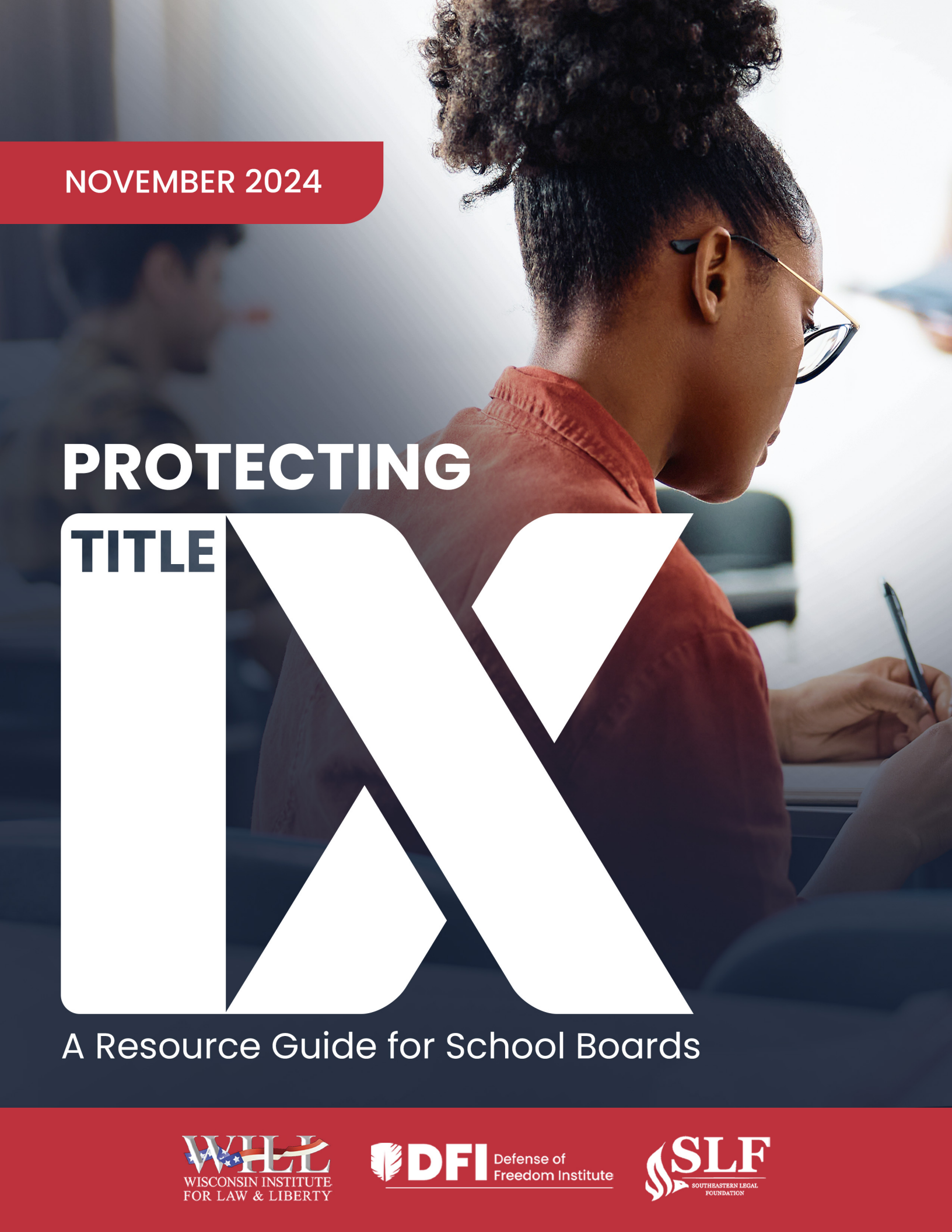

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PROTECTING TITLE IX

A Resource Guide for School Boards

WISCONSIN INSTITUTE FOR LAW & LIBERTY
DFI Defense of Freedom Institute
SLF SOUTHEASTERN LEGAL FOUNDATION

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Introduction

Since its enactment in 1972, Title IX of the Education Amendments of 1972 has been foundational in ensuring equal opportunities for women and girls in education. But the U.S. Department of Education's recent re-write of the regulations implementing Title IX has upended Title IX's statutory protections and implicates numerous legal issues, including the separation of powers principle, due process rights, free speech, and the safety and privacy of students within our schools. The regulatory changes, which include the redefinition of sex to encompass gender identity, modifications to grievance procedures, and a diminished standard for harassment, pose threats to schools nationwide.

