
Formal Complaint: a document filed by a Complainant (or parent/guardian) or signed by the Title IX Coordinator[1] alleging sexual harassment against a Respondent and requesting that the District investigate the allegation.
New Definition of Sexual Harassment 34 C.F.R. §106.30
**All employees must report suspected sexual harassment, but only a Complainant or the Title IX Coordinator can file a Formal Complaint.
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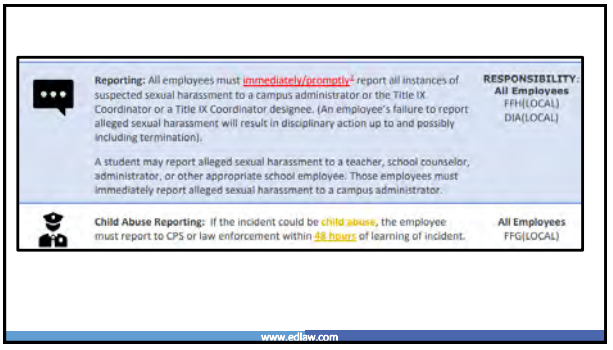
Reporting: All employees must immediately/promptly[2] report all instances of suspected sexual harassment to a campus administrator or the Title IX Coordinator or a Title IX Coordinator designee. (An employee's failure to report alleged sexual harassment will result in disciplinary action up to and possibly including termination).
A student may report alleged sexual harassment to a teacher, school counselor, administrator, or other appropriate school employee. Those employees must immediately report alleged sexual harassment to a campus administrator.
RESPONSIBILITY: All Employees FFH(LOCAL) DIA(LOCAL)
Child Abuse Reporting: If the incident could be child abuse, the employee must report to CPS or law enforcement within 48 hours of learning of incident.
All Employees FFG(LOCAL)
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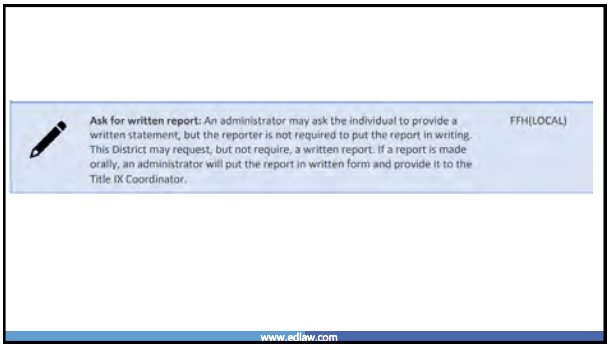
Ask for written report: An administrator may ask the individual to provide a written statement, but the reporter is not required to put the report in writing. This District may request, but not require, a written report. If a report is made orally, an administrator will put the report in written form and provide it to the Title IX Coordinator.
FFH(LOCAL)
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Notify Title IX Office: A campus administrator must inform the Title IX Coordinator/designee of report of sexual harassment via telephone call or email within 24 hours.
Campus Administrators
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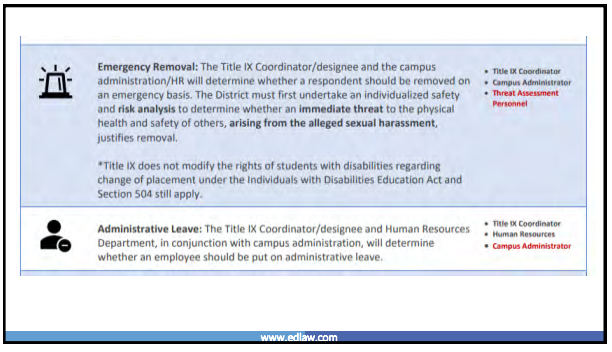
Emergency Removal: The Title IX Coordinator/designee and the campus administration/HR will determine whether a respondent should be removed on an emergency basis. The District must first undertake an individualized safety and risk analysis to determine whether an immediate threat to the physical health and safety of others, arising from the alleged sexual harassment, justifies removal.
*Title IX does not modify the rights of students with disabilities regarding change of placement under the Individuals with Disabilities Education Act and Section 504 still apply.
• Title IX Coordinator
• Campus Administrator
• Threat Assessment Personnel
Administrative Leave: The Title IX Coordinator/designee and Human Resources Department, in conjunction with campus administration, will determine whether an employee should be put on administrative leave.
• Title IX Coordinator
• Human Resources
• Campus Administrator
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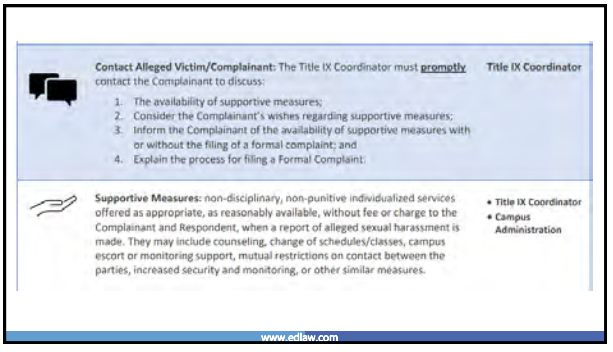
Contact Alleged Victim/Complainant: The Title IX Coordinator must promptly contact the Complainant to discuss:
1. The availability of supportive measures;
2. Consider the Complainant's wishes regarding supportive measures;
3. Inform the Complainant of the availability of supportive measures with or without the filing of a formal complaint; and
4. Explain the process for filing a Formal Complaint.
Title IX Coordinator
Supportive Measures: non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge to the Complainant and Respondent, when a report of alleged sexual harassment is made. They may include counseling, change of schedules/classes, campus escort or monitoring support, mutual restrictions on contact between the parties, increased security and monitoring, or other similar measures.
• Title IX Coordinator
• Campus Administration
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If no Formal Complaint Filed: The Title IX Coordinator/designee must offer the Complainant and Respondent with **supportive measures** and **document** the measures provided. Documentation of supportive measures must be retained for at least 7 years. — Title IX Coordinator

If Formal Complaint Filed (Dismissal): A Formal Complaint may be dismissed at any time during the grievance process if one of the following conditions are met. — Title IX Coordinator

Mandatory Dismissal: The District is required by law to dismiss a Formal Complaint if the conduct alleged: 1) would not constitute sexual harassment even if proved: 2) did not occur in a District program or activity; or 3) did not occur in the U.S.

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Discretionary Dismissal: The District may dismiss a Formal Complaint at any time during the investigation if: 1)the Complainant withdraws the allegations or complaint in writing; 2) the Respondent is no longer enrolled in the District; or 3) specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to allegations.

Dismissal of a Formal Complaint does not preclude the District from taking disciplinary measures against Respondents for non-sexual harassment violations of the Code of Conduct.

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Investigation of Formal Complaint – Appoint Investigator and Decision Maker — Title IX Coordinator

Provide **Notice to Parties**: Simultaneous notice must be provided to all known parties that includes:

- Allegations of sexual harassment, known at the time, with sufficient detail to prepare before any initial interview;
- Identities of the parties involved;
- Date, location of alleged incident(s);
- Statement that Respondent is presumed not responsible and that a determination will not be made until the conclusion of the grievance process
- Statement that the parties have the right to an advisor of their choosing, who can be a parent/guardian or another individual who may, but is not required to be, an attorney and who may inspect and review evidence; and
- Statement that the Code of Conduct prohibits knowingly making false statements.
- An offer of informal resolution.

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Facilitation of Voluntary Informal Resolution: At any time prior to deciding of responsibility the District may facilitate an informal resolution process, such as mediation. This is a voluntary process. Any party may decline to participate. [The investigation may be abated for a short, defined period for the parties to engage in informal resolution. However, the informal resolution process cannot be used to delay an investigation.) — Facilitator

Informal Resolution cannot be used to resolve allegations that an employee sexually harassed a student.

Prior to a resolution, a party has the right to withdraw and resume the grievance process with respect to the Formal Complaint.

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New Rules for Investigating Formal Complaints: — Investigator(s)

1. The **burden of proof** (preponderance of the evidence) rests on the District and not on the parties.
2. The District cannot demand access to **legally privileged information** (e.g., healthcare-patient, attorney-client, priest-penitent).
3. Both parties must have an equal opportunity to present **witnesses**, including fact and expert witnesses, and other inculpatory and exculpatory **evidence**.
4. The District **cannot restrict a party's ability to discuss the allegations** under investigation or to gather or present relevant evidence.
5. Both parties have the right to have a **parent/guardian** and/or **advisor present** during any part of the grievance process, including interviews.
6. Parties are entitled to **written notice** of the date, time, location, participants, and purpose of **investigative interviews** and other meetings in this grievance process, with sufficient time for the party to prepare to participate.
7. Parties have the right to inspect and **review** any **evidence** obtained as a part of the investigation that is directly related to the allegations raised in the Formal Complaint.

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Conduct the Investigation: — Investigator(s)

1. Review **Formal Complaint**.
2. Determine whether there is an **on-going criminal investigation** and confer with law enforcement about whether the school's investigation will interfere with the criminal investigation. If so, the school's investigation may be abated for a short, defined period in cooperation with law enforcement. Contact law enforcement on a weekly basis regarding the status of the investigation. Document law enforcement contact and directives.
3. Determine whether nature of allegations suggest the need for **forensic interview** by individuals specially trained in interviewing young children. If so, contact law enforcement or local child-advocacy center.
4. Send written notice of interviews to parties, including date, time, location, participants, and purpose of meeting with sufficient time (3-5 days) for the party to prepare to participate.
5. Interview **Complainant** regarding facts and potential witnesses. Advisor may be present but cannot answer for the Complainant.

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6. Interview **Witnesses** identified by Complainant. Witnesses are not entitled to have a parent/guardian or advisor present, unless allowed by administration.
7. Interview **Respondent**. Advisor may be present but cannot answer for Respondent.
8. Interview **Witnesses** identify by Respondent.
9. Re-interview Complainant for clarification, if necessary.
10. Gather **physical evidence**, visit incident site(s), review discipline and other relevant records of parties and witnesses.
11. Review statements or reports from **expert witnesses**, if any.
12. Allows parties access to facilities to gather evidence, if requested.

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13. The parties do not have the right to be present during witness interviews. They can ask questions of the other party and witnesses through written question process later.
14. Organize evidence to share with parties.
15. **Prior to completion of the investigative report**, the investigator must **send an electronic[1] or hard copy of the relevant evidence** gathered to the parties and the parties' advisors, if any. The parties must be provided **at least 10 calendar days** to submit a written response that the investigator must consider before completing the investigative report.
16. Prepare an investigative report that summarizes relevant evidence. The report may include proposed findings of fact.
17. **The investigative report must be sent to the parties at least 10 calendar days before the Decision Maker decides regarding responsibility.**
18. Send investigative report to Decision Maker.

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Decision Maker

Decision/Determination of Responsibility: A Decision Maker (who is not the Title IX Coordinator or the Investigator) must issue a comprehensive written determination regarding responsibility (i.e., whether sexual harassment occurred) and the complete grievance process to date. The decision must include:

1. Identification of the **allegations** that constitute sexual harassment;
2. Description of the **procedural steps** taken since the receipt of the Formal Complaint through the Decision, including notifications, interviews with the parties and witnesses, site visits, methods used to gather other evidence;
3. Findings of Fact
4. Conclusions regarding the application of the District's Code of Conduct to the facts;
5. A statement of and the rationale for the results of each allegation, including a determination of responsibility;
6. Any disciplinary sanctions imposed on the Respondent;
7. A statement whether remedies to the Complainant have been designed to restore or preserve equal access to the District's education program or activity; and
8. Information about the ability of the parties to appeal the decision.

The decision must be sent to the parties simultaneously.

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Appeals Decision Maker

Appeal: Either party may appeal on a form provided by the District within 10 calendar days of issuance of the decision. The only allowable bases for appeal are:

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time of the decision that could affect the outcome; and
3. The Title IX Coordinator, Investigator(s), or Decision Maker 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.

If an appeal is filed, the Appeals Decision Maker shall provide notice to the other party in writing. Both parties shall have the opportunity to submit a written statement in support of or challenging the outcome. Parties will be provided 10 calendar days to submit an appeal statement.

After considering the written appeal statements of the parties, the Appeals Decision Maker will issue a written decision that includes a rationale for the result and provide the decision to both parties simultaneously.

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Title IX Coordinator

Record Keeping: All records related to a sexual harassment report under this grievance process must be maintained by the District for at least 7 years.

Office for Civil Rights: An individual also has the right to file a complaint with United States Department of Education Office for Civil Rights.

All Employees

Retaliation Prohibited: All individuals shall be protected from retaliation if the individual made a report or complaint, testified, assisted, or participated or refused to participate in an investigation or the grievance process. Retaliation may include intimidation, threats, coercion, or discrimination.

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The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.

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REGULATION CURATION: 2020 v. 2024

Sex-Based Discrimination

Duty to Address Sex-Based Harassment		
	2020 Regulations	**2024 Regulations**
Definition of harassment	Schools must address sexual harassment if it is so "**severe**" **and** "**pervasive**" that it "**effectively denies**" a person equal access to a school program or activity. *§ 106.30(a).*	Schools must address sex-based harassment if it is so "**severe or pervasive**" that it "**denies or limits**" a person's ability to participate in a school program or activity. *§ 106.2.*
Off-campus harassment	Schools must address sexual harassment that occurs off-campus and inside the U.S. if it occurs: • In a school program or digital platform; • In an official student group's building; or • Under the school's "substantial control." *§§ 106.44, 106.45(b)(3)(i).*	Schools must address sex-based harassment **(or other sex discrimination)** that occurs off-campus and inside the U.S. if it occurs: • In a school program or digital platform; • In an official student group's building; or • Under the school's "disciplinary authority." *§ 106.11.*
Complainant status	Schools must address a complaint of sexual harassment only if the complainant was participating or trying to participate in school **at the time of filing the complaint**. *§ 106.30(a).*	Schools must address a complaint of sex-based harassment **(or other sex discrimination)** if the complainant was participating or trying to participate in school **at the time of the incident**. *§ 106.2.*
Respondent status	Schools can dismiss a complaint of sexual harassment at any time if the respondent is no longer a student or employee at the school. *§ 106.45(b)(3)(ii).*	Schools can still dismiss a complaint of sex-based harassment **(or other sex discrimination)** at any time if the respondent is no longer a student or employee at the school, **but they must also offer supportive measures.** *§§ 106.45(d)(1)(ii), 106.45(d)(4).*

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Notice of harassment	K12 schools must respond to alleged sexual harassment if any employee has **actual knowledge** of it.	All **non-confidential** K12 employees must **report** possible sex-based harassment **(or other sex discrimination)** to the Title IX coordinator.
Responding to Sex-Based Harassment		
	2020 Regulations	**2024 Regulations**
Standard	Schools must respond to sexual harassment in a way that is **not** "**deliberately indifferent**." *§ 106.44(a).*	Schools must respond to sex-based harassment **(or other sex discrimination)** with "**prompt and effective action**." *§ 106.44(a).*
Supportive measures	Schools must offer supportive measures to a complainant or respondent, even if there is no investigation. Supportive measures must be non-punitive and not unreasonably burdensome on the respondent. The school can reasonably burden the respondent. *§ 106.30(a).*	Schools must offer supportive measures to complainant or respondent, even if there is no investigation and **even if the complaint is dismissed**. Supportive measures must be non-punitive and not unreasonably burdensome on the respondent. The school can reasonably burden the respondent. §§ 106.2, 106.44(g)(2).
Informal resolutions	Schools can use an informal resolution process, such as mediation or a restorative process, to resolve a complaint of **student-on-student sexual harassment**. *§ 106.45(b)(9).*	Schools can use an informal resolution process, such as mediation or a restorative process, to resolve a complaint of **any sex discrimination, except employee-on-student sex-based harassment in a K-12 school**. *§ 106.44(k).*
Retaliation	Schools cannot retaliate against anyone to (i) interfere with their Title IX rights or (ii) punish them for their participation or lack thereof in a sex discrimination proceeding, including by: • **Charging someone for misconduct that arises out of the same facts as the reported sex discrimination.** • Charging someone for a "false statement" based solely on the school's decision in an investigation. *§ 106.71.*	Schools cannot retaliate against anyone to (i) interfere with their Title IX rights or (ii) punish them for their participation or lack thereof in a sex discrimination proceeding, including by: • **Disciplining someone for any misconduct for the purpose of retaliation.** • Disciplining someone for making a "false statement" **or engaging in consensual sexual conduct** based solely on the school's decision in an investigation. *§§ 106.2, 106.45(h)(5), 106.71.*

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Investigating Sex-Based Harassment		
	2020 Regulations	**2024 Regulations**
Formal Complaint	Investigation required for "Formal Complaints." Response required for "reports." **Formal Complaint** means a **document*** **filed by a complainant** (an individual who is alleged to be the victim of conduct that could constitute sexual harassment) or signed by the Title IX Coordinator **alleging sexual harassment** against a respondent **and requesting** that the recipient **investigate** the allegation of sexual harassment. At the time of the filing of a formal complaint, the complainant **must be participating in or attempting to participate in the education program** or activity of the recipient with which the formal complaint is filed. *"**Document**" means a document or electronic submission (e.g., email or online portal) that contains the complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint. *§ 106.30*	Investigations required for all complaints. ***Complaint*** means 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. *§ 106.2*
Staff requirements	Title IX Coordinator Investigator Decision-Maker Facilitators Appellate Decision-Maker	Single Investigator Model Option (Investigator and Decision-Maker can be same person)
Time frame	Recipients must resolve complaints of sex discrimination in a "prompt" manner. In investigations of sexual harassment, recipients can impose "**temporary**"	Recipients must resolve complaints of sex discrimination in a "prompt" manner. In investigations of sex-based harassment **(or other sex discrimination)**, recipients

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	delays for "good cause," including because there is a **concurrent criminal investigation**. *§§ 106.8(c), 106.45(b)(1)(v).* Before completing the investigation, the school must **send** a copy of any **evidence to each party** in electronic format or a hard copy **at least 10 days prior to completion of the investigative report**, so that a party can submit a written response to the evidence. Once the **investigative report** is completed, it must be sent simultaneously to each party **at least 10 days before the decision maker makes a determination** whether the respondent is responsible for sexual harassment.	can impose "**reasonable**" delays for "good cause." *§§ 106.8(b)(2), 106.45(a)(1), 106.45(b)(4).*
Presumption of non-responsibility	Schools must presume the respondent is not responsible until the end of an investigation of sexual harassment. *§§ 106.45(b)(1)(iv), (b)(2)(i)(B).*	Schools must presume the respondent is not responsible until the end of an investigation of sex-based harassment **(or other sex discrimination)**. *§ 106.45(b)(3).*
Questioning parties and witnesses	**In K12 investigations of sexual harassment**, the school must allow the **parties to submit written questions** for the school to ask of the other party and witnesses. *§ 106.45(b)(6)(i)-(ii).*	**In all investigations of sex discrimination**, the school must use a process to **assess the credibility** of parties and witnesses. *§ 106.45(g).*
Standard of proof	Schools must use either a **"preponderance of the evidence" standard** <u>or</u> **"clear and convincing evidence" standard** in sexual harassment investigations, <u>as long as</u> the school uses the same standard for students and employees. *§ 106.45(b)(1)(vii).*	Schools must use a "**preponderance of the evidence**" **standard** in all investigations of sex-based harassment **(or other sex discrimination)** <u>unless</u> the school uses a "clear and convincing evidence" standard in <u>all</u> "comparable" proceedings (such as for race and disability discrimination or physical assault). § *106.45(h)(1).*
Access to Evidence	Must provide both parties an equal opportunity to inspect and review any evidence directly related to the allegations, so that each party can meaningfully respond to the evidence	Must provide each party an equal opportunity to access either the relevant (and not otherwise impermissible evidence) or an accurate description of

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	prior to the conclusion of the investigation. Prior to completion of the investigative report, the school must send to each party the evidence in an electronic format or a hard copy. The parties must have at least 10 days to submit a written response that the investigator must consider prior to completion of the investigative report. *§ 106.45(b)(5)(vi).*	the evidence (with access to the evidence upon request). *§ 106.45(f).*
Investigation Report **Determination of Responsibility**	Schools must issue a written decision on whether sexual harassment occurred. The investigation report must contain the following components: • Identification of the allegations potentially constituting sexual harassment; • Description of 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; • Findings of fact; • Conclusions regarding the application of the code of conduct to the facts; • Statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the school 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 school to the complainant; and • The school's procedures and permissible bases for either party to appeal. *§ 106.45(b)(7).*	Schools must still issue a written decision whether sex discrimination occurred; however, the content requirements from the 2020 regulations are significantly reduced to a rationale for the decision and permissible bases for appeal.
Appeals	In a **sexual harassment investigation**, the parties can appeal if there was a	**In all investigations of sex discrimination**: (i) the complainant can

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	procedural irregularity, new evidence, or bias or conflict of interest that affected the outcome. *§ 106.45(b)(8)(i).*	appeal a dismissal of their complaint, and (ii) the parties must have the same appeal rights as in all "comparable" proceedings (such as for race and disability discrimination or physical assault). *§ 106.45(i).*
Preventing Sex-Based Harassment		
	2020 Regulations	**2024 Regulations**
Training	Schools must train the Title IX Coordinator, investigators, decision makers, and facilitators on the definition of sexual harassment, how to conduct investigations and the grievance process, bias, conflicts of interest, not relying on sex stereotypes, and impartial investigations. §106.45	Schools must train **all employees** on how to recognize and report sex discrimination. Additional training is required for all **Title IX officials**: coordinators, investigators, decision-makers, informal resolution facilitators, and those who can modify or terminate supportive measures. *§ 106.8(d).*
Prevention & monitoring barriers to reporting	N/A.	Schools must **prevent** sex discrimination from recurring (including when a complaint is dismissed) and **monitor and address barriers to reporting**. *§§ 106.44(b), 106.44(f)(1), 106.45(d)(4)(iii).*

LGBTQI+ Issues

	2020 Regulations	2024 Regulations
Definition of discrimination	N/A	Sex discrimination includes discrimination based on **sexual orientation**, **gender identity**, **sex characteristics** (including intersex traits), **and sex stereotypes** under Title IX. Schools must address anti-LGBTQI+ **harassment** (see **Part I**). *§§ 106.2, 106.10.*
Transgender	N/A	Schools must allow individuals to participate in **classes and activities**, use

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		bathrooms and locker rooms, and **dress and groom** themselves consistent with their gender identity. *§ 106.31(a)(2).*
Athletics	N/A	Note: This proposed rule is not yet final. **Categorical sports bans of transgender students in schools would be prohibited. Sports bans would also be prohibited in nearly all cases in K-8 and in most cases in high school**. Any policy that limits or denies a transgender student's participation in sports would have to: • Be **specific** to a sport, grade level, or level of competition; • Be "**substantially related**" to an important educational objective; and • **Minimize harm** to transgender students. Schools could not justify a transgender sports ban based on **overbroad generalizations** or **false assumptions**. *§ 106.41(b)(2).*

Pregnant & Parenting Students

	2020 Regulations	2024 Regulations
Definition of discrimination	Schools cannot discriminate against students based on pregnancy or related conditions. Related conditions include childbirth, termination of pregnancy, and recovery from any of these conditions. *§ 106.40(b)(1).*	Schools cannot discriminate against students based on **past, current, or potential** pregnancy or related conditions. Related conditions include childbirth, termination of pregnancy, **lactation**, and **medical conditions** or recovery related to any of these conditions. Schools must address pregnancy or related **harassment**. *§§ 106.2, 106.10.*

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Notice of rights	N/A.	An **employee** who knows of a student's pregnancy or related condition must inform them of the Title IX coordinator's role and contact information. The **Title IX coordinator** must then inform the student of their rights. §§ *106.40(b)(2), 106.40(b)(3)(i).*
Participation and exclusion	A **pregnant** student can participate in an alternate program if it is voluntary, and the program is comparable to those offered to their peers. A school cannot require a student who is pregnant or has a related condition to get a **doctor's** approval to participate in a school program or activity unless it is required of **students with other physical or emotional conditions**. *§§ 106.40(b)(1), 106.40(b)(3).*	A student who is **pregnant or has a related condition** may participate in an alternate program if it is voluntary, and the program is comparable to those offered to their peers. A school cannot require a student who is pregnant or has a related condition to get approval from a **healthcare provider or anyone else** to participate in a school program or activity unless it is required of **all students**. *§§ 106.40(b)(3)(iii), 106.40(b)(5).*
Leaves of absence	Schools must allow a leave of absence for pregnancy or related conditions for as long as a student's **doctor** deems medically necessary. Upon return, the student must be reinstated to their **prior status**. *§ 106.40(b)(5).*	Schools must allow a **voluntary** leave of absence for pregnancy or related conditions for **at least** as long as a student's **healthcare provider** deems medically necessary. Upon return, the student must be reinstated to their **prior academic status and, where practicable, prior extracurricular status**. *§ 106.40(b)(3)(iv).*
Accommodations	Schools must offer **services and benefits** to students who are pregnant or have a related condition **if they are offered to temporarily disabled students**. *§ 106.40(b)(4).* While the previous rules did not explicitly address it, a 2013 guidance stated that reasonable modifications include **elevator access**, **a larger desk**, or **more frequent trips to the bathroom**.	Schools must **consult** with a student who is pregnant or has a related condition to offer **individualized and voluntary** "**reasonable modifications**" unless this would "**fundament-tally alter**" **the school's program or activity**. Reasonable modifications include **elevator access**, **a larger desk**, **a footrest**, **breaks from class**, **absences**, **online courses**, **schedule changes**, **extensions**, **rescheduled exams**, and **counseling**. *§ 106.40(b)(3)(ii).*

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Lactation	While the previous rules did not explicitly address it, a 2013 guidance stated schools **should** provide a lactation room for students.	Schools **must** provide a **private**, **clean, non-bathroom** lactation space for students. *§ 106.40(b)(3)(v).*
Limitation on documentation	N/A.	Students who are pregnant or have a related condition need not submit **documentation** to get a modification, leave of absence, alternate program, or lactation space if: their need is obvious or is water, a bigger desk, sitting or standing, breaks, or lactation; prior documentation was sufficient; or documentation is not required of other students. *§ 106.40(b)(3)(vi).*
Parental, family, or marital status	Schools cannot apply a **rule** about a **student's actual or potential** parental, family, or marital status that treats them differently based on gender. *§ 106.40(a).*	Schools cannot apply a **policy, practice, or procedure** about a **student or applicant's past**, **current**, or **potential** parental, family, or marital status that treats them differently based on gender. *§§ 106.21(c)(2)(i), 106.40(a).*

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TITLE IX REGULATION 2020 — FULL TEXT

Title 34: Education

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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Subpart A—Introduction

§106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.2 Definitions.

As used in this part, the term:

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

(e) *Reviewing Authority* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *Administrative law judge* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *Program or activity* and *program* means all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or local government; or

(ii) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (h)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 20 U.S.C. 1687)

(i) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

(j) *Applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(k) *Educational institution* means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (l), (m), (n), or (o) of this section.

(l) *Institution of graduate higher education* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(m) *Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(n) *Institution of professional education* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(o) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(p) *Administratively separate unit* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(q) *Admission* means 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.

(r) *Student* means a person who has gained admission.

(s) *Transition plan* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(iii) of this section.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30572, 30579, May 19, 2020]

§106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B of this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.6 Effect of other requirements and preservation of rights.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Authority: Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.

(d) *Constitutional protections.* Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA).* The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

(g) *Exercise of rights by parents or guardians.* Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) *Preemptive effect.* To the extent of a conflict between State or local law and title IX as implemented by §§106.30, 106.44, and 106.45, the obligation to comply with §§106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30573, 30579, May 19, 2020]

§106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19 2020]

§106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) *Designation of coordinator.* Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator." The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) *Dissemination of policy*—(1) *Notification of policy.* Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

(2) *Publications.* (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

(c) *Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with §106.45 for formal complaints as defined in §106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) *Application outside the United States.* The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

[85 FR 30573, May 19, 2020]

§106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30573, May 19, 2020]

Subpart B—Coverage

§106.11 Application.

Except as provided in this subpart, this part 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.

[45 FR 86298, Dec. 30, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part

and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

(c) *Eligibility.* Any of the following in paragraphs (c)(1) through (6) of this section shall be sufficient to establish that an educational institution is controlled by a religious organization, as contemplated under paragraph (a) of this section, and is therefore eligible to assert a religious exemption to the extent application of this part would not be consistent with its religious tenets:

(1) That the educational institution is a school or department of divinity.

(2) That the educational institution requires its faculty, students, or employees to be members of, or otherwise engage in religious practices of, or espouse a personal belief in, the religion of the organization by which it claims to be controlled.

(3) That the educational institution, in its charter or catalog, or other official publication, contains an explicit statement that it is controlled by a religious organization or an organ thereof, or is committed to the doctrines or practices of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

(4) That the educational institution has a doctrinal statement or a statement of religious practices, along with a statement that members of the institution community must engage in the religious practices of, or espouse a personal belief in, the religion, its practices, or the doctrinal statement or statement of religious practices.

(5) That the educational institution has a published institutional mission that is approved by the governing body of an educational institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.

(6) Other evidence sufficient to establish that an educational institution is controlled by a religious organization, pursuant to 20 U.S.C. 1681(a)(3).

(d) *Severability.* If any provision of this section or its application to any person, act, or practice is held invalid, the remainder of this section or the application of its provisions to any person, act, or practice shall not be affected thereby.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30573, 30579, May 19, 2020; 85 FR 59980, Sept. 23, 2020]

§106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§106.16 and 106.17, and subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of subpart C.* Except as provided in paragraphs (d) and (e) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 85 FR 30579, May 19, 2020]

§106.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of subpart C unless it is carrying out a transition plan approved by the Secretary as described in §106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.17 Transition plans.

(a) *Submission of plans.* An institution to which §106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which §106.16 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b) (3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b) (4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which §106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment which emphasizes the institution's commitment to enrolling students of the sex previously excluded.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30573, May 19, 2020]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits

as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §106.3(a), and may choose to undertake such efforts as affirmative action pursuant to §106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.24 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30574, May 19, 2020]

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§106.30 Definitions.

(a) As used in this part:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in §106.8(a).

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Consent. The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

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. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under §106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under §106.45, and must comply with the requirements of this part, including §106.45(b)(1)(iii).

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

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

(1) 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;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are 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. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) As used in §§106.44 and 106.45:

Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

Postsecondary institution means an institution of graduate higher education as defined in §106.2(l), an institution of undergraduate higher education as defined in §106.2(m), an institution of professional education as defined in §106.2(n), or an institution of vocational education as defined in §106.2(o).

[85 FR 30574, May 19, 2020]

§106.31 Education programs or activities.

(a) *General.* 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 be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aid, benefits or services not provided by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982; 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) Comparable in quality and cost to the student.

A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.34 Access to classes and schools.

(a) *General standard.* Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex.

(1) *Contact sports in physical education classes.* This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(2) *Ability grouping in physical education classes.* This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) *Human sexuality classes.* Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.

(4) *Choruses.* Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

(b) *Classes and extracurricular activities*—(1) *General standard.* Subject to the requirements in this paragraph, a recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes or extracurricular activities, if—

(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(ii) The recipient implements its objective in an evenhanded manner;

(iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

(iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

(2) *Single-sex class or extracurricular activity for the excluded sex.* A recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.

(4) *Periodic evaluations.* (i) The recipient must conduct periodic evaluations to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.

(ii) Evaluations for the purposes of paragraph (b)(4)(i) of this section must be conducted at least every two years.

(5) *Scope of coverage.* The provisions of paragraph (b)(1) through (4) of this section apply to classes and extracurricular activities provided by a recipient directly or through another entity, but the provisions of paragraph (b)(1) through (4) of this section do not apply to interscholastic, club, or intramural athletics, which are subject to the provisions of §§106.41 and 106.37(c) of this part.

(c) *Schools*—(1) *General Standard.* Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school.

(2) *Exception.* A nonvocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether schools are substantially equal include, but are not limited to, the following: The policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the quality and range of extracurricular offerings, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources, and intangible features, such as reputation of faculty.

(4) *Definition.* For the purposes of paragraph (c)(1) through (3) of this section, the term "school" includes a "school within a school," which means an administratively separate school located within another school.

[71 FR 62542, Oct. 25, 2006, as amended at 85 FR 30579 May 19, 2020]

§106.35 Access to institutions of vocational education.

A recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient.

[71 FR 62543, Oct. 25, 2006, as amended at 85 FR 30579, May 19, 2020]

§106.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and §106.41.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.43 Standards for measuring skill or progress in physical education classes.

If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62543, Oct. 25, 2006, as amended at 85 FR 30579, May 19, 2020]

§106.44 Recipient's response to sexual harassment.

(a) *General response to sexual harassment.* A recipient 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. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient's response must treat complainants 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. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in §106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) *Response to a formal complaint.* (1) In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45. With or without a formal complaint, a recipient must comply with §106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* 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 1973, or the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with §106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

[85 FR 30574, May 19, 2020]

§106.45 Grievance process for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) *Grievance process.* For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in §106.30, must apply equally to both parties.

(1) *Basic requirements for grievance process.* A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in §106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-

makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in §106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(iv) 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;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and 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;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) *Notice of allegations*—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in §106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under §106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not 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, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) *Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint 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, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) *Consolidation of formal complaints.* A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

(5) *Investigation of a formal complaint.* When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or para-professional acting in the professional's or paraprofessional's capacity, or assisting in that capacity,

and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties 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 and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(6) *Hearings.* (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine

whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. 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. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section 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. 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.

(7) *Determination regarding responsibility.* (i) 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. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in §106.30;

(B) 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;

(C) Findings of fact supporting the determination;

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

(E) A statement of, and rationale for, the result 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

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. 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.

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

(8) *Appeals.* (i) 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:

(A) Procedural irregularity that affected the outcome of the matter;

(B) 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

(C) 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.

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

(iii) As to all appeals, the recipient must:

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

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

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

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

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

(F) Provide the written decision simultaneously to both parties.

(9) *Informal resolution.* A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal

resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, 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, provided, however, 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; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under §106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

[85 FR 30575, May 19, 2020]

§106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30578, May 19, 2020]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including those that are social or recreational; and

(10) Any other term, condition, or privilege of employment.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in §106.61.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.56 Fringe benefits.

(a) *Fringe benefits defined.* For purposes of this part, *fringe benefits* means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.62 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30578, May 19, 2020]

Subpart F — Retaliation

SOURCE: 85 FR 30578, May 19, 2020, unless otherwise noted.

§106.71 Retaliation.

(a) *Retaliation prohibited.* 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, 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 under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under §106.8(c).

(b) *Specific circumstances.* (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

§106.72 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart G—Procedures

SOURCE: 85 FR 30579, May 19, 2020, unless otherwise noted.

§106.81 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR part 101. The definitions in §106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101.

§106.82 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Appendix A to Part 106—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

EDITORIAL NOTE: For the text of these guidelines, see 34 CFR part 100, appendix B.

[44 FR 17168, Mar. 21, 1979]

EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

Sexual Harassment

TITLE IX GRIEVANCE PROCESS

for Reports, Complaints, Investigations, Appeals

Effective August 14, 2020

Terminology

Sexual harassment is conduct based on sex that satisfies one or more of the following:

1. An employee conditioning an aid, benefit, or service of the **school on an individual's participation in sexual conduct;**
2. Unwelcome conduct that a reasonable person would consider severe, pervasive, and objectively offensive such that it effectively denies an individual equal access to a district program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking.

Complainant: an individual who is alleged to be the victim of sexual harassment.
Respondent: an individual who is alleged to be the perpetrator of sexual harassment. A Respondent may not be disciplined for sexual harassment until the conclusion of this grievance process.
Formal Complaint: a document filed by a Complainant (or parent/guardian) or signed by the Title IX Coordinator[1] alleging sexual harassment against a Respondent and requesting that the District investigate the allegation.

New Definition of Sexual Harassment
34 C.F.R. §106.30

****All employees must report suspected sexual harassment, but only a Complainant or the Title IX Coordinator can file a Formal Complaint.**

Reporting: All employees must immediately/promptly[2] report all instances of suspected sexual harassment to a campus administrator or the Title IX Coordinator or a Title IX Coordinator designee. (An employee's failure to report alleged sexual harassment will result in disciplinary action up to and possibly including termination).

A student may report alleged sexual harassment to a teacher, school counselor, administrator, or other appropriate school employee. Those employees must immediately report alleged sexual harassment to a campus administrator.

RESPONSIBILITY:
All Employees
FFH(LOCAL)
DIA(LOCAL)

Child Abuse Reporting: If the incident could be **child abuse**, the employee must report to CPS or law enforcement within **48 hours** of learning of incident.

All Employees
FFG(LOCAL)

Ask for written report: An administrator may ask the individual to provide a written statement, but the reporter is not required to put the report in writing. This District may request, but not require, a written report. If a report is made orally, an administrator will put the report in written form and provide it to the Title IX Coordinator.

FFH(LOCAL)

[1] **Designees:** The Title IX Coordinator may designate other employees within the District to assist in fulfilling the requirements of Title IX.
[2] Red text indicates areas where the U.S. Department of Education left the timeline or process to the discretion of recipients. This chart contains recommendations from which districts may deviate.

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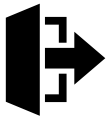
	Notify Title IX Office: A campus administrator must inform the Title IX Coordinator/designee of report of sexual harassment via telephone call or email within **24 hours**.	**Campus Administrators**
	Emergency Removal: The Title IX Coordinator/designee and the campus administration/HR will determine whether a respondent should be removed on an emergency basis. The District must first undertake an individualized safety and **risk analysis** to determine whether an **immediate threat** to the physical health and safety of others, **arising from the alleged sexual harassment**, justifies removal. *Title IX does not modify the rights of students with disabilities regarding change of placement under the Individuals with Disabilities Education Act and Section 504 still apply.	• **Title IX Coordinator** • **Campus Administrator** • **Threat Assessment Personnel**
	Administrative Leave: The Title IX Coordinator/designee and Human Resources Department, in conjunction with campus administration, will determine whether an employee should be put on administrative leave.	• **Title IX Coordinator** • **Human Resources** • **Campus Administrator**
	Contact Alleged Victim/Complainant: The Title IX Coordinator must **promptly** contact the Complainant to discuss: 1. The availability of supportive measures; 2. Consider the Complainant's wishes regarding supportive measures; 3. Inform the Complainant of the availability of supportive measures with or without the filing of a formal complaint; and 4. Explain the process for filing a Formal Complaint.	**Title IX Coordinator**
	Supportive Measures: non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge to the Complainant and Respondent, when a report of alleged sexual harassment is made. They may include counseling, change of schedules/classes, campus escort or monitoring support, mutual restrictions on contact between the parties, increased security and monitoring, or other similar measures.	• **Title IX Coordinator** • **Campus Administration**
	If no Formal Complaint Filed: The Title IX Coordinator/designee must offer the Complainant and Respondent with **supportive measures** and **document** the measures provided. Documentation of supportive measures must be retained for at least 7 years.	**Title IX Coordinator**
	**If Formal Complaint Filed (Dismissal):** A Formal Complaint may be dismissed at any time during the grievance process if one of the following conditions are met. **Mandatory Dismissal:** The District is required by law to dismiss a Formal Complaint if the conduct alleged: 1) would not constitute sexual harassment even if proved: 2) did not occur in a District program or activity; or 3) did not occur in the U.S.	**Title IX Coordinator**

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Discretionary Dismissal: The District may dismiss a Formal Complaint at any time during the investigation if: 1)the Complainant withdraws the allegations or complaint in writing; 2) the Respondent is no longer enrolled in the District; or 3) specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to allegations.

Dismissal of a Formal Complaint does not preclude the District from taking disciplinary measures against Respondents for non-sexual harassment violations of the Code of Conduct.

Investigation of Formal Complaint –
Appoint Investigator and Decision Maker

Title IX Coordinator

Provide **Notice to Parties**: Simultaneous notice must be provided to all known parties that includes:

- Allegations of sexual harassment, known at the time, with sufficient detail to prepare before any initial interview;
- Identities of the parties involved;
- Date, location of alleged incident(s);
- Statement that Respondent is presumed not responsible and that a determination will not be made until the conclusion of the grievance process
- Statement that the parties have the right to an advisor of their choosing, who can be a parent/guardian or another individual who may, but is not required to be, an attorney and who may inspect and review evidence; and
- Statement that the Code of Conduct prohibits knowingly making false statements.
- An offer of informal resolution.

Facilitation of Voluntary Informal Resolution: At any time prior to deciding of responsibility the District may facilitate an informal resolution process, such as mediation. This is a voluntary process. Any party may decline to participate. (The investigation may be abated for a short, defined period for the parties to engage in informal resolution. However, the informal resolution process cannot be used to delay an investigation.)

Facilitator

Informal Resolution cannot be used to resolve allegations that an employee sexually harassed a student.

Prior to a resolution, a party has the right to withdraw and resume the grievance process with respect to the Formal Complaint.

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New Rules for Investigating Formal Complaints: **Investigator(s)**

1. The **burden of proof** (preponderance of the evidence) rests on the District and not on the parties.
2. The District cannot demand access to **legally privileged information** (e.g., healthcare-patient, attorney-client, priest-penitent).
3. Both parties must have an equal opportunity to present **witnesses**, including fact and expert witnesses, and other inculpatory and exculpatory **evidence**.

4. The District **cannot restrict a party's ability to discuss the allegations** under investigation or to gather or present relevant evidence.

5. Both parties have the right to have a **parent/guardian** and/or **advisor present** during any part of the grievance process, including interviews.
6. Parties are entitled to **written notice** of the date, time, location, participants, and purpose of **investigative interviews** and other meetings in this grievance process, with sufficient time for the party to prepare to participate.
7. Parties have the right to inspect and **review** any **evidence** obtained as a part of the investigation that is directly related to the allegations raised in the Formal Complaint.

Conduct the Investigation: **Investigator(s)**

1. Review **Formal Complaint**.
2. Determine whether there is an **on-going criminal investigation** and confer with law enforcement about whether the school's investigation will interfere with the criminal investigation. If so, the school's investigation may be abated for a short, defined period in cooperation with law enforcement. Contact law enforcement on a weekly basis regarding the status of the investigation. Document law enforcement contact and directives.
3. Determine whether nature of allegations suggest the need for **forensic interview** by individuals specially trained in interviewing young children. If so, contact law enforcement or local child-advocacy center.
4. Send written notice of interviews to parties, including date, time, location, participants, and purpose of meeting with sufficient time (3-5 days) for the party to prepare to participate.
5. Interview **Complainant** regarding facts and potential witnesses. Advisor may be present but cannot answer for the Complainant.
6. Interview **Witnesses** identified by Complainant. Witnesses are not entitled to have a parent/guardian or advisor present, unless allowed by administration.
7. Interview **Respondent**. Advisor may be present but cannot answer for Respondent.
8. Interview **Witnesses** identify by Respondent.
9. Re-interview Complainant for clarification, if necessary.
10. Gather **physical evidence**, visit incident site(s), review discipline and other relevant records of parties and witnesses.
11. Review statements or reports from **expert witnesses**, if any.
12. Allows parties access to facilities to gather evidence, if requested.

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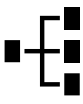
13. The parties do not have the right to be present during witness interviews. They can ask questions of the other party and witnesses through written question process later.
14. Organize evidence to share with parties.
15. **Prior to completion of the investigative report**, the investigator must **send an electronic[3] or hard copy of the relevant evidence** gathered to the parties and the parties' advisors, if any. The parties must be provided **at least 10 calendar days** to submit a written response that the investigator must consider before completing the investigative report.
16. Prepare an investigative report that summarizes relevant evidence. The report may include proposed findings of fact.
17. **The investigative report must be sent to the parties at least 10 calendar days before the Decision Maker decides regarding responsibility**.
18. Send investigative report to Decision Maker.

Decision/Determination of Responsibility: A Decision Maker (who is not the Title IX Coordinator or the Investigator) must issue a comprehensive written determination regarding responsibility (i.e., whether sexual harassment occurred) and the complete grievance process to date. The decision must include:

Decision Maker

1. Identification of the **allegations** that constitute sexual harassment;
2. Description of the **procedural steps** taken since the receipt of the Formal Complaint through the Decision, including notifications, interviews with the parties and witnesses, site visits, methods used to gather other evidence;
3. Findings of Fact
4. Conclusions regarding the application of the District's Code of Conduct to the facts;
5. A statement of and the rationale for the results of each allegation, including a determination of responsibility;
6. Any disciplinary sanctions imposed on the Respondent;
7. A statement whether remedies to the Complainant have been designed to restore or preserve equal access to the District's education program or activity; and
8. Information about the ability of the parties to appeal the decision.

The decision must be sent to the parties simultaneously.