As school board members navigate the complexities of education law and policy, understanding the implications of the new Title IX Rule is crucial. This guide addresses critical areas of the new Title IX regulations, including federal definitions, the history of Title IX, and the implications of these changes for students, families, and teachers. We cover key topics, such as the watered-down harassment standard, First Amendment concerns, and ongoing federal litigation. We also examine how these regulatory updates intersect with parental rights, student privacy, and the role of school boards.

As you engage with this resource, we encourage a thoughtful examination of how, in light of the new Title IX Rule, school boards can continue to protect the safety, privacy, and equal opportunities of all students. The erosion of due process, free speech, and privacy rights under the new regulations warrants careful consideration as school boards work to uphold fairness and constitutional protections for their school communities.

Nothing in this guide should be construed as legal advice. The Wisconsin Institute for Law & Liberty (WILL), Defense of Freedom Institute for Policy Studies (DFI), and Southeastern Legal Foundation (SLF) are 501(c)(3) nonprofit law and policy organizations that are providing this guide as a resource for anyone to review and use.

BACKGROUND

Background

Understanding Federal Regulations

WHAT ARE FEDERAL REGULATIONS?

Federal regulations are issued by Executive Branch agencies to implement laws passed by Congress. All regulations must be based in some legal authority. The regulations relevant here implement Title IX of the Education Amendments of 1972, codified at 20 U.S. Code § 1681 *et seq*. Title IX prohibits sex-based discrimination in any educational programs or activities that receive federal funding, with exceptions spelled out in the statute.

Federal agencies like the United States Department of Education ("the Department") must follow specific procedures when they propose and finalize regulations. Regulations begin with a proposed set of rules, followed by a notice and comment period during which all individuals in the United States have an opportunity to weigh in on proposed regulations. The Title IX regulations proposed by the Department under the Biden-Harris administration received more than 240,000 comments. After considering public feedback and complying with various other legal requirements, the agency finalizes the regulations, publishes them in the *Federal Register*, and implements them beginning on the date they go into effect.

The federal agency that preceded the Department issued the first set of regulations implementing Title IX in 1975, and the Department took over the implementation of these regulations when it began operating in 1980. Since then, the Department has updated its Title IX regulations periodically. Once a final rule is published, it includes an effective date, and, beginning on that date, the regulations have the same legal force as the law passed by Congress. **Federal regulations cannot conflict with the underlying statute or exceed the authority given to the federal agency by Congress.** When an agency exceeds its statutory authority or acts arbitrarily, its regulations can be overturned by Congress[1] or in litigation.

This resource guide uses the following terminology to refer to aspects of the new Title IX Rule. We use the terms "rules" and "regulations" interchangeably in the context of federal administrative law. We also use the terms "recipients," "schools," and "school districts" interchangeably. Under Title IX, a recipient institution is any entity, typically a local educational agency or school district, that receives federal funds and is thus required to comply with Title IX.

1 *See, e.g.,* Congressional Review Act ("CRA"), 5 U.S.C. §§ 801 – 808.

WHAT IS A PREAMBLE TO A FEDERAL RULE?

This resource contains several references to the preamble of the *Rule*. A preamble in a federal agency rule serves as an introductory statement that provides context, background, and justification for the rule. When courts decide whether rules issued by federal agencies comply with the law, they must determine the meaning of the language used in these rules; in doing so, they may look to the preamble of the rule at issue to understand what the agency meant by that language. Ultimately, courts consider the preamble in interpreting such rules but do not give it the same weight as the text of the actual rule when resolving legal disputes.

While the preamble to a final rule is not treated with the same force of law as the text of the adopted regulations, it is often used as persuasive authority when courts are determining how to interpret regulations.

As is typical practice during the federal rulemaking process, when the Department released the final version of the new Title IX Rule, it included in its preamble responses to the hundreds of thousands of comments it received about its proposed rule. The agency's responses to the comments are not part of the final Rule itself and are unenforceable, but they do reveal the government's intent behind the changes and offer additional insight into and context regarding the final Rule, as well as how the Department will implement and enforce it.

Background and History of Title IX

WHAT IS TITLE IX?