Appeal: Either party may appeal on a form provided by the District within 10 calendar days of issuance of the decision. The only allowable bases for appeal are:

Appeals Decision Maker

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time of the decision that could affect the outcome; and
3. The Title IX Coordinator, Investigator(s), or Decision Maker had a conflict of interest or bias for or against Complainants or Respondents

[3] The evidence may be provided using a platform that prevents downloading and copying to protect the confidentiality of information about students or victims of sexual offenses.

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generally or the individual Complainant or Respondent that affected the outcome of the matter.

If an appeal is filed, the Appeals Decision Maker shall provide notice to the other party in writing. Both parties shall have the opportunity to submit a written statement in support of or challenging the outcome. Parties will be provided 10 calendar days to submit an appeal statement.

After considering the written appeal statements of the parties, the Appeals Decision Maker will issue a written decision that includes a rationale for the result and provide the decision to both parties simultaneously.

Record Keeping: All records related to a sexual harassment report under this grievance process must be maintained by the District for at least 7 years.

Title IX Coordinator

Office for Civil Rights: An individual also has the right to file a complaint with United States Department of Education Office for Civil Rights.

Retaliation Prohibited: All individuals shall be protected from retaliation if the individual made a report or complaint, testified, assisted, or participated or refused to participate in an investigation or the grievance process. Retaliation may include intimidation, threats, coercion, or discrimination.

All Employees

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Assigning Roles Under 2020 Title IX Requirements

Title IX Coordinator: The Title IX Coordinator's responsibilities changed in 2020. A school district's Title IX Coordinator is specifically identified in its DIA(Exhibit), FB(Exhibit), and FFH(Exhibit). Make sure this information is updated in policy, handbooks, and online anytime a new individual assumes the responsibilities of the Title IX Coordinator. In most school districts, the Title IX Coordinator is the Superintendent, an Assistant Superintendent, or other Central Administrator. Given the duties of the Title IX Coordinator, school districts may wish to consider assigning this role to individuals who have substantial time to commit to individual matters. Under the 2020 regulations, anytime there is a report of sexual harassment in the school district, the Title IX Coordinator must promptly: contact all complainants to discuss the availability of "supportive measures" (e.g., counseling, schedule change, increased supervision); consider a complainant's wishes with respect to supportive measures; inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and explain the process for filing a formal complaint. 34 C.F.R. §106.30(a), .44(a). The Title IX Coordinator may file a formal complaint on behalf of an individual and trigger an investigation, even if the alleged victim does not file a formal complaint. The Title IX Coordinator may also be involved in dismissing complaints that do not involve sexual harassment, as now defined under the 2020 regulations. All of these actions will require documentation. The Title IX Coordinator is responsible for posting all sexual harassment training materials to the district's website. The Title IX Coordinator is also responsible for ensuring proper record keeping: the preservation of all documents related to alleged sexual harassment for 7 years. 34 C.F.R. §106.45(b)(10). Many of these tasks can still be delegated, but the Title IX Coordinator must oversee the process.

Investigators: This was a new role in 2020. The investigator, who can be the Title IX Coordinator, must investigate formal complaints of sexual harassment and produce a written investigative report. The investigator must provide written notice to parties of the date, time, participants, purpose, and location of any interview, allowing sufficient time to prepare. The investigative report must be shared with the parties at least 10 days before any determination of responsibility (i.e., whether the respondent engaged in sexual harassment). Historically, school districts have used assistant principals to investigate matters. If properly trained in the 2020 requirements for Title IX investigations, APs could be used in this role. Some districts may prefer to assign the role of Title IX investigator to another school administrator or outside source (e.g., law firm). It is advisable to train more than one individual as a Title IX investigator. Depending on the nature of the claims, an investigation could require significant time commitments. All investigators must be trained on: impartial investigations; standards of evidence; how to equitably and meaningfully include both parties in the process including inculpatory and exculpatory evidence; how to write an investigative report; the role of expert witnesses; legal privileges; and more.

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Decision-makers: This was also a new role in 2020. The decision-maker cannot be the investigator or the Title IX Coordinator, at least not on the same complaint. So, a school district will have yet another individual involved in a sexual harassment complaint. The roles of investigator and decision-maker could switch from complaint to complaint, assuming the individuals are properly trained to perform both roles. The decision-maker will review the investigative report from the investigator and "determine responsibility" (i.e., whether or not sexual harassment occurred). In the post-secondary setting, a live hearing will be used to determine responsibility, but live hearings are not required in the K12 setting. We do not recommend live hearings in the K12 setting, as they are designed to provide for confrontation and cross-examination of parties and witnesses, which may not be appropriate in situations involving minor students. Ultimately, the decision-maker must issue a written decision addressing the allegations, the procedural steps taken, findings of fact, application of the code of conduct to the facts, and the rationale as to each allegation of the determination of responsibility, disciplinary actions, and whether remedies to restore or preserve equal access will be provided. So, a decision-maker will also need significant time to dedicate to writing the decision and justifying the decisions made in the process. Ideally, the decision-maker will be a principal or central administrator. It makes sense for the decision-maker to be a higher-level employee than the investigator to maintain the appearance of impartiality and independence. It is advisable to have more than one individual trained to serve as a Title IX decision-maker. All decision-makers must have training on objectivity and independent analysis; impartiality and how to decide what evidence is relevant; weighing evidence based upon different standards of proof; drafting written decisions consistent with regulatory mandates; determining appropriate disciplinary sanctions and supportive measures; and providing appeal rights. In case of an appeal, there will be an additional appellate decision-maker, who still cannot be the investigator or Title IX Coordinator.

Facilitators: A facilitator is an unbiased individual who can attempt to facilitate a resolution between the parties. This, too, was a new concept under the 2020 Title IX regulations akin to a mediator. Facilitation is completely voluntary; parties cannot be required to engage in this process. The facilitator cannot be the investigator or decision-maker. Administrators or other employees who are skilled at conflict resolution and school counselors would make good candidates for this role. Facilitators must be trained on best practices for reaching compromise and voluntary resolution.

Advisors: An advisor is an individual who can assist a party in the investigation and grievance processes. This may be an adult of the student's (parents') choosing, including a parent or attorney. While a school district may establish restrictions regarding the extent to which an advisor may participate, a party may be accompanied by an advisor during any meeting or proceeding in the investigation or grievance process. 34 C.F.R. §106.45(b)(5)(iv). In school districts that opt to have live hearings for Title IX sexual harassment complaints, a party is entitled to have an advisor of his/her own choosing at the hearing. School districts that do not provide live hearings will still need to develop written restrictions on the role of advisors who accompany parties to meetings in the grievance process, including interviews.

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2020

Under Pressure: The Title IX Coordinator's Guide to Survival

Presented by:
Tyler P. Ezell

October 15, 2024

Tyler is a senior associate in our Austin office. He received a Bachelor of Arts in English Language and Literature from Baylor University and his Juris Doctor from the University of Tulsa College of Law.

Our clients trust Tyler given his demonstrated knowledge in a wide variety of practice areas. Tyler works extensively with Texas schools in the areas of personnel, student issues, board governance, special education, and school safety and security. Tyler is a regular speaker at school districts and state educational organizations on a number of topics, including personnel, school safety, and open government issues.

Tyler is no stranger to the field of education. His mother is a former high school principal and long-time school board member, and his father is a former ag teacher. Tyler has dedicated much of his time over the years coaching cross-examination debate at the high school level and is an active volunteer in Big Brothers Big Sisters of America.

While in law school, Tyler served as an Executive Editor for both the Energy Law Journal and “The Year in Review” published by the American Bar Association’s Section of Environment, Energy, and Resources.

Tyler is admitted to practice in the United States District Court for the Western District of Texas. He is a member of the State Bar of Texas and the Texas Council of School Attorneys.

Tyler’s email address is tezell@edlaw.com.

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UNDER PRESSURE:
THE TITLE IX COORDINATOR'S GUIDE TO SURVIVAL

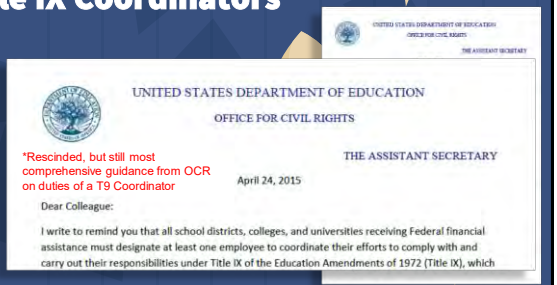
TEXAS TITLE IX 50 Year Anniversary ADMINISTRATOR CONFERENCE

TYLER P. EZELL

EICHELBAUM WARDELL HANSEN POWELL & MUÑOZ, P.C.

1

Title IX Coordinators



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
THE ASSISTANT SECRETARY

*Rescinded, but still most comprehensive guidance from OCR on duties of a T9 Coordinator

April 24, 2015

Dear Colleague:

I write to remind you that all school districts, colleges, and universities receiving Federal financial assistance must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX of the Education Amendments of 1972 (Title IX), which

2

Dear Colleague Letters (DCLs)

- Advisory in nature*
- Guidance to recipients of federal funding
- DOE's policies in reviewing Title IX compliance
- Not legislative rules/law
- OCR cannot create new law, rights, or duties through a DCL
- End of "Chevron Deference"

*The Office for Civil Rights is an administrative agency of the federal government and, therefore, constrained by the Administrative Procedure Act (APA). If an agency proposes a rule that would impose new obligations on the public, the APA requires the agency to subject those proposed rules to notice and comment before they may be adopted.

3

Title IX Coordinators

- ***Position cannot be vacant***
- ***Sufficiently independent***
- ***Avoid conflicts of interest***
- ***Full-time T9 Coordinator ensures sufficient time to perform responsibilities***
- ***Qualifications, training, authority and time***
- ***Multiple T9 Coordinators***

DESIGNATION OF T9 COORDINATOR(S)

4

Title IX Coordinators

- ***Monitor outcomes***
- ***Identify and address patterns***
- ***Assess effects on campus climate***
- ***Educate school community on how to file complaint***
- ***Promptly and appropriately resolve complaints***
- ***Provide technical assistance on school policies***
- ***Work with law enforcement***
- ***Offer supportive measures***

RESPONSIBILITIES AND AUTHORITY OF T9 COORDINATOR

5

Title IX Coordinators

- ***District's policies and procedures***
- ***Drafting and revising policies/procedures***
- ***Collecting information***
- ***Participation in subject areas, athletics***
- ***Administration of school discipline***
- ***Incidents of sex-based harassment***
- ***Retaliation***
- ***Aware of all T9 complaints***
- ***Visible in the school community***

RESPONSIBILITIES AND AUTHORITY OF T9 COORDINATOR

6

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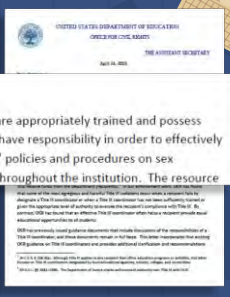
Title IX Coordinators



B. Training of Title IX Coordinators

Recipients must ensure that their Title IX coordinators are appropriately trained and possess comprehensive knowledge in all areas over which they have responsibility in order to effectively carry out those responsibilities, including the recipients' policies and procedures on sex discrimination and all complaints raising Title IX issues throughout the institution. The resource

Training on Policies and Grievance Procedures

7

RELEVANT POLICIES AND PROCEDURES

- FB (LEGAL) Equal Educational Opportunity
- FB (LOCAL) Equal Educational Opportunity
- FFG (LEGAL) Student Welfare: Child Abuse and Neglect
- FFG (LOCAL) Student Welfare: Child Abuse and Neglect
- FFH (LEGAL) Freedom from Discrimination, Harassment, & Retaliation
- FFH (LOCAL) Freedom from Discrimination, Harassment, & Retaliation
- FM (LOCAL) Student Activities
- FNE (LEGAL) Pregnant Students
- FNE (LOCAL) Pregnant Students
- FNG (LEGAL) Student & Parent Complaints
- FNG (LOCAL) Student & Parent Complaints
- DAA (LEGAL) Equal Employment Opportunity
- DGBA (LEGAL) Employee Complaints
- DGBA (LOCAL) Employee Complaints
- EHAA (LEGAL) Required Instruction
- GF (LOCAL) Public Complaints
- GRA (LEGAL) Relations with Governmental Entities – State and Local Authorities
- GRA (LOCAL) Relations with Governmental Entities – State and Local Authorities

8

Responsibilities From 2020 Sexual Harassment Regulations

9

Title IX Coordinator Responsibilities

- Ensure policies reflect current information about T9 Coordinator
- Ensure website and publications contain proper notices
- For all reports of sexual harassment, contact alleged victims (complainant) to discuss the availability of supportive measures
- Consider a complainant's wishes re supportive measures
- Inform complainants of the right to file formal complaint and right to supportive measures with or without a formal complaint
- Decide whether to file a formal complaint when the complainant does not

*Many of these tasks can be delegated but must be overseen by the Title IX Coordinator.

10

Title IX Coordinator Responsibilities

- Decide whether to dismiss a formal complaint (or who should decide dismissal)
- Assist with emergency removal and administrative leave decisions
- Provide notice to parties of grievance process in case of formal complaints
- Make available all training materials
- Ensure proper recordkeeping

*Many of these tasks can be delegated but must be overseen by the Title IX Coordinator.

11

Title IX Coordinator Responsibilities

1. Coordinating compliance with Title IX;
2. Take action when learning of possible sex discrimination including:
   a. Treating complainant and respondent equitably;
   b. Offering and coordinating supportive measures for the complainant and respondent;
   c. Notifying the complainant and respondent of the grievance procedures and informal resolution process;
   d. Initiate the grievance procedure/informal resolution process;
   e. Determine whether to file a complaint absent a complainant

12

Title IX Coordinator Responsibilities

3. Dismiss complaints if you deem them not to fall under Title IX;
4. Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur

13

New Standard for Action for Coordinators

OLD (2020) REGULATIONS: require a recipient to respond to possible sexual harassment when it has "actual knowledge" of the harassment (i.e. notice of sexual harassment or alleged sexual harassment)

NEW (2024) REGULATIONS: require a recipient to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.

14

No More "Actual Knowledge"

- 2024 Regs – Not yet in effect
- Instead of requiring a school district to have "actual knowledge" as from 2020, now it is redefined to state that the district must have "knowledge of conduct that may constitute sex discrimination"

This is broader

15

What is Effective Action?

"With respect to effective action, the Department considers effective action to mean that a Title IX Coordinator, upon learning of conduct that reasonably may constitute sex discrimination, takes reasonable steps calibrated to address possible sex discrimination based on all available information."

16

Filing a Complaint as a Title IX Coordinator

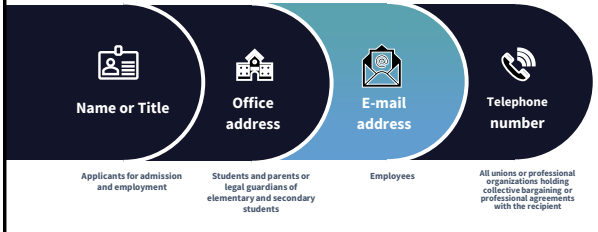
8 Factors to Weigh Before Filing a Complaint as the Coordinator:

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. 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
8. Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures

34 CFR s. 106.44

17

Individuals who must be informed of the Title IX Coordinators...



18

Reporting Sexual Harassment…

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment)…

Using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

19

Reporting Sexual Harassment…

Such report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

34 C.F.R. § 106.8(a).

20

Reporting Procedures	
Student Report	Any student who believes that he or she has experienced prohibited conduct or believes that another student has experienced prohibited conduct should immediately report the alleged acts to a teacher, school counselor, principal, other District employee, or the appropriate District official listed in this policy.
Employee Report	Any District employee who suspects or receives direct or indirect notice that a student or group of students has or may have experienced prohibited conduct shall immediately notify the appropriate District official listed in this policy and take any other steps required by this policy.

Consider changing "immediately" to "promptly."

21

Definition of District Officials	For the purposes of this policy, District officials are the Title IX coordinator, the ADA/Section 504 coordinator, and the Superintendent.
Title IX Coordinator	Reports of discrimination based on sex, including sexual harassment, gender-based harassment, or dating violence, may be directed to the designated Title IX coordinator for students. [See FFH(EXHIBIT)]
ADA / Section 504 Coordinator	Reports of discrimination based on disability may be directed to the designated ADA/Section 504 coordinator for students. [See FFH(EXHIBIT)]
Superintendent	The Superintendent shall serve as coordinator for purposes of District compliance with all other nondiscrimination laws.

Ensure that FFH (LOCAL) is updated to ensure that names are updated.

22

Reporting Procedures	
Student Report	Any student who believes that he or she has experienced prohibited conduct or believes that another student has experienced prohibited conduct should immediately report the alleged acts to a teacher, school counselor, principal, assistant principal, or the Title IX Coordinator/designee.
Employee Report	Any District employee who suspects or receives notice that a student or group of students has or may have experienced prohibited conduct shall promptly notify a campus administrator or the Title IX Coordinator.
Definition of District Officials	For the purposes of this regulation, District officials are the Title IX Coordinator/designee and campus administrators.
Title IX Coordinator	Reports of discrimination based on sex, including sexual harassment or gender-based harassment, may be directed to the designated Title IX Coordinator for students. [See FFH(EXHIBIT)]

23

Dissemination of Policy

- District does not discriminate on the basis of sex in the education program of activity that it operates
- It is required by Title IX to not discriminate in this manner
- Requirement not to discriminate extends to admission and employment
- Inquiries about the application of Title IX to the district may be referred to the Title IX Coordinator, the Assistant Secretary for Education (USDOE), or both

Applicants for admission and employment

Students and parents or legal guardians of elementary and secondary students

Employees

All unions or professional organizations holding collective bargaining or professional agreements with the recipient

24

April 2024

U.S. Department of Education

The following sample notice of nondiscrimination meets the minimum requirements of the 2024 amendments:

[ABC School] does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and its regulations, including in admission and employment.

Inquiries about Title IX may be referred to [ABC School's] Title IX Coordinator, the U.S. Department of Education's Office for Civil Rights,5 or both. [ABC School's] Title IX Coordinator is [name or title, office address, email address, and telephone number].

[ABC School's] nondiscrimination policy and grievance procedures can be located at [include link to location(s) on website or otherwise describe location(s)]. To report information about conduct that may constitute sex discrimination or make a complaint of sex discrimination under Title IX, please refer to [include link to location(s) on website or otherwise describe location(s)].

25

Publications

Must promptly display Title IX Coordinator's contact information:

- On district's website
- In each handbook or catalog

26

District must adopt and publish grievance procedures and provide notice of process including…

1. How to report or file a complaint of sex discrimination;
2. How to report or file a formal complaint of sexual harassment; and
3. How the district will respond.

27

While it is Best to Separate Roles…

- The Title IX Coordinator can also be the investigator and the informal resolution facilitator.
- The Title IX Coordinator cannot also serve as the decision-maker on a formal complaint or on appeal.*
- All roles can be outsourced, except the Title IX Coordinator (e.g., investigator, decision-maker, informal resolution facilitator, appellate decision maker).

28

Remember that anyone serving as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an information resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

29

SCENARIO: Conflicts of Interest

An employee files a Formal Complaint of sexual harassment against Sam (Employee). Rebecca is the Director of HR and the Title IX Coordinator for employee-related complaints. She usually serves as the investigator for Formal Complaints. Sam and Rebecca were previously romantically involved.

- Can she serve as the investigator?
- Can she serve as the Title IX Coordinator in this case?

30

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The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures…consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without filing a formal complaint, and explain to the complainant the process for filing a formal complaint."

34 C.F.R. § 106.44(a).

31

Contacting the Complainant

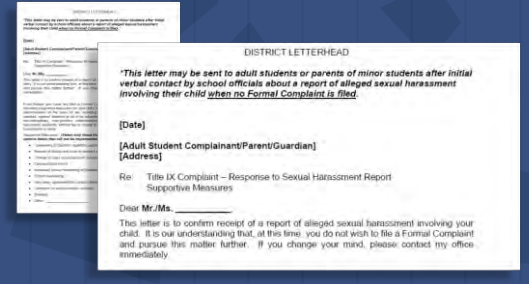
32

Contacting the Complainant

K-12 SETTING

- Phone call, followed by email/letter.
- In person parent conference, followed by email/letter.

33



DISTRICT LETTERHEAD

**This letter may be sent to adult students or parents of minor students after initial verbal contact by school officials about a report of alleged sexual harassment involving their child when no Formal Complaint is filed.*

[Date]

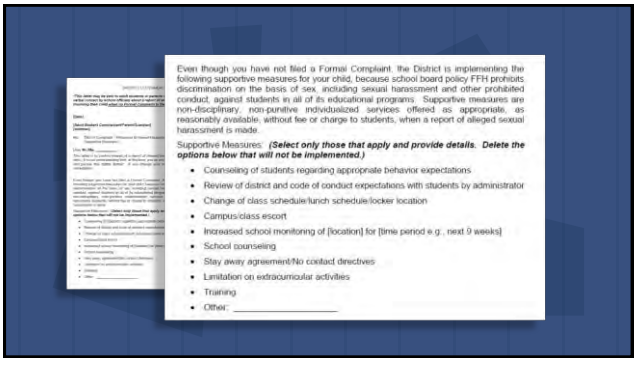
[Adult Student Complainant/Parent/Guardian]
[Address]

Re: Title IX Complaint – Response to Sexual Harassment Report
Supportive Measures

Dear Mr./Ms. _____,

This letter is to confirm receipt of a report of alleged sexual harassment involving your child. It is our understanding that, at this time, you do not wish to file a Formal Complaint and pursue this matter further. If you change your mind, please contact my office immediately.

34



Even though you have not filed a Formal Complaint, the District is implementing the following supportive measures for your child, because school board policy FFH prohibits discrimination on the basis of sex, including sexual harassment and other prohibited conduct, against students in all of its educational programs. Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge to students, when a report of alleged sexual harassment is made.

Supportive Measures: ***(Select only those that apply and provide details. Delete the options below that will not be implemented.)***

- Counseling of students regarding appropriate behavior expectations
- Review of district and code of conduct expectations with students by administrator
- Change of class schedule/lunch schedule/locker location
- Campus/class escort
- Increased school monitoring of [location] for [time period e.g., next 9 weeks]
- School counseling
- Stay away agreement/No contact directives
- Limitation on extracurricular activities
- Training
- Other: _____

35

"The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures."

34 C.F.R. § 106.30.

36

37

Supportive Measures Means...

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available
- Without fee or charge to the complainant or respondent
- Before or after filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access to the district's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment or deter sexual harassment

34 C.F.R. § 106.30

38

Supportive Measures Examples

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures

34 C.F.R. § 106.30

39

- Counseling of students regarding appropriate behavior expectations
- Review of district and code of conduct expectations with students by administrator
- Change of class schedule/lunch schedule/locker location
- Campus/class escort
- Increased school monitoring of [location] for [time period e.g., next 9 weeks]
- School counseling - # sessions
- No contact/no communication agreements
- No contact/communication directives
- Limitation on extracurricular activities
- Social Skills Training
- Staff Training
- Other: _____

Add a term to the supportive measures (e.g., pending resolution of the grievance process; four weeks; end of semester; end of the school year).

40

Supportive Measures Means...

The recipient must maintain as confidential any supportive measures provided to the complainant or respondent—to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

34 C.F.R. § 106.30

41

Keep documentation of supportive measures (e.g., no contact/communication agreements, log of counseling sessions, copies of social skills stories/trainings, summary of schedule changes, summary of campus escorts).

42

Notice to Parties if Formal Complaint is Filed

43

*This notice must be sent simultaneously to the Complainant and Respondent and before investigation of the Formal Complaint begins, including student interviews occur.

[Date]

[Adult Student Complainant/Parent/Guardian]
[Address]

Re: Notice to Parties of Title IX Formal Complaint of Sexual Harassment
Case No. _____

Dear Mr./Ms. _____

This letter is to notify you of the filing of a Formal Complaint of sexual harassment involving your student. The details of the allegations are included on the enclosed Formal Complaint form. Sexual harassment is prohibited by and defined in Board Policy FFH (LEGAL) and (LOCAL). The grievance process for handling this complaint can be found in FFH (REGULATION 2-SEXUAL HARASSMENT). The policies and procedures are enclosed for your reference.

44

Investigation of Formal Complaint –
Appoint Investigator and Decision Maker

Provide **Notice to Parties:** Simultaneous notice must be provided to all known parties that includes:

- Allegations of sexual harassment, known at the time, with sufficient detail to prepare before any initial interview;
- Identities of the parties involved;
- Date, location of alleged incident(s);
- Statement that Respondent is presumed not responsible and that a determination will not be made until the conclusion of the grievance process
- Statement that the parties have the right to an advisor of their choosing, who can be a parent/guardian or another individual who may, but is not required to be, an attorney and who may inspect and review evidence; and
- Statement that the Code of Conduct prohibits knowingly making false statements.
- An offer of informal resolution.

45

Assisting with Emergency Removal or Administrative Leave Decisions

46

Emergency Removal: The Title IX Coordinator/designee and the campus administration/HR will determine whether a respondent should be removed on an emergency basis. The District must first undertake an individualized safety and **risk analysis** to determine whether an **immediate threat** to the physical health and safety of others, **arising from the alleged sexual harassment**, justifies removal.

*Title IX does not modify the rights of students with disabilities regarding change of placement under the Individuals with Disabilities Education Act and Section 504 still apply.

- Title IX Coordinator
- Campus Administrator
- Threat Assessment Personnel

47

Emergency Removal: The Title IX Coordinator/designee and the campus administration/HR will determine whether a respondent should be removed on an emergency basis. The District must first undertake an individualized safety and **risk analysis** to determine whether an **immediate threat** to the physical health and safety of others, **arising from the alleged sexual harassment**, justifies removal.

*Title IX does not modify the rights of students with disabilities regarding change of placement under the Individuals with Disabilities Education Act and Section 504 still apply.

- Title IX Coordinator
- Campus Administrator
- Threat Assessment Personnel

48

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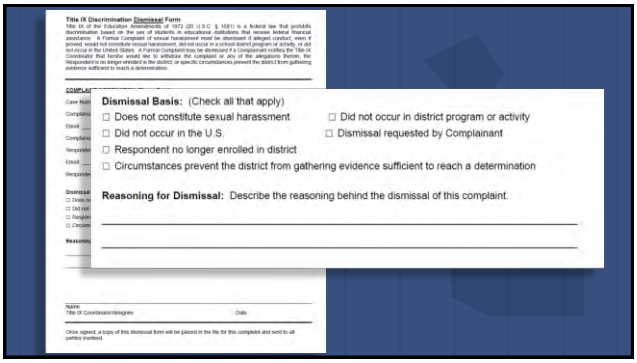
Determining Whether to Dismiss a Formal Complaint

49



50

"The Title IX Coordinator is responsible for effective implementation of remedies."

34 C.F.R. § 106.45(b)(7)(iv).

51

What are examples of remedies?

- Not defined in Title IX
- No list of examples in regulations
- Money damages?

52

Remedies - Purpose

Designed to restore or preserve the complainant's equal access to education

53

Remedies for Complainants

- Supportive measures
- Counseling
- Opportunity to make up work, retake exams
- Change of class, lunch period, campus
- Escort on campus
- Increase security
- Training efforts

54

Remedies for Complainants

- Disciplinary sanctions against respondent per the Student Code of Conduct (e.g., OSS, DAEP, expulsion)
- Removal of respondent from extracurricular activity/activities
- Unilateral no-contact order on respondent
- Other sanctions applicable to respondent

55

The Department believes that a complainant entitled to remedies should not need to file an appeal to challenge the recipient's selection of remedies; instead, we have revised [the rules] to require that Title IX Coordinator be responsible for effective implementation of remedies. This permits a complainant to work with the Title IX Coordinator to select and effectively implement remedies designed to restore or preserve the complainant's equal access to education."

p. 940 = Commentary

Selection of Remedies Not Appealable

56

Selection of Remedies Not Appealable

Bases for Appeal of Decisions

- Procedural irregularity
- Bias or conflict of interest
- That affected the outcome

57

Written Determination Must Include

- any 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 to the complainant

58

Remedies

- Shared with complainant – complainant's remedies and respondent's sanctions
- Shared with respondent – sanctions and whether remedies were provided to complainant (not details of the remedy, unless the sanctions overlap with remedies)

59

Posting Training Materials

60

Do we still have to post under new regs?

If 2024 regulations become effective, training materials no longer need to be published on the district's website. Instead, training materials must be made available for public inspection upon request.

Nothing in the final regulations precludes a district from formalizing how a public inspection request must be made—and thus exercising discretion in how it facilitates the inspection of such materials and the method in which the public inspection must occur.

61

Permission from the copyright holder should be obtained, but failure to obtain permission does not relieve a district from the requirement to post.

62

Where to Post:

- Non-discrimination policy and Title IX Coordinator's contact information must be prominently displayed.
- There is no requirement that the materials be on the homepage or linked to the homepage.

63

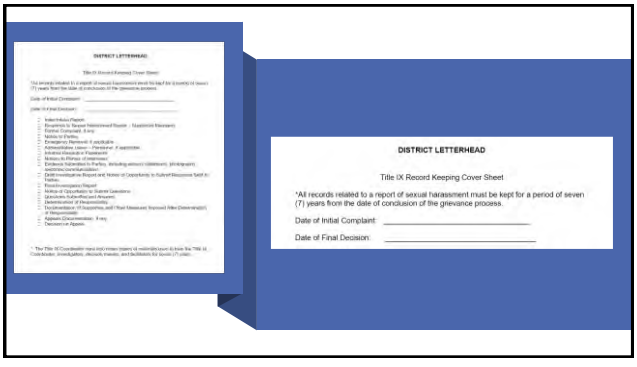
Where to Post:

- There is no requirement to have a section of the website dedicated to Title IX requirements.
- There is no requirement that Title IX information be located on multiple pages of a district's website.
- Title IX information could be added as a drop-down option in any of the following areas: Required Notices, Public Information, Departments, Students, Employees, Community.

64

Record Keeping

65



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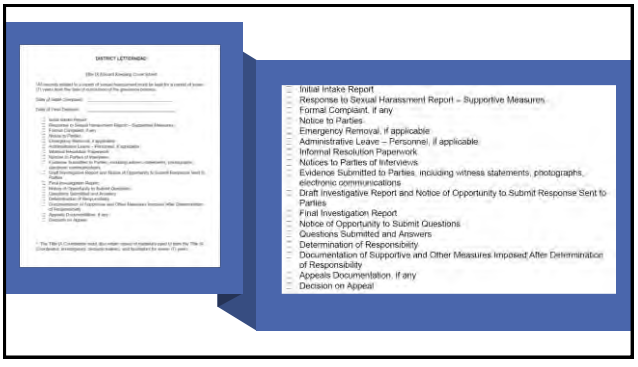

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The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 24, 2015

Dear Colleague:

I write to remind you that all school districts, colleges, and universities receiving Federal financial assistance must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX of the Education Amendments of 1972 (Title IX), which prohibits sex discrimination in education programs and activities.[1] These designated employees are generally referred to as Title IX coordinators.

Your Title IX coordinator plays an essential role in helping you ensure that every person affected by the operations of your educational institution—including students, their parents or guardians, employees, and applicants for admission and employment—is aware of the legal rights Title IX affords and that your institution and its officials comply with their legal obligations under Title IX. To be effective, a Title IX coordinator must have the full support of your institution. It is therefore critical that all institutions provide their Title IX coordinators with the appropriate authority and support necessary for them to carry out their duties and use their expertise to help their institutions comply with Title IX.

The U.S. Department of Education's Office for Civil Rights (OCR) enforces Title IX for institutions that receive funds from the Department (recipients).[2] In our enforcement work, OCR has found that some of the most egregious and harmful Title IX violations occur when a recipient fails to designate a Title IX coordinator or when a Title IX coordinator has not been sufficiently trained or given the appropriate level of authority to oversee the recipient's compliance with Title IX. By contrast, OCR has found that an effective Title IX coordinator often helps a recipient provide equal educational opportunities to all students.

OCR has previously issued guidance documents that include discussions of the responsibilities of a Title IX coordinator, and those documents remain in full force. This letter incorporates that existing OCR guidance on Title IX coordinators and provides additional clarification and recommendations

[1] 34 C.F.R. § 106.8(a). Although Title IX applies to any recipient that offers education programs or activities, this letter focuses on Title IX coordinators designated by local educational agencies, schools, colleges, and universities.

[2] 20 U.S.C. §§ 1681–1688. The Department of Justice shares enforcement authority over Title IX with OCR.

as appropriate. This letter outlines the factors a recipient should consider when designating a Title IX coordinator, then describes the Title IX coordinator's responsibilities and authority. Next, this letter reminds recipients of the importance of supporting Title IX coordinators by ensuring that the coordinators are visible in their school communities and have the appropriate training.

Also attached is a letter directed to Title IX coordinators that provides more information about their responsibilities and a Title IX resource guide. The resource guide includes an overview of the scope of Title IX, a discussion about Title IX's administrative requirements, as well as a discussion of other key Title IX issues and references to Federal resources. The discussion of each Title IX issue includes recommended best practices for the Title IX coordinator to help your institution meet its obligations under Title IX. The resource guide also explains your institution's obligation to report information to the Department that could be relevant to Title IX. The enclosed letter to Title IX coordinators and the resource guide may be useful for you to understand your institution's obligations under Title IX.

Designation of a Title IX Coordinator

Educational institutions that receive Federal financial assistance are prohibited under Title IX from subjecting any person to discrimination on the basis of sex. Title IX authorizes the Department of Education to issue regulations to effectuate Title IX.[3] Under those regulations, a recipient must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX and the Department's implementing regulations.[4] This position may not be left vacant; a recipient must have at least one person designated and actually serving as the Title IX coordinator at all times.

In deciding to which senior school official the Title IX coordinator should report and what other functions (if any) that person should perform, recipients are urged to consider the following:[5]

A. Independence

The Title IX coordinator's role should be independent to avoid any potential conflicts of interest and the Title IX coordinator should report directly to the recipient's senior leadership, such as the district superintendent or the college or university president. Granting the Title IX coordinator this

[3] The Department's Title IX regulations, 34 C.F.R. Part 106, are available at http://www.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html.

[4] 34 C.F.R. § 106.8(a).

[5] Many of the principles in this document also apply generally to employees required to be designated to coordinate compliance with other civil rights laws enforced by OCR against educational institutions, such as Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; 34 C.F.R. § 104.7(a), and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–12134; 28 C.F.R. § 35.107(a).

independence also ensures that senior school officials are fully informed of any Title IX issues that arise and that the Title IX coordinator has the appropriate authority, both formal and informal, to effectively coordinate the recipient's compliance with Title IX. Title IX does not categorically exclude particular employees from serving as Title IX coordinators. However, when designating a Title IX coordinator, a recipient should be careful to avoid designating an employee whose other job responsibilities may create a conflict of interest. For example, designating a disciplinary board member, general counsel, dean of students, superintendent, principal, or athletics director as the Title IX coordinator may pose a conflict of interest.

B. Full-Time Title IX Coordinator

Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role's responsibilities. If a recipient designates one employee to coordinate the recipient's compliance with Title IX and other related laws, it is critical that the employee has the qualifications, training, authority, and time to address all complaints throughout the institution, including those raising Title IX issues.

C. Multiple Coordinators

Although not required by Title IX, it may be a good practice for some recipients, particularly larger school districts, colleges, and universities, to designate multiple Title IX coordinators. For example, some recipients have found that designating a Title IX coordinator for each building, school, or campus provides students and staff with more familiarity with the Title IX coordinator. This familiarity may result in more effective training of the school community on their rights and obligations under Title IX and improved reporting of incidents under Title IX. A recipient that designates multiple coordinators should designate one lead Title IX coordinator who has ultimate oversight responsibility. A recipient should encourage all of its Title IX coordinators to work together to ensure consistent enforcement of its policies and Title IX.

Responsibilities and Authority of a Title IX Coordinator

The Title IX coordinator's primary responsibility is to coordinate the recipient's compliance with Title IX, including the recipient's grievance procedures for resolving Title IX complaints. Therefore, the Title IX coordinator must have the authority necessary to fulfill this coordination responsibility. The recipient must inform the Title IX coordinator of all reports and complaints raising Title IX issues, even if the complaint was initially filed with another individual or office or the investigation will be conducted by another individual or office. The Title IX coordinator is responsible for coordinating the recipient's responses to all complaints involving possible sex discrimination. This responsibility includes monitoring outcomes, identifying and addressing any patterns, and assessing effects on the campus climate. Such coordination can help the recipient avoid Title IX violations, particularly violations involving sexual harassment and violence, by preventing incidents

from recurring or becoming systemic problems that affect the wider school community. Title IX does not specify who should determine the outcome of Title IX complaints or the actions the school will take in response to such complaints. The Title IX coordinator could play this role, provided there are no conflicts of interest, but does not have to.

The Title IX coordinator must have knowledge of the recipient's policies and procedures on sex discrimination and should be involved in the drafting and revision of such policies and procedures to help ensure that they comply with the requirements of Title IX. The Title IX coordinator should also coordinate the collection and analysis of information from an annual climate survey if, as OCR recommends, the school conducts such a survey. In addition, a recipient should provide Title IX coordinators with access to information regarding enrollment in particular subject areas, participation in athletics, administration of school discipline, and incidents of sex-based harassment. Granting Title IX coordinators the appropriate authority will allow them to identify and proactively address issues related to possible sex discrimination as they arise.

Title IX makes it unlawful to retaliate against individuals—including Title IX coordinators—not just when they file a complaint alleging a violation of Title IX, but also when they participate in a Title IX investigation, hearing, or proceeding, or advocate for others' Title IX rights.[6] Title IX's broad anti-retaliation provision protects Title IX coordinators from discrimination, intimidation, threats, and coercion for the purpose of interfering with the performance of their job responsibilities. A recipient, therefore, must not interfere with the Title IX coordinator's participation in complaint investigations and monitoring of the recipient's efforts to comply with and carry out its responsibilities under Title IX. Rather, a recipient should encourage its Title IX coordinator to help it comply with Title IX and promote gender equity in education.

Support for Title IX Coordinators

Title IX coordinators must have the full support of their institutions to be able to effectively coordinate the recipient's compliance with Title IX. Such support includes making the role of the Title IX coordinator visible in the school community and ensuring that the Title IX coordinator is sufficiently knowledgeable about Title IX and the recipient's policies and procedures. Because educational institutions vary in size and educational level, there are a variety of ways in which recipients can ensure that their Title IX coordinators have community-wide visibility and comprehensive knowledge and training.

[6] 34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e)).

A. Visibility of Title IX Coordinators

Under the Department's Title IX regulations, a recipient has specific obligations to make the role of its Title IX coordinator visible to the school community. A recipient must post a notice of nondiscrimination stating that it does not discriminate on the basis of sex and that questions regarding Title IX may be referred to the recipient's Title IX coordinator or to OCR. The notice must be included in any bulletins, announcements, publications, catalogs, application forms, or recruitment materials distributed to the school community, including all applicants for admission and employment, students and parents or guardians of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient.[7]

In addition, the recipient must always notify students and employees of the name, office address, telephone number, and email address of the Title IX coordinator, including in its notice of nondiscrimination.[8] Because it may be unduly burdensome for a recipient to republish printed materials that include the Title IX coordinator's name and individual information each time a person leaves the Title IX coordinator position, a recipient may identify its coordinator only through a position title in printed materials and may provide an email address established for the position of the Title IX coordinator, such as TitleIXCoordinator@school.edu, so long as the email is immediately redirected to the employee serving as the Title IX coordinator. However, the recipient's website must reflect complete and current information about the Title IX coordinator.

Recipients with more than one Title IX coordinator must notify students and employees of the lead Title IX coordinator's contact information in its notice of nondiscrimination, and should make available the contact information for its other Title IX coordinators as well. In doing so, recipients should include any additional information that would help students and employees identify which Title IX coordinator to contact, such as each Title IX coordinator's specific geographic region (*e.g.*, a particular elementary school or part of a college campus) or Title IX area of specialization (*e.g.*, gender equity in academic programs or athletics, harassment, or complaints from employees).

The Title IX coordinator's contact information must be widely distributed and should be easily found on the recipient's website and in various publications.[9] By publicizing the functions and responsibilities of the Title IX coordinator, the recipient demonstrates to the school community its commitment to complying with Title IX and its support of the Title IX coordinator's efforts.

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[7] 34 C.F.R. § 106.9.

[8] 34 C.F.R. § 106.8(a).

[9] 34 C.F.R. § 106.9.

Supporting the Title IX coordinator in the establishment and maintenance of a strong and visible role in the community helps to ensure that members of the school community know and trust that they can reach out to the Title IX coordinator for assistance. OCR encourages recipients to create a page on the recipient's website that includes the name and contact information of its Title IX coordinator(s), relevant Title IX policies and grievance procedures, and other resources related to Title IX compliance and gender equity. A link to this page should be prominently displayed on the recipient's homepage.

To supplement the recipient's notification obligations, the Department collects and publishes information from educational institutions about the employees they designate as Title IX coordinators. OCR's Civil Rights Data Collection (CRDC) collects information from the nation's public school districts and elementary and secondary schools, including whether they have civil rights coordinators for discrimination on the basis of sex, race, and disability, and the coordinators' contact information.[10] The Department's Office of Postsecondary Education collects information about Title IX coordinators from postsecondary institutions in reports required under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act and the Higher Education Opportunity Act.[11]

B. Training of Title IX Coordinators

Recipients must ensure that their Title IX coordinators are appropriately trained and possess comprehensive knowledge in all areas over which they have responsibility in order to effectively carry out those responsibilities, including the recipients' policies and procedures on sex discrimination and all complaints raising Title IX issues throughout the institution. The resource guide accompanying this letter outlines some of the key issues covered by Title IX and provides references to Federal resources related to those issues. In addition, the coordinators should be knowledgeable about other applicable Federal and State laws, regulations, and policies that overlap with Title IX.[12] In most cases, the recipient will need to provide an employee with training to act as its Title IX coordinator. The training should explain the different facets of Title IX, including regulatory provisions, applicable OCR guidance, and the recipient's Title IX policies and grievance procedures. Because these laws, regulations, and OCR guidance may be updated, and

[10] OCR began collecting this information through the CRDC for the 2013-2014 school year. More information about the CRDC is available at http://www.ed.gov/ocr/data.html.

[11] The Department will begin collecting this information in 2015. More information about the Clery Act data collection is available at http://www.ed.gov/admins/lead/safety/campus.html.

[12] *See, e.g.*, the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, and its implementing regulations, 34 C.F.R. Part 99; and the Clery Act, 20 U.S.C. § 1092(f), and its implementing regulations, 34 C.F.R. Part 668. These documents only address an institution's compliance with Title IX and do not address its obligations under other Federal laws, such as the Clery Act.

recipient policies and procedures may be revised, the best way to ensure Title IX coordinators have the most current knowledge of Federal and State laws, regulations, and policies relating to Title IX and gender equity is for a recipient to provide regular training to the Title IX coordinator, as well as to all employees whose responsibilities may relate to the recipient's obligations under Title IX. OCR's regional offices can provide technical assistance, and opportunities for training may be available through Equity Assistance Centers, State educational agencies, private organizations, advocacy groups, and community colleges. A Title IX coordinator may also find it helpful to seek mentorship from a more experienced Title IX coordinator and to collaborate with other Title IX coordinators in the region (or who serve similar institutions) to share information, knowledge, and expertise.

In rare circumstances, an employee's prior training and experience may sufficiently prepare that employee to act as the recipient's Title IX coordinator. For example, the combination of effective prior training and experience investigating complaints of sex discrimination, together with training on current Title IX regulations, OCR guidance, and the recipient institution's policies and grievance procedures may be sufficient preparation for that employee to effectively carry out the responsibilities of the Title IX coordinator.

Conclusion

Title IX coordinators are invaluable resources to recipients and students at all educational levels. OCR is committed to helping recipients and Title IX coordinators understand and comply with their legal obligations under Title IX. If you need technical assistance, please contact the OCR regional office serving your State or territory by visiting http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm or call OCR's Customer Service Team at 1-800-421-3481; TDD 1-800-877-8339.

Thank you for supporting your Title IX coordinators to help ensure that all students have equal access to educational opportunities, regardless of sex. I look forward to continuing to work with recipients nationwide to help ensure that each and every recipient has at least one knowledgeable Title IX coordinator with the authority and support needed to prevent and address sex discrimination in our nation's schools.

Sincerely,

/s/
Catherine E. Lhamon
Assistant Secretary for Civil Rights

Title VII and Title IX

Presented by:
Heather R. Rutland

October 15, 2024

Heather is a shareholder in our Austin office. Prior to attending law school, she served as a Legislative Aide to the House of Representatives during the 75th Texas Legislative Session. While in law school, Heather competed in and later judged Moot Court and Mock Trial competitions. She served as Editor-in-Chief of the St. Mary's Law Journal and interned with the United States Court of Appeals for the Fifth Circuit. After graduating law school with honors, Heather clerked for the Chief Justice of the Fourth District Court of Appeals before returning home to Austin to practice law in the private sector.

A native Austinite, Heather has published articles in the *Journal of the National Association of Administrative Law Judges*. She was both co-author and editor of *How It Works...The Texas School Principal's Handbook* (1998) and remains dedicated to providing clients with the tools necessary to avoid litigation.

Heather works extensively with Texas schools, colleges, and other educational institutions in the areas of special education, students, personnel, board governance, Section 504 compliance and the ADAA. She routinely advises public entities on employee personnel issues such as termination and nonrenewals, special education and 504 disputes, Public Information Act and Open Meetings Act matters, conflicts of interest and governance concerns, state purchasing protocols, service contract and land use negotiations and disputes, constitutional challenges and discrimination complaints, and drafting Board policy and student and employee codes of conduct. Heather is asked to speak regularly on education law issues and provides training for teachers, faculty, administrators and trustees throughout the state.

Heather is admitted to practice in the United States Fifth Circuit Court of Appeals and the United States District Courts for the Eastern, Western, and Southern Districts of Texas. She is a member of the State Bar of Texas and its Education Law and Administration Law Sections, and a member of the Texas Council of Administrators of Special Education, National School Boards Association, Texas Council of School Attorneys, Austin Bar Association, John M. Harlan Honor Society, and the Phi Delta Phi legal fraternity. She is involved in her community by working with and supporting Partnerships for Children, Central Texas Food Bank, Special Olympics, and Camp Fire Central Texas.

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Title VII and Title IX

TEXAS TITLE IX Ten Year Anniversary ADMINISTRATOR CONFERENCE

Presented by Heather R. Rutland

EICHELBAUM WARDELL HANSEN POWELL & MUÑOZ, P.C.

1

***North Haven Board of Education v. Bell* 456 U.S. 512 (1982)**

The Court upheld the ruling of the Court of Appeals that Title IX prohibited employment discrimination.

(nothing in the statute excludes employment)

2

Suing for Employment Discrimination

- However, there is a split of authorities about whether employees can *sue* under Title IX rather than Title VII.
- The Fifth Circuit has held that Title VII displaces Title IX for an employment **discrimination** private right of action. *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995).
- The Seventh Circuit has held similarly.
- The First, Second, Third, Fourth, and Sixth Circuits have held the opposite.
- The Ninth and Eleventh appear to be undecided.

3

***Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)**

Supreme Court found an employee/coach could sue for **retaliation** under Title IX where he experienced an adverse employment action after complaining about discrimination against girls' athletic program.

4

- In *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 249 (5th Cir. 1997), the Fifth Circuit had already agreed that *Lakoski* did not preempt such a retaliation claim but noted that *Lakoski* still controlled the question about whether Title VII preempts claims that an employee was retaliated against for complaining about conditions of employment as opposed to educational disparities.
- Since *Jackson*, the Fifth Circuit continues to hold that Title VII preempts claims of **employment discrimination** under Title IX. *See Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1118 (5th Cir. 2021).
- So, there is still a split of authorities to be decided by Supreme Court if the right case is teed up.

5

What about claims of sexual harassment?

- Sexual harassment is just another form of discrimination on the basis of sex, so those claims should be treated the same by the courts.
- So, in Texas, a school district employee must pursue a sexual harassment claim under Title VII rather than Title IX.

6

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Why is this significant?

Title VII
- Title VII has an administrative scheme that must be followed.
- Title VII has damage caps.
- Causation standard varies depending on role of harasser
- Definition is severe or pervasive
- Discrimination standards are the same for both

Title IX
- No administrative remedies to exhaust
- No damage caps
- But does have a more difficult causation standard in the courts – deliberate indifference
- And may have tighter definition of harassment

7

Even under Title VII, you have plenty to worry about

8

Harrison v. Brookhaven Sch. Dist. (5th Cir. 2023)

- District refused to pay for an African American female educator/administrator to attend a training program.
- This was despite a precedent of:
  - paying for all employee's enrollment fees into the program and
  - providing such pay for similarly situated white male employees.
- Harrison paid the $2,000 herself and became Plaintiff by suing the district for discrimination in violation of Title VII.
- Initially, the suit was dismissed, finding that the refusal was not an "ultimate employment decision," which was required in the 5th Circuit to show the required "adverse employment action."

9

Harrison, cont'd

- The 5th Circuit reversed, pointing out that it had overruled its prior precedent requiring an "ultimate employment decision" in the case of *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023) (en banc).
- Thus, in *Harrison*, the 5th Circuit reviewed two prongs to establish that an adverse employment action has occurred: adversity and non-de minimis injury.
- The court found Harrison established adversity by showing that having her training fees paid would be a privilege of employment that had been denied.
- The court further held that the $2,000 she paid out of pocket to attend the training was more than a *de minimis* injury.
- Thus, the case was remanded for further proceedings.

10

Yates v. Spring Indep. Sch. Dist. (5th Cir. Aug. 26, 2024)

- This is another case where the 5th Circuit examined an allegedly adverse action after the decision in *Hamilton*.
- Yates was a math teacher in his late sixties claiming discrimination and retaliation under the Age Discrimination in Employment Act (ADEA), Title VII, and the Americans with Disabilities Act (ADA).
- He had been placed on a "support plan" and then a second support plan that included reassigning Yates to provide "push-in" services for the classroom of another math teacher, which meant he was no longer a lead teacher.

11

Yates, cont'd

- Later, after complaints about Yates yelling at students in the classroom and not letting them go to the restroom or nurse's office, he was placed on paid administrative leave for about four months.
- Under the terms of this administrative leave, Yates could not visit his school or any Spring ISD facility; participate in any Spring ISD activities; or have any contact with students, parents, or colleagues.
- Spring ISD ultimately cleared Yates to return to work following the investigation.
- Yates still works for the district.

12

Yates, cont'd

- What two things occurred that we usually feel pretty safe doing?
- Well, this case should cause all of us to pause each time we consider either option.
- The 5th Circuit panel found that the district court had erroneously relied on pre-*Hamilton* cases to find that there was no adverse employment action.
- The court also pointed out that, since *Hamilton*, the Supreme Court had also weighed on the adverse employment action requirement.

13

Yates, cont'd

- Specifically, in *Muldrow v. City of St. Louis*, 601 U.S. 346, 350 (2024), the Supreme Court held that although an employee must show some harm, he need not show that the injury satisfies a significance test.
- Based on *Hamilton* and *Muldrow*, the court made the following statements:
  - Spring ISD correctly concedes that, for purposes of this appeal, Yates's claims regarding his "reassignment to the 'push-in position' " and his "being placed on administrative leave for four months" constitute adverse employment actions under Hamilton.
  - We need not decide today whether placement on support plans constitutes an adverse action under *Hamilton*.

14

Yates, cont'd

- Fortunately, for the district it still prevailed because it offered a nondiscriminatory reason supported by evidence (i.e. documentation) for the alleged adverse employment actions, which Yates failed to show was pretextual.
- However, you can see why we all need to be more concerned than ever about Title VII lawsuits whether they are claiming sex-based discrimination or otherwise.

15

What about OCR?

- US Department of Education's Office for Civil Rights has investigatory role in Title IX complaints.
- Nothing about who can sue for what impacts that authority.
- In 2020 Title IX regulations, OCR has asserted that the sexual harassment grievance procedures apply in the employment setting.
- "The Department acknowledges that Title VII and Title IX impose different requirements and that some recipients will need to comply with both Title VII and Title IX."

16

- "These final regulations require all recipients with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, to respond promptly in a manner that is not deliberately indifferent, irrespective of whether the complainant and respondent are students or employees."
- "The grievance process in § 106.45 does not contradict Title VII or its implementing regulations in any manner and at most may provide more process than Title VII requires (such as specifying that a decision-maker must be a different person than the Title IX Coordinator or investigator)."

17

2024 Regulations (enjoined for now)

- Some changes to the employment provisions.
- The addition of some language to 34 C.F.R. § 106.51, which states that the anti-discrimination provisions apply to:
  (6) Granting and return from leaves of absence, leave for pregnancy or related conditions, leave for persons of either sex to care for children or dependents, or any other leave.
- Revisions to the section titled, "Parental, family, or marital status; pregnancy or related conditions." 34 C.F.R. §106.57

18

2024 Regulations, cont'd

- Section 106.57 has the following subsections:
  - Status generally – includes current, potential, or past parental, family, or marital status and whether an employee or applicant for employment is the head of household or principal wage earner.
  - Pregnancy or related conditions - current, potential, or past pregnancy or related conditions. [abortion?]
  - Comparable treatment to other temporary medical conditions - for pregnancy and related conditions.

19

2024 Regulations, cont'd

- Section 106.57 has the following subsections:
  - Voluntary leaves of absence

    In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient **must treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.**

    [What happened to FMLA requirements?]

20

2024 Regulations, cont'd

- Section 106.57 has the following subsections:
  - Lactation time and space - must provide reasonable break time for an employee to express breast milk or breastfeed as needed and must ensure that an employee can access a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed.

    [What about PUMP Act, which only addresses expression? Now do teachers get to leave and go to the childcare center to breastfeed?]

21

OCR Letter Findings

- In 2020 OCR issued a 51-page letter to the University of Southern California following an investigation into allegations that a USC employee, a gynecologist, was sexually harassing students during gynecological examinations.

22

USC agrees to $1.1 billion in settlement with hundreds of women alleging abuse by gynecologist

23

OCR Letter Findings, cont'd

- In addition to the findings related to USC's handling of the issues related to students, OCR also identified "compliance concerns" in other areas.
- **Compliance Concern 1:** USC did not complete an investigation of whether Student Health Center employees who worked with the gynecologist were subjected to sex discrimination, assess whether any interim measures were needed by SHC employees, or identify remedies for SHC employees to address the sex discrimination, if found.

24

OCR Letter Findings, cont'd

- This was true even though OCR specifically stated that the gynecologist treated only students.
- During an external investigation into complaints in 2016, staff who worked with the gynecologist indicated that his sexual harassment of patients made them feel uncomfortable.
- However, USC never sought to obtain additional details about how their work environment was impacted by this.

25

OCR Letter Findings, cont'd

- In addition, one of USC's Title IX coordinators told OCR that staff were subjected to harassment due to witnessing the gynecologist's conduct, but that USC did not identify them as complainants or provide them notice of the outcome of any investigation.
- As a result, OCR found there was a compliance concern that USC may have violated Title IX with respect to staff.

26

OCR Letter Findings, cont'd

- As a result, USC had to agree to develop plans to notify all the employee's co-workers that they may be entitled to remedies and provide said remedies where appropriate.

27

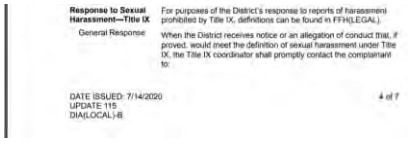
OCR Bottom Line

- In any complaint from a student alleging sex-based discrimination/harassment by an employee, look to whether there has been any kind of impact on other employees.

28

What about Policy?

DIA (LOCAL) includes:



Response to Sexual Harassment—Title IX

General Response

For purposes of the District's response to reports of harassment prohibited by Title IX, definitions can be found in FFH(LEGAL).

When the District receives notice or an allegation of conduct that, if proved, would meet the definition of sexual harassment under Title IX, the Title IX coordinator shall promptly contact the complainant to:

DATE ISSUED: 7/14/2020
UPDATE 115
DIA(LOCAL)-B

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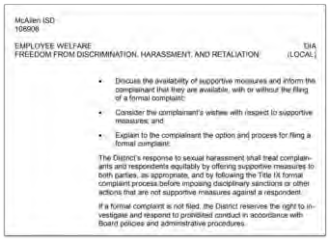

McAllen ISD
108909

EMPLOYEE WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION

DIA
(LOCAL)

- Discuss the availability of supportive measures and inform the complainant that they are available, with or without the filing of a formal complaint;
- Consider the complainant's wishes with respect to supportive measures; and
- Explain to the complainant the option and process for filing a formal complaint.

The District's response to sexual harassment shall treat complainants and respondents equitably by offering supportive measures to both parties, as appropriate, and by following the Title IX formal complaint process before imposing disciplinary sanctions or other actions that are not supportive measures against a respondent.

If a formal complaint is not filed, the District reserves the right to investigate and respond to prohibited conduct in accordance with Board policies and administrative procedures.

30

- So, treat a claim of sexual harassment by an employee as you would a claim by a student.
- Title IX coordinator should meet with complainant and offer supportive measures and determine whether the complainant wants to file a formal complaint.
- If a formal complaint is filed follow the grievance procedure.
- If not, follow DIA (LOCAL) procedure for investigations.

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Questions?

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The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.

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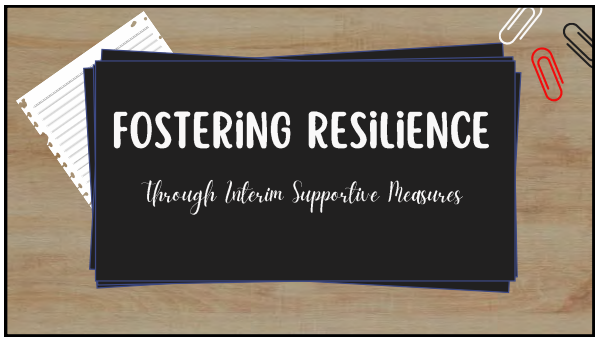
Fostering Resilience Through Supportive Measures

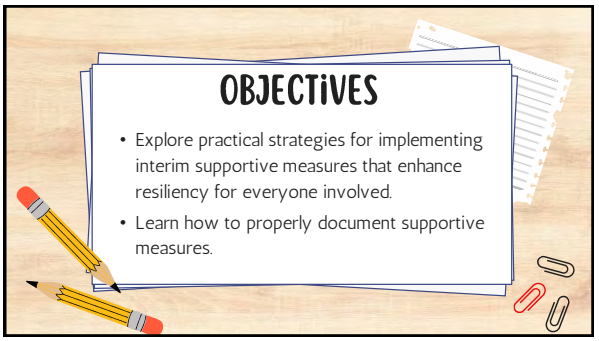
Dr. Cassandra Spearman is a passionate educational leader who has worked diligently to ensure improvement in student outcomes. As the Assistant Superintendent for Operations in Belton ISD, she leverages over two decades of experience to drive academic excellence.

Her educational foundation, including a Doctorate of Education, is complemented by her extensive leadership roles in school administration.

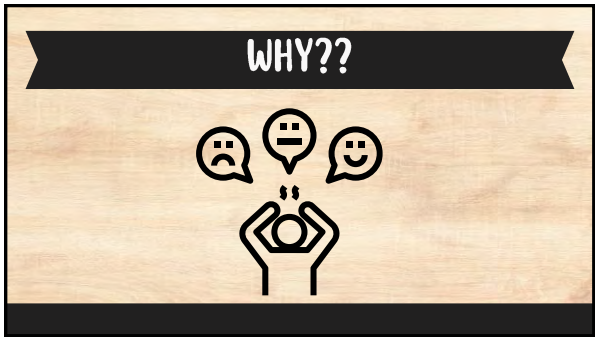
A dedicated advocate for students and educators, Dr. Spearman has a successful history of implementing innovative programs and fostering professional growth. Her data-driven approach has consistently yielded significant improvements in student achievement.


FOSTERING RESILIENCE
Through Interim Supportive Measures

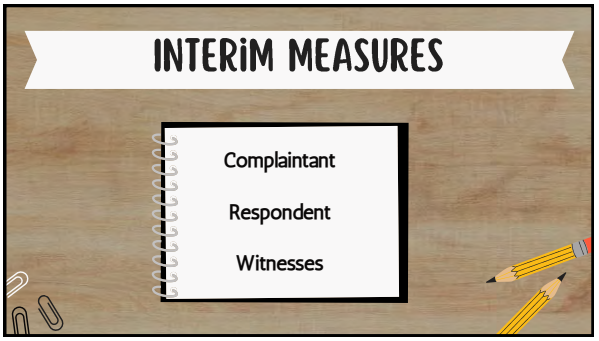
1


OBJECTIVES
• Explore practical strategies for implementing interim supportive measures that enhance resiliency for everyone involved.
• Learn how to properly document supportive measures.

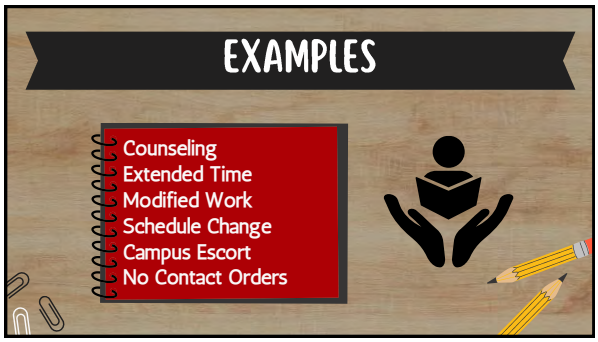
2


WHY??

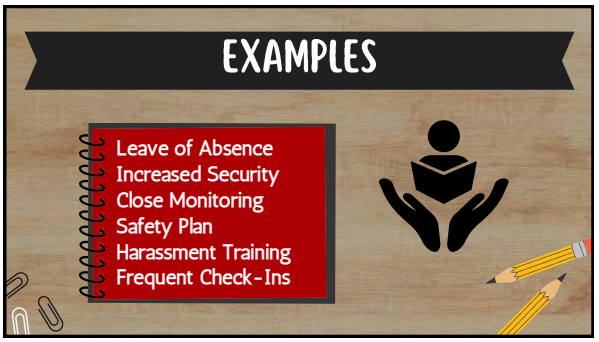
3


INTERIM MEASURES
Complaintant
Respondent
Witnesses

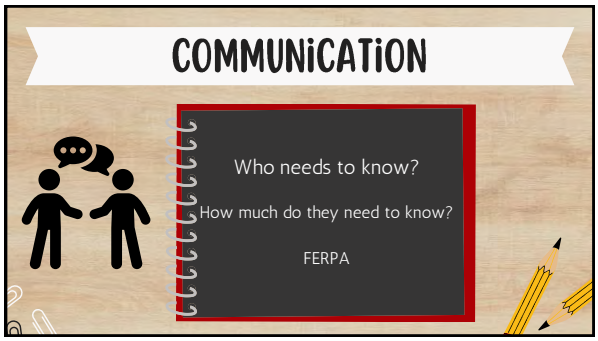
4


EXAMPLES
Counseling
Extended Time
Modified Work
Schedule Change
Campus Escort
No Contact Orders

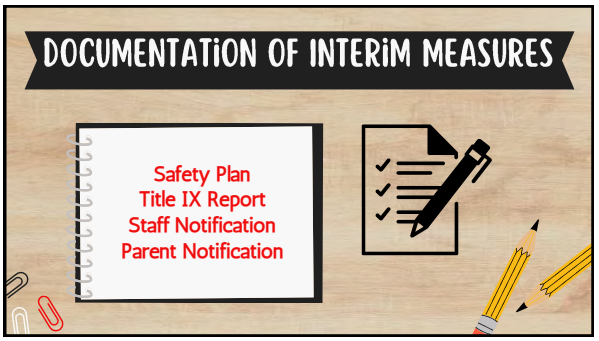
5


EXAMPLES
Leave of Absence
Increased Security
Close Monitoring
Safety Plan
Harassment Training
Frequent Check-Ins

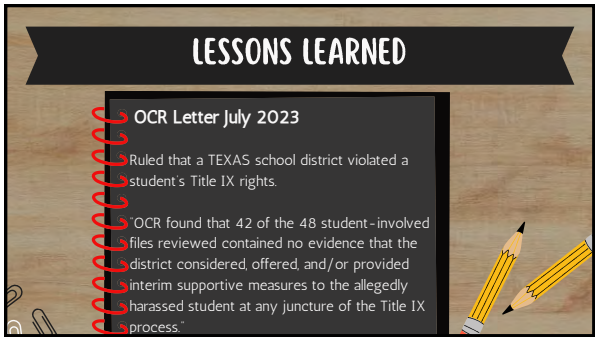
6


COMMUNICATION
Who needs to know?
How much do they need to know?
FERPA

7


DOCUMENTATION OF INTERIM MEASURES
Safety Plan
Title IX Report
Staff Notification
Parent Notification

8


LESSONS LEARNED
OCR Letter July 2023
Ruled that a TEXAS school district violated a student's Title IX rights.
"OCR found that 42 of the 48 student-involved files reviewed contained no evidence that the district considered, offered, and/or provided interim supportive measures to the allegedly harassed student at any juncture of the Title IX process."

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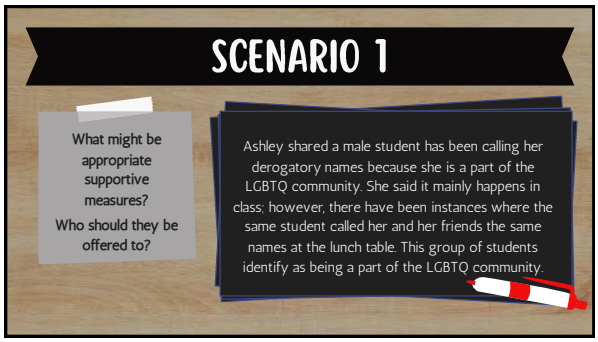
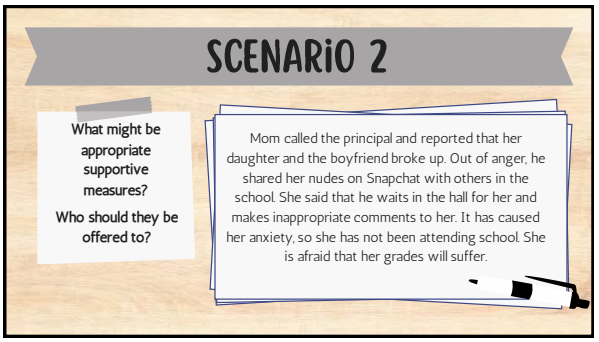
LESSONS LEARNED
OCR Letter August 2023
Ruled that a TEXAS school district violated a student's Title IX rights.
The district reported that the campus provided supportive measures to the complainant. The complainant said that her teachers denied her access to those supports. There was no proof that they had been provided. OCR said there was a lack of corroborating evidence that they had been provided.

10


SCENARIO 1
What might be appropriate supportive measures?
Who should they be offered to?
Ashley shared a male student has been calling her derogatory names because she is a part of the LGBTQ community. She said it mainly happens in class; however, there have been instances where the same student called her and her friends the same names at the lunch table. This group of students identify as being a part of the LGBTQ community.

11


SCENARIO 2
What might be appropriate supportive measures?
Who should they be offered to?
Mom called the principal and reported that her daughter and the boyfriend broke up. Out of anger, he shared her nudes on Snapchat with others in the school. She said that he waits in the hall for her and makes inappropriate comments to her. It has caused her anxiety, so she has not been attending school. She is afraid that her grades will suffer.

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KEY POINTS

- Interim supportive measures are offered as soon as you learn about the incident, not after the investigation is completed.
- They are offered to all parties, including witnesses.
- They are not punitive in nature.
- They must be communicated and documented.
- They must be monitored and can be adjusted as needed.
- They should be individualized.
- They ensure equal treatment of all involved.

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QUESTIONS

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Title IX Updates: Implications for Students with Disabilities

Presented by:
Emma K. Lynch

October 15, 2024

Emma K. Lynch

Emma Lynch serves as an associate in our Austin office, bringing with her a rich background in education. Prior to her legal career, Emma was a dedicated middle school teacher, academic team leader, and a member of the curriculum committee for the Leander Independent School District.

She graduated cum laude with a Bachelor of Science in Education from Southwestern University in 2015, with minors in special education and history. Emma earned her Juris Doctor, also cum laude, from the Southern Methodist University Dedman School of Law in 2023.

While in law school, Emma showcased her passion for education and law, serving as a student associate member in the SMU Dedman School of Law First Amendment Clinic. As a master-level member of the Board of Advocates, Emma demonstrated her legal advocacy skills by earning awards in both moot court and mock trial competitions, as well as individual recognition for her oral advocacy. She also volunteered her time and expertise to the Texas Advocacy Project. Since 2021, Emma has clerked for our firm, concentrating her efforts on special education and keeping abreast of legislative updates.

With her unique blend of experience in both the educational and legal areas, Emma is poised to focus her practice specifically on special education issues.

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Title IX Updates: Implications for Students with Disabilities

TEXAS TITLE IX Ten Year Anniversary
ADMINISTRATOR CONFERENCE

Emma K. Lynch

www.edlaw.com
(800) 488-9045

1

Why Do We Care About Sped and Title IX?

Claims under IDEA, Section 504 and Title IX are being increasingly brought together from the same set of facts.

One event or series of events can serve as the basis for multiple causes of action so you must be prepared to defend your district on several fronts, and within different departments.

A SpEd Due Process complaint is no longer the worst-case scenario…FAPE violations come in all shapes and sizes and price tags.

2

FAPE

Failure to provide FAPE underlies all IDEA and § 504 claims:

- **F**ree
- **A**ppropriate
- **P**ublic
- **E**ducation

→ In the Least Restrictive Environment

FAPE is demonstrated by a student making appropriately ambitious progress (academically, behaviorally, socially)

- Plaintiffs maintain that all harassed students will fail/have failed to make progress
- That failure to make progress violates a student's right to FAPE
- They argue therefore, that harassment/assault is a *de facto* finding of FAPE violation.

3

Title IX—Elements

Plaintiff must show that

1) The sexual harassment was so severe and pervasive and objectively offensive that it can be said to have deprived the student access to the educational opportunities or benefits provided by the school;
2) The district must have actual knowledge of the sexual harassment;
3) The district must have been deliberately indifferent to the harassment.

Davis v. Monroe Cty Bd. of Educ., 526 U.S. 629 (1999).

4

Title IX

Train Special Ed administrators and staff on board policy FFH and the concept of deliberate indifference.

They should know what to look for and what to do if a complaint is made.

Make sure your Special Ed staff members are aware of how their actions (or inaction) can lead to a lawsuit.

5

2024 Regulations

Although the 2024 Regs are currently enjoined, the following provisions are the clear direction that T9/SpEd Compliance is heading—regardless of federal litigation outcomes or election outcomes.

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2024

New Definitions in 34 CFR § 106.2

- **Student with a disability** means a student who is an individual with a disability as defined in Section 504 of the Rehabilitation Act of 1973, at 29 USC § 705(9)(B), or a child with a disability as defined in the IDEA at 20 USC § 1401(3).

7

New Definitions in 34 CFR § 106.2

- **Remedies** means measures provided, as appropriate, to a complainant or any other person the LEA identifies as having had their equal access to the LEA'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 LEA's education program or activity after a LEA determines that sex discrimination occurred.

Think FAPE

8

Modified Definitions in 34 CFR § 106.2

- **Sex-based harassment** (formerly sexual harassment) means any type of harassment on the basis of sex, including harassment that is based on sex stereotypes, sex characteristics, sexual orientation, and gender identity.
- **Complaint. "**actual knowledge" no longer required to trigger an LEA's obligation to respond to sex discrimination. Oral and written statements are now sufficient to trigger an LEA's duty to investigate.
- **Complainant/Respondent:** Both definitions broadened to address sex discrimination, no longer sexual harassment.

9

Quick Note about the 2020 Regulations

- The 2024 additions for students w/ disabilities does not mean they are ignored under the 2020 Regulations
- For K-12 students, telling any school employee puts the District on notice!
  - Teachers
  - Paras
  - Aides
  - Substitutes
  - Etc., etc.

  It is CRITICAL to train your SpEd staff.

10

Procedures for Students with Disabilities

(e) **Students with disabilities.** If a complainant or respondent is an elementary or secondary student with a disability, the recipient must require the Title IX Coordinator to consult with one or more members, as appropriate, of the student's Individualized Education Program (IEP) team, 34 [illegible] one or more members, as appropriate, of the gr[illegible] student's pla[illegible]nt decision [illegible]mply with the [illegible]tion Act, 20 U[illegible]n Act of 1973, 29 [illegible] of grievanc[illegible]ondent is a postse[illegible]ndary student with a [illegible] or may consult, as appropriate, with the individu[illegible] recipient has designated to provide support to students with disabilities to determine how to comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

Let's break this down....

11

PK-12 Complainant/Respondent

Title IX Coordinator is required to consult with:

one or more members, as appropriate, of the student's IEP Team, if any; or

one or more members, as appropriate, of the student's 504 student's placement decision committee if any.

In order to:

determine how to comply with the requirements of the IDEA and Section 504, throughout the recipient's implementation of grievance procedures under § 106.45

12

Postsecondary Students

If a complainant or respondent is a postsecondary student with a disability:

the Title IX Coordinator *may* consult, as appropriate, with the individual or office that the recipient has designated to provide support to students with disabilities to determine how to comply with Section 504.

13

What will this look like?

- "Consult with" in order to determine how to comply with IDEA/ § 504 during the implementation of grievance procedures.
- The Regs do not:
  - require the ARDC or 504 Committee to convene,***
  - identify which specific individual members of the ARDC/Team the Coordinator must "consult" with
  - outline how the determination is made for compliance during the grievance process.

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Supportive Measures & FAPE

Title IX supportive measures offered to students with disabilities (either complainant or respondent) must be analyzed in the context of the provision of FAPE to the student.

Keep an eye toward:

LRE	Changes of Placement	Schedule of Services	Accommodations	BIPs

15

Emergency Removals/Changes in Placement

- For example…
- While a Title IX Respondent may be removed on an emergency basis if there is an imminent and serious threat to the safety of a complainant or others…
- It can still be considered a disciplinary change in placement that would trigger the need for a manifestation determination review.

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Special Education Concerns & Complications

17

Investigation Complications

Unreliable narrators:

- Time, place, details are harder than usual to determine
  - Story may change unintentionally due to cognitive deficits
- Issues with reality versus make-believe
- Often even more susceptible to parental influence

Consent between students especially fraught

- Does student have the ability to consent?
  - SpEd students often more "persuadable"
  - Reading "social cues" often a deficit
- Student version versus Parent version
  - Implications of "bad" and "good" especially powerful

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Special Education Concerns

- More vulnerable to harassment of all kinds
  - Seen as easy targets by other students
  - Less likely to fight back or resist
  - *Less likely to report*
  - More likely to be re-victimized
  - Easier to intimidate
  - ***May not realize they are being harassed or were assaulted***
  - ***May not understand the implications/consequences of actions***

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Special Education Concerns

Harm from Harassment is Often Magnified

- Special ed students may be impacted in different and more severe ways than their Gen Ed peers
  - Current disabilities manifest more severely
  - New disabilities develop
  - Re-evaluations may be necessary
  - Revised IEPs required to ensure educational benefit

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Special Education Concerns

- **Educational benefit easily derailed**
  - District is already working hard to ensure progress for SpEd students
    - *A team of experts has developed a plan, which has to be revisited/revised*
    - "Progress" for many students is already a precarious proposition
- **The "optics" are especially ugly**
- **It is often easier to meet the "objectively offensive" standard when the recipient is SpEd.**

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Special Education Concerns

- **Title IX = how you investigate claims, and what you do with findings.**
  - Any Special Ed perpetrator will likely require a new/revised Behavior Intervention Plan (BIP) and Individualized Education Plan (IEP)
  - Many victims will as well
  - Additional evaluations likely required and ARD Committee should meet, but now parent trust is low(er)
  - Discipline under Student Code of Conduct; MDR trigger
  - Criminal charges possible against perpetrator

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Special Education Concerns

- **Implications for Discipline**
  - Manifestation Determination Reviews (MDRs) required for disabled students accused of harassment
  - May find harassing behavior was function of disability so not able to discipline legally
  - May find harassing behavior the result of district failure to implement IEP, so no discipline
    - Very difficult to explain this to parents and staff
    - Must revise BIP and/or conduct Functional Behavior Analysis (FBA)
    - Even if not a Title IX violation, still SCOC…

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Special Education Concerns

- **Failure to Protect claims**
  - "Failure to supervise" claims common–for both students
  - Harassment may be result of inappropriate BIP or failure to implement BIP/IEP
  - Did school have any prior knowledge of the aggressor's behaviors?
- **Parent trust may never be restored**
- **Sex education especially difficult issue for SpEd students**
  - Cognitive roadblocks to understanding
  - Struggle to appreciate consequences
  - Social cues, impulse control, sensory issues…

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SpEd Due Process—The Starting Point

- The Due Process hearing under IDEA is the typical starting point
- Can be an early opportunity to settle ALL claims
- Settlement asks often factor in "loss" of any Title IX recovery
- Each side can access the discovery process; see evidence before get to federal court
- Discovery can expose other weak spots
- Admin Hearing Officer likely find for parents under IDEA if go to hearing
  - May have to litigate whether harassment occurred in an administrative proceeding – even if the claim is about education
  - Loss means approx. $50k-70k in district fees – *plus* parent fees
  - Still vulnerable to federal Title IX claim, especially with sworn testimony and HO findings of fact.

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Illustrations

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Doe v. Taos Mun. Schs.

- Title IX (settled) & § 1983, the facts as alleged:
- Male Student (M.S.) transferred into LEA after being expelled for sexual assault, with five documented instances of sexual harassment. Upon enrollment, behaviors continued.
- M.S.'s IEP and BIP addressed these sexual behaviors, and repeatedly received referrals for his sexual misconduct. Admin met to discuss how to handle his behaviors toward female students repeatedly, but the District allegedly minimized his behavior due to the guardian's relationship with the superintendent.

Doe v. Taos Mun. Schs., 2024 WL 4264507 (D.N.M. Sep. 23, 2024)

27

Cont'd

- Student was transferred to an alternative high school placement for special education students with serious behavioral issues (which later merged with the main campus)
- While placed there, M.S. had been reported to the superintendent for sexual misconduct, and that some female students stopped attending school due to him.
- BIP addressed "contact/verbal communication of a sexual nature" and M.S.'s tendency to deny that contact.
- M.S. participated on the wrestling team, which provided him access to the main campus and to techniques to physically overpower others.
- Assigned a 1:1 male aide for his behaviors; escort was reassigned to another role, and nobody resumed escorting duties.
- 1:1 not provided the following year, nor were teachers or staff made aware of his behavior when he returned from the alternative campus.

28

Cont'd

- Student would cut class to "stalk, sexually harass, and assault female students."
- Assaulted Jane Doe #2 three times at school, in a hallway without surveillance. This was reported to the school.
- LEA did not investigate, but referred to police. Personnel told JD2 that they could not enforce a restraining order issued. JD2 had to do school from home.
- M.S. was "nominally" assigned to IAES, but was allowed to return to the campus more-or-less as he pleased.
- Teachers reported that he was sending videos of the assault to others.

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Cont'd

- Following year, District did not provide more surveillance cameras in the areas where the assault occurred; did not provide more staff to monitor M.S.; did not maintain footage of covered areas for more than a few days.
- Within the first week of school, new IEP stated MS already had an incident of unwanted advances to a female student.
- IAES discontinued without explanation, returned to campus.
- Case managers said his schedule was "really confusing" and people were not sure where he was supposed to be, leaving him unsupervised.
- JD1 was a freshman, M.S. "groomed" her, then stalked her when she said she did not want a sexual relationship.
- M.S. followed JD1 after school, assaulted her in the same hallway he assaulted others without surveillance; used a wrestling hold on her to overpower.
- Rape eventually reported to administration by another student.
- School manipulated records to allow M.S. to graduate, and participate in ceremonies.

30

Cont'd

- LEA did not follow T9 procedures; did not train staff.
- LEA did not replace trained SpEd teachers, leading to LEA's failure to provide qualified teachers trained to supervise and handle students like M.S.
- Did not provide SpEd discipline training, leading to the "mistaken impression that SpEd students could not be suspended for more than 45 days, and that employees could not share information about his misconduct with others."
- **Student's BIP and IEPs addressing sexual misconduct were evidence that the LEA was on notice, and bolstered the deliberate indifference claim.**

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Cianciotto v. New York City Dep't of Educ.

- Gay student with IEP (PTSD and learning disabilities) was subjected to multiple years of bullying based on his sexuality.
- IHO found that the "prolonged and severe pattern of emotional and physical bullying" that the LEA blamed the student for making himself a "target" led to academic and emotional regression
- IHO found that the failure to address bullying constituted FAPE deprivation
- District Court denies LEA's motion to dismiss the Title IX and Rehabilitation Act claims.

Cianciotto ex rel. D.S. v. New York City Dep't of Educ., 600 F. Supp. 3d 434 (S.D.N.Y. 2022)

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Title IX Claims:

At MTD, well-pleaded facts are treated as true, and viewed in the light most favorable to the plaintiff

- Deliberate indifference was adequately pleaded:
  - After coming out, faced bullying and harassment, subjected to slurs
  - Led to suicidal ideations, anxiety, and school avoidance (teachers were informed)
  - Many incidents occurred in the presence of teachers, during class
  - School administration was informed
  - Bullying was logged in district incident report system
  - Dean of Students suggested isolating student from peers; told student that bullying wouldn't occur if he stopped talking about his sexuality
  - Continued peer mediations despite increase in bullying after mediations was not a "reasonable response"; instead, was "textbook deliberate indifference"

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Rehabilitation Act Claims:

- Required to plead denial of FAPE + deliberate indifference
- Pleadings, largely undisputed:
  - IHO found a denial of FAPE based on the bullying experienced at school
  - Bullying substantially interfered with educational opportunities
  - District refused to address bullying in the IEP
  - Deliberate Indifference discussed in Title IX context.

34

Sampson Cty. Bd. of Educ. V. Torres

- LEA appealed IHO decision finding that LEA erred in its MDR of a student with a disability
- Student was told by female student to "get away"—he proceeded to grab her buttocks and breasts. Student previously sexually assaulted the same female student, and was on juvenile probation for that prior assault.
- IHO found that misconduct had a direct, substantial relationship to his ADHD, ODD, and selective mutism; and that the misconduct was a result of a failure to implement his BIP.

Sampson Cty. Bd. of Educ. v. Torres, --F. Supp. 3d --, 2024 WL 1093632 (E.D.N.C. 2024)

35

Findings of Fact:

- ALJ findings of fact cited to a failure to consider whether student was on medication, and mother felt that she "tried" to explain but was not heard by the MDR.
- Upheld ALJ determinations that were seemingly biased in the Student's favor because they did not "stray so far from the accepted norm"
- MDR team committed procedural violation by failing to consider the Student's FBA and BIP (marked "no" to having either)

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Procedural Violation

- Student's BIP was specifically for poking other students.
  - FBA identified 'communicating (poking) with peers and unfamiliar adults' and that Student "typically responds by poking other students to gain attention"
  - Resulting BIP replaced behavior with snapping fingers
  - ALJ and Court recharacterized this as "inappropriate touching"—which would apply to the groping behavior as well as poking.
- Court held that the violation was "material" because the MDR did not consider Student's BIP for "inappropriate touching"
- Equated argument that following the poking BIP would not have prevented sexual assault to an admission that the BIP was inappropriate because it would not have prevented the sexual assault.

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Substantive Violation

- Accepted Student's expert's testimony that groping a student after being told to "get away" was due to ODD; that student's "physical contact" was a "form of communication" due to Selective Mutism, and that since it "was the end of the day" his medication may have worn off.
- Accepted ALJ's revision of the poking BIP to encompass "inappropriate communication" to "gain attention" and that because the BIP was not used in this incident, it was a result of that failure.
- (Yes, this IS being appealed)

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Recommendations

39

Recommendations

- Take all complaints and allegations seriously
  - Do not dismiss the source of any outcry
  - Do not dismiss any allegation, no matter how improbable
  - Be quick to review any available video footage
- All employees should know who the district Title IX coordinator is and what triggers an investigation
- Be ready to take action to stop the alleged harassment that also comports with all IEPs
  - Separating students can end up violate their IDEA rights
  - Failure to sufficiently separate can mean deliberate indifference

40

Recommendations

- **Conduct at least an abbreviated Title IX training for SpEd staff.**
  - Even if they are not conducting the investigation, they should know what's important and whom to contact.
- **Develop a plan for the student(s) involved during an investigation.**
  - Moving students may not be as easy as in Gen Ed
    - Disruptions of any kind can have negative impact
  - Must still comply with student's IEP
    - If change in placement occurs, ARD required; pay attention to timelines and "10-day" rule
  - Deliberate indifference can be a problem at this level
  - At the very least, increased supervision should occur
- **Ensure that your Special Ed staff knows the circumstances that could trigger a Title IX investigation, and what to do *during* the investigation.**

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Recommendations

- Be prepared to contact law enforcement, CPS, etc.
- Maintain confidentiality and follow district policies and procedures throughout investigation process.
- **Be mindful of what ends up in writing**; contact your attorney for help in this regard.
  - Carefully document your efforts after the claim to avoid deliberate indifference allegations.
  - Plan on Plaintiff's counsel serving you with discovery in IDEA Due Process.

42

Investigation is Complete… Now What?

- **Take appropriate actions depending on your findings.**
  - This includes revising BIPs, conducting FBAs, and revisiting IEPs…for all students impacted
- **Lack of evidence of sexual harassment doesn't mean it didn't happen.**
  - The student(s) may each be impacted by the experience of an allegation in ways that require changes to IEP and/or BIPs
  - Student (and parent) versions of the truth may be all that matters
  - Student discipline still possible
- **Keep close eye on both accuser and accused for future behaviors of concern.**
  - This is where many districts get into trouble
  - Students who want to be together will find a way
  - Failure to supervise will be primary complaint – if it happens/happens again, parent will claim you failed despite having knowledge of threat

43

Next Steps after Investigation…

- **Notify parents immediately and keep them informed.**
  - Special Ed parents are often used to more communication
  - An ARD may be required; send notices promptly
  - Parents may need help understanding legal nuances depending on findings
    - "Unsubstantiated" does not mean we do not believe their child
    - Title IX elements may not have been met, but we may still take action
- **Even small steps can be "taking action"**
- **Keep the legal requirements for Title IX in mind:**
  - **Must deprive the student of educational opportunity.**
  - ARD Committee actions and data collection efforts can disprove educational deprivation
  - If can show student continues to progress, it weakens damages claims

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Takeaways

- Title IX violations can result in a denial of FAPE, exposing district to potential liability for additional claims (IDEA, §504, etc.)
- Prevention is the ultimate goal – adequate student supervision required.
  - Both in the plan AND the execution
  - Staff training and accountability measures are critical to ensure implementation
- SpEd staff must be able identify and take steps in response to possible Title IX violations, and then make decisions and revisit IEPs based on findings of any investigation.
- Take prompt action in keeping with IEP immediately and make plans after the investigation as appropriate for the individual student.

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The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.

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Full Circle Investigations: Enhancing Title IX Through Data-Driven Insights

Dr. Darwin P. Spiller is the Executive Director of Title IX Compliance and Investigations, a newly established division in Richardson ISD that he has been appointed to onboard. Prior to this role, he served as the Lake Highlands Learning Community Executive Director, which comprised of over 10,500 pre-K to 12th-grade students in Richardson ISD for eight years. With his experience as a classroom teacher, assistant principal, principal, and school support officer, Dr. Spiller has a wealth of knowledge in education leadership.

In June 2022, Dr. Spiller was recognized by the Texas School Safety Center as the recipient of the Statewide Staff Development and Training Award for his efforts in increasing Title IX awareness and understanding through partnerships with local agencies and development of virtual professional trainings.

Dr. Spiller earned his bachelor's degree in elementary education from Langston University, a master's degree in educational leadership and policy study from the University of Texas at Arlington, and a doctoral degree in educational leadership at Dallas Baptist University. His research provided recommendations for improving teacher retention. He holds Texas certification as a teacher, principal and superintendent.