Title IX is a federal law passed by Congress as part of the Education Amendments of 1972. 20 U.S.C. § 1681 *et seq.* **Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a).** This text, enacted by Congress, has **not** been amended. It means that any educational institution receiving federal funds must treat all students equally regardless of their sex, except in certain situations specifically identified by Congress. This law has been instrumental in promoting equal opportunities for women and girls in both academics and athletics.

Title IX specifically addresses discrimination based on sex. Ever since the law was passed by Congress in 1972, "sex" has been understood to refer to a biological male or female distinction and **not** concepts like "gender identity." For this reason, Title IX allows for certain sex-based distinctions, such as separating housing and bathroom facilities by sex, as long as they are comparable in quality for both males and females. This recognition of biological differences is reflected in various regulations and exemptions within Title IX which will be discussed in this resource. They make clear

that the law recognizes that there are circumstances in which, in light of the biological differences between males and females, sex-separated activities and spaces are appropriate.

WHAT IS THE HISTORICAL CONTEXT AND IMPACT OF TITLE IX?

Before the passage of Title IX, women and girls faced significant barriers in education. For example, women were often excluded from professional educational institutions like law and medical schools. The introduction of Title IX aimed to change this by providing women with equal opportunities to pursue education and contribute to society based on their talents and abilities.

In both higher education and K-12, one of the most visible impacts of Title IX has been in promoting equal opportunities for women in athletics. Prior to Title IX, many high schools and universities prioritized boys' and men's sports programs, often at the expense of girls' and women's programs. This limited the opportunities for girls and women to compete in sports. Title IX and its implementing regulations have changed this by requiring schools to provide equal athletic opportunities for both sexes. The regulations allow schools to maintain sex-separated athletic teams but mandate that these programs provide to both sexes equal opportunities for participation and competition. This has resulted in increased funding, scholarships, and support for women's sports programs, allowing more women to benefit from athletic participation and achieve higher levels of success in sports.

How Title IX Is Implemented

The United States Department of Education is one of the federal agencies that enforces Title IX. It "is authorized and directed to effectuate" Title IX "by issuing rules, regulations, or orders of general applicability . . . consistent with achievement of the objectives of the statute." 20 U.S.C. § 1682. The Department's Office for Civil Rights ("OCR") investigates school district compliance with Title IX. Based on the results of those investigations, the Department may sanction such school districts for noncompliance with the law, including by withholding federal funding.

OCR COMPLAINT PROCESS

Anyone may file a complaint with OCR asserting that a school district has not complied with Title IX. According to its policies, OCR has 180 days to investigate such a complaint and decide whether to proceed with an

investigation or close the complaint for a lack of foundation. Investigations can take 6 to 12 months or longer. In the absence of a complaint, OCR may open a compliance investigation to determine whether the policies of any school district are consistent with Title IX and the Department's regulations.

When OCR finds that a school district has violated Title IX or its implementing regulations, generally, the school district will work with the federal government to come to a resolution, through email exchanges or sometimes on-site visits and through corrective actions such as changing policies and requiring staff training. OCR must give the school district the opportunity to come into compliance with the law prior to divesting federal funds or pursuing any other sanction. The U.S. Department of Justice ("DOJ") may also bring enforcement actions for noncompliance with Title IX. The Supreme Court of the United States ("SCOTUS") has also recognized a private right of action under Title IX, allowing individuals to sue for damages if they face discrimination.

ONGOING LITIGATION

THE NEW TITLE IX RULE is currently being challenged in at least nine federal lawsuits. To date, eight federal courts have enjoined the Rule. This effectively blocks the Department from enforcing the Rule with respect to the plaintiffs in these lawsuits while the litigation continues. So far, the injunctions apply to Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming, as well as the schools attended by the members of Young America's Foundation or Female Athletes United, and the schools attended by the children of members of Moms for Liberty. The Department cannot implement, enact, enforce, or take action to enforce the new Title IX Rule in any state or school where these injunctions apply. These cases are very likely to reach the United States Supreme Court, which will eventually decide, for school districts and other educational institutions nationwide, whether the Rule is lawful or not.

The Wisconsin Institute for Law & Liberty (WILL), Defense of Freedom Institute for Policy Studies (DFI), and Southeastern Legal Foundation (SLF) are available as legal and policy resources, and the websites of each organization contain additional information and updates. Should readers have questions or specific inquiries, the end of this resource explains how to contact WILL, DFI, and SLF and where to find more information about Title IX.