Full Circle Investigations:

Enhancing Title IX Through Data-Driven Insights

Dr. Darwin P. Spiller

Executive Director of Title IX Compliance and Investigations

Richardson ISD

1

1

2

Systems, Processes, and Protocols are Needed

3

3

Structure of Support

Title IX Coordinator | Investigator | Campus Administrator

4

4

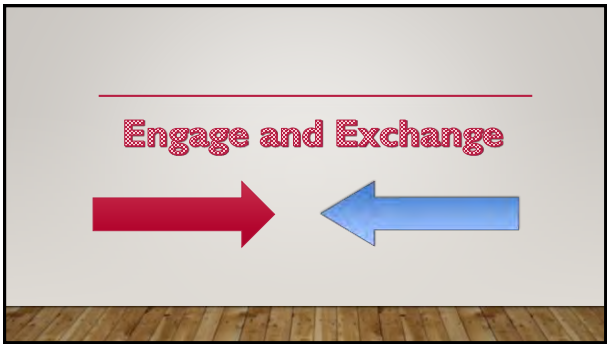
Student Services

Legal Counsel

Human Resources

5

5



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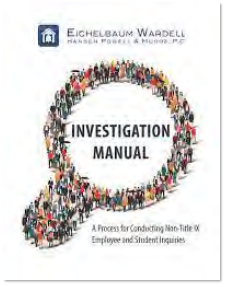


Resource for development of Systems, Processes and Protocols

7

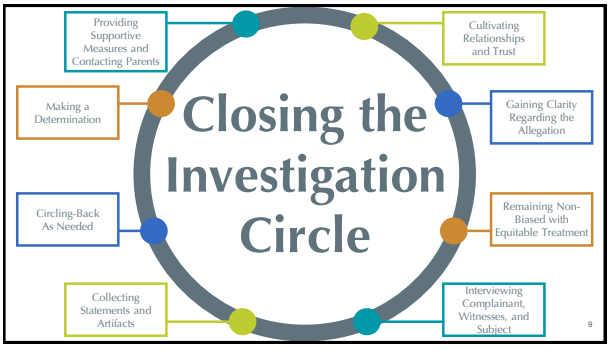
7

What You Will Gain

Resources and Strategies	Next Steps
• Eichelbaum Wardell Resources to Use • Investigate Informal Complaints	Record and Maintain a Record Track and Identify Trends

8

8



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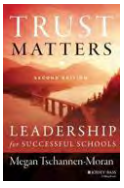
Relationships Build Trust

"Trust is cultivated through speech, conversation, commitments, and action."



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10

"Trust is the easiest thing in the world to lose, and the hardest thing to get back."

-Unknown

11

11

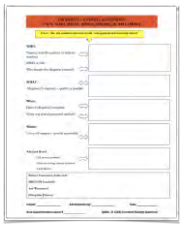
Key Components Throughout the Investigation

- Relationships
- Trust
- Communication

12

12

Purpose of the Incident Guiding Questions Form



- **Communicating** Between Campus Administrator and Dr. Spiller
- **Capturing** Critical Components of Student Incidents
- **Coaching** on Procedures and Next Steps

13

Gain Clarity Regarding the Allegation

The 5 W's: Who, What, When, Where, Why and How

- What happened?
- Who was present?
- Where and When did it happen?
- Who said what?
- Who else knows about what happened?
- How do they know?

14

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Tracking Student Incidents

15

Tracking Student Incidents

Campus Data is Shared

Data is Tracked on a Master Form Summarizing All District Student Incidents

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Components Tracked

- Investigation Status
- Incident Dates
- Incident Location
- Student Information
- Allegation Specifics
- Supportive Measures
- Notes
- Date Closed

17

Components Tracked

Investigation Status

Tracks the status of the investigation as *active* or *closed*

18

Components Tracked

Incident Dates

Captures the time frame of the incident, how it was reported, and by whom

19

Components Tracked

Incident Location

Captures the feeder, campus, level, and incident location.

20

Components Tracked

Student Information

Captures the student information of the **complainant** and **subject**

21

Components Tracked

Allegation Specifics

Captures the specifics of the allegation including witnesses and policy violation

22

Components Tracked

Supportive Measures

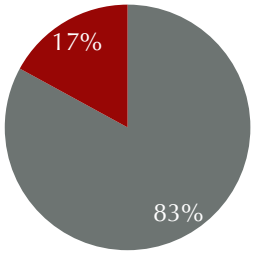
Captures the specific supportive measures including supports, referrals, and placements

23

Patterns Emerging in Student Incidents

24

Incident Reporting



The majority of student incidents are reported on the same day the incident occurs.

- Reported the Same Day of the Incident
- Reported Day(s) After the Incident Occurs

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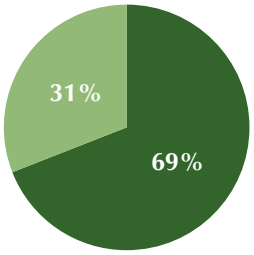
Location of Incident

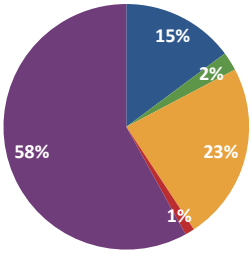


The majority of student incidents are occurring on campus, however 1/3 of incidents are taking place off campus.

- On Campus
- Off Campus

26

Who Brought the Allegation Forward?

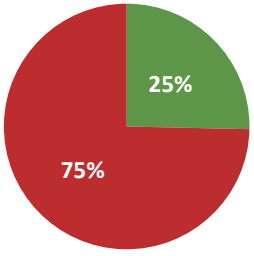


The majority of incidents are reported by 3rd Party individuals that were not present when the incident occurred.

- Complainant
- Witnesses
- Parent
- Subject
- 3rd Party

27

Is Camera Footage Available?



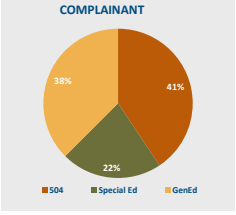
The majority of incidents are not captured by cameras.

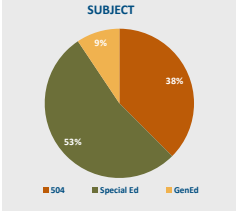
- Cameras Captured the Incident
- Cameras Did Not Capture the Incident

28

Students in Special Programs

More often than not, the students involved are part of a special population.





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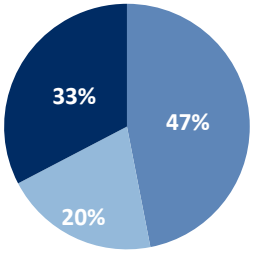
Grade Level

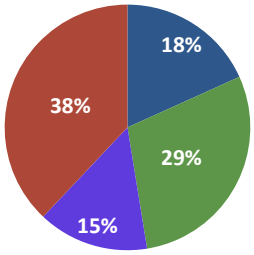


More incidents occur at the secondary level, however the most challenging incidents to investigate occur at the primary elementary level (PK-2).

- Elementary
- Jr. High
- High School

30

Incidents by Quadrant/Feeder



More student incidents occur in Quadrant 4 than any other quadrant of the District.

Quadrant 1 Quadrant 2
Quadrant 3 Quadrant 4

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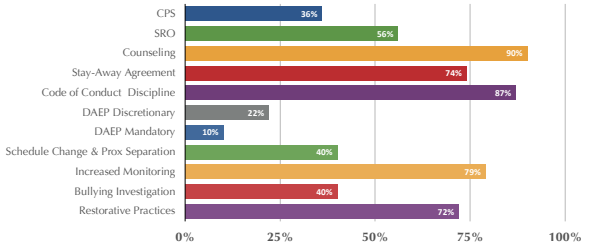
Supportive Measures



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Next Steps

33

Next Steps

- Conduct Investigations for New and Returning Administrators
- Increase Collaboration with School Resources Officers
- Conduct Round Table Discussions with Key Stakeholders
- Develop Training Modules Aligned with Data Trends

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INCIDENT – GUIDING QUESTIONS
5 W'S: WHO, WHAT, WHEN, WHERE, & WHY (HOW)

First: Are the students involved safe and separated from each other?

WHO:

Name(s) and ID numbers of students involved

SPED or 504?

Who bought the allegation forward?

WHAT:

Allegation/Complaint – specific as possible

When:

Date of allegation/complaint

When was school personnel notified?

Where:

On or off campus – specific as possible

Why (and How)?

Cell phones involved?

Other technology devices involved?

Social Media?

Written Statements Collected?

SRO/CPS Involved?

Any Witnesses?

Discipline History?

School: _____ **Administrator(s): _____** **Date_____**

Area Superintendent aware? _____

Spiller, D. (2021) Incident Guiding Questions

2024 Title IX Legal Update

Presented by:
Andrea L. Mooney

October 16, 2024

Andrea, a shareholder in our Plano office, received her Juris Doctor from Texas Tech University School of Law. She graduated magna cum laude with a Bachelor of Business Administration in Management also from Texas Tech University.

Andrea has an extensive background in litigation. Prior to joining our firm, she practiced family law for several years, successfully representing clients in highly contested divorce, custody, and adoption matters. This experience makes Andrea invaluable not only in court, but also in training school personnel in family law issues and in handling sensitive situations with parents and students.

Currently, one focus of Andrea's practice is the area of disability rights. She represents school districts in ARD meetings, Section 504 meetings, OCR complaints, mediations, and due process hearings. She also litigates appeals of due process hearings in the federal courts. She has prevailed in oral arguments before the United States Fifth Circuit Court of Appeals and has authored countless briefs and motions resulting in victories for school districts at the district and appellate court levels.

In addition, Andrea routinely litigates employment, personnel, and contract matters in both administrative and court proceedings. She is also a frequent speaker at school districts and regional education service centers across Texas on a wide variety of topics, including special education, personnel, family law, and student issues.

Andrea is admitted to practice in the United States Fifth Circuit Court of Appeals and the United States District Courts of the Northern, Eastern, Southern and Western Districts of Texas. She is a member of the School Law section of the Texas Bar and the Texas Council of School Attorneys.

Andrea's email address is amooney@edlaw.com.

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2024 TITLE IX LEGAL UPDATE

ANDREA L. MOONEY

EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

1

AGENDA

- 2024 Title IX Regulations – Review as Pertinent to Caselaw
- 2023-2024 Title IX "Year-in-Review"
- Title IX Across the Circuits
- Winding It Down!

DISCLAIMER: *This presentation contains accounts of sexual violence, abuse, and assault. All pictures, graphics, and any other visual media are for presentation purposes only and do not represent, portray, or intend to portray any figures, officials, or students in the provided cases. All similarities are pure coincidence, and all images, charts, or maps are duly obtained through creative commons.*

2

> *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.A. § 1681

3

2024 TITLE IX UPDATES REVIEW

- Changes to the federal regulations governing Title IX
- Supposed Implementation Date: August 1, 2024***

***But Wait!

4

2024 TITLE IX REGULATIONS REVIEW

- Sex discrimination now refers to any discrimination based on sex, including sex-based harassment such as quid pro quo, specific offense, and hostile environment harassments.
  - Sex stereotypes;
  - Sex characteristics;
  - Pregnancy and related conditions;
  - Sexual orientation; and
  - Gender identity

5

2024 TITLE IX REGULATIONS REVIEW

Hostile environment harassment defined as:

Unwelcome sex-based conduct that, based on totality of the circumstances, is subjectively and objectively offensive and is so severe OR pervasive that it limits ability to participate in or benefit from education program or activity.

6

2024 TITLE IX UPDATES REVIEW

- Not "actual knowledge," rather "knowledge of conduct that may constitute sex discrimination."

***Courts have always applied the "actual knowledge" standard (discussed below).

- Recipients must take "prompt and effective actions" to end, prevent, or remedy any Title IX violations.

7

2024 TITLE IX UPDATES REVIEW

- "Non-confidential" employees with authority to take corrective action or responsibility for administrative leadership, teaching, or advising must notify the Title IX Coordinator.
  - This also may conflict with the courts' definition of "appropriate person" as explained further in the cases below.
  - *We have not identified any "confidential" employees in school districts.

8

STANDARDS IN CASES V. NEW REGULATIONS

- "Actual knowledge" applied by courts is "knowledge of conduct that *may* constitute sex discrimination" under new regs.
- "Appropriate person" and individuals with "supervisory power" responsible for Title IX compliance/reporting are now essentially everyone under the regs: employees with "administrative, leadership, teaching or advising" responsibilities.
- "Deliberate indifference" under the regs is "prompt and effective actions" to end, prevent, or remedy *any* Title IX violations.
- "Severe, pervasive AND objectively offensive under the regs is "subjectively and objectively offensive" and "severe OR pervasive"

9

HOLD YOUR HORSES!!

10

TEXAS v. CARDONA

- State of Texas filed suit in the Northern District Court of Texas (Ft. Worth division) against Miguel Cardona (Secretary for the DOE) and asked the Court to set aside Title IX Guidance released on June 22, 2021 and June 23, 2021 by the DOE.
- The State asked to enjoin enforcement or implementation of the Guidance that Title IX protections extend to sexual orientation and gender identity.

2024 WL 2947022 (N.D. Tex. June 11, 2024), *corrected and superseded by* 2024 WL 3658767 (N.D. Tex. Aug. 25, 2024)

11

TEXAS v. CARDONA

Texas' Injunction from Enforcement of DOE Guidance in Texas GRANTED.

- After finding that Texas had standing to sue the DOE and that the Guidance could be reviewed, the District Court found the following:
  - "Sex" in Title IX was intended to only mean "biological sex"
    - Gender Identify and Sexual Orientation would not be included in this interpretation
  - Gender Identity and Sexual Orientation are "statuses" within the meaning of Title IX
  - Personal privacy would be at risk with the more expansive definition of "sex"
  - Female athletic competition would be substantially harmed and dangerous with a more expansive definition of "sex"
  - *Bostock* (Title VII precedent) differs in important aspects from Title IX

2024 WL 2947022 (N.D. Tex. June 11, 2024), *corrected and superseded by* 2024 WL 3658767 (N.D. Tex. Aug. 25, 2024)

12

TEXAS v. CARDONA (FINAL)

"The Court ORDERED that the [2024] Guidance Documents are unlawful, [including] that the anti-discrimination provisions of Title IX include sexual orientation or gender identity."

DOE is enjoined from *enforcing* the new Regulations in Texas against "[Texas's] respective schools, school boards, and other public, educationally based institutions"

DOE is also enjoined from continuing or starting any discrimination investigation based on "sex" as defined in the 2024 Title IX Updates.

2024 WL 3658767 (N.D. Tex. Aug. 5, 2024)

13

DEP'T OF EDUC., ET AL. v. LOUISIANA, ET AL. 08/16/2024 SUPREME COURT RULING

- SCOTUS UPHELD two federal court orders that blocked DOE from enforcing the ENTIRETY of the new 2024 regulation updates.
- What this means? DOE is enjoined from enforcing the new regulations in states that refuse to adopt the new Title IX changes, including Texas, at least pending litigation regarding the new changes.
  - DOE cannot pursue enforcement of the 2024 Regulations.
  - TEA says comply with the 2020 Regulations.

2024 WL 3841071 (U.S. Aug. 16, 2024)

14

STATE OF TEXAS v. UNITED STATES

- State of Texas filed suit in the Northern District Court of Texas (Amarillo division), seeking an injunction against the United States from implementing or enforcing the 2024 Title IX Regulation Updates. Injunction was GRANTED.
  - Enjoins final rule.
  - Court reasoned Texas WAS likely to succeed on the merits since the 2024 Update (1) *redefined* Title IX's prohibition against "sex discrimination," (2) *redefined* "sex-based harassment," (3) *illegally* protected abortion, and (4) changed procedural safeguards in the Title IX grievance process

2024 WL 3405342 (N.D. Tex. July 11, 2024)

15

STATE OF TEXAS v. UNITED STATES

- The Court reasoned:
  - Title VII case law and standards shouldn't govern Title IX determinations.
  - Title IX does NOT *specifically* address "gender identity" or "sexual orientation" and 2024 Update was "arbitrary and capricious."
  - The 2024 Update regarding "subjectively offensive" was *likely* to violate/chill First Amendment speech since the language of the regulations was not "narrowly tailored" to give a person of "ordinary intelligence" a "reasonable opportunity to understand what conduct is permitted."
  - The 2024 Update would require Texas insurers to cover abortions.

2024 WL 3405342 (N.D. Tex. July 11, 2024)

16

STATE OF TEXAS v. UNITED STATES

- Lastly, the Court found that 3 of the 5 grievance procedures ARE *arbitrary and capricious:*
  - The single investigator model
  - Title IX Coordinator's opportunity to initiate a complaint
  - Manner that parties may be allowed to access relevant evidence
  - Live hearing procedures
  - Recipient's ability to elect the standard of proof to be applied in proceedings

2024 WL 3405342 (N.D. Tex. July 11, 2024)

17

STATE OF TEXAS v. UNITED STATES

- Court concluded that Texas would suffer irreparable injury and that "public interest and balances of equity" favor Texas.
- "Limited to the State of Texas"
  - *But recall SCOTUS decision prohibited the DOE from enforcing the regulations for now.*

2024 WL 3405342 (N.D. Tex. July 11, 2024)

18

CARROLL INDEPENDENT SCHOOL DISTRICT v. U.S. DEP'T OF EDUC.

- CISD brought suit against the DOE regarding the 2024 Updates to Title IX.
- Sought a preliminary injunction against DOE's enforcement of the 2024 Updates.
- Court GRANTED CISD's request for a preliminary injunction

2024 WL 3381901 (N.D. Tex. July 11, 2024)

19

CARROLL INDEPENDENT SCHOOL DISTRICT v. U.S. DEP'T OF EDUC.

- The Court ruled that CISD was substantially likely to prevail on the merits and found that:
  - The 2024 Update does not formally redefine sex, but it does *functionally* redefine the term based on gender identity
  - The "non-transgender" student is being treated as "inferior and has access to fewer spaces and opportunities"
  - "Privileging" gender identity over biological sex is in no way authorized by the statutory text of Title IX.

2024 WL 3381901 (N.D. Tex. July 11, 2024)

20

CARROLL INDEPENDENT SCHOOL DISTRICT v. U.S. DEP'T OF EDUC.

- Court further concluded CISD would suffer irreparable harm without injunctive relief and the public interest/balance of equities weigh in CISD's favor.
- DOE enjoined from "implementing, enacting, enforcing, or taking any action in any manner to enforce the [2024 Update] against Carroll ISD."
  - DOE was specifically enjoined from enforcing the 2024 Update's "novel standard" for unlawful sex-based harassment, enforcing the "self-initate[d]" Title IX Coordinator processes, and "requiring [CISD] to enforce or apply [the 2024 Updates]."

2024 WL 3381901 (N.D. Tex. July 11, 2024)

21

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

22

MURPHY v. NORTHSIDE INDEPENDENT SCHOOL DISTRICT (RECAP FROM 2023)

- Chloe Murphy—a former cheerleader for Northside I.S.D.— filed suit against NISD for relief under Title IX, alleging that NISD "failed to provide female student athletes an equivalent level of funding, as compared to male athletes."
- Murphy and her teammate were forced to complete 150 frog jumps as punishment for tardiness.
  - Murphy alleged that the team was not given any water or breaks in the 100° weather and—when Murphy started to fall ill—no trainer was contacted.
- When Murphy got home from practice, she was taken to the hospital for dehydration and was placed there for a six-day stay.

2024 WL 1554057 (5th Cir. Apr. 10, 2024)

23

MURPHY v. NORTHSIDE INDEPENDENT SCHOOL DISTRICT (RECAP FROM 2023)

- District Court found when a plaintiff seeks damages under Title IX, they must allege "intentional discrimination." *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).
  - Test is whether the District intended to treat females differently on the basis of their sex.
- Court found Murphy failed to plead the following:
  - That NISD failed to protect her on the basis of her sex
  - That any NISD failures were intentional
  - That the frog jumps were district policy
  - That a district official had notice of her cheer coach's utilization of frog jumps, as a means of punishment
  - That similarly situated males were even treated differently
- The District Court Granted NISD's motion to dismiss Murphy's claim of Title IX discrimination and Murphy appealed to the 5th Circuit for Review

2023 WL 3232614 (W.D. Tex. 2023)
2024 WL 1554057 (5th Cir. Apr. 10, 2024)

24

MURPHY v. NORTHSIDE INDEPENDENT SCHOOL DISTRICT (5TH CIRCUIT UPDATE!)

- In 2024, 5th Circuit held that Murphy must show District "intended" to treat Murphy differently on the basis of her sex. *See Pederson v. La. State Univ.*, 213 F.3d 858, 882 (5th Cir. 2000).
- No facts suggest that this was the case.

TAKEAWAY: The 5th Circuit affirms that "Intention" is *still* the appropriate standard for assessing sex-based discrimination due to a school's policy.

2024 WL 1554057 (5th Cir. Apr. 10, 2024)

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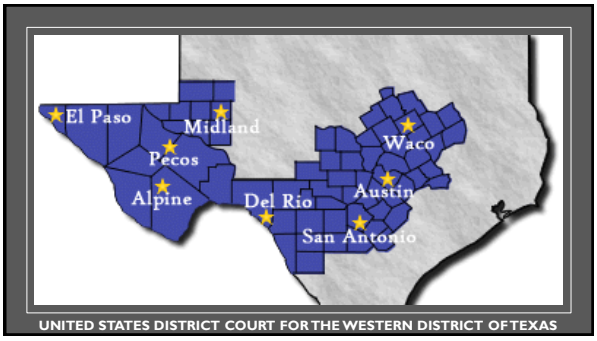

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

26

AYON v. AUSTIN INDEPENDENT SCHOOL DISTRICT

- Bus driver sexually assaulted student multiple times on the bus.
- Plaintiff's parents sued AISD for violation of Title IX and alleged Plaintiff was subjected to a hostile educational environment.
- To succeed on a pre-assault claim under Title IX, a Plaintiff must show:
  - A school maintained a policy *deliberately indifferent* to reports of sexual misconduct;
  - The policy created a risk of sexual harassment that was *known or obvious*;
  - The conduct was subject to the *school's control*; and
  - The harassment was so "*severe, pervasive, and objectively offense* that it…deprived Plaintiff of access to his/her educational opportunities."

2024 WL 1572408 (W.D. Tex. Feb. 5, 2024)

27

AYON v. AUSTIN INDEPENDENT SCHOOL DISTRICT

- Deliberate indifference by a school district, in the Title IX context, occurs when "a school official had *actual knowledge* that there was *substantial risk* that sexual abuse would occur."
- Court Granted Summary Judgment for AISD on the Title IX claim.

2024 WL 1572408 (W.D. Tex. Feb. 5, 2024)

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AYON v. AUSTIN INDEPENDENT SCHOOL DISTRICT

TAKEAWAY: *The standard is "actual knowledge," not "should have known."*

FINDINGS:

1. There was no evidence that AISD failed to respond to previous instances of sexual assault on its school buses; AISD installed cameras after the incident.
2. AISD installed the cameras because it knew that live monitoring would not be feasible.
3. AISD's response to the incident was not *clearly unreasonable in light of the known circumstances*
4. "School districts can allow police to handle assault investigations—instead of a Title IX Investigator—if there was a serious risk that criminal actions have occurred."
5. "*Should* have known" that assault was occurring is insufficient to show actual knowledge.

2024 WL 1572408 (W.D. Tex. Feb. 5, 2024)

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DOE v. KERRVILLE INDEPENDENT SCHOOL DISTRICT

- High school student Doe contended that she was sexually abused by two teachers: one being her JROTC educator and the other being her math teacher.
- Doe brought a Title IX claim against KISD based on
  - teacher-on-student sexual harassment by her JROTC educator and math teacher,
  - a hostile environment from student-on-student harassment, and
  - retaliation.
- KISD moved for Summary Judgment and—after trial—a Judgment as a Matter of Law on all three claims.

2024 WL 1705960 (W.D. Tex. Apr. 19, 2024)

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DOE v. KERRVILLE INDEPENDENT SCHOOL DISTRICT

- Court concluded the following on the Motion for Summary Judgment:
  - There was no fact question as to whether KISD had "actual notice" of the JROTC's sexual abuse of Doe
  - KISD failed to establish that it was not deliberately indifferent to its actual notice of the math teacher's abuse of Doe
- In reference to Title IX, the Court only Granted KISD's Motion for Summary Judgment pertaining to the JROTC's sexual abuse of Doe. All other claims survived KISD's Motion.

2024 WL 1705960 (W.D. Tex. Apr. 19, 2024)

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DOE v. KERRVILLE INDEPENDENT SCHOOL DISTRICT

TAKEAWAY: Court applied "supervisory power," "actual knowledge," and "deliberately indifferent" standards

- After trial, KISD moved for a Judgment as a Matter of Law against the claims of (1) the math teacher's abuse and (2) other teachers' harassment.
- In response, the Court found the following:
  - No individual with "supervisory power" had "actual notice" of the math teacher's harassment of Doe.
  - KISD was not deliberately indifferent since they "investigated/reprimanded" the offenders.
  - No reasonable jury could conclude that any verbal remarks by school officials were "because" of Doe's report of sexual harassment.
- The Court Granted KISD's Motion for Judgment as a Matter of Law.

2024 WL 1705960 (W.D. Tex. Apr. 19, 2024)

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

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DOE v. CITY VIEW INDEPENDENT SCHOOL DISTRICT

- Plaintiff attended high school at CISD from 2016 to 2020, where she was emotionally and sexually abused by a teacher/coach.
  - Eventually reported the alleged abuse to high school principal and CISD superintendent
  - Plaintiff alleged that Sup threatened her with expulsion and said that Plaintiff's aunt could lose her job.
- Beginning in 20222, Plaintiff made public outcry, regarding the teacher's abuse.
- Sup sent a cease-and-desist letter to Plaintiff.
  - Plaintiff filed this Title IX lawsuit shortly thereafter.

2024 WL 2856720 (N.D. Tex. June 4, 2024)

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DOE v. CITY VIEW INDEPENDENT SCHOOL DISTRICT

- Defendant argued that all of Plaintiff's claims are untimely (two-year statute of limitation in Texas to bring a Title IX claim).
- The Court found that Plaintiff's Title IX claim WAS untimely
  - In Texas, the plaintiff's claims do not accrue until the plaintiff reaches the age of majority (i.e., 18). A claim can also accrue and "the limitation period begins to run the moment the plaintiff becomes aware she has suffered an injury or has sufficient information to know that she has been injured." Time officially starts to run when the Plaintiff turns 18.
  - Doe turned 18 in 2020, more than two years before filing suit in April 2023.
  - Two relevant elements: (1) the existence of the injury and (2) the connection between the injury and the defendant's actions.

2024 WL 2856720 (N.D. Tex. June 4, 2024)

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DOE v. CITY VIEW INDEPENDENT SCHOOL DISTRICT

- Here, a reasonable person who was being abused and who had lodged complaints with administration would have investigated further and ultimately brought a complaint if her complaints were not addressed.
  - The record showed that Plaintiff was "sufficiently aware" *prior* to turning 18 and her claims accrued the moment she became of age—more than two years prior to the filing of the lawsuit.
- As a result, the Court GRANTED the Defendant's Motion to Dismiss on grounds that the statue of limitations for Plaintiff's Title IX claim had run.

2024 WL 2856720 (N.D. Tex. June 4, 2024)

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CAMPBELL v. COPPELL INDEPENDENT SCHOOL DISTRICT

- Plaintiff, a student at CISD, was removed to DAEP for threatening comments made online towards his chemistry teacher.
- In his Complaint, Plaintiff claimed that CISD violated Title IX by placing him in DAEP. More specifically, Plaintiff claimed retaliation and discrimination under Title IX, Title VI and Section 1983.
- CISD filed a Motion to Dismiss the Title IX claims.

2024 WL 991590 (N.D. Tex. Mar. 7, 2024)

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CAMPBELL v. COPPELL INDEPENDENT SCHOOL DISTRICT

- Court Granted CISD's Motion to Dismiss on the following grounds:
  - Plaintiff did not plead any facts to support that the district's policy was *intentionally* discriminatory or that an *appropriate* person had *actual* knowledge of discrimination.
  - Plaintiff did not plead any facts to support an adverse action or a casual link between an adverse action and the protected activity.

2024 WL 991590 (N.D. Tex. Mar. 7, 2024)

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BICHEL v. KENNEDALE INDEPENDENT SCHOOL DISTRICT

- KISD student (Plaintiff) was allegedly sexually harassed by both her peers in jazz band and an anonymous KISD student who was sending her derogatory texts during school hours.
  - Shared intimate photo without consent
  - Obscene name-calling in texts
- Upon alerting KISD personnel, the District conducted a "protracted investigation" into the bullying and harassment.
- Despite this, Plaintiff still claimed that Defendant's response was inadequate.
- Plaintiff sued KISD for violation of her Title IX rights for discrimination and student-on-student harassment.

2024 WL 1776405 (N.D. Tex. Apr. 24, 2024)

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BICHEL v. KENNEDALE INDEPENDENT SCHOOL DISTRICT

- Court granted KISD's Motion to Dismiss Plaintiff's Title IX claims on the following grounds:
  - Plaintiff had not pleaded sufficient facts to support that the sexual harassment was beyond "moderate sever[ity]." Rather, it was not "physically intimidating," though it was humiliating.
  - Likewise, the Court determined that KISD's "protractive investigation" was not "clearly unreasonable" in light of the "known circumstances."
- Given the student-on-student harassment claim determination, the Court also decided that Plaintiff did not plead sufficient facts to support a claim for discrimination under Title IX.

TAKEAWAY: "Humiliating" conduct by a student's peers was "moderately severe," but "physically intimidating" would have been "severe."

2024 WL 1776405 (N.D. Tex. Apr. 24, 2024)

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

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DOE v. BEAUMONT INDEPENDENT SCHOOL DISTRICT

- After being hired by BISD as a substitute, teacher sexually harassed and abused several female students, including having an inappropriate sexual encounters with many of the teenagers.
- Shortly after his termination, the parents of Student sued BISD under Title IX.
- Staff at teacher's former BISD campuses did not receive Title IX training prior to the incidents.

2024 WL 1329933 (E.D. Tex. Mar. 28, 2024)

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DOE v. BEAUMONT INDEPENDENT SCHOOL DISTRICT

- BISD moved for Summary Judgment on the Title IX claim.
- The Court decided whether BISD could be held liable for the teacher's sexual harassment.
  - The Court found that neither of the middle school's principals had "actual" knowledge of the teacher's inappropriate behavior. The fact that they "should have known" is not enough to satisfy Title IX's high burden.

2024 WL 1329933 (E.D. Tex. Mar. 28, 2024)

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DOE v. BEAUMONT INDEPENDENT SCHOOL DISTRICT

- Likewise, after accepting the Plaintiff's argument for a "heightened risk" analysis, the Court further found the following:
  - that the Student's counselor was an "appropriate person"
  - that school counselor had "actual knowledge."
  - a genuine dispute of material fact exists as to whether BISD was deliberately indifferent under Title IX.
- Accordingly, the Court denied BISD motion for summary judgment as to Title IX claim.

TAKEAWAY: Like *Ayon v. Austin ISD*, court applied "actual knowledge" and "appropriate person" standards.

2024 WL 1329933 (E.D. Tex. Mar. 28, 2024)

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

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MONROE v. ALDINE INDEPENDENT SCHOOL DISTRICT

- Student returned home without backpack and when Plaintiff asked for video footage of where backpack could be, it showed student being sexually assaulted by an older student on a school bus.
  - Plaintiff learned that older student was assaulting her child for several weeks.
- Following the assault, Plaintiff called for ISD to introduce bus aides on all buses, including daily review of footage, dismissal of AISD supervisors, counseling, and charges against bus driver.

2024 WL 3627777 (S.D. Tex. July 31, 2024)

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MONROE v. ALDINE INDEPENDENT SCHOOL DISTRICT

- Plaintiff filed suit under Title IX.
- AISD filed its Motion to Dismiss in response.
- Court found the following:
  - Plaintiff cannot bring individual Title IX claim. Court said this is not an IDEA matter.
  - Plaintiff has not adequately pleaded that AISD officials were "deliberately indifferent." No ISD official had "actual notice" that sexual abuse was occurring.
  - The Court dismissed Plaintiff's Title IX claims without prejudice.

TAKEAWAY: In this case, "actual notice" by an ISD official of sexual assault was required.

2024 WL 3627777 (S.D. Tex. July 31, 2024)

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LOERA v. KINGSVILLE INDEPENDENT SCHOOL DISTRICT

- Teacher was rumored to have an improper relationship with a KISD student. Thereafter, he resigned and moved to another ISD.
- Three years later, the same teacher regained employment with KISD, despite two board members voting against the re-employment.
- Teacher began a new improper relationship/harassment of a different KISD student and was arrested.
- Plaintiff filed suit against KISD under Title IX for rehiring the teacher.

2023 WL 8830750 (S.D. Tex. Dec. 21, 2023)

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LOERA v. KINGSVILLE INDEPENDENT SCHOOL DISTRICT

- Court denied KISD's Motion to Dismiss.
  - For "actual notice" Plaintiff needed to show *only* that KISD failed to act and knew of the "substantial risk" posed by teacher towards students "in general."
  - For "deliberate indifference," Plaintiff needed to show that it was obvious that the "likely consequences would be a deprivation of [Title IX] rights…"

TAKEAWAY: Knowledge of teacher's history will be considered in "notice" and "deliberate indifference" questions.

2023 WL 8830750 (S.D. Tex. Dec. 21, 2023)

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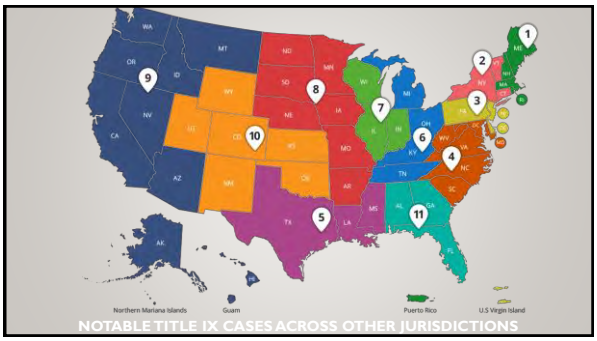

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SECOND CIRCUIT

CT, NY, VT

SOULE v. CT. ASSOC. OF SCHOOLS

Former non-transgender athletes filed action for damages and declaratory and injunctive relief after conference policy ten years ago **allowed transgender athletes to participate in athletics in accordance with their gender identity**.

Circuit decided in 2022 that Plaintiff's **DID NOT** have standing for an **injunction**

- The Circuit did not reach merits of overall standing under Title IX

Circuit Court held the following:

- Plaintiffs sufficiently alleged a concrete injury and monetary damages **would** be redressable for standing under Title IX.
- Vacated the previous District Court decision and **remanded to District Court**.

90 F.4th 34 (2d Cir. 2023)

FOURTH CIRCUIT

WV, VA, NC, SC

B.P. J. v. WV BOARD OF EDUCATION

*

- Transgender female student's mother brought action against state entities alleging that state law preventing transgender girls from playing on girls' athletic teams **violates Equal Protection and Title IX**.
- Circuit Court held the following:
  - Statute's definition of person's sex was facial classification based on gender identity and **subject to *intermediate* scrutiny**.
    - Remanded to District Court for further proceedings with this standard.
  - Plaintiff sufficiently showed she was treated differently compared to others "similarly situated," and **she was deprived opportunities on the basis of sex.**

98 F.4th 542 (4th Cir. 2024)

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NINTH CIRCUIT

WEST COAST + U.S. TERS.

HECOX v. LITTLE

*

- Transgender athletes brought action alleging that Idaho statute banning transgender women and girls from participating in women's athletics and subjecting all female athletes to intrusive sex verification process violated Equal Protection and Title IX.
- Circuit Court held the following:
  - ***Heightened* scrutiny** should apply for consideration of Plaintiff's claims.
  - Plaintiffs were likely to succeed, face irreparable harm, and the public interest favored **an injunction against the enforcement of the statute**.
    - Injunction is **necessary**.
  - **Remanded** to District Court to determine the scope of the injunction.

104 F.4th 1061 (9th Cir. 2024)

TENTH CIRCUIT

NM, UT, CO, WY, KS, OK

DOE v. R. M. C. ACADEMY

- Plaintiff brought Title IX and § 1983 action against school, alleging discrimination and retaliation under Title IX and a violation of Equal Protection from school's dress code, which **prohibited boys, but not girls, from wearing earrings**.
- Circuit Court held the following:
  - ***Intermediate* scrutiny** applies to the Plaintiff's equal protection and Title IX discrim. claims.
    - District Court applied wrong standard and should analyze both claims under intermediate scrutiny.
  - Affirmed the District Court's ruling that RMC didn't retaliate "***because*** he complained of sex discrimination." **Therefore, there was no viable Title IX retaliation claim.**

99 F.4th 1256 (10th Cir. 2024)

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KEY POINTS

- Courts are still ruling that a school MUST have "actual notice" or "actual knowledge" that abuse is occurring to be liable.
- "Deliberate Indifference" is also still the standard.
- School policy must be INTENTIONALLY discriminatory to violate Title IX.
- Buses have been common environment for Title IX incidents this past year—be observant.
- WATCH out for the SCOTUS's potential ruling on transgender athletics (*Hecox* + *B.P.J.*)

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THANK YOU

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Investigations and Appeals

Presented by:
Dennis J. Eichelbaum

October 16, 2024

Over the last thirty-five years Dennis has gained experience and is among the most successful school law litigators in Texas and can be found in our Metroplex office, that is, when he's not at a board meeting or training educators. As a founding shareholder and managing director, Dennis specializes in personnel, student, board issues, and litigation, with more than sixty-five cases published and more than thirty Commissioner of Education Decisions, he has achieved major school law victories at every level including the United States Supreme Court.

Since 1986, when he began practicing school law, Dennis has worked to help establish much of the case law in the Fifth Circuit protecting school districts from liability. Chances are when a court rules in favor of a school district they are supporting their decision with case won by Mr. Eichelbaum.

Dennis is a frequent presenter at school and legal conferences as well as regional seminars and local trainings. He is the author of numerous school law articles, including Preventive Law Corner articles on TexasISD.com. Dennis served for over ten years as an Associate Adjunct Professor of School Law at Texas Women's University.

Graduating in 1986 with a J.D. degree from Northern Illinois University College of Law, he received an award as an Outstanding Young Alumnus. He is admitted to practice in the following courts: U.S. District Court, Northern, Eastern, Southern and Western Districts of Texas; U.S. Court of Appeals, Fifth Circuit; and the U.S. Supreme Court. He is a member of the School Law Section of the Texas Bar, the Texas and National Council of School Attorneys. He has been a serious Cubs and Bears fan since 1969.

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INVESTIGATIONS & APPEALS

Dennis J. Eichelbaum

EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

TEXAS TITLE IX ADMINISTRATOR CONFERENCE

1

Agenda

- Old versus New Requirements
- Law Enforcement Delays
- Access to Evidence
- How to Handle Appeals
- 1 Policy 1 Procedure

2

2020 V. 2024 REQUIREMENTS

3

Investigation Requirement Differences - Overview

2020

- Must appoint two people: Investigator and Decisionmaker
- District cannot restrict a party's ability to discuss the allegations
- Parties are entitled to **written notice** of the date, time, location, participants, and purpose of **investigative interviews** and other meetings in this grievance process, with sufficient time for the party to prepare to participate.
- Allows for advisors

2024

- Can appoint single person to investigate and decide
- There is a reasonable expectation of privacy throughout the procedure
- Parties do not have the right to be present for interviews
- Does not include advisors

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Investigation Comparison – nearly the same

2020

Review **Formal Complaint**.

Determine whether there is an on-going criminal investigation and confer with law enforcement about whether the school's investigation will interfere with the criminal investigation.

Determine whether nature of allegations suggest the need for forensic interview by individuals specially trained in interviewing young children. If so, contact law enforcement or local child-advocacy center.

2024

Review the **Complaint**.

Determine whether there is an on-going criminal investigation and confer with law enforcement about whether the school's investigation will interfere with the criminal investigation.

Determine whether nature of allegations suggest the need for forensic interview by individuals specially trained in interviewing young children. If so, contact law enforcement or local child-advocacy center.

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Investigation Comparison

2020

Send written notice of interviews to parties, including date, time, location, participants, and purpose of meeting with sufficient time (3-5 days) for the party to prepare to participate.

Interview Complainant regarding facts and potential witnesses. Advisor may be present but cannot answer for the Complainant.

2024

Interview Complainant regarding facts and potential witnesses.

Interview Witnesses identified by Complainant.

Interview Respondent.

Interview Witnesses identified by Respondent.

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Investigation Comparison

2020	2024
Send written notice of interviews to parties, including date, time, location, participants, and purpose of meeting with sufficient time (3-5 days) for the party to prepare to participate. Interview Complainant / Witnesses / Respondent. Advisor may be present but cannot answer for the Complainant/Respondent.	Interview Complainant regarding facts and potential witnesses. Interview Witnesses identified by Complainant. Interview Respondent. Interview Witnesses identified by Respondent.

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Investigation Comparison

2020	2024
Gather physical evidence, visit incident site(s), review discipline and other relevant records of parties and witnesses. Review statements or reports from expert witnesses, if any. Allows parties access to facilities to gather evidence, if requested.	Gather physical evidence, visit incident site(s), review discipline and other relevant records of parties and witnesses. Review statements or reports from witnesses, if any. Organize relevant, permissible evidence in case parties wish to see the evidence.

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Investigation Comparison

2020	2024
Organize evidence to share with parties. Prior to completion of the investigative report, the investigator must send an electronic or hard copy of the relevant evidence gathered to the parties and the parties' advisors, if any. The parties must be provided at least 10 calendar days to submit a written response that the investigator must consider before completing the investigative report.	Draft investigation report

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Investigation Comparison

2020	2024
Prepare an investigative report that summarizes relevant evidence. The report may include proposed findings of fact. The investigative report must be sent to the parties at least 10 calendar days before the Decision Maker decides regarding responsibility. Send investigative report to Decision Maker.	Draft investigation report

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Staff Involvement

- When using the 2020 regulations, there must be separate people for investigation and decision-making
- Under both regulations, all those involved in the grievance procedure must be **trained**
- All individuals who participate cannot have any bias against complainants, respondents, or witnesses (2020 and 2024)
- Big schools v. small schools

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Complainant/Respondent Involvement

- The 2020 regulations allow far more influence from the parties:
  - Allowing their input on questions for interviews
  - Granting them the option of an advisor
  - Parties can discuss anything they want with whomever they wish (bullying, intimidation)
  - Giving their opinions on the investigation report (as if they are trained in Title IX)

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2024 Deficiencies

- Prohibits disciplining a party, witness, or others participating in a recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination whether sex discrimination occurred.
- *Either ignore this totally*, or add something to the effect that "persons may be disciplined for violating other policies or misconduct listed in the student code of conduct."

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LAW ENFORCEMENT DELAYS

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When to Contact Law Enforcement

- The "Big 4" → Domestic Violence, Stalking, Dating Violence, Sexual Assault
- These four offenses are included in both the 2020 and 2024 regulations
- Any instance where child pornography is involved

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Law Enforcement Delays

2020	2024
Determine whether there is an on-going criminal investigation and confer with law enforcement about whether the school's investigation will interfere with the criminal investigation. If so, the school's investigation may be abated for a short, defined period in cooperation with law enforcement. Contact law enforcement on a weekly basis regarding the status of the investigation. Document law enforcement contact and directives.	Determine whether there is an on-going criminal investigation and confer with law enforcement about whether the school's investigation will interfere with the criminal investigation. If so, the school's investigation may be abated for a short, defined period in cooperation with law enforcement. Contact law enforcement on a frequent basis regarding the status of the investigation. Document law enforcement contact and directives. When appropriate, the district's investigation must resume.

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Working with Law Enforcement

- Handling child pornography
- Searching electronic devices – fruit of the poisonous tree in some cases, they can subpoena (we cannot)
- Some law enforcement frown upon children being interviewed multiple times, considered traumatic
- Share evidence if you can – if they won't share you may have to ask the complainant/witnesses/the respondent to write their statements twice
- What is an "expected delay" really?
- Just because law enforcement is involved doesn't mean you can't put someone on administrative leave, stay away agreement

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Working with Law Enforcement

BEWARE

You do not want to be charged with obstruction of justice.

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ACCESS TO EVIDENCE

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Evidence

2020

Prior to completion of the investigative report, the investigator must send an electronic or hard copy of the relevant evidence gathered to the parties and the parties' advisors, if any. The parties must be provided at least 10 calendar days to submit a written response that the investigator must consider before completing the investigative report.

2024

Organize relevant, permissible evidence in case parties wish to see the evidence. Do not have to give evidence not deemed relevant to parties.

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Relevant Evidence

Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedure. 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.

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Impermissible Evidence

- Evidence that is protected under a privilege recognized by Federal or State law;
- A party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless the district obtains that party's or witness's voluntary, written consent for use in its grievance procedures; and
- 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.

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Relevant Evidence: 2020 Fears

What is to stop the evidence from showing up on social media?

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Sharing Evidence

- We do not recommend sending copies of evidence to the parties, especially electronically.
- **Only** let them review COPIES of the evidence.
- Have them come into the District to view the evidence.
- **Don't** let them make copies or take photos of evidence.
- Require them to leave their cell phones outside the room where the evidence is held and **supervise** their review of evidence.

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APPEALS

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Appeals

2020

The only allowable basis for appeal are:

1. Procedural irregularity that affected the outcome of the matter;

2. New evidence that was not reasonably available at the time of the decision that could affect the outcome; and

3. The Title IX Coordinator, Investigator(s), or Decision Maker had a conflict of interest or bias for or against Complainants or Respondents

2024

Use the appeals for all other complaints of discrimination; or change your policies to reflect the only allowable basis for appeals being:

1. Procedural irregularity that **would change** the outcome of the matter;
2. New evidence that was not reasonably available at the time of the decision that **would change** the outcome; and
3. The Title IX Coordinator or Investigator(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that **would change** the outcome of the matter.

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Appeal Policies

1. A procedural irregularity that would change the outcome of the matter;
2. New evidence was discovered that was not reasonably available at the time of the determination of responsibility or dismissal that would change the outcome of the matter; or
3. A conflict of interest on the part of a District official directly

The appellate decisionmaker's decision may be appealed to the Board of Trustees by filing a written appeal with the superintendent within three days after receipt of the decision. The written appeal must state all the bases for appeal and the remedy the student or parent is seeking. At a Board meeting after the appeal is received and for which proper notice can be posted, the Board will review the complete record of the investigation and determination, including the former written appeal. The Board may choose to take no action after reviewing the record and appeal, which has the effect of sustaining the last administrative decision. The Board may also choose to schedule an appeal at a future meeting at which the parents and administration may make an oral presentation. The Board's decision in either case is final and may not be appealed.

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Key Differences

- Make appeals for Title IX complaints two levels: (1) appellate decisionmaker, then (2) the board. No additional staff need spend their time and energy being involved and hearing a grievance
- Have written into policy that the Board reviews the record but has the option to not listen to oral presentations
- Narrow the grounds for an appeal

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ONE POLICY, ONE PROCEDURE

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One Policy Covers Claims of Discrimination Based on:

- Race
- Color
- Religion
- Sex
- Gender
- Gender identity
- Sexual orientation
- National origin
- Age
- Disability
- Or any other basis prohibited by law

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What about the "Texas Unmentionables?"

- Gender identity
- Sexual orientation

Regardless of politics or other personal beliefs, we do not permit anyone to DISCRIMINATE AGAINST, HARASS, or BULLY someone because of their gender identity or sexual orientation. Schools are to be a safe zone.

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A Singular "Civil Rights" Policy

- Put all discrimination claims under a singular policy: one policy, one procedure
- All of these claims will use the same *focused* grievance procedure
- Narrow the basis for all appeals
- Take all these claims out of the 3-4 level grievance procedure
- All discrimination investigations use the same forms

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THANK YOU

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2024

Expecting Equity: Pregnancy Rights Under Title IX

Lisa Ray is a 20 +-year lawyer and has served as Garland ISD's General Counsel since 2018. Lisa is the elder daughter of first-generation immigrants from India. In fact, Lisa was an immigrant herself as she was born in Toronto, Canada, but quickly became a U.S. citizen and a proud Texan.

She grew up in Houston and attended college at Loyola University in New Orleans and the University of Houston. She attended law school at South Texas College of Law, where she serves on the Alumni Board of Directors.

Lisa has been Board-certified in Labor Employment Law by the Texas Board of Legal Specialization since 2007. She has previously served as outside counsel and in-house counsel in the private and public sector. She is passionate about serving children and serves on the board of the International Dyslexia Association – Dallas Branch.

Lisa is married to Joey Ray, who is a CPA and works in finance. They have a strong constitution because even though they live in the DFW area, they are huge fans of the Houston Texans and the Houston Rockets. They are proud parents of a 15-year-old daughter, Devi, and a Yorkie mix puppy, Finn.

Mary Garcia is a seasoned educator with 33 years of experience. Currently serving as the Title IX Coordinator and Director of Student Services for the Garland Independent School District, Mary oversees a comprehensive range of areas related to student engagement and behavior, welfare, discipline, and safety.

Throughout her career as a teacher, campus principal, and also working at the district level, her experiences have given her a keen understanding of the complexities of student behavior and the factors that contribute to both challenges and successes in the educational setting. With a deep commitment to opening access and ensuring equity for students, Mary focuses on improving student behavior support for campuses, and ensures that students have the support and resources they need to thrive academically, socially, and emotionally.

Cindy Rodriguez serves as a Behavior Program Specialist and Student Deputy Title IX Coordinator at Garland ISD, where she plays a critical role in shaping the district's approach to student safety and compliance. With a master's degree in criminology, specializing in school violence. Her expertise lies in policy implementation, with a strong focus on areas such as Bullying, Behavior Threat Assessments, and Title IX.

In her role, Cindy oversees the investigation and resolution of Title IX complaints. She leads the development and delivery of training and educational initiatives aimed at preventing sexual harassment discrimination, and student safety. She actively collaborates with teachers, administrators, parents, and community members to uphold Garland ISD's commitment to maintaining a discrimination-free environment. Cindy is deeply passionate about creating a school culture where all students and staff members feel valued, supported, safe, and empowered to succeed.

Expecting Equity
Pregnancy Rights Under Title IX

Lisa Ray
Mary Garcia
Cindy Rodriguez

GISD

1

Agenda

- Proposed 2024 Regulations
- Policy
- Protections and Rights
- Practice and Supports

2

Proposed 2024 Regulations

The Title IX rule changes provide greater clarity about discrimination based on pregnancy or related conditions.

Include a clear requirement for academic institutions to provide pregnant and postpartum students with
- medically-necessary leave
- reasonable accommodations, and
- lactation space.

Clarify who is responsible for ensuring students get the reasonable academic adjustments, leave, and anti-discrimination protections they need to thrive. And, require staff to notify students of where they can find help.

Continue to ban discrimination based on **pregnancy-related conditions including abortion and miscarriage, and newly define 'parental status'** in a way that reflects the diversity of student parent families.

3

Policy and Other Resources

Student Rights and Responsibilities: Pregnant Students
Attendance: Attendance Enforcement
OCR: Title IX Guidance

4

Intersection of Pregnancy and Disability

- **Pregnancy itself is not a disability**
- **Some pregnancy-related conditions could manifest as a temporary disability when there is a medical necessity to put temporary reasonable accommodations in place**
- **Address using the same interactive process as any other temporary disability**

5

Title IX vs. ADA/504 Obligations

Title IX	ADA/504
• Prohibits sex discrimination against the student/employee • Provides the student/employee with the option of reasonable modifications or supportive measures • Allows access, on a voluntary basis, to any separate and comparable portion of the program or activity • Allows voluntary leave of absence • Ensures availability of lactation space	• Prohibits discrimination against individuals with disabilities (including temporary ones) • Follows school/district's interactive process • Provides reasonable accommodations using the interactive process

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Protections & Rights

- Definition
- Notice of Rights
- Participation in School
- Leaves and Absence
- Accommodations
- Lactation Rooms

7

Definition

Discrimination

Discrimination related to your current, potential, or past parental status, family status, or marital status.

Example: Excused absences to mothers but not fathers to take children to the doctor.

Harassment

Harassment related to pregnancy or a related condition

Example: Unwelcome physical touching, name-calling, sexual jokes, sexual propositions, or rumors about the student's sexual activity.

8

Notice of Rights

Pregnant Parenting

If a district employee becomes aware of a pregnant student or a student with a related condition, they are required to inform the student about their rights under Title IX.

The district employee must provide clear guidance on how to contact the Title IX Coordinator, who can offer further assistance, resources, and accommodations to ensure the student receives appropriate support and is protected from discrimination.

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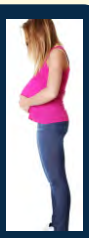
Pregnant Student Scenario

•A student notified administrators at South Texas High School of her pregnancy prior to beginning of the school year. She communicated with her teachers and the Title IX Coordinator about her coursework and her need to miss school due to pregnancy-related illness and, in one instance, hospitalization.

•Following multiple notices from the Title IX Coordinator, the school's administration continued to express concern to the pregnant student about her absences and continued to count her absences toward her truancy warnings.

•The student alerted the Title IX Coordinator when some of her teachers placed restrictions on late assignment submissions and denied her requests for academic adjustments, resulting in a failing grade. The school did not address these issues.



10

Participation in School

Students have the right to continue participating in classes and extracurricular activities while pregnant. This includes full access to advanced placement and honors classes, school clubs, sports teams, honor societies, student leadership roles, and other activities such as after-school programs offered by the school. Pregnancy should not limit a student's ability to engage in any academic or extracurricular opportunities.

The law requires that if schools choose to offer separate programs or schools for pregnant and parenting students, participation in those programs must be completely voluntary. A school can tell its students about an alternative program as an option but cannot urge or pressure its pregnant or parenting students to attend. Schools should let students know that they will be supported no matter what program they choose.

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Leaves and Absences

Schools must excuse absences due to pregnancy or related conditions, such as for prenatal or postnatal appointments, recovery from childbirth, or recovering from pregnancy-related illnesses.

These absences must be excused for at least as long as a healthcare provider determines is medically necessary.

Teachers may not penalize students for pregnancy-related absences.

Example: A teacher cannot refuse to accept a late assignment due to these absences.

Students must be allowed to return to the same academic and extracurricular status they held before their medical leave, including the opportunity to make up any missed work during their absence.

Provide pregnant students with the same special services it provides to students with temporary medical conditions.

This includes homebound instruction/at-home tutoring/independent study.

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Accommodations

Reasonable Accommodations:

Changes in the academic environment or typical operations that enables pregnant students or students with pregnancy-related conditions to continue to pursue their studies.

Reasonable accommodations may include, but are not limited to:

- Providing accommodations requested by a pregnant student to protect the health and safety of the student and/or the pregnancy
  - Ex: allowing the student to maintain a safe distance from hazardous substances
- Making modifications to the physical environment
  - Ex: accessible seating
- Providing mobility support;
- Extending deadlines and/or allowing the student to make up tests or assignments missed for pregnancy-related absences;
- Offering remote learning options;

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Lactation Rooms

- The school must provide a clean, private space for pumping milk or breastfeeding.
- This space cannot be a bathroom.
- The school must also allow breaks during class to pump milk or breastfeed.

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Lactation Rooms Scenario

- Carson is a student at Central Texas High School. She is a new mom and is nursing her child. She reaches out to her counselor to ask about accommodations for pumping during the school day.
- CTHS is an older school and does not have any dedicated lactation spaces. When Carson complains about using the girls' bathroom where other students can come in, the counselor arranges for her to use the restroom off of the teacher's lounge, which is a single restroom and has a lock to allow for privacy.

15

Bonds & New Facility Construction

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New Facility Construction

- Include your Title IX Coordinator or Title IX office on bond committee and have them review facility plans
- Title IX regs require schools provide equal athletic opportunity to members of both sexes
- This include facilities and the quality, maintenance, access to restrooms, field surface, availability of seating, scoreboards, lighting, fencing, dugouts, and concession stands, among other areas
- Equity in access to facilities

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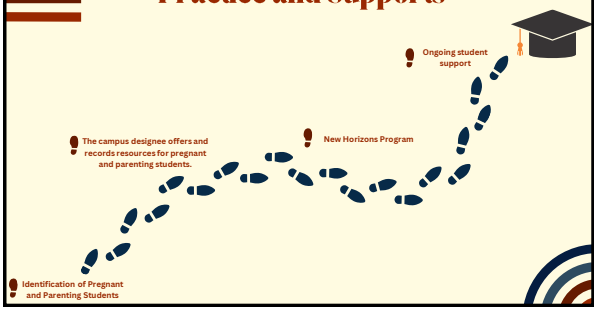
Practice and Supports



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Identification of Pregnant and Parenting Students

Administrator BOY Training

Identify any pregnant or parenting students at their campus

Notify the Title IX Coordinator through Guardian

Guardian

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Administrator's Responsibility

- ☐ Share the letter provided by the district's Title IX Coordinator, which outlines the student's rights and protections under Title IX.
- ☐ Ensure the student understands the process and the supports available to them.

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New Horizons Program

The New Horizons Program is dedicated to supporting pregnant and parenting teens in the GISD by providing a comprehensive network of resources through collaboration with schools, communities, and government agencies.

Academic Guidance: Assistance with basic academic skills and access to educational materials.	**Maternity Leave and Home Instruction:** Support during maternity leave and continued home instruction.	**Nutrition Assistance:** Help with prenatal nutrition, supplemental nutrition for children, and breastfeeding support.
Prenatal Care: Education on prenatal health and help securing prenatal care.	**Transportation:** Student and dependent transportation to and from school and the Infant Center, as available.	**Child Care:** Assistance with child care needs.
Counseling: Support in obtaining family life education, personal, family, and crisis counseling.	**Language Services:** District language interpretation services.	**Social Service Networking:** Connections to broader social services.
Parent Education: Resources and training to enhance parenting skills.	**Developmental Assessments:** Help with securing developmental assessments for infants and children.	**Post-Secondary Education:** Information on further education and training through SAPEs, School Counselors, and CTE Teachers.
Career Guidance: Help with career counseling and planning.	**Case Management:** Personalized case management to address individual needs.	**Immunization Referrals:** Guidance on obtaining immunizations for children.

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Ongoing Support

- Check-in on Academic and Personal Well-Being
- Reinforce Available Resources
- Document services provided and /or changes

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Thank you!

GISD

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Interviewing and Assessing the Credibility of Children in K-12 Schools

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Since 2005, Dr. Sherry has been involved in over 800 cases in family, civil, criminal, probate, immigration, education, and employment law conducting forensic psychological evaluations, both as a consulting expert and a court appointed expert. She has testified in deposition, bench, and jury trials well over 100 times. She is regularly consulted on issues pertaining to child suggestibility, bias, false allegations, and the science of interviewing of children.

Read more here - https://munevarsherry.com/alissa-sherry-phd/#alissa-qualifications

Interviewing and Assessing the Credibility of Children

In K - 12 Schools

Alissa Sherry, Ph.D., ABPP

MUNEVARSHERRY™ PSYCHOLOGICAL CONSULTING

Welcome!

Purpose

Child Suggestibility
Interviewer Traits
Interview Context
Question Types
Interview Components
Assessing Credibility

Forensic Interviewing of suspected child abuse victims is a specialized skill.

Suggestibility

Factors that Increase Suggestibility

Interviewer bias
Effects of repeated questioning
Effects of repeated misinformation
Emotional tone of the interview
Peer pressure or interaction
Being interviewed by a high status adult
Stereotype inducement
Use of anatomically correct dolls
Source attribution errors

Interviewer Traits

- Research Informed Practice
- Ongoing Training
- Interviewer Stance
- Developmentally Appropriate Language
- Culturally Competent
- Consult with Others

Interviewer Traits

Interview Context

- Preparation
- Timing; Duration
- Parent/Guardian Notification
- Location/Setting
- Documentation
- Number
- Participants
- Structure
- Rapport
- Developmental differences

Open v. Closed Questions

Tell Me Prompts
What happened next?
Time Segments
Sensory Focus

WH Prompts
Feeling Questions
Cued Recall
Interview Aids

Avoid Closed Questions!!

Interview Components

I don't know
Correct me
What do you mean?
Help me understand

Introduction
Inform
Ground Rules
Truth/Lie
Narrative Practice
Topic of Concern
Substantive Questions
Closure

Credibility

HINT: It's all you...

BARRIERS TO ASSESSING CREDIBILITY
Bias
Conflict of interest
Lack of understanding
Inability to separate personal beliefs from situation
Failure to properly prepare for interview

.

Assessing Credibility

Preparation
Plausibility
Observation/Demeanor
Motivations
History of Abuse
Inconsistencies
Culture

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Thank you!

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Practice Guidelines

Forensic Interviewing in Cases of Suspected Child Abuse

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Introduction

Forensic interviewing of suspected child abuse victims is a specialized skill. It is investigative in nature and used to obtain information to help determine whether abuse has occurred. Forensic interviews are most often conducted by specially trained child forensic interviewers, law enforcement investigators, and child protective service workers. These interviews can provide critical evidence for both criminal child abuse investigations and civil child protection proceedings. Information from the interviews may also identify other victims, assist professionals responsible for assessing risk and safety needs of children and families, and facilitate case management decisions. Because children are often a key source of information about alleged abuse (especially child sexual abuse), it is critical that these interviews be done competently.

These Guidelines are an update of the 2002 **APSAC Practice Guidelines** on *"Investigative Interviewing in Cases of Alleged Child Abuse."* They reflect current knowledge about best practices related to forensic interviews, and should be considered in conjunction with the 2011 **APSAC Handbook on Child Maltreatment** – **Third Edition** (see especially Chapter 20, *"Interviewing Children"* by Saywitz, Lyon & Goodman). They are aspirational and intended to encourage the highest level of interview proficiency and to offer direction in the development of training for child forensic interviewers. These Guidelines are not intended to establish a legal standard of care or a rigid standard of practice to which professionals are expected to adhere in all cases. They provide a framework for professionals who conduct forensic interviews and are not an all-inclusive guide. For example, these Guidelines, while informative, are not meant to provide specific guidance for medical providers, who may follow different standards when they interview children to obtain history as part of a medical evaluation.

Based on practical experience and empirical research conducted over the last three decades, these Guidelines are offered with the understanding that there is no single correct way to interview a suspected child abuse victim. Best practices will continue to evolve and change as new evidence becomes available. Currently, there are some aspects of interviewing for which there is limited or no evidence base. Interviewers will need to exercise their best professional judgment in individual cases and stay informed about the latest research and developments. As experience and scientific knowledge expand, further revision of these Guidelines is expected.

Forensic interviews of children most often involve allegations of sexual abuse, physical abuse, domestic violence and/or other serious crimes where the child is a victim or witness. The majority of forensic interviews involve children who have previously disclosed, and many of the recommendations herein are directed at such situations. However, many of the recommendations contained in these guidelines are also helpful and can be applied in cases of serious child neglect. For more specific guidance regarding interviewing in neglect cases, refer to the 2008 **APSAC Practice Guidelines** on *"Challenges in the Evaluation of Child Neglect."*

State statutes, court decisions, and local practices, as well as case characteristics may require interviewers to modify interview practices. Interviewers should remain flexible in applying these Guidelines and continuously seek new knowledge. Interviewers should adhere to the ***APSAC Code of Ethics*** and be prepared to justify their decisions about particular practices in specific

cases. A child who fails to disclose abuse in an interview may not have been victimized. On the other hand, a child's lack of disclosure in an interview or a subsequent recantation cannot be considered as definitive proof that abuse did not occur. Experts agree we do not yet know how to effectively elicit disclosures from child victims who are unwilling or extremely reluctant to disclose. Likewise, a decision not to pursue an abuse case in civil or criminal court does not necessarily mean there was no abuse.

I. Purpose of a Child Forensic Interview

The purpose of a forensic interview in a suspected abuse case is to elicit as much reliable information as possible from the child to help determine whether abuse happened. Interviewers attempt to collect facts in a neutral and objective way. In keeping with the ***APSAC Code of Ethics***, the interview should be conducted "in a manner consistent with the best interests of the child." Trauma to the child should be minimized, while considering all reasonable explanations for the allegations.

No interview is perfect. The child interview is only a part of a complete child protection or criminal investigation. Further investigation should be conducted to confirm or refute the allegations, and to see if details supplied by the child can be corroborated. Interviewers should always attempt to elicit information about specific facts that can be verified later – during a search of the scene as well as during interviews with other witnesses and the suspect. Additional investigation may corroborate facts elicited during the interview and thus prove the reliability of those facts, even at times when the interview was not conducted in a manner consistent with these Guidelines.

II. Interviewer Attributes

Forensic interviewers come from a variety of disciplines, agency affiliations and educational backgrounds. Even though interdisciplinary goals may differ, effective forensic interviewers utilize similar skills and techniques. Specialized knowledge is necessary and especially important when young children are being interviewed. This knowledge can be acquired through a combination of training, experience, supervision, and independent learning. Effective interviewers can be either male or female. Gender of the interviewer is usually less important than skill. However, if the child demonstrates a strong preference for a male or female interviewer, his/her preference should be accommodated when possible.

The following are recommended interviewer attributes, competencies and practice behaviors:

1. **Engage in Practice that is Research-Informed**
   Interviewers should make every effort to be aware of new and existing research relevant to forensic interviewing, and use this knowledge to guide them in improving their practice.

2. **Participate in Ongoing Training and Peer Review Whenever Possible**
   A. Complete specialized child forensic interview training prior to assuming primary responsibility for conducting formal forensic interviews.

B. Take advantage of opportunities to reinforce best practice interviewing skills and participate in continuing education on a regular basis.
C. Seek periodic review, evaluation and consultation from peers and more experienced colleagues in order to enhance skills.

3. Exhibit an Interviewer Stance Aimed at Eliciting Accurate and Reliable Information
A. Convey a warm, friendly and respectful manner while maintaining objectivity.
B. Be open-minded and consider all possible explanations for the allegation(s).
C. Attempt to equalize power and de-emphasize authority.
D. Provide non-contingent reinforcement.
E. Avoid stereotype induction (negative or positive characterizations of suspected abusers or the events disclosed).
F. Be patient and comfortable with silence.
G. Consider plausible explanations for unusual or seemingly inexplicable elements in the child's account; do not automatically dismiss the child's report when these are present.

4. Use Language that is Developmentally Appropriate
A. Tailor vocabulary, sentence structure, and complexity of prompts to the child's developmental level.
B. Continue to assess and clarify the child's understanding and use of language throughout the interview.

5. Adapt to the Individual Child
A. If possible, find out what the child was told and how the child is reacting prior to the interview.
B. Let the child set the pace for the interview and adjust accordingly.
C. Listen to the child; allow the child's responses to guide the questioning process and use the child's words whenever possible in follow-up questioning.

6. Demonstrate Respect for Cultural Diversity and Strive for Cultural Competence
A. Racial similarities do not necessarily mean two people share cultural norms; whereas racial differences between an interviewer and a child might be a source of initial mistrust.
1) Be aware of cultural influences on your own interviewing habits.
2) Develop the ability to accommodate the needs of diverse children.
3) Do not rely on stereotypical notions about members of any cultural group; rather, expect that members of groups manifest their culture in a wide variety of ways.
4) Remember cultures are in flux; how individuals and groups live their culture regularly changes in the larger context of societal change.
5) Engage in an ongoing process of self-reflection regarding personal responses and possible biases in order to cultivate greater cultural awareness and avoid stereotyping.
6) Remember that interviewers, children and their families are all cultural beings who bring their own definitions, nonverbal behavior, preferred phrasing, and habits of formality/informality to the interview process.

B. Learn as much as possible about the child's cultural background, practices and language proficiency prior to the interview, and adapt the interview accordingly.

1) If the child's family has recently immigrated, try to ascertain the degree to which the child and family have assimilated into the dominant culture.

2) Find out as much as possible about relevant cultural values such as parenting practices related to child discipline, hygiene, and sleeping and bathing arrangements; cultural definitions and expectations regarding child abuse, violence and sexual assault; and actions that might be expected when abuse, violence or sexual assault is suspected.

3) Determine the child's level of English proficiency and provide an interviewer who can conduct the interview in the child's native language whenever possible.

4) Note any cultural or family norms that may inhibit abuse reporting or impede the interviewer's ability to develop rapport with the child.

5) Cultural practices related to eye contact and pacing (e.g., longer pauses and more silences, or rapid overlapping speech) may vary and be apparent during the interview.

C. Be aware of potential barriers when there are religious, ethnic, social class, and/or linguistic differences between the child and interviewer.

1) Establishing rapport and trust may require more time and effort.

2) Kinship terms may not have the same meaning to the child as they do for the interviewer.

3) The child's culture may strongly discourage disagreement with or correction of adults; thus the child may agree more readily with suggestive questioning. Giving permission to correct interviewer mistakes and testing the child's willingness to do so, as well as asking open-ended questions and encouraging narrative responses becomes even more crucial in such circumstances.

4) The child's cultural norms may prohibit revealing sensitive, family-related information to a stranger.

5) Prior to the interview, it may be helpful to request that a respected elder or the child's non-offending caregiver give the child permission to talk with the interviewer and answer questions truthfully.

D. If a bilingual interviewer is unavailable, use qualified interpreters whenever the child is deaf/hard of hearing or when not proficient in English.

1) An experienced professional interpreter should interpret interview questions and responses for the interviewer and child.

2) The interpreter should be forewarned about the sensitive nature of the information that might be disclosed and instructed to interpret verbatim everything said by the interviewer and child.

3) As much as possible, the child's attention should be focused on communication with the interviewer. A sign language interpreter should sit next to the interviewer. It may be helpful to have a spoken language interpreter sit behind or beside the child with the interviewer facing the child.

4) As a general rule, family and friends should <u>not</u> be used as interpreters.

7. Accommodate Any Special Needs the Child May Have, Including Physical and Developmental Disabilities

A. Find out whether the child has any special needs that should be taken into account before the interview begins.

B. Ascertain if any medications the child may be taking are likely to affect the child's behavior, communication, and/or ability to relate, perhaps in consultation with medical personnel and schedule the interview accordingly.

C. Because adaptive equipment (e.g., wheelchair, helmet, hearing aid, computer) is typically regarded as an extension of the child's body, ask permission before attempting to touch or adjust the equipment. Evaluate how, if at all, this may affect the interview; ideally in consultation with others who know the child (e.g., medical and school personnel, case managers, non-offending caregivers).

D. If a child has developmental delays or disabilities, consult with teachers, parents, physicians or others familiar with the child whenever possible to determine the child's level of functioning. During the initial stages of the interview, carefully assess whether the interviewer and child are communicating effectively.

E. Be aware that some children with developmental delays may aim to please and reply to questions in a manner they believe the interviewer desires.

8. Actively Participate as Part of a Multidisciplinary Team, If Available

Whenever possible, the interviewer should consult with other professionals involved with the child, the child's family, or the investigation before, during (if they are observing), and after the interview.

III. Interview Context

The circumstances surrounding a forensic interview can influence its outcome and should be carefully considered.

1. Preparation

It is helpful to know as much as possible beforehand about the child (e.g., cultural, developmental, emotional, behavioral, and cognitive functioning) and the reason for the interview. This can include reviewing the specifics of the referral as well as communicating with the child's non-offending caregiver and other professionals involved in the case. Such information will assist the interviewer to better meet individualized needs, and to understand the child's reactions and statements. It will orient the interviewer and suggest possible avenues of inquiry. The interviewer should keep in mind that the background information may be incomplete and/or inaccurate. Rather than being used to confirm a particular hypothesis, the information should be used to encourage the child to provide as many details as possible in his/her own words. It should also be used to facilitate the development and exploration of alternative explanations for the allegation as well as for pre-planning specific transition prompts and additional questions.

2. Timing and Duration

The initial child interview should occur as close in time to the event in question as feasible. Whenever possible, the child interview should also be timed to maximize the

child's capacity to provide accurate and complete information. This often involves consideration of the child's physical and mental state (e.g., alert, rested) as well as immediate safety. The possible impact of delays on the child's ability to recall and willingness to report an experience should also be taken into account.

As a general rule, it is preferable to aim for shorter rather than longer interviews, especially with younger children. The interviewer should listen to the child's cues and be mindful of signals indicating fatigue, loss of concentration, or need to use the bathroom. When breaks are taken, what occurs during break time should be documented.

3. Parent/Guardian Notification

Interviewers should consult local procedures and legal requirements to determine if and how notice should be given to parents prior to and after the forensic interview. Parental notification may be inadvisable when parents or other family members are suspects, and/or when notification may result in attempts to influence the child's report, prevent the interview, or cause destruction of evidence.

4. Location/Setting

It is recommended the interview occur in a neutral environment whenever possible. The setting should be private, informal, and free from distractions. Children's advocacy centers and other specialized interview rooms are advantageous because they are generally child-friendly, and allow for observers as well as audio and video recording. If the child is to be interviewed at school, prior arrangements should be made with school officials regarding an appropriate interview room, the child's availability, and who else will be present during the interview. If at all possible, law enforcement officers should arrive at the school in unmarked cars and wear plain clothes. If it is necessary to conduct an interview where abuse may have occurred, the interviewer should confirm the suspected offender is not in the vicinity and that there is a reasonable degree of privacy.

5. Documentation

Video recording is recommended to document the forensic interview whenever possible. Care should be taken in setting up the video recording equipment to insure everything is accurately documented, including what both the interviewer and child say, as well as their facial expressions, movements and positions. If video recording is not possible for logistical or local policy reasons, audio recording is recommended. It is important to carefully follow local policy and requirements for keeping interview recordings secure and confidential. Protective orders can be used and/or local protocols developed to prevent copying and/or inappropriate use or distribution of recordings.

If neither video nor audio recording is available, written notes should be as close to verbatim as possible for both interviewer prompts and the child's responses. If another professional is assisting or observing the interview, that person may be a good choice for note taking.

6. Number

A policy that limits the investigative or fact-finding process to a single interview is not recommended. Professionals should attempt to share information so as to minimize unnecessary multiple interviews. The number of interviews should be governed by the number necessary to elicit complete and accurate information from the child. One interview is sometimes sufficient, but multiple interviews may produce additional relevant information, as long as they are open-ended and non-leading. When further investigation or subsequent disclosures indicate there may be additional abusive incidents or offenders, additional interviews are usually appropriate. In order to minimize the child's distress as well as the risk of acquiescence to presumed interviewer expectations, careful consideration should be given to who should conduct subsequent interviews. A referral for an extended forensic assessment may be appropriate in situations where the child has not disclosed during a routine forensic interview but there is significant reason to suspect abuse.

7. Participants

A. Number of Interviewers

A single interviewer is generally preferred. Depending on jurisdictional protocols and individual circumstances, joint interviews involving more than one professional (e.g., child protection worker, law enforcement investigator) may be appropriate. If more than one person is present, a lead interviewer should be designated; usually the most experienced and qualified interviewer, or the person preferred by the child. Audio-visual equipment or one-way mirrors can be used to enable other members of the multidisciplinary child abuse investigative team to observe the interview. The interviewer should have a means of receiving feedback and questions from observers, and can take a break to consult with them prior to concluding the interview.

B. Advocates or Support Persons

Some jurisdictions have policies or statutes that grant children the right to have an advocate or support person present during interviews, providing the presence of the person does not interfere with the course of the investigation. Interviewers should meet with the support person ahead of time to establish rules of conduct and the importance of refraining from direct involvement in the interview. It is best to have the support person sit behind the child and instruct him/her not to say anything or otherwise assist the child in responding.

C. Parents

In general, parents (or other relatives and caregivers) should not be present during the interview. If a child refuses to separate, it may be appropriate to allow the caregiver to be present during the initial stages of the interview. The caregiver should be instructed not to influence the child in any way. If possible, he or she should leave the room prior to issues of abuse being raised. The interviewer or another member of the multidisciplinary team may debrief the parent or caregiver following the interview.

D. Suspected Offender

No one suspected of committing abuse should be present or in the vicinity during an interview. This recommendation would also preclude a suspected offender from accompanying the child to or from the interview site.

E. Other Children

Except in rare circumstances, siblings and other suspected victims should be interviewed separately. Additionally, information obtained from another alleged victim or witness should generally not be shared with the child.

8. Structure

Both structured and semi-structured interview formats can be effective and increase adherence to best practice recommendations. While it is important for the interviewer to be flexible and adapt the interview to the individual child, completely unstructured interviews are not advised. A phased approach is recommended, with an introductory stage (e.g., introductions, explanation of documentation and observers, interview instructions, narrative practice), an information gathering stage (e.g., transition to topic of concern followed by prompts aimed at gathering details about the suspected abuse), and a closure stage (e.g., final clarification questions, opportunity for child to ask questions, assessment of safety, re-establishing child's equilibrium). Interviewers should pay careful attention to the child and adapt accordingly. For example, if a child begins talking about abuse very early in the interview, covering all components of the introductory stage may be unnecessary and could be counter-productive.

9. Importance of Establishing/Maintaining Rapport

Rather than being a discrete stage of the interview, rapport should be established and maintained throughout the entire interview. The pace of the interview is primarily established by the child. The interviewer must be sensitive to the child's needs and appreciate how difficult it may be for the child to talk to a stranger. The child should not be pressured to respond to questions.

10. Linguistic and Developmental Considerations

Interviewers should be knowledgeable about basic concepts of child development and linguistics. Although age-related developmental norms exist, there are variations among children and within age groups. Each child should be approached as an individual. The best way to gauge the developmental and linguistic capacity of the child being interviewed is to pay close attention to the child's use and understanding of language. Consequently, it is important to encourage narrative responses from the beginning of the interview and assess the child's ability to respond to open-ended questions. It is also important to remember that a child who stumbles in English might be very competent and able to provide a full disclosure in his or her first language. The child's linguistic and developmental abilities should be assessed in the language in which he or she is most competent.

Memory source monitoring is the ability to recognize the source of a memory for an event. It is an important developmental consideration during a forensic interview. School-age children are better able to differentiate between events they have personally experienced and events they have only imagined, heard about or been told about. If there is a concern about the source of a memory, interviewers should consider asking the child to clarify and expand on where the memory comes from (but remember preschoolers may not be able to do so):

- *"How do you know that?"*
- *"Tell me everything you heard when_____."*
- *"Tell me everything you saw when _____."*

Appendix A contains additional information related to *Basic Developmental and Linguistic Concepts.*

11. Question Types

Interviewers should utilize questioning techniques most likely to enhance the production of reliable information from children. It is widely agreed interviewers should avoid inappropriately suggestive techniques (e.g., questions that reflect interviewer biases or reinforce interviewer expectations, that invite children to pretend or speculate, or that are coercive). While there are a number of ways to categorize and define question types, the most useful distinction for interviewers to keep in mind is the difference between open-ended and closed-ended questions. Open-ended questioning techniques should be maximized because they invite more complete narrative responses from recall memory and elicit the most accurate information. The use of closed-ended questions (or "recognition" prompts) that encourage guesses and short answers should be minimized.

A. Open-ended questions/techniques

Interviewers should always think about the best way to phrase questions, listen carefully to the child's responses, and whenever possible, incorporate the child's answer into subsequent inquiries. While the child's age, developmental capabilities, and motivation will affect the length of their answers, open-ended narrative invitations consistently produce longer and more informative answers, especially when narrative practice about a neutral event is included early in the interview.

The concept of a funnel can be a useful way to think about how to formulate questions. One should begin with a prompt that is as broad and open-ended as possible (top of the funnel), but if not productive, the interviewer should only gradually narrow his/her focus. Follow-up questions should not quickly become narrow nor stay extremely direct and focused. Once the child responds with some information, questioning should once again "recycle" to the broad end of the funnel, sometimes referred to as the "hourglass approach." A related concept is "pairing" focused or direct questions with open-ended follow-up prompts (i.e., routinely following short answers given by a child with open-ended requests to elaborate).

The following are some additional techniques an interviewer can use to encourage narrative responses in the child's own words.

1) ***"Tell Me"* Prompts**:
"Tell me" can be incorporated in numerous ways in interviewer prompts and is one of the most useful ways to invite narratives. Some helpful examples include, *"Tell me everything that happened,"* and *"You said_____. Tell me everything/all about/more about that."*

2) ***"Then what happened?"* and *"What happened next?"* Questions:**
These types of questions are another excellent way to encourage elaboration during interviews.

3) **Time Segmentation Prompts**:
Breaking an event into smaller segments of time and requesting more details is an effective open-ended strategy. For example, *"Tell me everything that happened from* [some action already mentioned by the child] *until* [another action mentioned by the child]."

4) **Sensory Focus Questions:**
As endorsed in cognitive interviewing, it is often advisable to focus the child on sensory perceptions and request additional details. For example, *"Tell me everything you saw,"* and *"Tell me everything you heard."*

5) **Open-ended "WH" Prompts:**
Another non-suggestive and open-ended strategy is to ask general but concrete "WH" questions that focus on *"Who," "What,"* and *"Where"* and encourage more than one-word answers.
For example:
   - *"What happened when* [repeat child's words]?"
   - *"What did* [name] *do with his hands?"*
   - *"Tell me all about the person who did that."*
   - *"Tell me all about the place where it happened."*

   The best way to elicit information about *"when"* something happened is to gather concrete information related to the context of the abuse in order to identify factors that can help identify the time frame for the event in question. For example, *"What else was happening that day?"*

6) **"Feeling" Questions:**
Open-ended prompts that ask the child to describe physical or emotional feelings, reactions, and thoughts may produce forensically relevant details or shed light on the child's frame of mind, and thus are helpful in assessing allegations of abuse.
For example:
   - *"How did that make you feel?"*
   - *"How did that make your body feel?"*
   - *"How did you feel when* [name] *touched you?*
   - *"How did your body feel when* [name] *touched you?"*
   - *"What did you think when* [name] *touched you?"*
   - *"How did you feel after* [name] *touched you?"*

- *"How did it feel when you went to the bathroom?"*
- *"How do you feel about everything that has happened?"*

7) <u>Cued Recall Questions</u>

Cued invitations and focused recall questions, especially when the cues are action oriented, have been shown to be particularly useful with preschoolers. The interviewer directs the child's attention to a specific topic (i.e., 'cues' the child) and then requests further information by encouraging narrative responses from the child. The cue is chosen from a previous statement of the child or may be related to an area not yet discussed, taking care to make it as non-suggestive as possible. Common examples include: *"You said _____. Tell me <u>all about/everything about/more about</u> that,"* and *"I heard something about* _____ [non-suggestive cue]. *Tell me about that."*

B. Closed-ended Questions

Closed-ended questions that can easily be answered with one or two words are usually categorized as 'recognition' prompts. "Yes/no" and multiple or forced choice questions are examples of common recognition prompts. Characteristically, when a majority of interview questions are closed or recognition prompts, the interviewer talks more than the child. There are a number of potential problems with closed questions – the child's response is limited and offers no information beyond that provided by the interviewer; closed questions rely on interviewer-supplied information which may be incorrect or biased; closed questions are more prone to response biases (a 'yes' or 'no' bias, or a first or last item bias); it is often unclear whether the child really understands the words used by the interviewer; and such questions encourage guessing, thus leading to increased inaccuracy. For all these reasons, interviewers should strive to decrease the number of closed–ended questions in their interviews.

When necessary to ask recognition questions with young children, they should be phrased carefully to reduce the amount of information suggested in the question. For example, one possible strategy would be to phrase a yes/no question so that it suggests the opposite of the expected answer (e.g., *"Did* [name] *want other people to find out about what happened?"*) and then follow the likely negative answer from the child with, *"How do you know?"* or *"Tell me more about that."* The negative impacts of closed-ended questions can be reduced if the interviewer follows the child's short answer with an open-ended request to elaborate and provide more information.

12. Use of Interview Aids/Media

Because interview "props," aids, and media tap less accurate recognition memory rather than free recall, they should be used with caution. Therefore, interviewers and investigators should have less confidence in the information gathered using only media. A variety of such "props" have been used by interviewers over the years, especially with young children, in hopes that it will increase the children's comfort and help them provide more details about their experiences.

A. Anatomical Dolls

Anatomically detailed dolls received a great deal of attention from researchers, commentators, and interviewers in the 1980s and 1990s. However, their use has significantly declined, largely due to challenges claiming the dolls were unduly suggestive and/or invited fantasy. Published in 1995, APSAC's Practice Guidelines on *"The Use of Anatomical Dolls in Child Sexual Abuse Assessments"* reflected generally accepted practice and knowledge at that time. (These Guidelines are under review and are subject to revision in the near future.) As APSAC's 1995 Guidelines recognized, it is inappropriate to use the dolls as a diagnostic tool and reach conclusions about whether or not sexual abuse has occurred based solely on a child's behavior with dolls. And though other uses were discussed in APSAC's 1995 Guidelines, employing them as a demonstration aid and clarification tool to assist a child in 'showing' what happened is the most frequently endorsed use of anatomical dolls. There is widespread agreement now that dolls should not be used to elicit disclosures. Whenever dolls are used, careful documentation (by video recording if at all possible) is essential, and the interviewer should use open-ended prompts to ask the child to explain what he or she is demonstrating. See ***Appendix B*** for a summary of generally agreed best practices for using anatomical dolls as a demonstration aid during the forensic interview.

B. Child's Abuse-Related Drawings or Writings

When additional details are desired or if the child is having difficulty providing a verbal account, it may be useful and appropriate to ask if the child would be able or prefer to explain what happened by writing it down or to show what something looked like by drawing a picture. The interviewer should ask open-ended questions that invite the child to explain what he or she has drawn or written. As with anatomical dolls, the interviewer should not make assumptions about what the child means. Any drawings or writings produced by the child to explain or clarify abuse-related information should be described in the interview documentation, labeled appropriately, and preserved/retained as evidence.

C. Anatomically-Detailed Drawings/Body Maps

As the use of anatomical dolls decreased, there was a concomitant increase in the use of anatomically detailed drawings (or "body maps") to have the child label body parts and to facilitate discussion about touching. Despite their popularity, there has been little research regarding the impact these drawings may have on the reliability of information elicited during the interview. Recent research suggests an increased risk of producing erroneous reports of touch when anatomically detailed drawings are introduced early in the interview, especially to elicit initial disclosures of abuse. Although this research has limitations, interviewers would be well-advised to attempt open-ended invitations to elicit disclosures first, and to use anatomically detailed drawings with caution.

As an alternative to having the child provide labels for body parts early in the interview, the child's terms for body parts can be clarified following a disclosure of possible abuse. Being careful not to interrupt a narrative, the interviewer can ask

questions to clarify where the child was touched, the child's word(s) for the part(s) touched, and the location and function of the relevant body part(s). If aspects are unclear or additional details would be beneficial, the interviewer may consider the careful use of drawings for verification and elaboration, while continuing to seek verbal explanations. Some interviewers prefer to use body outlines without anatomical details for this purpose.

When the level of suspicion for abuse is very high and other inquiries have not been productive, some interviewers may choose to use drawings to provide a visual aid that focuses the child on body parts. Interviewers who do so must be prepared to defend their actions against criticism that they were unduly suggestive. It is critical to follow any disclosures elicited in this way with open-ended requests to elaborate in order to encourage the child to provide narrative responses that contain additional relevant details.

As research in this area continues, better guidance is expected to emerge regarding appropriate uses of anatomically detailed drawings and body maps.

D. Other Media

Other media (e.g., hand puppets, doll houses, flash cards, sand trays) are not recommended for use in forensic interviews. Though such items may be useful for treatment, they may encourage fantasy, result in distortions, and/or be distracting or suggestive during a forensic interview.

For all the reasons detailed above, it is recommended interviewers start interviews with an attempt to develop rapport by encouraging the child to talk. Media should be considered only when deemed necessary to gather information, and its use should be carefully documented (by video-recording if at all possible), and always accompanied by requests for verbal elaboration from the child.

IV. Interview Components

APSAC recommends a narrative interview approach with an emphasis on research-based free recall techniques aimed at eliciting reliable verbal narratives whenever possible from children. Throughout the interview, interviewers are encouraged to listen more and talk less, and to ask more open-ended questions and fewer closed questions. The following structure reflects components appropriate for inclusion in many forensic interviews.

1. Introduction of Self, Role, and Purpose of the Interview

Interviewers should introduce themselves and provide a brief neutral explanation of their role and the purpose of the interview, using simple, non-suggestive, developmentally appropriate language. Interviewers should strive to convey a manner which immediately helps the child feel safe and at ease.

Some experts also recommend asking a few questions to assess the level of support for the child, for example:

- *"How do you feel about talking to me today?"*
- *"Are you worried about talking with me today? Tell me how come."*
- *"Is someone else worried about us talking today? How do you know?"*

Depending on the child's concerns and frame of mind, it may be appropriate to provide reassurance that the child is not in trouble with the interviewer and that the interview is not taking place because the child has done something wrong. Interviewers should be careful, however, not to inadvertently suggest such concerns to the child.

2. Informing Child about Documentation Method

It is recommended interviewers inform all children, in a simple and matter-of-fact way, about how and why the interview is being documented as well as about anyone observing the interview. Interviewers should consult their local legal counsel to determine whether explicit consent for audio or video recording of the interview is required and proceed accordingly.

3. Interview Instructions/"Ground Rules"

Interview instructions (or "ground rules") at the beginning of the interview serve to orient the child to the unique expectations of a forensic interview and explain permissible responses. When properly presented, the instructions listed below can reduce the inclination to guess, increase willingness to ask for clarification, and increase resistance to suggestion. When good interviewing techniques are utilized in the rest of the interview, this can increase the accuracy of information generated from the child. Interview instructions are most effective when presented one at a time and phrased simply and succinctly. For children 10 years old and younger, and for those who may be extremely shy or deferential, the first three instructions listed should be accompanied by appropriate practice examples that allow the child to demonstrate understanding and ability to comply. Positive acknowledgment whenever a child follows instructions during the interview is also advised. When done well, the following four key instructions should take no more than a few minutes.