PREEMPTION OF STATE AND LOCAL LAW

Title IX requires the Department to issue regulations to implement the law's prohibition of sex-based discrimination in education programs and activities. Thus, the regulations the Department has issued, beginning in 1975 and up to and including the new Rule, are part of federal law and take precedence over any state or local laws and policies. The new Title IX Rule makes this preemptive effect explicit by stating, "The obligation to comply with Title IX and [these regulations] is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or [these regulations]." New § 106.6(b). This Rule requires a minimum level of protections that a school district must offer—particularly in the context of grievance procedures discussed below. Any school may go above and beyond this minimum to ensure that all students and employees receive robust due process protections before they are deprived of educational opportunities.

Recipients should note that where the new Title IX regulations grant them discretion to determine whether to institute policies or offer procedural safeguards (as discussed extensively in this guide with respect to the grievance procedures), they must abide by state and local law to the extent it does not conflict with these federal regulations.

WHAT SHOULD SCHOOL BOARDS KNOW ABOUT A DECISION NOT TO IMPLEMENT THE NEW RULE?

The Department has put school boards in a difficult position because they must either comply with the new Title IX Rule and potentially face legal challenges similar to the lawsuits challenging the new Title IX Rule itself or choose not to comply and risk sanctions from the Department, including—in a worst-case scenario—the withdrawal of federal funding.

School boards should know that there is a risk of being investigated by OCR, whether through a complaint filed by any individual or, in the absence of such a complaint, pursuant to a compliance investigation. School districts should know that they could lose federal funding for noncompliance. It is important to recognize that there is a risk of litigation on both sides of the issue. While individuals could file lawsuits alleging their rights have been violated due to noncompliance with the Rule, implementation of the Rule could also open schools up to litigation. For instance, schools may face litigation for imposing unlawful restrictions on the due process, free speech, or parental rights of students, families, or employees when attempting

to implement the new Rule. It is possible that families would file complaints alleging that policies compliant with the Rule themselves violate Title IX or that policies implementing the Rule have resulted in injury to their child. While the existence of the Rule may provide some protection to claims for damages, it does not eliminate the possibility.

If OCR finds a school district to be in violation of Title IX, the federal government will generally pressure the school district to come to a resolution and must attempt to gain compliance prior to divesting federal funds. As discussed previously, DOJ may also bring enforcement actions for noncompliance with Title IX.

School boards under pressure to implement the new Title IX Rule, or school boards that have already done so, should monitor the ongoing litigation, consider all relevant information, and know that it is ultimately their decision to make. In doing so, they must recognize that any decision they make may trigger a complaint to OCR or litigation.

PART ONE: Redefinition of Sex and New Harassment Standard

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Redefinition of "Sex" to Include "Gender Identity"

What you need to know

- Title IX bans discrimination on the basis of sex in educational settings. For decades, "sex" has meant male or female and has been based on biological sex.
- With the new Rule, the Department has expanded discrimination on the basis of sex to include discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. By doing so, the Department has effectively changed the very definition of "sex" to mean more than male or female.
- The Department has also lowered the standard for harassment, making it easier to discipline a student or teacher for harassment based on sex.
- The new standard for harassment and the new definition of sex together raise serious First Amendment concerns. Students and teachers will be forced to guess whether their speech will offend others based on how they identify. The new Rule censors these students and teachers, discriminates against them based on viewpoint, and compels them to say things they do not believe.

DEFINITION OF "SEX"

In the executive summary describing the purpose of the new Rule, the Department states that "amendments are required to fully effectuate Title IX's sex discrimination prohibition." 89 Fed. Reg. at 33,476. The Department goes on to explain that the new Rule "provide[s] greater clarity" regarding the scope of discrimination on the basis of sex, and that **"sex discrimination" now includes "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."** 34 C.F.R. § 106.10.

In its responses to public comments, the Department stated that gender identity "describe[s] an individual's sense of their gender, which may or may not be different from their sex assigned at birth." 89 Fed. Reg. at 33,809. It contrasted gender identity with biological sex, stating that individuals may "identify in some other way that is inconsistent with their sex assigned at birth." *Id.* It also

listed a range of genders and sexual orientations it considered to be protected under the new Rule, including "lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, or [those who] describe their sex characteristics, sexual orientation, or gender identity in another similar way." *Id.* at 33,803. Once again, the Department did not define any of these terms and even said it did not need to provide definitions. *Id.*

Thus, it is unclear in the text of the new Rule what "sex" actually means now. But based on the statements by the Department, "sex" now includes gender identity for purposes of discrimination. While "sex" itself is not the same as gender identity under the new Rule, the Department has made it clear that, in its view, discrimination based on gender identity is considered a form of sex-based discrimination.