A. Give permission to say *"I don't know"* – the '*Don't Guess*' instruction: Explain if the child knows the answer to a question, he or she should answer, but if the child does not know, not to guess and it is okay to say *"I don't know."* Practice examples should be used to reinforce both aspects of this instruction with children who are age 10 or younger and those who are extremely shy or deferential.

B. Give permission to correct interviewer mistakes – the *'Correct Me'* instruction: It is critical to encourage the child to correct interviewer mistakes. Children age 10 and under, and those who are extremely shy or deferential should also be provided with a practice example to reinforce this message.

C. Give permission to admit lack of understanding – the '*Tell Me If You Don't Know What I Mean*' instruction:

Tell the child to let the interviewer know when something is said that the child does not understand so it can be said in a different way (but avoid using the word *'understand'* with young children since they may not know what it means). Follow

the instruction with a practice example for children age 10 and under, and for any others who seem unlikely to ask for clarification or admit lack of comprehension.

D. The uninformed interviewer – the '*Help Me Understand*' instruction: In order to counter any belief by the child that the interviewer already knows what happened and expects specific information, it is important to convey to the child that the interviewer does not know what happened and cannot help the child answer his/her questions.

See ***Appendix C*** for illustrations of possible phrasing and practice examples for the preceding four instructions.

E. Additional instructions: Depending on the circumstances, the following additional instructions may be appropriate to reinforce *during* an interview.

1) **Give permission to admit lack of memory – the *'I Don't Remember'* instruction**
2) **Give permission not to answer,** for example, "*Tell me if I ask a question that you don't want to answer right now."*
3) **Explain repeated questions,** for example, *"If I ask the same question more than once, it doesn't mean your first answer was wrong. Maybe I forgot or got confused. If your first answer was right, just tell me again."*

4. Truth/Lie Discussion

There are two separate and distinct aspects to a discussion of the concepts of truth and lie during a child forensic interview – eliciting a commitment to tell the truth from the child, and assessing the child's testimonial competency with regard to understanding of the concepts of 'truth' and 'lie.'

A. Eliciting a promise to tell the truth

It is recommended that interviewers ask the child tell to the truth (or to talk only about things that really happened) during the interview since existing research shows when a child does promise to tell the truth, it increases (though does not guarantee) honesty. Research demonstrates increased honesty, even with children who have been coached to make false reports or to keep silent about an adult's wrong-doing, and even with children who did not perform well on 'truth/lie' comprehension tasks.

B. Assessing truth/lie competency

Interviewers who routinely inquire into a young child's understanding of the concepts of 'truth' and 'lie' and of the immorality of telling lies (i.e., assess truth/lie competency), normally do so at the request of legal professionals. However, this is unnecessary unless legally required, since such assessments do not increase the reliability of information elicited during the interview and may not accurately indicate a child's actual understanding of these concepts. For interviewers who do assess truth/lie competency during the interview, this inquiry should not be extensive and can take place at the end of the interview. The use of a simple and efficient third party example provided by the interviewer is recommended.

5. Narrative Event Practice

Narrative event practice (or "training in episodic memory") is a critical component of the forensic interview. It consists of asking the child to tell about a neutral or positive event in a way that maximizes open-ended questioning and encourages narrative responses. Narrative practice serves several important functions. First, it increases the child's comfort and allows the interviewer to convey genuine interest and develop rapport. Second, it permits assessment of the child's developmental level, cognitive functioning, and ability to use and understand language. Third, effective narrative practice lets the child know that narratives are what the interviewer wants to hear, and will (hopefully) establish a pattern of open-ended questions and narrative responses during the rest of the interview. Finally, the basic testimonial competency of children can be demonstrated during narrative practice, through their ability to accurately perceive, remember, and communicate about an innocuous event.

The interviewer may begin by stating he or she would like to get to know the child better and ask what kinds of things the child likes to do. Based on the child's answer, the interviewer may be able to identify an event connected to an activity the child enjoys and ask the child to tell him/her all about that event. Alternatively, the child's caregivers or another adult familiar with the child may be able to identify a recent enjoyable event (e.g., holiday, school activity, birthday, other special occasion) in which the child participated. If the interviewer cannot easily identify a memorable innocuous event, he or she can always ask about the child's day leading up to the interview as an event for narrative practice.

Following initial open-ended invitations to tell everything that happened, the interviewer can use a variety of open-ended questioning techniques to try to exhaust the child's memory for the event, so the child clearly gets the message that he or she is expected to talk more and elaborate in his/her own words. The child's response to the interviewer's efforts to engage him/her in discussing neutral or positive events during narrative practice is often a good indication of how willing and likely the child is to disclose possible abuse later in the interview.

6. Introducing the Topic of Concern/Transition

The interviewer should introduce the topic of suspected abuse by being as open-ended and non-suggestive as possible. Beginning with a prompt such as *"Tell me why you're here today,"* or *"Tell me the reason you are here,"* is recommended and often productive, especially when the child is aware of the reason for the interview or has made a previous disclosure. When the child has previously told about the suspected abuse, a prompt referencing the person to whom the disclosure was made (assuming the interviewer is allowed to reveal referral sources) can be useful (e.g., *"I heard you talked to* [name] *about something that happened – tell me what happened."*).

The prompts above have proven effective in a large number of real-life cases, and thus should be considered in most interviews. When a child fails to respond, saying *"It's really important for me to know why you are here to talk to me,"* may be enough to encourage the child to answer.

If the child does not respond with information about the topic of concern, the interviewer can use other open-ended non-suggestive prompts, for example:

- *"I heard something might have happened to you – tell me what happened."*
- *"What did* [name] *tell you about coming to talk to me today?"*
- *"Why do you think* [name] *brought you here to talk to me today?"*

Other general prompts or carefully considered questions based on the specific circumstances of the case may be necessary. See ***Appendix D*** for ideas related to additional useful transition prompts.

7. Substantive Questions

The goal of this phase of the interview is to gather as many reliable details as possible, in order to generate a clear and convincing description of what happened, to evaluate whether something other than abuse may have occurred, and to serve as a basis for successfully collecting corroborative evidence in the follow-up investigation.

As soon as a child indicates abuse may have occurred, a general open-ended invitation is appropriate (e.g., *"Tell me everything that happened."*). In sexual abuse cases and many physical abuse cases, the interviewer should attempt to clarify whether the abuse occurred once or on multiple occasions.

If the child indicates the abuse happened more than once, it is usually helpful to begin further questioning by focusing on the most recent incident ("*the last time*") and continuing with open-ended questions to encourage the child to elaborate and clarify. Prompts such as *"Tell me more about ____,"* and *"Then what happened?"* are especially useful. Limited use of more direct and focused prompts that generate short answers may be necessary, but these should take place later in the interview and be 'paired' with open-ended follow-up invitations to provide more information. When the child's memory for the most recent time has been exhausted, other incidents can be explored in the same fashion by focusing the child on another specific event. For example, *"the first time," "another time,"* and/or *"the time you remember the most."*

Narrative prompts should be used liberally, with the interviewer being careful not to interrupt the child's responses. Sometimes simply repeating what the child has just said, using 'facilitators' as the child is talking (e.g., "*okay," "uh-huh," "I see,"*), or sitting silently, will be enough to keep the child talking. See ***Appendix E*** for additional suggestions for questioning during the substantive phase of the interview.

8. Presenting a Child With Pictures, Videos or Other Physical Evidence

It may be necessary to refer to or show the child physical evidence such as pictures, videos, or chat logs, especially if the child has not yet disclosed abuse prior to the interview. Before proceeding, careful consideration must be given to the impact this may have on the child and what is in the child's best interest. It is essential to coordinate with the multidisciplinary team in planning exactly how to handle the situation. The interviewer will need to arrange with law enforcement to have temporary access to the evidence during the interview and, if there are many items, will need to select a few to show the child. Some representative still images can be printed from video evidence,

rather than showing a video to the child. No part of the evidence should be covered or modified. And since this may be embarrassing or difficult for the child, supportive services need to be available immediately following the interview.

Experts recommend a straightforward approach, perhaps starting the interview by saying, *"I have some pictures/videos/chat logs to talk to you about. But first I want to get to know you."* After covering instructions and narrative practice, the child can be reminded about the reason for the interview (e.g., *"Remember at the beginning I said I had some pictures/videos/chat logs, I have them right here."*). The interviewer then shows the child the picture or other evidence, starting with the least egregious items and stating *"Tell me about this picture,"* or *"Do you recognize this thing? What is it? When have you seen it before? What else do you know about it?"* With photos, the interviewer should then attempt to confirm the identity of everyone pictured, as well as the location, and whether any other witnesses were present at the time but not in the pictures. Follow-up questioning should draw out as many details as possible about the child's knowledge regarding the evidence using the techniques recommended in these Guidelines.

If child denies knowing anything about the evidence, the interviewer should still ask questions related to surrounding details. For example, when a child denies he/she is in a picture or video:

- *"Do you recognize this place/room? Where is it? Have you been there before? Tell me all about that."*
- [Pointing to each person pictured] - *"Who is that person? How do you know him/her? What do you know about him/her?"*

9. Closure

Before ending the interview, and especially if there is someone observing the interview, it is a good idea to take a break to think about and discuss whether there are any other topics that should be raised with the child. Video and/or audio recording of the child should continue during the break. After the break, additional and clarifying questions can be asked before ending the interview.

Rather than asking *"Did anything else happen?"* during this last phase of the interview, it is preferable to ask, "*Is there something else you want to tell me?"* It is often possible to get an indication of the level of support for the child and possible recantation risk by asking questions such as:

- *"How do you feel about talking to me?"*
- *"How do you feel about leaving with* [name of person who brought child to interview]*?"*
- *"What do you think* [names of caregivers, and possibly suspect] *will say/think about you talking to me today?"*

The interviewer can also invite the child to ask questions (e.g., "*Do you have questions for me about what we talked about?"*). The child may have questions about what is likely to happen next, and the interviewer can briefly describe expected next steps, taking care to do so in a developmentally appropriate way and not to make any promises that are

beyond his/her control. The child can also be prepared for any referrals that will be made as a result of the interview. For example, *"Maybe we can get someone for you to talk to about this,"* or *"I'm going to ask another person to try to help you."*

It may be informative to also ask the child to talk about the last time they saw or communicated with the suspect. If there are still concerns about possible abuse or the child's safety, especially when the child has not made a disclosure, the interviewer should help the child identify an appropriate adult or adults with whom the child could talk. Some interviewers will provide their contact information to the child, perhaps a business card, and some refer the child and his/her family to other members of the multidisciplinary team for ongoing support or if they need to initiate contact again.

It is important to conclude on a positive note, usually by shifting the discussion to more neutral topics. The child can be thanked for his/her effort. For instance, "*Thank you for talking to me today,"* and the interviewer may then return discussion to another neutral activity. It is important for the child to regain composure and leave feeling as good as possible about his/her participation in the interview.

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Appendix A

Basic Developmental and Linguistic Concepts

The following points are important to keep in mind with regard to linguistics and the developmental capacity of children.

- Young children are concrete, egocentric, and make idiosyncratic use of language. Simply because a child uses a word (or fails to express lack of understanding) does not mean that he or she knows what the word means. Language is acquired gradually and unevenly, therefore interviewers need to listen, and to clarify the child's meaning and understanding of words throughout the interview. The interviewer's language should fit the child's.
- In general, children as young as preschoolers can accurately recall core aspects of significant, emotionally salient, participatory events. At the same time, young children, especially preschoolers, tend to be the most susceptible to suggestion. They also need more focus and cues in order to access their memories.
- In general, the younger the child, the shorter his/her attention span and the more quickly he or she may drift from one topic to another completely unrelated topic.
- Interviewers should tolerate silences and be prepared to wait after a question has been asked, giving the child time to respond.
- Interviewers should use simple words, and keep questions and probes short.
- Concepts of number and time develop gradually, and are difficult for young children to understand and use accurately. Interviewers should use caution in asking children *"when"* or "*how many times?"* something happened. Furthermore, questions asking younger children about what happened *"before"* another event should be used with care.
- It is important to avoid pronouns and other "pointing" or "shifting" words that have no meaning without referring to another part of the conversation, (e.g., words like *"he," "she," "him," "her," "it," "there," "that,"*). Instead, whenever possible, interviewers should try to use people's names, place names, and specific nouns to avoid confusion, and clarify who or what the child means when such words are used.

- Negation takes longer to process and a child may not yet understand that a simple negative, such as *"no"* or *"not,"* does not always imply a negative. Therefore, negatives should be avoided (not just double negatives) or used very carefully to be sure the child and interviewer have the same understanding.
- Be aware of the implications of using *"Something/Someone"* versus *"Anything/Anyone."* "*Some"* usually implies a positive and *"any"* usually implies a negative.
- When ready to change the subject or move on to another issue, it is recommended the interviewer signal the child by "framing" or "scaffolding." Examples include:
    - *"Now that I know you better, I want to talk about why you're here today."*
    - *"Now I want to talk to you about_____."*
    - *"All right, we just talked about_____. Now I want to ask you about something different."*

Appendix B

Using Anatomical Dolls as a Demonstration Aid

The following are generally agreed best practices in using anatomical dolls as a demonstration aid during a forensic interview.

- Interviewers should have specific training in the use of anatomical dolls and be aware of what is legally acceptable in their own jurisdictions.

- Introduce the dolls only after the child has verbally indicated abuse happened.

- Introduce the dolls as something to help *"show"* what happened, not toys to be played with.

- Use dolls **only if needed** to assist the child in communicating details of what happened. Interviewers should emphasize narrative event practice in the introductory stages of the interview and continue to use recommended questioning techniques to elicit verbal descriptions from the child whenever possible. Introduce dolls later in the interview, only when the child is unable or unwilling to communicate verbally (or in writing), and/or when the child's verbal description is limited or unclear.

- Use the dolls only if developmentally appropriate. Be extremely cautious using the dolls with preschoolers. An accurate portrayal of what happened using the assistance of dolls requires the child to have both understanding of the symbolic nature of the dolls (i.e., the developmental capability to understand the abstract notion that the dolls represent him/herself and/or the suspect), as well as the ability for dual representation (i.e., the ability to use them symbolically to communicate events).

- Present the dolls fully clothed.

- Ask open-ended questions that invite the child to explain what he or she is demonstrating with the dolls to get verbal clarification and do not make assumptions about what happened.

- Do not use dolls together with direct, leading or suggestive questions.

- When the child has finished demonstrating with the dolls, they should be put away.

- Use reputable professionally produced dolls.

- Use dolls with culturally appropriate features such as similar skin-tones and hair color, as well as developmentally appropriate physical characteristics.

Appendix C

Possible Phrasing and Practice Examples for Interview Instructions

By way of illustration, the following are some ideas for possible phrasing and practice examples to use when informing young children about key interview instructions. These are only examples and interviewers are encouraged to develop their own explanations and examples that work for them and the children they interview.

The 'Don't Guess' Instruction

- "[Child's name], *when we talk today, it's important to tell me when you **do** know the answer to a question. But if I ask a question and you **don't** know the answer, don't guess."*

- *"So if I ask you, 'What did **I** have for breakfast?' what do you say?"* [Answer: "I don't know."] *"Okay, good, because you don't know."*

- *"But what if I ask, 'What did **you** have for breakfast?'"* [Answer: "Cereal."] *"Okay, because you **do** know. It's important to tell me when you know the answer."*

The 'Correct Me' Instruction

- "[Child's name], *sometimes I make mistakes or say the wrong thing. When I do, you can tell me I'm wrong."*

- *"So if I say, 'You're 30 years old' what do you say?"* [Answer: "I'm not 30."] *"Okay, so how old are you?"* [Answer: "6 years old."] *"Thanks for correcting me. Please tell me if I make any other mistakes."*

The 'Tell Me If You Don't Know What I Mean' Instruction

- "[Child's name], *if I ask a question and you don't know what I mean or what I'm saying, you can say 'I don't know what you mean' or 'I don't get it,' and I'll ask it in a different way."*

- *"So if I ask, 'How many **siblings** do you have?' what do you say?"* [Answer: "I don't know what siblings means."] *"Good, because 'siblings' is a hard word. What I mean is 'How many brothers and sisters do you have?'"*

- If the child knows the meaning of your first practice example, be prepared with at least one or two other possible options. For example:
    - *"Do you have a **canine**?"/"What I mean is do you have a dog?"*
    - *"What is your **ocular hue**?"/"What I mean is what color are your eyes?"*

The 'Help Me Understand' Instruction

- "[Child's name], *because I wasn't there, I don't know what happened and I need your help to figure it out."*

Appendix D

Formulating "Transition" Prompts to Shift Focus to Suspected Abuse

If the general suggestions contained earlier in these Guidelines do not produce a disclosure by the child, most experts recommend using a series of general prompts and/or formulating additional questions based on the specific circumstances of the case that are as non-suggestive as possible, and that only gradually become more focused.

The following examples illustrate some other options for potential 'transition' prompts:

- When the child has an observable injury – *"I see you have a bruise, a broken arm. Tell me what happened."*

- When the child has been seen by another professional prior to the forensic interview – *"I heard you saw the doctor, a policeman last week. Tell me how come/what you talked about."*

- When the child has been removed from his/her home and placed in protective custody – *"Where do you live right now? How come you're living there?"*

- *"Is your mom, another person worried about something that happened to you? Tell me what she's worried about."*

- *"I heard someone might have bothered you. Tell me what happened."*

- *"I heard someone may have done something that wasn't right. Tell me what happened."*

- Referencing the location of possible abusive conduct may be productive and is not unduly suggestive – *"I understand something happened at* [location]. *Tell me what happened."*

If the suspected offender is someone routinely in the child's life, the interviewer may want to ask the child to talk about things he or she likes and does not like doing with that person, balanced with similar questions about other people in the child's life.

If the child still has not disclosed, the interviewer should carefully consider whether to continue the interview and ask more direct questions, whether to stop the interview and perhaps try to talk to the child again another time, or whether to spend more time trying to develop rapport through narrative practice. As a general rule, interviewers should avoid directly suggesting that a particular suspect performed a specific act.

Appendix E

Suggestions for Prompts During Substantive Phase

The following examples illustrate some of the ways open-ended questioning techniques can be used to gather additional details during the substantive phase of the interview.

Narrative Prompts

- *"Tell me everything from the beginning to the end."*
- *"Tell me everything, even the little things you don't think are important."*
- *"Tell me how it started."*
- *"What's the first thing that happened?"*
- *"Tell me more,"* or *"Tell me more about_____."*
- *"Then what happened?"* or *"What happened next?"*
- *"I'm confused, tell me again,"* or *"I'm trying to understand. Since I wasn't there, please tell me again about_____."*
- *"How do you know that?"* or *"How did you figure that out?"*
- *"How come you think that?"*
- *"What happened right before?"* and *"What happened right after?"*

Time Segmentation Prompts

- *"I'd like to find out more about what happened. Tell me everything that happened from* [child's words describing one portion of the event] *until* [another portion].*"*

Sensory Focus Prompts

- *"Tell me everything you saw."*
- *"Tell me what* [suspect's name] *looked like, from the top of <u>his/her</u> head, to the bottom of <u>his/her</u> feet."*
- *"Tell me everything about what _____ looked like."*
- *"What did you see when_____?"*
- *"Tell me everything you heard."*
- *"What did you hear when_____?"*
- *"Did* [suspect's name] *say something? Tell me everything* [suspect's name] *said."*
- *"How did that make your body feel?"*

Cued Invitations/Focused Recall

- *"You said _____. Tell me <u>all about/everything about/more about</u> that."*
- *"I heard something about _____* [use least suggestive cue possible]. *Tell me about that."*
- *"Tell me all about <u>who did that/what else was happening/where it happened</u>."*
- *"What else do you remember that happened that same day?"*
- *"What were you thinking when* [repeat child's words describing what happened]?"
- *"Tell me something different that* [suspect's name] *did to you."*
- *"What was the worst thing* [suspect's name] *did?"*
- *"What was the last thing* [suspect's name] *did?"*

- *"How did you know when it was over?"* or *"What did* [suspect's name] *do/say when it was over?"*
- *"What did you do when it was over?"*
- *"How did it feel when you went to the bathroom?"*

Focused Questions Paired With Open-Ended Requests to Elaborate

When further information about key facts is needed, more focused questions may be necessary during the substantive phase. Information about the context of the abuse (e.g., when and where the abuse occurred, information about any instruments or items present or used in the abuse) can lead to potential corroborative evidence. The nature of the case (e.g., sexual abuse or exploitation, physical abuse, domestic violence), together with what the child has said so far will point toward additional specific areas the interviewer may want to explore. For instance, in sexual abuse situations, if the child has not already provided this information, interviewers will likely want to inquire about facts such as the type of touching involved, what part of the child's body was touched, whether the suspect (if male) had an erection or ejaculated, what happened with both the child's and suspect's clothing, and what implements or other objects or strategies were used to facilitate the abuse. In a physical abuse case, facts related to articles or weapons used to inflict the abuse may be important. It is often relevant and useful to find out if the suspect used technology in any way before, during or following the abuse (e.g., to take pictures, to record or show videos, and/or to communicate with the child via cell phone, computer or otherwise).

The interviewer must be careful at this point to phrase additional prompts in the least suggestive way and continue to pose open-ended follow-up requests for the child to provide elaboration from recall memory. Some yes/no and other closed-ended questions may be needed, but their use should be careful and minimized.

Examples of this kind of focused questioning include the following:

- *"Exactly what part of your body did* [suspect's name] *touch? Tell me more about that."*
- *"What did* [suspect's name] *touch you with? Tell me everything about that."*
- *"Did any other part of* [suspect's name] *body touch your body? What part? Tell me about that."*
- *"Tell me everything that happened with his* [child's name for suspect's body part]" and/or *"Tell me everything you saw/Tell me everything you felt."*
- *"Where were your clothes?"* and *"Tell me everything that happened with your clothes while* [suspect's name] *was* [repeat child's words describing what happened]."
- *"What did* [suspect's name] *use to* [repeat child's words describing what happened]? *Tell me more about that."*
- *"Did* [suspect's name] *have a camera/computer/web cam/cell phone? How do you know? What did* [suspect's name] *do with the camera/computer/web cam/cell phone?"*
- *"Think about the last time you saw/talked to* [suspect's name]*? Tell me everything* [suspect's name] *said,"* or *"…everything that happened."*
- *"Did* [suspect's name] *want other people to find out what happened? How do you know?"* (Note that although this is fairly direct and focused, it is phrased to suggest the opposite of the expected response.)

Questions About Others Who Know or Were Told

It is advisable for every interview to include questions about who else knows about the abuse, who else has been told, the circumstances leading to the others' knowledge, and the child's motivation for disclosing. The child may also be asked if anyone else was present before, during, or immediately after the concerning event(s). This can potentially identify other victims or witnesses and thereby lead to valuable corroborative evidence. The following are examples of some ways an interviewer might go about asking such questions:

- *"Was someone else there? Tell me all about who else was there."*
- *"Who was the first person who found out about what happened? How did* [person's name] *find out?"* or *"Tell me everything about how* [person's name] *found out."*
- *"Who else knows about what happened? How did* [person's name] *find out?"*
- *"What did you say to* [person's name]*?"*
- *"What were you thinking when you told?"*
- *"What did* [person's name] *say/do when you told?"*
- *"What did you think after you told?"*
- *"What made you decide to tell now?"* or *"What made you not tell right away?"*
- *"Do you know if something like that happened to other children? How do you know? Tell me all about that."*

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AMICUS BRIEF FOR THE CASE OF *STATE OF NEW JERSEY v. MICHAELS* PRESENTED BY COMMITTEE OF CONCERNED SOCIAL SCIENTISTS

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In the past decade, there has been an exponential increase in research on the accuracy of young children's memories and the degree to which young children's memories and reports can be molded by suggestions implanted by adult interviewers. Although some of these studies document the strengths of young children's memories, increasing numbers of studies highlight their weaknesses when they are interviewed under certain conditions. As will be explained, these same interview conditions, which have a high risk of contaminating young children's reports, characterize the available investigative interviews carried out with the child witnesses in the *Wee Care* case.[1]

In this brief, we present a summary of the pertinent social science research that addresses the issues of children's suggestibility. Our primary focus is on the conditions under which preschool children are most suggestible. Citing interviews with *Wee Care* children, we provide illustrations of procedures of interviewing so faulty that they may have substantially increased the risk that the children's subsequent reports were mere reflections of the interviewers' suggestions.

This brief also contains a summary of some of the conditions which have been shown to increase the reliability of young children's reports, and which act as a safeguard against the production of false reports. The *Wee Care* children were not interviewed under these safer conditions.

Finally, we will explain that the failure to record initial interviews with child witnesses rules out the possibility of ever reaching any firm conclusion as to whether any abuse actually occurred. In other words, the primary evidence has been destroyed.

A. Research on Children's Suggestibility

Children's suggestibility has been a focus of research since the turn of the twentieth century. There have been many studies that examine the influence of a

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The amicus that is reprinted in this journal is identical to the one submitted to the Supreme Court of New Jersey (Docket Number 36,633), with a few exceptions. Some of the appendixes (e.g., the article by Ceci and Bruck, 1993a, and the video) are not included, and typographical errors have been corrected.

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[1]At the outset we note that the identities of the children in this case were never revealed, in any form, to the signatories of this brief. The transcripts of interviews to which reference is made herein are the redacted transcripts included in the appendix to the brief filed by Ms. Michaels in the Appellate Division of the State of New Jersey. This appendix includes all known recorded interviews of the children in the *Wee Care* case. *Amicus* chose freely from these transcripts in selecting illustrations of various interview strategies discussed in this brief.

single misleading suggestion on children's recall of an event; generally, these studies indicate that in a variety of conditions, young children are more suggestible than adults with preschoolers being more vulnerable than any other age group (see attached article by Ceci and Bruck, 1993a, for the most recent review of this literature).

In the past 5 years, there has been a major paradigmatic shift in this research in an attempt to make it more forensically relevant. More and more children are called to court to provide uncorroborated testimony, especially in cases involving child sexual abuse. Social scientists have turned their attention from studying the effects of a single misleading question on children's recall of neutral, nonscripted, and often uninteresting events, to examining the accuracy of children's testimony under a range of conditions that are characteristic of those that bring children to court.

One important area of study concerns the effects of different interviewing techniques on the reliability of children's reports. These studies go beyond the examination of how a single misleading question influences children's reports. Rather, they examine the effects of a host of implicit and explicit suggestive techniques that can be woven into the fabric of the interview through the use of bribes, threats, repetitions of certain questions, and the induction of stereotypes and expectancies (Ceci & Bruck, 1993a).

It is important to understand that this is a rapidly expanding area of inquiry. Reviews of the literature that were published only a few years ago are now out-of-date. For example, in 1989, Cornell University hosted an international conference which called together major researchers in the area of child testimony (J. Doris ed. 1991). At that conference some researchers made the following types of statements:

> (m)ost research on children as eyewitnesses has relied upon situations that are very different from the personal involvement and potential trauma of sexual abuse. Researchers have used brief stories, films, videotapes or slides to simulate a witnessed event. A few have used actual staged events but these events are also qualitatively different from incidents of child abuse. (Goodman & Clarke-Stewart, p. 92–93)

This statement no longer characterizes the relevant research. Researchers have developed paradigms to examine children's reports of salient and personally-experienced events that involve their own bodies. No longer do older maxims hold that when children are inaccurate in their reporting about such events it is because they make errors of omission (i.e., they fail to report important events) rather than errors of commission (i.e., they insert inaccurate details). The newer research indicates that under certain conditions, young children also make errors of commission about personally experienced events involving their own bodies.

In the section below, we summarize some of the major findings of this area of research. We utilize the *Wee Care* interviews to provide examples of different suggestive interview techniques.

1. The Effects of Interviewer Bias on Children's Reports

A review of interviews of children suspected of sexual abuse reveals that some interviewers blindly pursue a single hypothesis that sexual abuse has occurred. In such interviews, the interviewer typically fails to rule out rival hypotheses that might explain the behavior of the child. As a result, the interviewer often concludes that the child was sexually abused.

Some investigative and therapeutic interviewers claim that such techniques are necessary because sexually abused children are so scared or embarrassed that they will never willingly or spontaneously tell any interviewer, including their own parents of the past abuses. Therefore, they claim, it is necessary to use all available strategies to get the child to reveal sexual abuse. These strategies include the use of repeated leading questions, repeated interviews, bribes or threats, and the induction of stereotypes and expectancies (Ceci & Bruck, 1993a). Such strategies may prove successful when the child has been sexually abused; that is, the interviewer will be successful in drawing out a report of sexual abuse from the child. However, as we document below when interviewers have strong preconceived impressions of what happened, these biases can also result in the generation of false confessions from children.

The following three studies show that interviewers, who are given false information about certain events, often shape children's reports to be consistent with the interviewers' inaccurate beliefs about what happened. This occurs through the use of leading questions and other implicit suggestive techniques.

Clarke-Stewart, Thompson and Lepore (1989) conducted a study in which 5- and 6-year-olds viewed a staged event that could be construed as either abusive or innocent. Some children interacted with a confederate named Chester as he cleaned some dolls and other toys in a playroom. Other children interacted with Chester as he handled the dolls roughly in a mildly abusive manner. Chester's dialogue reinforced the idea that he was either cleaning (e.g., "This doll is dirty, I had better clean it"), or playing with the doll in a rough suggestive manner (e.g., "I like to play with dolls. I like to spray them in the face with water").

The children were questioned about this event several times, on the same day, by different interviewers who differed in their interpretations of the event. The interviewer was either 1) accusatory in tone (suggesting that the janitor had been inappropriately playing with the toys instead of working), 2) exculpatory in tone (suggesting that the janitor was just cleaning the toys and not playing), or 3) neutral and non-suggestive in tone. In the first two types of interviews, the questions changed from mildly to strongly suggestive as the interview progressed.

Following the first interview, all children were asked to tell in their own words what they had witnessed (this is referred to as "free recall"). They were then asked some factual questions (e.g., "Did the janitor wipe the doll's face?"), and some interpretive questions regarding the janitor's activities (e.g., "Was the janitor doing his job or was he just being bad?"). Then, each child was interrogated by a second interviewer who either reinforced or contradicted the first interviewer's tone. Finally, children were asked by their parents to recount what the janitor had done.

When questioned by a neutral interviewer, or by an interviewer whose interpretation was consistent with the activity viewed by the child, children's accounts were both factually correct, and consistent with the janitor's script. However, when the interviewer contradicted the script, children's stories quickly conformed to the suggestions or beliefs of the interviewer. By the end of the first interview, 75% of children's remarks were consistent with the examiner's point of view, and 90% answered the interpretive questions in agreement with the interviewer's point of view, as opposed to what actually happened. Children changed their stories from the first to second interviews only if the two interviewers differed in their interpretation of the events. Thus, when the second interviewer contradicted the first interviewer,

the majority of children then fit their stories to the suggestions of the second interviewer. If the interviewer's interpretation was consistent across two interviews, the suggestions planted in the first session were quickly taken up and mentioned by the children in the second session. Moreover, when questioned by their parents, the children's answers were consistent with the interviewers' biases. Finally, although the effects of the interviewers' interpretations were most observable in terms of the children's responses to the interpretive questions about what the janitor had done, 20% of the children also made errors on the factual questions in the direction suggested by the biased interpretation, even though no suggestions had been given regarding these particular details.

On a practical level, these results suggest that if children experience an ambiguous event (e.g., touching), depending on the interviewers' beliefs about the touching, and how these beliefs get translated into questions, children may relate that it was good touching ("my teacher was only rubbing my back"), or bad touching ("my teacher was rubbing my bum").

Pettit, Fegan and Howie (1990) examined how interviewers' beliefs about a certain event affects (a) their style of questioning children about those events and (b) the accuracy of children's subsequent reports. Two actors, posing as park rangers, visited the classes of preschool children to ask them to help a bird find a nest for her eggs. During the presentation, one of the rangers accidently knocked a cake onto the floor. When the cake fell and shattered on the floor, there was an abrupt silence and a halt to all activities. Seven children, who were members of the class had been taken to other parts of the school, and did not view this event. Two weeks later, all children were questioned about the event.

Interviewers' beliefs about the event were manipulated. Some interviewers had full accurate knowledge of the event. Some were given inaccurate information (i.e. false beliefs). Other interviewers were given no information about the event. The interviewers were told to question each child until they found out what happened, and to avoid the use of leading questions.

Despite the warning to avoid leading questions, 30% of all interviewers' questions could be characterized as leading, and half of these were misleading. Interviewers with inaccurate knowledge (false beliefs) asked four to five times as many misleading questions as the other interviewers. Overall, children agreed with 41% of the misleading questions. Children who were interviewed by biased interviewers gave the most inaccurate information. Thus if an interviewer's belief is contrary to what the child actually experienced, the interview is characterized by an overabundance of misleading questions which results in children providing highly inaccurate information.

A similar finding was reported by Ceci, Leichtman & White (in press). Here, preschoolers were exposed to a touching-game, and then were interviewed one month later. The interviewer was given a one-page report containing information about what might have occurred. Some of the information was accurate and some was inaccurate. The interviewer was asked to conduct an interview to determine how much information the child could, in fact, still recall. The only instruction given to the interviewer was that she should begin by asking the child for a free narrative of what had transpired, avoiding all forms of suggestions and leading questions. Following this, the interviewer was instructed to use whatever strategies she felt necessary to elicit the most factually accurate report from the child.

When the interviewer was accurately informed, she got children to recall correctly most of the events that had transpired. There were no false reports when the interviewer was correctly informed. However, when she was misinformed, 34% of the 3- to 4-year-olds and 18% of the 5- to 6-year-olds corroborated one or more false events that the interviewer erroneously believed had transpired. Thus, in the misinformed condition, the children made errors of commission. After two such interviews, children continued to give detailed, but false, accounts of bodily touching (e.g., some falsely claimed that their knees were licked and that marbles were inserted into their ears). Finally, the children in the misinformed condition seemingly became more credible as the interview unfolded. Many initially stated details inconsistently, or with reluctance or even denial, but as the interviewer persisted in asking about non-events, some children abandoned their denials and hesitancy.

These studies provide important evidence that interviewers' beliefs about an event can influence their style of questioning. This, in turn, can affect the accuracy of children's testimony. The data highlight the dangers of having only one hypothesis about the event in question—especially when this hypothesis is incorrect.

Examples of interviewers' biases, blind pursuit of a single hypothesis, and failure to test alternate, equally believable, explanations of the children's behavior are rife in the interviews conducted with the *Wee Care* Children. These biases are revealed where interviewers' persistently maintain one line of inquiry (through the use of repeated leading questions, bribes and threats) even when children consistently reply that the presumed events never occurred. Interviewer biases are also revealed by a failure to follow-up on some of the children's inconsistent or bizarre statements where doing so might disconfirm their primary hypotheses. A long section of interaction shown on pages 40–43 illustrates some of these principles. The following dialogue in which the interviewer (Q) engages one child (A) during an early investigatory interview is illustrative of an interviewer's failure to seriously consider any evidence that was contrary to her or his primary beliefs.

Q: Do you think that Kelly was not good when she was hurting you all?
A: Wasn't hurting me. I like her
Q: I can't hear you, you got to look at me when you talk to me. Now when Kelly was bothering kids in the music room
A: I got socks off

Q: Did she make anybody else take their clothes off in the music room?
A: No
Q: Yes
A: No

Q: Did you ever see Kelly have blood in her vagina?
A: This is blood
Q: Kelly had blood in her vagina
A: Yeah
Q: She did? Did you ever get any of that blood on your penis?
A: No. Green blood
Q: Did you ever see any of your friends get blood on their penis from her vagina?

A: Not green blood but red blood

Q: Tell me something, tell me about the piss box. The piss box that's in the music room?
A: No, up there. All the way up there
Q: Is the piss box the bench at the piano? When you open up the bench: is that the piss box?
A: Yeah
Q: It is?
A: Yeah
Q: And what happened, she would open it up?
A: And, popped it up
Q: She popped it up and then what would you do?
A: Jump in it?
Q: Jump in it?
A: Yeah
Q: And would you have to pee in it?
A: Yeah

(about 10 questions later, the topic comes up again)
Q: So the pee-pee box is the bench at the piano and you flip it open?
A: No
Q: What is the pee-pee box?
A: This is the pee-pee box
Q: That's not a pee-pee box. That's a crayon box

Q: Did Kelly ever make you kiss her on the butt?
A: No
Q: Did Kelly ever say—I'll tell you what. When did Kelly say these words? Piss, shit, sugar?
A: Piss, shit sugar?
Q: Yeah, when did she say that, what did you have to do in order for her to say that?
A: I didn't say that.
Q: I know, she said it, but what did you have to do?

(In this section, the child is asked to use anatomically detailed dolls and different utensils)
Q: Okay, I really need your help on this. Did you have to do anything to her with this stuff?
A: Okay. Where's the big knife at. Show me where's the big knife at.
Q: Pretend this is the big knife because we don't have a big knife
A: This is a big one
Q: Okay, what did you have to do with that? What did you have to. . .
A: No . . . take the peanut-put the peanut butter
Q: You put what's that, what did you put there?
A: I put jelly right here
Q: Jelly
A: And I put jelly on her mouth and on the eyes

Q: You put jelly on her eyes and her vagina and her mouth
A: On her back, on her socks
Q: And did you have to put anything else down there?
A: Right there, right here and right here and here
Q: You put peanut butter all over? And where else did you put the peanut butter?
A: And jelly
Q: And jelly?
A: And we squeezed orange on her.
Q: And you had to squeeze an orange on her?
A: Put orange juice on her
Q: And did anybody—how did everybody take it off? How did she make you take it off?
A: No. Lick her all up, eat her all up and lick her all up
Q: You had to lick her all up?
A: And eat her all up
Q: Yeah? What did it taste like?
A: Yucky
Q: So she made you eat the peanut butter and jelly and the orange juice off of the vagina too?
A: Yeah
Q: Was that scary or funny?
A: Funny, funny and scary.

Thus when children's responses contained discrepant, inconsistent, incomprehensible or no information, the investigators only considered these responses to be consistent with the fact that abuse had taken place or else they chose to ignore these statements. We are struck by the inconsistencies and the bizarre statements made by the children in response to the interviewers' questions. Most adults interacting with children in these situations would try to figure out just what the child was thinking about or why the child might be so confused to make such statements. Yet this simply did not happen. The children were never asked common sense questions such as: "Did this happen to you or are you just pretending that it happened to you?" or "Did you see this happen or did someone tell you that it happened?" Children were never challenged about their statements, "Are you sure that this happened or are you telling me a joke?" Competent investigative interviewers would have used such techniques in order to understand how the alleged acts could actually be carried out in a short period of time in a very public place.

That the *Wee Care* interviewers held preconceived biases that these children were abused is not an inference. It is based on their statements regarding their interviewing procedures. These interviewers believed that their major objective was to get the children to admit to sexual abuse.

Dr. Susan Esquilin, a child therapist, presided over two heavily attended parent meetings when allegations were first made. She conducted five group therapy sessions with the *Wee Care* children and eventually assessed or treated 13 of the 20 child witnesses. She stated that her goal was to induce the children to discuss sexual abuse. In the first group therapy session, she told the children that they were assembled together because of some of the things that had happened at *Wee Care*

and with Kelly. Based on courtroom testimony, it seems that 4 children made allegations after their contacts with Esquilin. (5C, 11C, 14C, and 20C)

Lou Fonolleras, an investigator from the Division of Youth and Family Services (DYFS), conducted 82 interviews with *Wee Care* children and 19 interviews with *Wee Care* parents, between May 22 and July 8, 1985. At trial, Fonolleras described his interviewing techniques as follows, "The interview process is in essence the beginning of the healing process." To rationalize his use of persistent questions with the children, he stated, "because it is my professional and ethical responsibility to alleviate whatever anxiety has arisen as a result of what happened to them." Fonolleras justified his telling children about other children's allegations by saying, "children who needed some reassurance . . . (that) they were not alone." Finally one other detail is of importance in understanding the bias and pursuit of a single hypothesis in Fonolleras' interviews. He himself had been abused as a child. And in at least one recorded interview he uses this to lead the child's testimony. At least 13 children made initial allegations after their interviews with Fonolleras. (3C, 4C, 6C, 7C, 8C, 9C, 10C, 11C, 13C, 14C, 15C, 18C, and 19C)

Eileen Treacy, an expert for the prosecution, also interviewed these children several times between November 1985 and February 1987. At trial she testified on her interviewing techniques, "So you open the interview in an effort to disempower Kelly of these super powers that she allegedly has or that the kids thought she had and also to let the children know that telling about these things was okay and they would be safe."

Finally, we do not limit our consideration of interviews to those held between children with legal and therapeutic professionals, but also extend these to conversations between parents and their children. Although we do not have any recordings or descriptions of the structures of these conversations, parents were soon instilled with the belief that abuse had taken place. Two weeks after 16C made the initial allegation, Peg Foster a sex abuse consultant told the parents at a school meeting that three children had been abused and urged them to discover whether their own children had been abused.

The following is a review of the components of suggestive biased interviews that have the largest impact on producing inaccurate reports from young children.

2. The Effects of Repeated Questions

A number of studies have shown that asking children the same question repeatedly within an interview and across interviews, especially a yes/no question (e.g., Poole & White, 1991), often results in the child changing her original answer. Preschoolers are particularly vulnerable to these effects. Children often do this because they seem to reason, "The first answer I gave must be wrong, that is why they are asking me the question again. Therefore I should change my answer." At other times, children may change their answer to please the adult who is questioning them; they reason that the "adult must not have liked the first answer I gave so I will give another answer." At other times, children's answers may change because the interviewer's previous suggestions become incorporated into their memories.

For example, Cassel and Bjorklund (1993) questioned children and adults about a videotaped event they had viewed one week earlier. The subjects were asked leading questions. If they did not fall sway to the lead, then they were asked a more suggestive follow-up question. Kindergarten children were most affected by this manipulation. As expected, compared to adults and older children, they were most

inaccurate in answering the first misleading questions; but also when the second more suggestive question was asked, they were more likely than older subjects to change their answers and to incorporate the desired answer into their second responses.

The *Wee Care* interviews provide numerous examples of questions frequently repeated when a child denied abuse or when the child's answer was inconsistent with the interviewers' beliefs. Although there are instances when children tenaciously rejected the interviewer's persistent suggestive questions, upon repetition of a question children often changed their answers to ones that were consistent with sexual abuse.

Q: When Kelly kissed you, did she ever put her tongue in your mouth?
A: No
Q: Did she ever make you put her tongue in her mouth?
A: No
Q: Did you ever have to kiss her vagina?
A: No
Q: Which of the kids had to kiss her vagina?
A: What's this?
Q: No that's my toy, my radio box.
Which kids had to kiss her vagina?
A: Me

3. The Effects of Repeating Misinformation across Interviews

A number of studies show that repeatedly giving children misleading information in a series of interviews can have serious effects on the accuracy of their later reports (for a review, see Poole & White, in press). Not only can the misinformation become directly incorporated into the children's subsequent reports (they use the interviewers' words in their inaccurate statements), but it can also lead to fabrications or inaccuracies which do not directly mirror the content of the misleading information or questions.

For example, Bruck, Ceci, Francouer, and Barr (submitted) found that children will give highly inaccurate reports about a previous visit to a pediatrician's office if they are given multiple suggestions in repeated interviews. The children in this study visited their pediatrician when they were five years old. During that visit, a male pediatrician gave each child a physical examination, an oral polio vaccine and an inoculation. During that same visit, a female research assistant talked to the child about a poster on the wall, read the child a story and gave the child some treats.

Approximately one year later, the children were re-interviewed four times over a period of a month. During the first three interviews, some children were falsely reminded that the pediatrician showed them the poster, gave them treats, and read them a story, and that the research assistant gave them the inoculation and the oral vaccine. Other children were given no information about the actors of these events. During the final interview, when asked to recall what happened during the original medical visit, children who were not given any misleading information were highly accurate in their final reports. They correctly recalled which events were performed by the pediatrician and by the research assistant. In contrast, the misled children were very inaccurate; not only did they incorporate the misleading suggestions into their reports, with more than half the children falling sway to these suggestions (e.g.,

claiming that the female assistant inoculated them rather the pediatrician), but 45% of these children also included non-suggested but inaccurate events in their reports by falsely reporting that the research assistant had checked their ears and nose. None of the control children made such inaccurate reports. Thus, when suggestions are implanted and incorporated, young children use these in highly productive ways to reconstruct and distort reality (see Chester Study above by Clarke-Stewart et al., and Sam Stone Study below by Leichtman & Ceci for similar results).

Unfortunately, we do not have any of the initial interviews with the *Wee Care* children. Thus, we cannot ascertain the degree to which the allegations that emerge in much later taped investigatory interviews reflect earlier implanted suggestions. It is also possible that some of the allegations that occurred in these investigatory interviews reflect suggestions implanted from earlier conversations with parents who were urged by professionals and by other parents to look for signs of abuse in their children.

It is also important to note that the suggestive interviews did not end in July 1985 with the completion of Fonolleras' investigation. Children were interviewed before they appeared before the grand jury. Children were questioned by therapists, and they were questioned by members of the prosecutors' office leading up to trial. These children were also questioned by the prosecution and the defense attorneys at the trial.[2] A consideration of the research findings suggests that if the children had not been abused, then this magnitude of repeated suggestive interviews could have the effect of increasing and cementing false reports.

4. Emotional Tone of the Interview

Children are quick to pick up on the emotional tones in an interview and to act accordingly. There is much information that can be conveyed in the emotional tone, including implicit or explicit threats, bribes, and rewards. For example, in some studies when an accusatory tone is set by the examiner (e.g., "we know something bad happened," or "it isn't good to let people kiss you in the bathtub," or "you'll feel better once you tell," or "don't be afraid to tell"), then children in these studies are likely to fabricate reports of past events even in cases when they have no memory of any event occurring. In some cases, these fabrications are sexual in nature (see review in Ceci & Bruck, 1993b).

For example, four years after children played with an unfamiliar research assistant for five minutes while seated across a table from him, Goodman and her colleagues asked these same children to recall the original experience, and then asked them a series of questions, including abuse-related suggestive questions about the event (Goodman, Wilson, Hazan & Reed, 1989; also described in Goodman & Clarke-Stewart, 1991). At this time, the researchers created what they described as "an atmosphere of accusation," by telling the children that they were to be questioned about an important event and by saying such things as, "Are you afraid to tell? You'll feel better once you've told." Although few children had any memory for the original event from four years earlier, their performance on the suggestive abuse questions was mixed. Five out of the fifteen children incorrectly agreed with the interviewer's suggestive question that they had been hugged or kissed by the

[2]We have no precise figures on the number of times that each child was interviewed between May 1, 1985 and the present time. Appendix 1 represents an attempt to reconstruct the interviewing schedule for each child. These figures are clearly underestimates.

confederate, two of the fifteen agreed that they had their picture taken in the bathroom, and one child agreed that she or he had been given a bath. The important conclusion of this study is that children may begin to give incorrect information to misleading questions about events for which they have no memory, when the interviewer creates an aura (emotional tone) of accusation.

There are many other studies in the social science literature to show that reinforcing children for certain behaviors regardless of the quality of the behaviors also increases the frequency of these types of behaviors. Telling children "you are a really good boy" is one example of this. In some situations, when used appropriately, these types of supportive statements make children feel at ease and make children more responsive and accurate than when they are provided with no feedback or support (e.g., Goodman, Rudy, Bottoms, & Aman, 1990). If used inappropriately, however, these types of statements can also produce inaccurate statements. Thus, it has also been found that when interviewers are overly supportive of children, then children tend to produce many inaccurate as well as many accurate details (e.g., Geiselman, Saywitz & Bornstein, 1990). Certainly, there appears to be some trade-off in the effect of positive and neutral support on the accuracy of children's reports.

The quality and quantity of positive support and reinforcement provided in many of the research studies exemplify good interviewing techniques. However, the types of "encouraging" statements made by some of *Wee Care* investigators would never be considered as acceptable examples of how children should be encouraged in an interview:

> McGrath: Do you want to sit on my lap? Come here. I am so proud of you. I love big girls like you that tell me what happened—that aren't afraid because I am here to protect you. Did you ever see what's this right here? . . . You got such pretty eyes. You are going to grow to be a beautiful young lady. I'm jealous, I'm too old for you.

Detective McGrath rationalized this behavior by saying "this way she may feel more comfortable and more at ease." These statements may have far greater consequences, though; they may change the balance of accuracy in children's reports.

Threats and bribes also influence the emotional tones of interviews. However, these elements have never been systematically investigated, because it would be ethically impermissible to include such statements in research interviews with young children. But from everything we know about the principles of child development and about principles of punishment and reward, these statements should dramatically decrease the accuracy of children's statements.

The *Wee Care* interviews provide numerous examples of bribes. Some children were offered police badges in exchange for their incriminating statements. Sometimes the bribe took the form of promises to terminate the interviews ("Well, we can get out of here real quick if you just tell me what you told me last time we met" or, "Tell me what Kelly did to your hiney and then you can go."). Sometimes uncooperative children were explicitly threatened ("Now listen you have to behave" or, "You are acting like a baby").

The *Wee Care* interviewers often created an atmosphere of conspiracy and tried to enlist the children's cooperation. For example:

> Investigator: Your mommy tells me that you guys are interested in busting this case wide open with us, is that right?

Investigator: That's why I need your help, especially you older kids . . . because you can talk better than the younger kids . . . and you will be helping to keep her in jail longer so that she doesn't hurt anybody. Not to mention that you'll also feel a lot better once you start.

These statements reflect interviewer biases and attempts to get children to admit abuse. As we have noted, such statements may have deleterious effects on the subsequent accuracy of young children's reports.

5. The Effects of Peer Pressure or Interaction on Children's Reports

The effects of letting children know that their friends have "already told" is a much less investigated area in the field of children's testimonial research. In addition, suggestions or misleading information may also be planted by peers. However, there are at least three relevant studies. First, Binet (1900) found that children will change their answers to be consistent with those of their peer group even when it is clear that the answer is inaccurate.

In the Pettit et al. study described above, there were seven children who were absent from their classrooms when the target event (the cake falling off the piano) occurred. Yet when questioned two weeks later, six of these children indicated that they were present. One presumes that these six children gave false reports so that they would feel they were part of the same group as their friends who did participate. Importantly, this study also shows how the peer group's actual experiences in an event can contaminate non-participants' reports or fabricated memories of the event.

Finally, Pynoos and Nader (1989) studied people's recollections of a sniper attack. On February 24, 1984, from a second story window across the street, a sniper fired repeated rounds of ammunition at children on an elementary school playground. Scores of children were pinned under gunfire, many were injured, and one child and passerby were killed. Roughly 10% of the student body, 113 children, were interviewed 6 to 16 weeks later. Each child was asked to freely recall the experience and then to respond to specific questions. Some of those children who were interviewed were not at the school during the shooting, including those already on the way home and those on vacation. Yet, even the non witnesses had memories: "One girl initially said that she was at the school gate nearest the sniper when the shooting began. In truth she was not only out of the line of fire, she was half a block away. A boy who had been away on vacation said that he had been on his way to the school, had seen someone lying on the ground, had heard the shots, and then turned back. In actuality, a police barricade prevented anyone from approaching the block around the school." (p. 238) One assumes that children heard about the event from their peers who were present during the sniper attack and they incorporated these reports into their own memories.

Wee Care interviews provide numerous illustrations of the use of peer pressure; both by telling the interview subject what other children had allegedly reported, and by threatening to tell other children that the child being interviewed was uncooperative. The following are some examples:

Interviewer: All the other friends I talked to told me everything that happened. 29C told me. 32C told me . . . And now it's your turn to tell. You don't want to be left out, do you?

Interviewer: Boy, I'd hate having to tell your friends that you didn't want to help them.

Interviewer: Now it is important for you to tell me what you saw Kelly do, okay, because I need it to help you and I need to help your friends. I've spoken to 32C, 33C, 24C, 20C, 29C, and all the different [other children with the same first name]

Interviewer: Oh, come on, we talked to a few more of your buddies. We talked to everybody now. And everyone told me about the nap room, and the bathroom stuff and the music room stuff and the choir room stuff and the peanut butter stuff and everything. Nothing surprises me anymore.

Interviewer: There's a couple of things I'd like to let you know before we start. Alright? That is, Kelly said a lot of things to scare kids and I think she might have said them to you too, like she had some special powers, like she can come through a wall, and she could lift your bed, and stuff like that. Kelly can't do anything like that.

* * *

Interviewer: Kelly was saying a lot of scary things to everybody because she knew that if she was going to get caught that she was going to get into a lot of trouble. Kelly got caught and she is in a lot of trouble, and thanks to kids like you and all your friends who told us the truth of the whole story.

Interviewer: Do you know that I've been talking to a lot of your buddies? I've been talking to 32C and I've been talking to 14C and all the [other children with the same first name] and everything else. And you know what we've been talking about?

15C: What?

Interviewer: We've been talking about some stuff that's not so nice that's been happening at school with Kelly. . . . You can help us with giving some information on your friends that were hurt, okay?

* * *

Interviewer: Anyway, I'm wondering if you can tell me some things of how Kelly was touching some of your friends in the way that you didn't like too much. And all the other friends I talked to told me everything that happened. 29C told me. 32C told me. 14C told me. . . . And now it's your turn to tell me. You don't want to be left out, do you?

Interviewer: All your friends that I mentioned before were telling us that Kelly, the teacher we are talking about, was doing something they didn't like very much. She was bothering them in kind of a private way and they were all pretty brave and they told us everything, and we were wondering if you could help us out too, doing the same thing.

Interviewer: Some of your friends were hurt and they told us just about everything.

* * *

Interviewer: Now some of the kids were saying that maybe this stuff [silverware] was used and somebody was hurting them with it.

Interviewer: Some of the kids were saying that the teacher hurt them with this thing [a knife].

Interviewer: S]ome of your friends said that [the music room]'s where they were hurt, upstairs. Can we take a little walk and you can show me the room that I'm talking about, the music room?

Interviewer: All your other friends, all the other kids in the class, have told me what happened, and they showed me.

* * *

Interviewer: [Y]our other friends, 51C, and 14C and 6C . . . they got hurt.

Interviewer: It's important to help your friends. . . .

* * *

Interviewer: Don't you feel bad for the kids that were hurt?

* * *

Interviewer: You know . . . all of your other friends from your class showed us and told us exactly what happened.

* * *

Interviewer: I will get you the badge if you help us get this information . . . like all your other friends did.

Interviewer: Why don't you tell me or show me what she was doing, okay? Just like all your other friends. 8C showed me and 2C showed me.

Interviewer: [S]ome of them were saying that she was sitting at the piano without clothes on, playing Christmas songs, and that she also did other things they didn't like too much and like peanut butter and stuff?

Parents also told their children that they had been named as victims by other children. Child 1C finally disclosed to his mother after she had told him that others had mentioned him as a participant. The above evidence suggests that this strategy may co-opt children into making false reports.

6. The Effects of being Interviewed by Adults with High Status

Young children are sensitive to the status and power of their interviewers. As a result they are especially likely to comply with the implicit and explicit agenda of such interviewers. If their account is questioned for example, children may defer to the challenges of the more senior interviewer. To some extent, it is this power differential and its recognition by the child that is one of the most important explanations for children's increased suggestibility. Children are more likely to believe adults than other children, they are more willing to go along with the wishes of adults, and to incorporate adults' beliefs into their reports. This fact has long been recognized by researchers since the turn of the century and has been demonstrated in many studies (Ceci & Bruck, 1993a, for review).

The *Wee Care* children were interviewed by law enforcement agents or by social workers who made reference to their connection to law enforcement agents. The children were explicitly made aware of the status of their interviewers by such comments as:

Interviewer: I'm a policeman, if you were a bad girl, I would punish you wouldn't I? Police can punish bad people

Or

Interviewer: I'm going to introduce you to one of the men who arrested Kelly and put her in jail.

A recent study by Tobey and Goodman (1992) suggests that interviews by high status adults who make such statements may have negative effects on the accuracy of children's reports. In their study, 4-year-olds played a game with a research assistant who was called a "baby-sitter." Eleven days later, the children returned to the laboratory. Half of the children met a police officer who said:

> I am very concerned that something bad might have happened the last time that you were here. I think that the babysitter you saw here last time might have done some bad things and I am trying to find out what happened the last time you were here when you played with the babysitter. We need your help. My partner is going to come in now and ask you some questions about what happened.

A research assistant dressed-up as a police officer then questioned these children. The other children never met the police officer; they were only questioned by a neutral interviewer about what happened with the baby-sitter. When the children were asked to tell everything they could remember, the children in the police condition gave fewer accurate statements and more inaccurate statements than children in the neutral condition. Two of the 13 children in the police condition seemed to be decisively misled by the suggestion that the baby sitter had done something bad. One girl said to her mother, "I think the baby-sitter had a gun and was going to kill me." Later, in her free recall, the same child said, "That man he might try to do something bad to me . . . really bad, yes siree." The second child inaccurately reported his ideas of what something bad might be, by saying "I fell down, I got lost, I got hurt on my legs, and I cut my ears."

Goodman (1993) summarizes these findings as follows:

> One should be concerned not only with the actual questions but also with the context of the interview. An accusatory or intimidating context leads to increased errors in children's reports (p. 15).[3]

Another feature of some of the *Wee Care* interviews was that there was often more than one adult questioner present in the interview. One might argue that this might be a safe-guard to ensure that the child tells the truth—especially if one of the adults is the child's parent. However, it also seems that additional adults merely multiply the number of questions and suggestive interview strategies to which the children are subjected. These increased questions may increase children's willingness to defer to the adults' agenda rather than to their own memories of whether an event actually occurred.

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[3]Note the discrepancy between Goodman's interpretations of her own results and those of the prosecutor. (See p. 45 prosecutor's supplemental brief.)

In the following, 13C is interviewed by Fonolleras (L) and Detective Mastrangelo (R)

L: What little girls did she do that to?
13C: (names a child)
L: Who?
13C: (repeats)
L: really
R: You want to show us again what she did with the fork?
L: Show us again what you just showed us
R: She put the fork where?
13C: The vagina
R: OK, whose vagina?
13C: um
R: Do you know. Who, honey?
13C: Down there.
L: OK but who's this little girl?
13C: Huh?

7. The Effects of Stereotype Inducement

As we have argued above, suggestions do not have to necessarily be in the form of an explicit (mis)leading question such as, "Show me how she touched your bottom." One component of a suggestive interview involves the induction of stereotypes. That is, if a child is repeatedly told that a person "does bad things," then the child may begin to incorporate this belief into his or her reports. As the following two studies demonstrate, stereotype induction can have a very powerful effect on children's subsequent reports.

In the first study (Lepore & Sesco, in press), children ranging in age from 4- to 6-years old played some games with a man called Dale. Dale played with some of the toys in a researcher's laboratory room and he also asked the child to help him take off his sweater. Later, an interviewer asked the child to tell her everything that happened when Dale was in the room. For half the children, the interviewer maintained a neutral stance whenever they recalled an action. For the remaining children, the interviewer re-interpreted each of the child's responses in an incriminating way by stating, "He wasn't supposed to do or say that. That was bad. What else did he do?" Thus, in this incriminating condition, a negative stereotype was induced. At the conclusion of these incriminating procedures, the children heard three misleading statements about things that had not happened ("Didn't he take off some of your clothes, too?", "Other kids have told me that he kissed them, didn't he do that to you?" and, "He touched you and he wasn't supposed to do that, was he?"). All children were then asked a series of direct questions, requiring "yes" or "no" answers, about what had happened with Dale.

Children in the incriminating condition gave many more inaccurate responses to the direct yes-no questions than children in the neutral condition. Interestingly, ⅓ of the children in the incriminating condition embellished their responses to these questions, and the embellished responses were always in the direction of the incriminating suggestions. The question that elicited the most frequent embellishments was: "Did Dale ever touch other kids at the school?" Embellishments to this question included information about who Dale touched (e.g., "He touched Jason, he

touched Tori, and he touched Molly."), where he touched them (e.g., "He touched them on their legs."), how he touched them (e.g., ". . . and some he kissed . . . on the lips"), and how he took their clothes off ("Yes, my shoes and my socks and my pants. But not my shirt."). When they were re-interviewed one week later, children in the incriminating condition continued to answer the yes/no questions inaccurately and they continued to embellish their answers.

The second study also demonstrates the powerful effects of stereotype inductions especially when these are paired with repeated suggestive questioning. A stranger named Sam Stone paid a two-minute visit to preschoolers (aged 3 to 6 years) in their daycare center (see Leichtman & Ceci, in press). Following Sam Stone's visit, the children were asked for details about the visit on 4 different occasions over a 10-week period. During these 4 occasions, the interviewer refrained from using suggestive questions. She simply encouraged children to describe Sam Stone's visit in as much detail as possible. One month following the fourth interview, the children were interviewed a fifth time, by a new interviewer who asked about two "non-events" which involved Sam doing something to a teddy bear and a book. In reality, Sam Stone never touched either one. When asked in the fifth interview: "Did Sam Stone do anything to a book or a teddy bear?" most children rightfully replied "No." Only 10% of the youngest (3 to 4-year-old) children's answers contained claims that Sam Stone did anything to a book or teddy bear. When asked if they actually saw him do anything to the book or teddy bear, as opposed to "thinking they saw him do something," or "hearing he did something," now only 5% of their answers contained claims that anything occurred. Finally, when these 5% were gently challenged ("You didn't really see him do anything to the book/the teddy bear, did you?") only 2.5% still insisted on the reality of the fictional event. None of the older (5 to 6-year-old) children claimed to have actually seen Sam Stone do either of the fictional events.

A second group of preschoolers were presented with a stereotype of Sam Stone before he ever visited their school. Each week, beginning a month prior to Sam Stone's visit, these children were told a new Sam Stone story, in which he was depicted as very clumsy. For example:

> You'll never guess who visited me last night. [pause] That's right. Sam Stone! And guess what he did this time? He asked to borrow my Barbie and when he was carrying her down the stairs, he tripped and fell and broke her arm. That Sam Stone is always getting into accidents and breaking things!

Following Sam Stone's visit, these children were given 4 suggestive interviews over a ten-week period. Each suggestive interview contained two erroneous suggestions, one having to do with ripping a book and the other with soiling a teddy bear (e.g., "Remember that time Sam Stone visited your classroom and spilled chocolate on that white teddy bear? Did he do it on purpose or was it an accident?" and "When Sam Stone ripped that book, was he being silly or was he angry?").

Ten weeks later, when a new interviewer probed about these events ("Did anything happen to a book?" "Did anything happen to a teddy bear?"), 72% of the youngest preschoolers claimed that Sam Stone did one or both misdeeds, a figure that dropped to 44% when asked if they actually saw him do these things. Importantly, 21% continued to insist that they saw him do these things, even when gently challenged. The older preschoolers, though more accurate, still included some children (11%) who insisted they saw him do the misdeeds.

The *Wee Care* interviews are rife with examples of stereotype induction. The interviewers explicitly repeated in various interviews that Kelly was bad. Based on analyses of the existing interviews, the investigator told 15 of the 34 interviewed children that Kelly was in jail because she had done bad things. The investigators told the children that they needed their help to keep Kelly in jail. The investigators also promoted fear by asking leading questions about whether Kelly had threatened them or their families if they were to tell on her. Sometimes the investigators suggested that she had claimed to have supernatural powers ("Kelly said a lot of things to some kids and I think that she might have said them to you too, like she had some special powers like she can come through a wall and she could lift your bed and stuff like that . . ."). The investigators constantly told the children that they were now safe and could talk because Kelly was in jail.

It is interesting that despite these statements, in the early interviews at least, the children did not completely incorporate the suggested stereotypes of Kelly. Sixteen of the 34 children never said they were afraid of her and the remaining children never volunteered that information. Some children claimed that Kelly was bad, but these claims were never completely justified by the children. For example, in one of the few examples we have of two transcribed interviews for the same child, we see that in the first of the transcribed interviews (but not the first interview) the child is repeatedly asked about bad things that Kelly did. She denies that Kelly did anything bad to her. In the next (transcribed) interview, the following exchange takes place:

Q: Was Kelly a good girl or a bad girl?
A: She was a bad girl?
Q: She was a bad girl. Were there any other teachers who were bad?
A: No
Q: Kelly was the only bad girl? What did Kelly do that made her a bad girl?
A: She readed
Q: She what?
A: She readed and she came to me and I said no, no, no.
Q: Did she hurt you?
A: I hurted her.
Q: How did you hurt her?
A: Because I didn't want to write and she write and I said no, no, no, no and I hit her.

When other children made statements that Kelly was bad, it is impossible to tell whether these statements reflect the fact that Kelly actually did bad things or whether these reports reflect the children's adoption of the interviewers' suggested stereotypes of Kelly, an indeterminacy exacerbated by the general absence of recorded initial interviews.

8. The Use of Anatomically Detailed Dolls

Anatomically detailed dolls are frequently used by professionals, including child therapists, police, child protection workers, and attorneys, when interviewing children about suspected sexual abuse. They were used repeatedly in the interviews with the *Wee Care* children.

One rationale for the use of anatomical dolls is that they allow children to manipulate objects reminiscent of a critical event, thereby cuing recall and overcoming language and memory problems. Another rationale is that their use is

thought to overcome motivational problems of embarrassment and shyness. The dolls have also been used as projective tests. Some professionals claim that if a child actively avoids these dolls, shows distress if they are undressed, or shows unusual preoccupation with their genitalia, this is consistent with the hypothesis that the child has been abused (see Mason, 1991).

The use of anatomically detailed dolls has raised skepticism, however, among researchers and professionals alike. Two related arguments are frequently invoked against their use. The first is that the dolls are suggestive, that they encourage the child to engage in sexual play even if the child has not been sexually abused (e.g., Gardner, 1989; Terr, 1988). A child, for instance, may insert a finger into a doll's genitalia simply because of its novelty or "affordance," much the way a child may insert a finger into the hole of a doughnut. Another criticism is that it is impossible to make firm judgments about children's abuse status on the basis of their doll play because there are no normative data on non-abused children's doll play. Over the past several years, researchers have conducted a number of studies to address these concerns.

In several studies, researchers have compared the doll play of children suspected of having been sexually abused with children not suspected of having been abused. In addition, there have been a score of studies examining the doll play of non-abused children. Reviews of this literature (Berry & Skinner, 1993; Ceci & Bruck, 1993a; Wolfner, Faust, & Dawes, 1993) indicate that many of the studies are methodologically inadequate and do not allow for firm interpretations about the potential usefulness or risks of using dolls. Furthermore, other data indicate that some of the play patterns thought to be characteristic of abused children, such as playing with the dolls in a suggestive or explicit sexual manner, or showing reticence or avoidance when presented with the dolls, also occur in samples of non-abused children.

More recent studies have focused on how accurately young preschoolers use dolls to represent themselves. For example, DeLoache (1993) used dolls to interview 2.5-, 3-, and 4-year-old children about a play session they had with a male experimenter. The dolls did not help the children report their experiences. The younger children in particular gave fuller and more accurate accounts of where they had been touched without the dolls than they did with the dolls. When asked to place stickers on the doll in the same places that stickers had been placed on their own bodies, the younger children were not very successful. Indeed, many of the children did not seem to realize that they were supposed to treat the doll as a representation of themselves. Further, several children in this and a subsequent on-going study rejected the suggestion that they "pretend that this doll is you." This last finding is important, since a reluctance to play with dolls in forensic or therapeutic interview sessions is often taken as a possible indicant of abuse. Generally these results indicate that very young children may not have the cognitive sophistication to use a doll to represent their own experiences. Hence, the use of dolls may actually impede or distort, rather than facilitate and clarify, their ability to provide accurate testimony.

Two studies have examined how accurately non-abused children use the dolls to show how they were touched during a pediatric visit. In both studies, half the children received genital examinations and half did not. If the dolls provide children with a tool that will allow them to overcome their shyness, and embarrassment concerning sexual matters, then reports of genital touching should be more accurate

when children are allowed to re-enact events with the dolls. The results of both studies fail to support this hypothesis. The first study included 5- and 7-year old girls (Saywitz, Goodman, Nicholas & Moan, 1991). When the children were asked for a verbal report of their genital examination, 78% of the children who had received a genital examination failed to disclose genital touching. When given the opportunity to provide the same information with the dolls ("Show me with the dolls what happened"), 83% of these children failed to disclose genital touching. However, when the experimenter pointed to either the genitalia or buttocks of the doll and asked a direct question, "Did the doctor touch you here?", only 22% of the responses were incorrect denials. Children who did not receive a genital examination never made a false report in the verbal free recall or doll enactment conditions. However, when the experimenter pointed to the genital or anal region of the doll and asked, "Did the doctor touch you here?", 9% of these children inaccurately claimed that they had been touched. These results indicate that regardless of interviewing technique, 5- and 7-year old children rarely make false reports about genital touching. These data also indicate that the dolls do not assist the children to divulge potentially embarrassing material, unless the interviewer uses highly directive questioning. As the next study shows, however, a very different pattern of results is obtained for younger children.

Three-year-old children visited their pediatrician for their annual check-up (Ceci & Bruck, 1993b). Half the children received a genital examination where the pediatrician gently touched their buttocks and genitals. The other children were not touched in these areas. Immediately after the examination, an experimenter pointed to the genitalia or buttocks of an anatomically detailed doll and asked the child, "Did the Doctor touch you here?" Only 45% of the children who received the genital exam correctly answered yes; and only 50% of the children who did not receive a genital exam correctly answered "No" (i.e. 50% of these children falsely reported touching). When the children were simply asked to "Show on the doll" how the doctor had touched their buttocks or genitalia, accuracy did not improve. Now only 25% of the children who had received genital examinations correctly showed how the pediatrician had touched their genitals and buttocks. Accuracy decreased in part because a significant number of female subjects inserted their fingers into the anal or genital cavities of the dolls; the pediatrician never did this. 55% of the children who did not receive genital examinations falsely showed either genital or anal touching when given the dolls.

These data indicate that three-year-old preschool children are inaccurate when reporting how and where they were touched, even when the touching occurred five minutes prior to the interview. Children who were not touched demonstrated on the dolls that they were touched and children who were touched either refused to admit that they were touched, or at the other extreme they showed penetration when none had occurred. The use of the dolls increases this type of inaccurate reporting in three-year-old children.

The interview procedures in this study also elicited a number of other behaviors that adults might interpret as sexual. When the children were given a stethoscope and asked to show what the doctor did with it, some children incorrectly showed that he used the instrument to examine their genitals. The children were also shown a small spoon and asked whether the doctor had used it (the doctor had not used a spoon). A number of the children were inaccurate, stating that he had given them

medicine with it. The children were then asked once, "How might he use this spoon?" A small but significant number of children (18%) inserted the spoon into the genital or anal openings or hit the doll's genitals.

These "sexualized" behaviors do not reflect three-year-old children's sexual knowledge or experiences but two other factors. First, the types of questions and props used in an interview (asking children to name body parts, including genitals, showing children anatomically detailed dolls and asking children to manipulate these dolls) make children come to think that it is not only permissible but it is expected to respond to the interviewers' questions using these same terms. Second, the children insert fingers or objects into the dolls openings for the same reasons they would insert a finger into the hole of a doughnut; it is there, it is something to manipulate.

In the interviews with the *Wee Care* children, anatomically detailed dolls were shown to the children before they said anything about abuse in 24 of the 39 interviews. Most of the leading and suggestive aspects of the transcribed interviews involve the interviewers' interactions with the dolls and their asking children sexualized questions in the contexts of the demonstrations with the dolls. In 17 of the 39 sessions silverware was given to the children with dolls. The children were asked such questions as:

Interviewer: Did Kelly ever do anything to you with a knife that hurt you?
Child: No.
Interviewer: Did she ever do bad things or hurt you with a spoon?
Child: No.
Interviewer: Did she ever do bad things or hurt you with a knife?
Child: No.
Interviewer: Okay. What about a wooden spoon?
Child: No.

Children were asked to speculate about how silverware could have been used.

Interviewer: Why don't you show me how you think a little girl can be hurt by the fork?

And

Interviewer: Why don't you show me what Kelly did with the big wooden spoon.

Often, as shown above, the children resisted these suggestions, but sometimes after much repetition, the children responded by poking the silverware into the genitalia or buttocks of the doll:

Interviewer: Can you think of a way somebody might have used this to hurt little girls?
Child: (indicates the tummy)
Interviewer: Where else do you think a little girl could have gotten hurt with a wooden spoon?
Child: The belly button.
Interviewer: Where else do you think a little girl might get hit with a wooden spoon? How do you think Kelly used this fork to hurt little girls?
Child: Belly button.

Interviewer: Where else?
(finally after many more persistent questions)
Child: Bottom.

There are difficulties in drawing parallels between the behaviors of children in research studies and the behaviors of children in actual forensic contexts or clinical settings. Transcripts of some of these sessions with children suspected of having been sexually abused reveal the following practices by interviewers:

— Naming the dolls after defendants. In 12 of the transcribed interviews, *Wee Care* investigators named a doll Kelly rather than allowing the child to do so. e.g. "This is Kelly, o.k?";
— Berating the dolls for alleged abuses against the child. e.g., shaking a finger at the male doll who has been named after the defendant, and yelling: "You are naughty for hurting [the child being interviewed]!";
— Assuming the role of fantasy characters in doll play.

Interviewer: Now we are going to play pretend. And we're going to pretend who the dolls are. Now the one with the brown hair we are going to pretend is Kelly, o.k. Now we're going to pretend the one with the yellow hair is you, and we'll pretend that it has brown hair, o.k.? This way you don't have to do anything, but I want you to show me where or how Kelly spanked you with the wooden spoon. O.k. so put this spoon in Kelly's hands o.k. and I'll tell you and you pretend and hold Kelly's hand, now the only thing that we are pretending is that the doll is Kelly, right you're going to show me what happened, right?
Child: Need to draw.
Interviewer: No, let's do this first and then we will draw;

— Creating a persistent atmosphere of accusation. E.g. "What happened to 8C with the wooden spoon. . . . Maybe you can show me."; and
— Asking a stream of suggestive questions that reflect the sexual knowledge of the adult interviewer. E.g. Utilizing the dolls, the interviewer asked:

> Did Kelly and Brenda [another teacher] do anything to each other? . . . What did Kelly and Brenda do to each other? . . . Did they kiss? . . . Huh? Nobody can hear us. What did Kelly and Brenda do to each other? What? They kissed? Is that what you're showing me? I can't hear you. They kissed?

Non-abused children in research studies were never subjected to such highly suggestive experiences; they were never given prior motivation to play with the dolls suggestively or aggressively. If they had been, it is possible that their play with the dolls would contain many explicit sexual events, reflecting prior interviewing techniques rather than sexual abuse.

Anatomically detailed dolls may serve as a nonverbal suggestive device which promotes subsequent sexualized play and sexualized verbalizations, none of which are accurate indicators of past abuse. Because the initial interviews with the *Wee Care* children were not recorded, we cannot determine how *Wee Care* children were first interviewed with the dolls and how they responded to their introduction. But we do know from comments in the later transcribed interviews that children had interacted with the dolls on previous occasions. This raises the issue of whether any

sexualized behavior or sexualized reports in the transcribed interviews reflects the children's prior exposure to the dolls rather than their attempt to demonstrate actual experiences. These concerns are raised by the behavior of one non-abused child who served as a pilot subject in a study of young children's interactions with anatomically detailed dolls (described in Ceci, in press, and Ceci & Bruck, 1993b).

A three-and-a-half year old non-abused girl was examined by a pediatrician. She was not given a genital examination. Immediately after the examination, when interviewed by the experimenter, she correctly said that the doctor had not touched her genitals or buttocks. Furthermore, when shown an anatomically detailed doll and told to show how the doctor had touched her genitals and buttocks, she correctly stated that he had not touched her.

Three days later, the same child was given an anatomically detailed doll and asked to show all the things that the doctor had done in her previous visit. This time, she inserted a stick into the vagina of the doll and said that this had happened at the doctor's office. However, upon further questioning, she said that the doctor did not do this. Three days later, the child was asked to use the anatomically detailed doll and to show her father everything that had happened at the examination. This time, she hammered a stick into the doll's vagina and then inserted a toy earscope into the doll's anus. When asked if this really happened, she said "Yes it did." When her father and the experimenter both tried to debrief her with such statements as, "Your doctor doesn't do those things to little girls. You were just fooling. We know he didn't do those things," the three-year-old tenaciously clung to her prior claims that she had just demonstrated on the doll (a videotape including footage of this child's doll play is appended to this brief). Thus, repeated exposure to the doll, with minimal suggestions, resulted in highly sexualized play for this one 3-year-old subject. Although this pilot observation calls for more systematic research on the influence of repeated exposure to anatomically detailed dolls in interviews with sexual themes, the dramatic and startling results of this one subject demonstrates vividly the potential suggestiveness of anatomical dolls with non-abused 3-year-olds.

Wolfner and his colleagues (1993) concluded their recent review article on the use of anatomical dolls with the following statement:

> . . . we are left with the conclusion that there is simply no scientific evidence available that would justify clinical or forensic diagnosis of abuse on the basis of the dolls. The common counter is that such play is "just one component" in reaching such a diagnosis based on a "full clinical" picture. . . . [Doll] play cannot be validly used as a component, however, unless it provides incremental validity and there is virtually no evidence that it does." (Wolfner et al., p. 9)

Since this statement was written, we now have data on three-year-old children's interactions with anatomically detailed dolls (Ceci & Bruck, described above). If replicated, these data would appear to suggest that dolls ought not be used in interviews with young children, as their use promotes sexualized behavior and false reports in non-abused children.

9. Less Invasive Methods: Source Attribution Errors

In the previous sections, we have presented some of the elements of interviews that may produce inaccurate reporting. To a large extent, these elements are quite salient; their presence can be easily isolated in recorded interviews. Some authors of this brief have recently conducted three different types of studies that illustrate how

suggestions that are delivered in a much milder and less detectible manner can also have repercussions on children's memories and reports.

These three studies focus on the theoretical construct of "source attribution error." This refers to the problems that both children and adults have in separating the sources of their memories. In some cases, this may be particularly problematic for some children. For example, 6- and 9-year-old children make more errors than adults when discriminating between actions they performed and actions they merely imagined themselves performing (Foley & Johnson, 1985). When asked to remember which of two people said what, preschool children have a more difficult time than adults, if the two people speaking share similar physical characteristics (Foley & Johnson, 1985; Lindsay, Johnson, & Kwon, 1991).

Zaragoza and her colleagues (Ackil & Zaragoza, 1993) have used some of these same techniques to explore the basis of children's suggestibility. In these experiments, subjects viewed a videotape, after which the experimenter read them a summary of the video which contained events that were part of the video as well as events that were not part of the video. Sometime later, subjects were given a surprise memory test; here they were read a list of events and asked to say whether they remembered seeing the event on the video, or hearing the event from the summary, or both. The youngest children (6-year-olds) were most prone to confusing actually viewed with suggested (heard) events. These findings suggest that suggestibility effects reflect young children's susceptibility to serious memory errors, namely the tendency to believe they remembered seeing details that were only suggested to them. The next two experiments take this paradigm closer to the field of children's testimony in the forensic context.

Poole and Lindsay (unpublished) demonstrated how source attribution errors may occur through subtle interventions, such as parents reading a book to their child. In this study, preschoolers played with "Mr. Science" for 16 minutes in a university laboratory. During that time the child participated in four demonstrations (e.g., lifting cans with pulleys). Four months later, the parents were mailed a story book which was specially constructed for each child. It contained a biographical description of their child's visit to Mr. Science. However, not all of the information was accurate; the story described two of the experiments that the child had seen and it also described two that the child had not seen. Furthermore, each story finished with the following fabricated account of what happened when it was time to leave the laboratory:

> Mr Science wiped (child's name) hands and face with a wet-wipe. The cloth got close to (child's name) mouth and tasted really yuckie.

The parents read the story to their children three times.

These young children were very susceptible to source attribution errors. When later interviewed by the experimenters, the children reported that they had participated in demonstrations which had only been mentioned in the stories read to them by their parents. When asked whether Mr. Science put anything "yuckie" in their mouths, more than half of the children inaccurately replied "yes," and these children elaborated their "yes" answers. Moreover, inaccurate reports of having something "yuckie" put in their mouths increased on repeated questioning; when asked, "Did Mr. Science put something yuckie in your mouth or did your Mom just read you this in a story?", now 71% of the children said that it really happened. This

study demonstrates how very subtle suggestions can influence children's inaccurate reporting of non-events which can have a sexual interpretation.

The next study, conducted by Ceci and his colleagues (Ceci, Crotteau, Smith & Loftus, in press), was designed to pursue the question of whether preschoolers exhibit source misattributions when they are repeatedly encouraged to think about events that never occurred. Each week for 10 consecutive weeks, an interviewer asked preschoolers to think about both actual events that they had experienced in their distant past (e.g., an accident that eventuated in stitches) and fictitious events that they had never experienced (e.g., getting their hand caught in a mousetrap and having to go to the hospital to get it removed; seeing an alligator on a bus with an apple in its mouth). Each of these events and non-events was written on a separate card. The child selected a card, the interviewer would read it aloud, and then ask if the event ever happened. For example, when the child selected the card that read: "Got finger caught in a mousetrap and had to go to the hospital to get the trap off," the interviewer would ask: "Think real hard, and tell me if this ever happened to you. Can you remember going to the hospital with the mousetrap on your finger?" (This study will be henceforth referred to as "The Mousetrap Study.")

After 10 weeks of thinking about both real and fictitious events, these preschool children were interviewed by a second interviewer. Initially, the interviewer asked: "Tell me if this ever happened to you: Did you ever get your finger caught in a mousetrap and have to go to the hospital to get the trap off?" Following the child's reply, the interviewer asked for additional details (e.g., "Can you tell me more?").

When exposed to these very mild manipulations, 58% of the preschool children produced false narratives to one or more of these fictitious events; 25% produced false narratives to the majority of them. Furthermore, the children's reports did not solely contain one word responses; their narratives contained elaborated and embellished descriptions of events that never occurred. Some accounts were internally coherent, containing not only details and sequences of events that never occurred but also containing descriptions of the child's affect during these non-events (see, appended videotape).[4]

These data indicate that children can come to make false reports about non-occurring events, even ostensibly painful bodily events, when suggestions are mildly made in the course of a conversation or a story-telling activity. If children are repeatedly asked by investigators, therapists, and parents to try to remember "how someone touched you" or "if someone touched your vagina," will children eventually come to make statements that they had been sexually abused, when abuse had never taken place? Furthermore, when parents or therapists read books with abuse themes to children, do children come to believe what happened in the book actually happened to them? (For example, Dr. Susan Esquilin read *Where the Wild Things Are* to some [of] the *Wee Care* children. One of the pictures contains a monster with a fork running after a child. After reading this book, some children began reporting abuse with utensils.) There are no data on these important issues. However, the results of the studies that we have just reviewed provide a theoretical and empirical framework for suspecting that such activities could lead to significant source misattributions.

[4]It should be noted that subsequent work with same paradigm indicates that the same quality of false report can be produced in half the time as the original experiment. Furthermore, similar patterns of results have been recently reported for adult subjects (e.g., Hyman et al., 1993; Loftus, 1993).

Summary

We have presented a number of features that, when present in interviews or interactions with young children, may greatly compromise the accuracy of their reports. These factors include: biased beliefs of the interviewer, the use of repeated questions, the repetition of misleading information, the use of rewards, bribes, and threats. Children's reports are at risk for being tainted if they are interviewed by an intimidating adult, such as a police officer. Other important factors that contribute to children's unreliable reports include the use of peer pressure, the use of anatomically detailed dolls, and stereotype induction. Finally some very recent evidence indicates that merely asking children to repeatedly think about whether an event occurred may have a profound negative effect on their subsequent memories. These features characterize many of the interviews of the *Wee Care* children.

The following excerpted interview, along with our annotated comments, summarizes many of the points made in this section. The interviewer, an experienced social worker, is denoted I, and he is interviewing one child, denoted C. Occasionally a police detective (P) joins the interview.

I: We have gotten a lot of other kids to help us since I last saw you.
C: No. I don't have to.
I: Oh, come on. Did we tell you she is in jail?
C: Yes. My mother already told me.

Comment: The interviewer bias regarding the defendant's guilt, as well as stereotype induction is apparent. The interviewer insinuates that because she is now jail the child need not be afraid of her. Note that it is not clear that this child was ever afraid. Also note the use of peer pressure.

I: Well, we can get out of here real quick if you just tell me what you told me last time.

Comment: The interviewer fails to test an alternative hypothesis; rather he desires the child to reaffirm on tape what the interviewer recalls from an earlier interview through the use of a bribe.

C: I forgot.
I: No you didn't, I know you didn't.
C: I did, I did.
I: No, come on.
C: I forgot.
I: I thought we were friends last time.
C: I'm not your friend any more.
I: How come?
C: Because I hate you.
I: Is it because we are talking about stuff you don't want to talk about? What are you a monster now? Huh? . . .

Comment: This provides an example of interviewing which borders on being coercive. There is little respect for the child's wish not to discuss this matter.

I: We talked to a few more of your buddies—we talked to everybody now. And everyone told me about the nap room, and the bathroom stuff, and the

music room stuff, and the choir stuff, and the peanut butter stuff, and nothing surprises me any more.

Comment: Again, no alternative hypothesis is being tested. This is also an example of utilization of peer pressure. The interviewer essentially tells the child that his friends already told on the defendant, and that he, the child, should do the same.

C: I hate you.
I: No you don't . . . You just don't like talking about this, but you don't hate me.
C: Yes, I do hate you.
I: We can finish this real fast if you just show me real fast what you showed me last time.
C: No.
I: I will let you play my tape recorder. . . . Come on, do you want to help us out? Do you want to help us keep her in jail, huh? . . . Tell me what happened to (three other children). Tell me what happened to them. Come on. . . . I need your help again, buddy. Come on.
C: No.
I: You told us everything once before. Do you want to undress my dolly?
I: Let's get done with this real quick so we could go to Kings to get popsicles. . . . Did (defendant) ever tell you she could get out of jail?

Comment: In this example, the interviewer comes close to bribing the child for a disclosure, by implying that the aversive interview can be terminated as soon as the child repeats what he said earlier. Popsicles and playing with a tape recorder are offered as rewards.

Police: She could never get out.
C: I know that.
Police: Cause I got her. . . . She is very afraid of me. She is so scared of me.
I: She cries when she sees him (indicating the police detective) because she is so scared. . . . What happened to (another child) with the wooden spoon? If you don't remember in words, maybe you can show me.

Comment: Here we see examples of using statements of an authoritative adult, the policeman, and the failure to test the hypothesis that the defendant did not do what the interviewers believed she did.

C: I forgot what happened, too.
I: You remember. You told your mommy about everything, about the music room, and the nap room. And all the stuff. You want to help her stay in jail, don't you? So she doesn't bother you any more. . . . Your mommy told me that you had a picture of yourself in your room and there was blood on your penis. Who hurt you?
C: (Child names the defendant).
I: So, your penis was bleeding, oh. Your penis was bleeding. Tell me something else: was your hiney bleeding, too?
C: No.

Comment: The child never says to this investigator that his penis was bleeding. The investigator provides this misleading information to the child.

I: Did (defendant) bleed, too?
C: No.
I: Are you sure she didn't bleed?
C: Yes. . . . I saw her penis, too.
I: Show me on the (anatomical) doll . . . you saw that? Oh.
C: She doodied on me . . . She peed on us.
I: And did you have to pee on her at all?
C: Yeah.
I: You did? And who peed on her, you and who else?
C: (Child names a male friend)
I: Didn't his penis bleed?
C: Yes.
I: It did? What made it bleed? What was she doing?
C: She was bleeding.
I: She was bleeding in her penis? Did you have to put your penis in her penis? Yes or No?
C: Yeah. . . . And I peed in her penis.
I: What was that like? What did it feel like?
C: Like a shot.
I: Did (friend) have to put his penis in her penis, too?
C: Yes, at the same time.
I: At the same time? How did you do that?
C: We chopped our penises off.
I: So, she was bleeding in her penis and you had your penis and your friend's inside her penis.
C: At the same time.

Comment: This is another example of interviewer bias. When the child says something that is not part of the interviewer's hypothesis (in this case, that the children chopped off their penises), the interviewer ignores it. Further, we see that the child does not begin to make allegations until after much initial resistance. Previous research indicates that when children want an interview to end, they often increase the quantity of false statements (Pettit et al.).

At this point the child and interviewer began discussing a stream of events in which the child alleged that the defendant urinated in his mouth and he urinated in her mouth; he and others were made to walk in her urine and slide on the classroom floor in her urine.

Nowhere in this interview, or numerous others by this and other mental health professionals is there any evidence that an alternative hypothesis was being tested. Specifically, there is no attempt by this interviewer to try to get the child to assent to an incompatible hypothesis, e.g., one in which the child's pediatrician put his penis in the child's mouth, or the sheriff made him drink his urine, or that he was just teasing about the defendant bleeding. As can be seen, there is no attempt to encourage the child to deny that any of this happened. Although it is not possible to know how much of what the child is reporting is factually accurate, there is a certain suspiciousness about his disclosures—and this is even more troubling in the interviews of some of his classmates. Partly, this is due to the heavy-handed use of coercive tactics ("If you tell me real quick, we can go get Popsicles") and a refusal to believe that the child has forgotten or has a legitimate motive for not wanting to repeat an earlier remark he

allegedly made to his mother, (e.g., the child may realize the former statement is false). Partly, though, there is an absence of incredulity on the part of the interviewer which may reflect some interviewers' confusion between taking everything the child says seriously, vs. believing everything a child says.

To summarize, a consideration of the nature of the interviews conducted with the *Wee Care* children raises a possibility that their statements were in response to highly suggestive and coercive interviewing techniques. Our analyses of the transcripts of the initial interviews with the *Wee Care* children also reveal that despite all examples of coercive and suggestive interviewing practices, the children made relatively few accusations of sexual abuse. When these did occur, for the most part, they were one word responses to investigator's suggestive questions. It is rare to find any elaborated account by a child even after all the suggestive interviewing practices. (An instructive exercise to support this conclusion involves reading only the child's portions of the interviews, deleting all of the interviewers' questions and comments.)

B. Children's Credibility

Although children's reports may be highly influenced by a number of suggestive influences, this does not necessarily mean that the children will appear credible when they parrot interviewers' erroneous suggestions. Of particular concern is whether a juror, or a child development researcher, or a child therapist can differentiate children whose reports are accurate from those whose reports were a product of suggestive interviews. The existing evidence suggests that one cannot tell the difference between these two kinds of children. The evidence is based on some of the results from studies already discussed in this brief.

It will be recalled that in the Pettit et al. study, there were seven children who were absent from the classroom when a major event occurred, and yet six of these children later reported that they were present. On closer analysis, these researchers found that the reports of three of these six absent children were indistinguishable from those of their classmates who actually did view the events.

Some researchers have opined that the presence of perceptual details in reports is one of the indicators of an actual memory, as opposed to a confabulated one (Schooler, Gerhard, & Loftus, 1986; Raskin & Yuille, 1989). However, in the Sam Stone study for example, the presence of perceptual details was no assurance that the report was accurate. There was a surprising number of fabricated perceptual details that children in the combined stereotype plus suggestion condition provided to embellish the non-events (e.g., claiming that Sam Stone took the teddy bear into a bathroom and soaked it in hot water before smearing it with a crayon; claiming that there was more than one Sam Stone; claiming that they saw Sam Stone go to the corner store to buy chocolate ice cream).

It is one thing to demonstrate that children can be induced to make errors and include perceptual details in their reports, but it is another matter to show that such faulty reports are convincing to an observer, especially a highly trained one. To examine the believability of the children's reports, videotapes of their final interviews were shown to approximately 1,000 researchers and clinicians who work on children's testimonial issues (Leichtman & Ceci, in press). These researchers and clinicians were told that all the children observed Sam Stone's visit to their daycare centers. They were asked to decide which of the events reported by the children actually transpired and then to rate the overall credibility of each child.

The majority of the professionals were highly inaccurate. Experts who conduct research on the credibility of children's reports, who provide therapy to children suspected of having been abused, and who carry out law enforcement interviews with children, generally failed to detect which of the children's claims were accurate and which were not, despite being confident in their judgments. The highly credible yet inaccurate reports obtained from the children may have resulted from a combination of repeated interviews with persistent and intense suggestions that built on a set of prior stereotypes. Similarly, it may become difficult to separate credibility from accuracy when these children, after repeated interviews, give a formal video-taped interview or testify in court.

Similar results were obtained when psychologists who specialize in interviewing children were shown videotapes of the children in the Mousetrap study (Ceci, in press). Recall that these children had been simply asked to repeatedly think about whether a fictitious or real event had actually happened. Again, professionals could not reliably detect which of the events in the children's narratives were real and which were not. One reason for their difficulty may be that they cannot imagine such plausible, internally coherent narratives being fabricated. In addition, the children exhibited none of the tell-tale signs of duping, teasing, or tricking. They seemed sincere, their facial expressions and affect were appropriate, and their narratives were filled with the kind of low-frequency details that make accounts seem plausible, as shown in the following account:

> My brother Colin was trying to get Blowtorch (an action figure) from me, and I wouldn't let him take it from me, so he pushed me into the wood pile where the mousetrap was. And then my finger got caught in it. And then we went to the hospital, and my mommy, daddy, and Colin drove me there, to the hospital in our van, because it was far away. And the doctor put a bandage on this finger (indicating).

Some researchers are developing techniques that may ultimately be used to detect when children's reports are accurate and when their reports are inaccurate. These involve fine-grained analyses of the linguistic content of the statements, the gestures, voice quality, and other affective measures. However, these techniques have not yet been validated on children who have undergone repeated and highly suggestive interviews. Furthermore, even if such techniques were available, they could only be used by highly trained professionals, not by jurors, or even by specialists in child development. These techniques are being developed precisely because of the difficulty that professionals and non-professionals all share in distinguishing between children's reliable and unreliable reporting.

To summarize, when children have undergone suggestive interviewing or are exposed to some of the components of suggestive interviews, they frequently appear highly credible when they are inaccurate, even to well-trained professionals.

C. The Time-Course of Suggestibility Effects

How long-lasting are the effects of suggestions? Perhaps it could be argued that suggestive interviewing techniques change children's reports but only for a short time; and sometime after suggestive interviews have ceased, then children's reports revert to accurate accounts. Following this line of reasoning, if children's accounts of events are consistent over long periods of time even after the cessation of suggestive interviews, then these reports must be faithful versions of what actually happened to

the children. This is a difficult but important issue to address. Based on some anecdotal and scientific evidence, however, we note that misleading suggestions can indeed have long lasting effects; indeed, they can sometimes give rise to life-long illusory beliefs.

The longevity of the suggestibility effects is primarily influenced by the overall strength of the suggestions. Thus, the same factors that increase the risk of erroneous reports also increase the longevity of these reports and beliefs. To repeat these include such factors as: the forcefulness of the suggestions, the perceived authority of the provider of the suggestions, the use of threats and bribes, reinforcement for reports of abuse, negative reinforcement or ignoring denials, retractions, or implausible reports, creation of an accusatory atmosphere, peer pressure, and the suggestive use of anatomically detailed dolls.

Further, aspects of the social and mental life of the child may serve to solidify and strengthen their false reports and false beliefs long after the interviews are over. That is, if the children continue to think about the suggested events and to talk about them and to hear others around them talk about them, their beliefs in the reality of these events may solidify.

These arguments are supported by numerous anecdotes of long-lasting but erroneous memories of childhood events (e.g., see Lindsay & Read, in press). Perhaps the most famous of these involves the inaccurate memory of one of the great developmental psychologists Jean Piaget (Piaget, 1962).

> . . . one of my first memories would date, if it were true, from my second year. I can still see, most clearly, the following scene, in which I believed until I was about fifteen. I was sitting in my pram, which my nurse was pushing in the Champs Elysees, when a man tried to kidnap me. I was held in by the strap fastened round me while my nurse bravely tried to stand between me and the thief. She received various scratches, and I can still see vaguely those on her face. . . . When I was about fifteen, my parents received a letter from my former nurse . . . she wanted to confess her past faults, and in particular to return the watch she had been given as a reward. . . . She had made up the whole story . . . I, therefore, must have heard, as a child, the account of this story, which my parents believed, and projected into the past in the form of a visual memory.

The false memories were with Piaget for at least a decade.

A second piece of evidence to support the contention that some children maintain their beliefs about fabricated stories that are a product of suggestive interviews, long after the suggestions of ceased, comes from the "mousetrap" study. Several weeks after the last interview, one of the subjects who had told about his finger being caught in the mousetrap was re-interviewed. When his mother brought him to the lab, she told the experimenters that both she and her husband thought that the study was completed, and therefore two days earlier they explained to their son that the story about the mousetrap was fictitious and had never happened. She said that her son initially refused to accept this debriefing, claiming that he remembered it happening when the family lived in their former house. She and her husband continued to explain that the whole story was just in his imagination, that nothing like this ever happened.

Despite the debriefing, the experimenters decided to re-interview the child. When asked if he ever got his finger caught in a mousetrap, the child stated that he remembered this happening, and he proceeded to supply a richly-detailed narrative. When the interviewer challenged him, asking him if it was not the case that his

mother had already explained that this never happened, the child protested, "But it really did happen. I remember it!" While this child's insistence, in the presence of his mother, is not proof that he believed what he was saying about this fictitious event, it does suggest that he was not duping the adults for any obvious motive, given that the demand characteristics were all tilted against his claiming that he remembered this.

This child provides a vivid example of the long-lasting effects of suggestions. His pattern of behavior is also common in other children involved in Mousetrap studies. That is, there are also other children who hold on to their original beliefs even when their parents debrief them and tell them that the events were only imagined (Ceci, Crotteau, Smith & Loftus, in press). And, there are children who continue to say that the events occurred even when they are told right before the final memory test that the experimenter had it wrong (e.g. Ceci, Loftus, Leichtman & Bruck, in press; Lindsay, Gonzales & Eso, in press).

These data suggest that the effects of suggestions may be extremely long-lasting. Some children hold onto their beliefs long after the suggestions have terminated.

Thus, if the *Wee Care* children's testimony was a product of suggestive interviewing techniques, then their false allegations might persist long after the interviews had terminated. It is also important to note that these suggestive interviews continued for a long time and still may be continuing to the present. That is, although the investigative interviews ceased in July of 1985, 15 of the 20 child witnesses were seen in therapy; some may still be in therapy. The children were interviewed and "prepped" by the prosecutor's office before appearing as witnesses at trial. All but three of the 20 children were interviewed at least twice by Eileen Treacy before the trial; as we show below, the interviews with Treacy were more suggestive and coercive than those conducted at the beginning of the investigation.

ET: Let me ask you this; did she touch boys, did she touch girls, did she touch dogs?
3C: She touched boys and girls

ET: Did she touch them with telephones? Did she touch them with spoons? What kinda spoons?
3C: Teaspoons

ET: Can you make a mark where she hurt you? . . . Make a mark. Just show me where Kelly hurt you. Then I can show that to the judge

ET: Tell me about 7C. What happened to 7C?
3C: I don't know
ET: 7C told me about some of the stuff that happened to you
3C: (no response)
ET: She cares about you. Some of the kids told me that things happened with knives at *Wee Care.* Do you remember anything like that?

ET: I see and did the kids want Kelly to do that peanut butter stuff?
3C: I didn't even think that there was a peanut butter
ET: Well what about licking the peanut butter?
3C: There wasn't anything about peanut butter.

ET: (brings out dolls). Ok now what about the private areas? What happened in the private areas?

4C: I don't know
ET: That's harder to talk about?
4C: Yeah
ET: Does it make you embarrassed?
4C: I don't know

ET: Did you ever see Kelly's private spots?
4C: I am not too sure
ET: What about her boobies?
4C: I don't even really know about.

ET: There's some pictures that Sara (McArdle, the prosecutor) has
4C: What kind of pictures?
ET: Kelly like doing something to 2C and I was so surprised. What was she doing?
4C: Um, I forgot but I know she did it.
ET: She do something with a fork to 2C?
4C: Sara would know though

ET: Now when Kelly was touching the kids with the spoons and the knives, did she touch them inside of their private spots or outside?
4C: I don't remember.
ET: Did Kelly ever put her elbow on your private spots?
4C: Um . . . maybe

(after some questioning, Treacy gets 6C to say that Kelly's private parts were the same as little girls)

ET: Did Kelly have hair?
6C: Nah, I know cause it's grown ups . . . I know about that
ET: So I guess that means you saw her private parts huh? Did Kelly ask the kids to look at her private parts, or to kiss her private part or . . .
6C: I didn't really do that. . . . I didn't even do it.
ET: But she made you
6C: She made me. She made me . . . But I couldn't do it. . . . So I didn't even really do it. I didn't do it.

ET: Did it smell good?
6C: shhh
ET: Her private parts?
6C: I don't know

ET: Did it taste good? Did it taste like chocolate?
6C: Ha, ha. No, I didn't even do it.

ET: You *Wee Care* kids seem so scared of her
6C: I wasn't. I'm not even.

ET: But while you were there, were you real scared?
6C: I don't know
ET: What was so frightening about her, 6C, what was so scary about her?
6C: I don't know. Why don't you ask her?

ET: Did she drink the pee pee?
6C: Please that sounds just crazy. I don't remember about that. Really don't.

In addition to the suggestions provided by mental health and forensic professionals, it is possible that the parents of these children continue to subtly suggest Kelly's guilt to these children. Thus if *Wee Care* children indeed continue to report past incidents of sexual abuse, it is possible that these reports reflect the long-lasting effects of much earlier suggestions, or that these reports reflect the effects of past and current suggestions which have been maintained over the period of years (1985 to the present).

If the children were not abused, the beliefs of the legal authorities, the therapists, and the parents may provide a permanent architecture of suggestion to maintain the children's false allegations and beliefs. In other words, living in an environment where the primary belief is that "Kelly abused children" provides a constant source of suggestion to these children; as a result these children's reports and beliefs may be permanently tainted.

D. The Argument That Children Are Not Suggestible Or E. How To Obtain Reliable Reports From Children

Some critics may argue that this brief contains a biased presentation of the literature; that there are a number of studies that show that children are not suggestible, or that they are no more suggestible than adults. It is true that we have focused on those studies that emphasize the weaknesses of children's memories. This is because the conditions in those studies have the most relevance to the forensic interviewing conditions exhibited in the *Wee Care* investigation.

Other studies that emphasize the strengths of young children's memories (e.g., see Goodman, Batterman-Faunce & Kenney, 1992 for a review) do not contain the same types of suggestive interviewing procedures as described above. What characterizes many such studies is the neutral tone of the interviewer, the limited use of misleading questions (for the most part, suggestions are limited to a single occasion) and the absence of the induction of any motive for the child to make a false report. When such conditions are present, it is a common (although not a universal) finding that children are much more immune to suggestive influences, particularly about sexual details.[5] Hence studies of children's strengths were not cited in the main part of this brief because the interviewing conditions of these studies do not typify those under which the *Wee Care* children were interviewed and therefore they have limited relevance to the issues in this case. However, there are two important implications of the studies which focus on the strength of children's reports.

The first point is that although children are mainly highly accurate in studies in which they are interviewed by a neutral experimenter, asked minimal leading

[5]For example Ornstein and his colleagues (Baker-Ward et al., 1993; Gordon et al., 1990) found that when children were later questioned on one occasion about their memories of the visit to the pediatrician, 3-year-olds were more prone than 6-year-olds to make false claims in response to suggestive questions about silly events involving body contact (e.g., "Did the nurse lick your knee?"). Similarly, after one interview, Oates and Shrimpton (1991) found that preschoolers were more suggestible than older children about previously experienced events that involved body touching.

questions, and not given any motivation to produce distorted reports, there are nevertheless a few children in such studies who do give bizarre or sexualized answers to some leading questions. For example, in the Saywitz, et al. study of children's reports of their medical examinations, one child, who never had a genital exam, falsely reported that the pediatrician had touched her buttocks and on further questioning claimed that it tickled and that the doctor used a long stick. In a study of children's recalls of their visit to a laboratory (Rudy & Goodman, 1991) one small child claimed that he had seen bones and blood in the research trailer (see Goodman et al., 1992, for additional examples). Thus, children do occasionally make spontaneous, strange, and unfounded allegations. However, as Goodman and her colleagues point out, many of these allegations can be understood by sensibly questioning the child and parents further. Often these allegations reflect the child's source confusions or his anxieties.

One can only imagine what would have happened were these few rare spontaneous allegations followed-up in the same way as those made by children in the *Wee Care* investigation. Perhaps participating researchers and adults would have ended up being falsely accused of many heinous acts. Also one can only imagine what would have happened in the *Wee Care* case if the child's initial allegation that "Kelly took my temperature" was investigated with the same sensitivity and understanding that Goodman and her colleagues showed in trying to understand their subjects' bizarre statements.

A second important implication of studies that emphasize the strength of children's memories is that they highlight the conditions under which children should be interviewed if one wishes to obtain reliable reports. Again, when children are interviewed by unbiased, neutral interviewers, and when leading questions are kept to a minimum, and there is the absence of threats, bribes and peer-pressure, then children's reports are less at risk for taint.

It is not our intention to write a section on "good interviewing" practices in this brief. There have been several guidelines for the interviewing of children in sexual abuse cases. (e.g., White, Santilli, & Quinn, 1986; Yuille, Hunter, Joffe & Zaparniuk, 1993; also see interview guidelines promulgated by the National Center for the Prosecution of Child Abuse and the New Jersey Governor's Task Force on Child Abuse and Neglect.)

At the most general level, all these guidelines share the following common elements. Interviewers are told to encourage the child to say as much as he or she can in his own words about what happened (Can you tell me about what happens at naptime?). Then more general questions to prompt recall are asked (Can you tell me anything else?). Following this the child might be asked more specific (not leading) questions to elaborate on the previous description (e.g., Who is in the room at naptime?; Do people do anything special at naptime?). Some interviewers advocate the use of leading questions as a last resort, if the child provides no information in the interview (Did anything scary happen at naptime? Did anyone ever touch you in a bad place at naptime?). The available *Wee Care* interviews illustrate interviews that did not unfold in this way. Rather, after establishing some rapport with the children, the interviewers jump to specific and leading questions.

Even those researchers who emphasize the strengths of children's memories

are highly critical of interviewing tactics like those used in the *Wee Care* investigation:

> Although there may be times when one needs to ask specific questions of children, several important caveats must be heeded. First, in actual practice, leading questions should be avoided when possible: Even if the child can maintain an accurate report, his or her and the interviewer's perceived credibility are likely to suffer. Second, there is a broad range of suggestion and coercion that can characterize an interview, and probably almost everyone would agree that some interviewers and parents go too far. Browbeating a child through repeated suggestive questioning is quite different from asking a few questions (Goodman, 1993, p. 15).

F. Missing First Interviews

The failure to have audio- or video-taped records of the initial interviews with children makes it impossible to determine the accuracy of their subsequent statements. Summaries of missing interviews and/or electronic recordings of later interviews in which children make allegations do not substitute for missing original interviews. Written summaries of unrecorded interviews are subject to a number of distortions, especially if the interviewer is questioning a number of children and parents daily. It is a well documented fact in the psycholinguistic literature that when asked to recall conversations, most adults may recall the gist, but they cannot recall the exact words used, nor the sequences of interactions between speakers. This linguistic information rapidly fades from memory, minutes after the interactions have occurred (see Rayner & Pollatsek, 1990, for a review).

In the case of child witnesses, it is crucial to document the details by which their reports were obtained. For example, we must know whether and how often the interviewer asked the child leading questions. We most know whether the interviewer prodded the child's reports with the use of anatomically detailed dolls, etc. We also must know the verbatim statements and questions of the interviewer as well as the verbatim responses of the children. Because this verbatim information fades most rapidly from memory (within a matter of minutes), it is crucial that it be electronically recorded. Without this information, one cannot begin to evaluate the reliability of the children's allegations. It is also the case, that the gist of previous interviews may be inaccurately summarized in later reports due to certain biases or misperceptions of the interviewer. If the investigator has a bias that the child was sexually abused, this can color his interpretations of what the child said or did; and it is this interpretation that appears in the summary rather than a factual account of what transpired.

There is scanty information concerning how the *Wee Care* children were initially questioned, and how many times they were questioned. The first allegation in this case was made on April 30, 1985. On May 1, 1985, the Essex County Prosecutor's office initiated an investigation: between May 2 and May 8, they interviewed five children and four parents. There are no electronic copies of these interviews. Between May 22 and July 8, 1985, Lou Fonolleras, an investigator from DYFS, conducted 82 interviews with *Wee Care* children and 19 interviews with their parents. None of the interviews were taped before June 19; less than half of the children's interviews and none of the parents' interviews were recorded. In addition, most of the other interviews are not recorded (1985–present). There are no recorded

interviews with 16C, the child who made the initial allegation. Many of Treacy's interviews were not recorded.

Finally, although there are some examples of taped interviews (e.g., 3C) in which there seem to be few leading questions and in which the child gives coherent reports of abuse, this is not the first interview and it is impossible to evaluate the reliability of these statements without knowing about the details of the first interview. If in the first interview, this child had been subjected to the same techniques that occur in the taped interviews, then the reliability of this child's statements would be highly suspect.

G. Generalizing from Research to the Real World

A consideration of the nature of the interviews conducted with the *Wee Care* children raises the possibility that their statements were in response to highly suggestive and coercive interview techniques. The social science research has documented how even subtler forms of these techniques can produce highly inaccurate reports in children. It is true that no study mirrors all of the influences operating in any particular real-world case. Indeed, many aspects of the interviewing procedures in the *Wee Care* case will never be examined in research studies, because researchers and their institutional review boards would deem the practices that occurred in the interviews with the *Wee Care* children grossly unethical, whether they be used on naive research subjects, on children suspected of sexual abuse, or on children with confirmed diagnoses of sexual abuse.

This brings us to the question of how much weight we should attach to the social science literature, given that no study perfectly mimics the constellation of variables observed in the *Wee Care* interviews. As little as 3 or 4 years ago, experts in this area would have had little empirical evidence upon which to base an opinion. However, as is clear from our review of the literature, in recent years a number of researchers across North America have conducted studies that share many of the features of the *Wee Care* case.

This recent research indicates that suggestive interviewing procedures can lead young children to give false reports of real-life experiences which include erroneous claims about interactions involving physical contact between an adult and a child. The research also shows that very few young children would fabricate detailed claims of bizarre sexual abuse in response to one or two mildly leading questions. And, as we have seen, many of the *Wee Care* children initially appeared to resist repeated and forceful suggestions before capitulating to the interviewers' insinuations.

The research also shows, however, that with more powerful and persistent methods of suggestion, such as those described in this brief, a substantial percentage of children can be led to make false reports of events that never occurred, including events that involve their own bodies and that would have been quite traumatic had they occurred. Based on this literature, and based on our analyses of the *Wee Care* interviews, it is our opinion that the constellation of factors operating in the *Wee Care* case would constitute an extraordinarily powerful suggestive atmosphere, one that is far stronger than those that have given rise to false reports in the research studies that we have described in this brief.

Most scientists admit to being "fallibilists," that is, to recognizing that knowledge is incremental, and therefore, while we may never possess perfect knowledge

about a phenomenon, we must base our inferences on the most scientifically rigorous evidence we have available. Thus, even though there is not one study that reflects all the variables that were operative in the *Wee Care* interviews, we do have scientifically adequate knowledge about most of these. This knowledge leads prudent scientists to conclude that if a study did include the sum total of the variables that were operative in the *Wee Care* investigation, we would obtain a large numbers of erroneous reports by preschoolers. In fact, many of us believe that the available evidence is such that we anticipate even larger numbers of erroneous reports than were reported in the research reviewed earlier in this brief. In sum, there is always some risk when generalizing from scientific studies to real world analogs. Scientists believe, however, that the best basis for doing this is to extrapolate from the corpus of research that comes closest to matching the constellation of variables that operate in the real world, even if the match is less than perfect. The alternative is to eschew insights, predictions, or hypotheses gained from systematic, controlled studies in lieu of anecdotes, personal opinions, and ideological views.

Summary

We have illustrated that the investigation of child sexual abuse allegations is a complex matter fraught with problems. Scientists have begun to contribute important insights to these problems, though clearly more research is needed. Regardless of the complexities of the research, the present state of scientific knowledge permits us to make the following general statements about the reliability of the testimony of the child witnesses.

1. There are reliable age effects in children's suggestibility, with preschoolers being more vulnerable than older children to a host of factors that contribute to unreliable reports.

2. Although young children are often accurate reporters, some do make mistakes—particularly when they undergo suggestive interviews; and these errors can involve not only peripheral details, but also central, predictable (i.e., scripted) events that involve their own bodies. It is also the case that suggestive questioning not only distorts children's factual recall, but it also has a strong influence on their interpretation of events.

3. Measures can be taken to lessen the risk of suggestibility effects. To date, the factors that we know most about concern the nature of the interview itself—its frequency, degree of suggestiveness, and demand characteristics.

—A child's report is less likely to be distorted, for example, after one interview than after several interviews (the term "interviews" here includes informal conversations between parents and child about the target events).

—Interviewers who ask non-leading questions, who do not have a confirmatory bias (i.e., an attachment to a single hypothesis), and who do not repeat close-ended yes/no questions within or across interviews, are more likely to obtain accurate reports from children.

—Interviewers who are patient, non-judgmental, and who do not attempt to create demand characteristics (e.g., by providing subtle rewards for certain responses) are likely to elicit the best quality reports from young children.

Thus, at one extreme we can have more confidence in a child's spontaneous

statements made prior to any attempt by an adult to elicit what they suspect may be the truth. At the other extreme, we are more likely to be concerned when a child has made a statement after prolonged, repeated, suggestive interviews.

4. Finally, it is also important that the court appreciate the complexity of the interrelationships of the factors affecting children's suggestibility. As in most areas of social science, effects are rarely as straightforward as one might wish. Even though suggestibility effects may be robust, the effects are not universal. Results vary between studies and children's behavior varies within studies. Thus, even in studies with pronounced suggestibility effects, there are always some children who are highly resistant to suggestion. We have seen this in our own studies as well as in the transcripts of the *Wee Care* interviews: in some cases, no matter how much an interviewer may try to suggest that an event occurred, some children will consistently resist and not incorporate the interviewer's suggestion or point of view. On the other side, although suggestibility effects tend to be most dramatic after prolonged and repeated interviewing, some children incorporate suggestions quickly, even after one short interview (e.g., Clarke-Stewart, et al., 1989).

The authors of this brief are fully aware of the immense obstacles that face those who are charged with investigating and reporting suspected child maltreatments. In no way do we want to convey the attitude that we deny the seriousness of the problem of child sexual abuse in today's society. The focus of our research and our arguments, however, is that unless one is very careful in the interviewing procedures that one uses with young children suspected of abuse, that one may never make an accurate determination of whether or not abuse occurred. This is because there are a number of interviewing procedures that have the potential to make non-abused children look like abused children. These are the same conditions that were used in the interviews with the *Wee Care* children. Given our present state of scientific knowledge, there are no valid scientific tests to determine which of the children's reports were accurate. The fact that these children underwent extremely suggestive interviews makes the determination of accuracy impossible.

The authors of this brief also wish to convey their deep concern over the children in this case. Our concern is that if there were incidents of sexual abuse, the faulty interviewing procedures make it impossible to ever know who the perpetrators were and how the abuse occurred. Thus poor interviewing procedures make it difficult to detect real abuse. But we have further concerns. And these involve the interviewing techniques which we view as abusive in themselves. After reading a number of these interviews, it is difficult to believe that adults charged with the care and protection of young children would be allowed to use the vocabulary that they used in these interviews, that they would be allowed to interact with the children in such sexually explicit ways, or that they would be allowed to bully and frighten their child witnesses in such a shocking manner. No amount of evidence that sexual abuse had actually occurred could ever justify the use of these techniques, especially with three- and four-year-old children. Above and beyond the great stress, intimidation, and embarrassment that many of the children so obviously suffered during the interviews, we are deeply concerned about the long-lasting harmful effects of persuading children that they have been horribly sexually and physically abused, when in fact there may have been no abuse until the interviews began. The authors of this brief

will be permanently disturbed that children were interviewed in such abusive circumstances regardless of the ultimate innocence or guilt of the accused.

Respectfully submitted,

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(*Ed. Note.* Since the brief was submitted, a number of the articles have been published. Attached is a revised and updated reference list.)

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Appendix

Attempts to Reconstruct Interviews and Emergence of Disclosures

NOTE: These are clearly underestimates of the number of times that the child was interviewed. These reconstructions are based upon available transcripts, and some of the courtroom testimony. Every child had at least two interviews which are not listed below: once before their Grand Jury testimony in July 1985 and at least once before their Courtroom Testimony.

1C: No transcribed interviews

Prior to June 13: Denies involvement
Mom tells him that he is being named by his friends

June 13: Tells mom

Winter 1987: Treacy two times (no transcripts)

2C: June 28: Discloses to Detective Mastrangelo
(There was a previous interview—this is not transcribed)

August 1985: Several therapy sessions

November 13, 1986 January 12, 1987: Interviews with Treacy (no records)

At trial: Mom said that to this day 2C had never told her of anything bad happening at Wee Care

3C: June 7: Interviewed by Fonolleras (no records)

June 11: Disclosed to mom

June 13: interviewed by Det. Mastrangelo and Fonolleras (Mom was present)
Dolls and silverware were used. (No transcript)

Child was in therapy with Barbara Wright

Nov. 13 1986–January 12, 1987: Three interviews with Treacy

4C: June 7: Fonolleras Interview (no transcript)
Few days later: Discloses to mom

July 12–August 16, 1985: Attends 5 group therapy sessions led by Esquilin

September 5, 1985: First disclosure to Mom about Sexual Abuse

October, 1985: Begins therapy with Esquilin

November 1986–Feb 8 1987: Three interviews with Treacy

In addition at least one interview by Mercandante and one or more by McArdle

5C: From May 9 on: Mom says she kept after 5C to tell her things

May 13 1985: Tells mom that she saw 1C naked

June 21: Interviewed by Mastrangelo—no disclosures (this is transcribed)

June 30, 1985: Speaks to Peg Foster who wasn't sure about this child so Mom goes to Esquilin

June 30 1985: Disclosures begin at Esquilin's office (no transcripts)

Few days later: more disclosures at prosecutors office (no transcripts)

July 3, 1985: Seductive interview with McGrath (transcribed)
McGrath takes her to the choir room and puts on a black robe that scares 5C

July and August: Esquilin's group sessions

Feb 16, 20, 1987: Interviews with Treacy

Appendix (*continued*)

	Over 100 private therapy sessions
	In addition at least one interview with Peg Foster, and 2 interviews with Sara McArdle
6C:	May 22: Interview with Fonolleras (no transcript)
	June 6: Interview with Fonolleras (no transcript) Disclosures began after this interview
	June 11: Interviewed by Mastrangelo (transcript available)
	July 8: Interviewed jointly with 14C by Fonolleras (transcript)
	July–August 1985: Attends five group sessions with Esquilin
	Seen by Esquilin individually over 50 times.
	1987: Two interviews with Treacy (second one is transcribed)
	At least two interviews with McArdle
7C:	June 10: Interviewed by Fonolleras (no transcript)
	Starts disclosing after this interview
	June 11: Mastroangelo interview (transcribed)
	July 1985: Begins therapy with Barbara Wright, certified social worker
	Nov–Jan 1987: Three interviews with Treacy (transcribed)
	At least one known interview with Prosecutor's personnel; At least 6 known interviews with Sara McArdle
8C:	June 17, 1985: Fonolleras interview (no transcript) Some time after discloses to Mom
	June 28: Fonolleras and Mastroangelo (transcript)
	July–August 1985: Attends all five of Esquilin's group therapy
	Dec 1986: Eileen Treacy (no transcripts)
9C:	(this child is sibling of 10C)
	June 17 1985: Fonolleras Interview (no transcript) —Mom reports that 9C came out of the interview jumping all over the place and just totally out of control. —First disclosure after this —Mom found 9C and 10C playing doctor after disclosures
	July–August 1985: attends Esquilin's four group sessions attends two private sessions with Esquilin.
	Dec–Jan 1987: Two interviews with Treacy (no reports)
10C:	(this child is sibling of 9C)
	June 17 1985: Fonolleras Interview (no transcript) — First disclosure after this —Mom found 9C and 10C playing doctor after disclosures,
	July–August 1985: attends Esquilin's group sessions
	Dec–Jan 1987: Two interviews with Treacy (no reports)
11C:	June 10 1985: Fonolleras Interview (no transcript) First disclosure after this interview
	June 12: Foster and Esquilin interview (no transcript)

Appendix *(continued)*

Attempts to Reconstruct Interviews and Emergence of Disclosures

June 13: Interview with police officer Catalano (transcript)

July–August 1985: Esquilin's group sessions

November 1985: Individual therapy with Esquilin

Jan 1987: Treacy (no transcript)

12C: June 1985: older brother makes allegation that live-in baby sitter touched him. 12C denies this happened

June 25: Mom takes child to prosecutor's office (By that time alot of children had said that they had been abused. She just wanted to make sure he had not been abused Interviewed by Detective McGrath (no transcript) who is convinced that 12C is not a victim

End July 1985: first disclosures to parents

Late August: McGrath came to the house with the dolls.

Mom says she brought 12C to prosecutor's office maybe 8 times.

Fall 1985: Two sessions with Esquilin

Dec 1986: Treacy (transcript)

13C: June 19 1985: Interview with Fonolleras and Mastrangelo (transcribed)
This is not the first interview
Disclosures begin after this

14C: May 2: Prosecutor's office because named by 16C.
Child denied anything happened

May 22: Fonolleras. Denied abuse (no transcripts)

June 6: Fonolleras. Denied abuse (no transcripts)

Early June: Disclosed to mother who read from book "No more secrets"

July 8: Fonolleras holds joint interview with 6C (transcribed)

Jan 1987: Treacy (no transcripts)

1987: Evaluated by Social Worker Barbara Wright

There were also interviews with Mastroangelo and with McGrath

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15C: June 20: Mastrangelo (transcript, but not first interview)

June: Peg Foster and Ann Felsten (grad student in psychology)—no transcription

June 28: Fonolleras interview (transcript)
First disclosure comes after this

July–August: Attends Esquilin's therapy sessions.

January 10 1987: Treacy (no records)

16C: This child started everything on April 30 1985 when a pediatrician's assistant was about to put a thermometer in his rectum. He said that was what his teacher did at school. No further notice was taken at that visit. When Mom got home she started questioning 16C

May 2: Prosecutor's office. Interview included dolls. (no transcripts)

June 1985: One session with Esquilin

June 1986: Begins therapy (Dr. Toby Kaufman)

Also seen by Psychology Sharon Ryan (no dates available)

Appendix (*continued*)

Attempts to Reconstruct Interviews and Emergence of Disclosures

17C: May 3: taken to prosecutor's office after named by 16C.
Interviewed by McGrath (no transcript)

May 5: videotaped interview at police station (there is no copy available of this)

July 1985: Attended two of Esquilin's session

18C: June 7 1985: Fonolleras interview. Used dolls and silverware (no transcript)
Disclosures begin after

June 11 1985: Statement to Det. John Noonan at police station (transcript)

July 2: shown a jail cell. Child worried about a pillow for Kelly

August 1985–Spring 1987: Therapy with Dr. Sharon Ryan

19C: June 7 1985: Fonolleras interview. (no transcript)
Disclosures begin after

June 20: Interview with Detective Noonan (transcript)

July 1985: Prior to grand jury Prosecutor McArdle saw 19C 3 times

July and August: in Esquilin's group sessions
two individual sessions with Esquilin

Dec. 1985—Therapy with Dr. Toby Kaufman

Nov 1986: Treacy (transcript)

There is at least one interview with McGrath

20C: June 27: Interviews with Esquilin and Foster (no transcripts)

July 11: Interviews with Esquilin and Foster (no transcripts)

Disclosures begin after this

July–August: Attends Esquilin's sessions
Two private sessions with Esquilin

Ongoing: Therapy with Dr. Carol Lewis

November 1985 and others: Interviewed by McArdle several times (once she gave him an anatomical doll and a spoon)

Jan–Feb 1987: Three interviews with Treacy (no transcripts)

There is also one interview with McGrath.

Transgender Issues in Schools

Presented by:
Holly Boyd Wardell and Emma K. Lynch

October 16, 2024

TEXAS TITLE IX ADMINISTRATOR CONFERENCE

REAL WORLD TRANSGENDER ISSUES IN SCHOOLS

EICHELBAUM WARDELL HANSEN POWELL & MUÑOZ P.C.

1

2

Pat

Patricia comes in to interview for the assistant theater director position. The hiring committee recommends her hire, and the superintendent agrees. And since he has hiring authority in the summer, her offers her a contract. When she comes in to return the signed contract, it is signed "Pat," and Patricia is presenting as a man. Patricia says, "You should call me Patrick from now on, and I've had my name legally changed." The Superintendent has taken this all in and thinks he knows how his community will react to a transgender employee. He calls the district's lawyers to ask if he can rescind the contract based on misrepresentation. Can he do that?

3

Pat

No. First off, the contract has been signed by the superintendent and the employee, so the offer can no longer be rescinded. But, even if that was possible from a contractual standpoint, it would be problematic from a statutory standpoint. Since *Bostock,* Title VII now specifically protects transgender employees from employment discrimination (i.e., you cannot take an adverse employment action against someone based on their transgender status). From DIA (LEGAL):

> **Gay and Transgender**
> The prohibition against discrimination because of sex includes discrimination on the basis of an individual being gay or transgender. *Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020)*

If the Superintendent rescinds the contract or otherwise ends the employment of Patrick, it will be based on their transgender status, so it would violate Title VII.

4

Pat

What about Title IX?

This is an area that is currently the subject of litigation. The 2024 Title IX regulations state that, just as gender identity is protected by Title VII, so too is it protected by Title IX. The Attorney General is challenging this interpretation, and those regulations are currently enjoined. So, for now, this would not violate Title IX but depending on how the courts rule on this issue, it may be covered in the future.

5

Pat

The Superintendent takes your advice, and school starts with Patrick in the classroom. Kids are telling their parents Mr. So and So has boobs, and parents are starting to realize that Patrick is transgender. Parents are pulling their students out of Patrick's class, others are lined up to complain to the Superintendent, and some are planning a protest at the administration office with the media invited. The Superintendent calls you back and says things are not going well. He needs to get Patrick out of there. He asks again about misrepresentation and also whether the publicity and complaints are good cause for termination based on DFBB (LOCAL): "Any activity, school-connected or otherwise, that, because of publicity given it, or knowledge of it among students, faculty, or the community, impairs or diminishes the employee's effectiveness in the District."

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Pat

Terminating the contract for misrepresentation would still be based on gender identity/transgender status. It is similar to if a pregnant applicant did not disclose her pregnancy and then showed up and immediately asked for time off for her pregnancy. The district could not terminate based on misrepresentation there, and it's no different here. He also can't terminate based on the DFBB (LOCAL) reason, because the reason for the publicity is Patrick's gender identity. The courts have been clear that you cannot take adverse action based on customer preferences. So, just like you would never say I can't hire a _____ teacher because our families prefer _____ teachers, the district cannot act here based on the families' preferences.

7

Staff

What we know…

- Cannot take adverse employment action because of an employee's sexual orientation or gender identity
- Adverse employment action is more than being terminated…

What we do not know…

- Whether requiring employees to use students' preferred names/pronouns violates employees' First Amendment rights

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Students

What we know…

- UIL – sex on original birth certificate or as…

What we do not know…(in Texas)

- Whether can require separate or bio-sex bathrooms, locker rooms, hotel rooms.
- Whether UIL rule violates Title IX

9

Alex

10

Alex

- Alex is eligible for special education and related services primarily as a student with Autism. Alex has a documented history of pronounced anxiety, clinical depression, and characteristics of OCD. Alex's IEPs have previously addressed these issues through accommodations for sensory breaks, a BIP allowing for time to cool-down, etc.
- Alex is nonbinary, and Alex's pronouns are they/them/theirs. Alex experiences significant distress when misnamed or misgendered, which triggers dysregulated behaviors, perseveration, and fixation on the use of the incorrect pronouns. Panic attacks and self-injurious thoughts and actions are also experienced.
- Alex's parent is alarmed by ongoing Title IX litigation, and fears that Alex's schools may no longer provide gender-affirming policies, so would like something legally binding in place.
- In the next ARDC meeting for Alex, Alex's parent requests an accommodation that staff will always use the name "Alex" and will refer to Alex using they/them pronouns.
- Result? Educational need? Disability-related need? How do you respond?

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Alex

- Title II of the ADA specifically excludes "gender identity disorders not resulting from physical impairments" from its definition of disability. 28 CFR § 35.104(5)(i).
- Transgender or gender-diverse status is *not* a disability.
- However, gender dysphoria is a DSM-V recognized condition, and is associated with clinically significant distress and impairment in various functional areas. (Think depression, anxiety, social communication)—be alert to potential educational needs stemming from potential secondary, incidental disabilities.*
- At least one hearing officer in another state has found that purported accommodations for pronouns were not "educational interventions" to be documented in a 504 plan. (KS)
- Educational outing: Anyone with access to the document would then know the student's transgender status.

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Alex

- There is no controlling caselaw in our Circuit on this issue.
- The first question should always be "is this necessary for the provision of FAPE to this student?"
- Since gender identity is not a disability, it would likely be inappropriate to identify gender identity within an IEP or § 504 plan alone.
- However, you shouldn't turn a blind eye from disabling conditions that are co-morbid.
- Here, it would be appropriate to address and accommodate the perseveration, the panic attacks, and address self-harm concerns since the District is aware of these issues, and has otherwise accommodated these conditions in the past.

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Jay

- Jay is an honor-roll student, takes a mix of AP and on-level courses, and generally passes all classes. Over the past year, Jay's attendance has taken a troubling nose-dive. The school has diligently reached out to the family, but the family has reported that Jay has just been ill.
- Upon Jay's return to school, the parents inquire into the availability of a 504 for Jay. Jay's parents send the school counselor a doctor's note and treatment plan.
- As it turns out, Jay has been diagnosed with gender dysphoria. Jay is under the care of medical professionals who specialize in treating transgender youth. Jay's gender dysphoria causes her "significant stress, depression, and anxiety."
- The letter and treatment plan from Jay's care team involves the exclusive use of she/her pronouns, to refer to Jay as Jay (not James), and outlines the need for full social transition to include the use of gender-affirming facility access. The letter states that these interventions are medically necessary for Jay to ameliorate her severe depression and anxiety.
- Result?

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Jay

- Is there a disabling condition?
- What, if anything, do we accommodate?
- Medically-necessary is not always the same as educationally-necessary. (Clinical vs. educational need)
- Does this student have equal access to education to a non-disabled student?
- Different result under IDEA? Title IX?
- Different result if no attendance issues?

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When records <u>must</u> be amended to reflect a different name/gender:

Records must be amended when the school is provided a copy of a final, signed court order requiring that official government records be changed to reflect the new name/gender. The Academic Achievement Record (AAR) and PEIMS records may be amended only when the district is presented with an official, revised birth certificate or court order signed by a judge. Documentation justifying and explaining the change to these records must be maintained permanently.

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When records may be amended without a legal name change:

The following slide will address which records require the use of a student's legal name.

For records other than those, a student's name and gender may be changed upon request of the parent, guardian, or adult student in accordance with procedures adopted by the District.

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Changes requiring a revised birth certificate or court order (legal name change)

A student's legal name must be used for:

- PEIMS
- Academic Achievement Record (AAR)/Transcript
- College exams (ex.: SAT, ACT, PSAT, TSI, etc.)
- College applications
- FAFSA/TAFSA
- College letters of recommendation
- Official college/university transcripts
- Texas State assessments (STAAR, EOC, etc.)

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Records that *can* be changed to reflect preferred name, pronouns, and/or gender (without legal change)

The following records can be changed without a revised birth certificate or court order:

- Skyward records (except for PEIMS/attendance reporting)
- SpEd Manager or other SpEd software platforms
- ID badges
- Class rosters
- Campus-based publications (ex.: yearbooks, event programs, etc.)
- High school diploma and graduation ceremonies

*legal name will still appear on transcripts, attendance, and other areas necessary for legal documentation and state/federal reporting

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Who can request a change to a student's name or gender?

Districts will need to decide whether students may request a change, or whether parental/guardian consent is required prior to making a change.

Keep in mind that the Education Code requires that parents shall be partners with educators when it comes to their children's education. Parents have a right to "full information" regarding their children's school activities.

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Changing the records of former students:

- It is possible that a transgender former student may request that school records be changed to retroactively protect their privacy in the context of future inquiries by schools or employers.
- In a 1991 opinion letter, the Department of Education advised that FERPA did not require districts to amend former students' records to reflect a name or gender other than the student's name and gender during the time of attendance.
- So, FERPA does not require a change to records that were accurate at the time, but it does not prohibit the district from deciding to change the records in the interest of protecting the student's privacy.
- Case law in this area is developing and may later impose amendment obligations based on Title IX or the Equal Protection Clause.

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FERPA rights of former students

- FERPA protects both current and former students.
- If a parent or eligible student (including former) believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's right of privacy, he or she may ask the educational agency or institution to amend the record. 34 CFR § 99.20
- One could argue that refusing to correct a former student's name would violate the student's privacy rights (ex.: a former student applying for a new job and the employer requests school records from prior to the student's transition).
- The Fourth Circuit has held that a district's refusal to amending a transgender former student's records violated his rights under the Equal Protection Clause. (Persuasive, but not mandatory, authority in TX).

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