The new Title IX Rule redefines sex discrimination to include distinctions based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Id.* The new Rule does not define these categories, but the Department has listed a range of genders and sexual orientations it considers to be protected under the Rule. This is not consistent with the way Title IX was written or understood. At the time Title IX was enacted, the term "sex" unequivocally meant "biological sex." In fact, "the overwhelming majority of dictionaries" at the time "defin[ed] 'sex' on the basis of biology and reproductive function." *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (listing the definitions from various dictionaries).

Since the new Rule contains such vague terminology, it is entirely unclear what the Department means by sex-based discrimination. Would using someone's correct, biological pronouns count as discrimination based on gender identity? What about a girl expressing fear or discomfort over competing against a biological male in an upcoming game—is that discrimination? Under the new Rule, the answer to each of these questions is most likely yes.

THE DEPARTMENT failed to define sex itself, let alone sex stereotypes, gender identity, and sex characteristics. These terms are so vague that the Department essentially gets to define what they mean, and schools are burdened with attempting to read the mind of the Department to implement the Rule. Given the subjectivity and confusion that will follow from the new definition of sex discrimination to include gender identity, school boards will be forced into an uncomfortable position: put students' safety and privacy at risk and impose overly broad restrictions on speech that violate students' and teachers' First Amendment rights or risk federal investigations and sanctions.

DID YOU KNOW the Department also expanded the definition of sex to include pregnancy? This change has significant implications for school boards. In 1988, Congress enacted a law that included a "neutrality clause," stating that nothing in Title IX should be interpreted to require any entity to provide or pay for services related to abortion or prohibit any entity from doing so. 20 U.S.C. § 1688. In essence, while schools could choose to support abortion-related services, they could not be required to do so. However, the new Rule undermines this congressional intent. The expanded definition of sex now includes pregnancy, childbirth, termination of pregnancy, and lactation, along with any related medical conditions, and schools receiving federal funding must make "reasonable modifications" for students based on pregnancy, such as allowing absences for medical appointments, online or virtual education, and schedule changes. Since "pregnancy" includes abortion under the new Rule, it may require schools to make accommodations for students seeking abortions. This creates a conflict for school boards, which must decide whether to follow the law passed by Congress or the new Rule promulgated by the Department—a matter currently being litigated. Until a final ruling is made, it remains uncertain whether schools will be obligated to provide benefits for abortions under the new Rule.

SEX-SEPARATED FACILITIES AND DE MINIMIS HARM

The new Rule requires schools to allow students to participate in school-related activities and use facilities, including bathrooms and locker rooms, based on whatever gender identity they assert, rather than their biological sex. How the Rule gets there is confusing and overly complicated, but the end result is clear.

Under the new Rule, a school cannot "carry out . . . different treatment or separation on the basis of sex in a way that would cause more than de minimis [or trivial] harm," or else it will be liable for discrimination. 89 Fed. Reg. at 33,887. The Rule then declares that "adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex." *Id.*

As to what counts as de minimis harm, the Department simply says in its discussion, "Harm . . . must be genuine and objectively non-trivial and assessed from the perspective of a reasonable person in the individual's position." *Id.* at 33,815. This is a low and extremely subjective threshold, considering that even requesting to see a birth certificate is more than de minimis harm.

The new Rule carves out a few small—and contradictory—exceptions to the de minimis harm standard. By statute, Congress listed specific activities and spaces where individuals could be separated by sex, including in living spaces, sororities and fraternities, sex-based youth organizations like Boy Scouts and Girl Scouts, and father-son or mother-daughter events. *See id.* at 33,818; 20 U.S.C. § 1681(a)(1)-(9); *id.* § 1686.

Recognizing this clear statement from Congress, **the Department has claimed that it will not interfere with the provisions in Title IX allowing for sex separation in certain instances and that its de minimis harm standard will not apply to separation or different treatment of students under these exemptions.** In other words, the new Rule allows schools to subject students to more than de minimis harm in the circumstances exempted by the statute—including by not allowing them to participate in a manner which is consistent with their "gender identity"—without running afoul of the regulations. 89 Fed. Reg. at 33,818. Thus, for example, it would likely not be a Title IX violation for a school to require students to live in dormitories that match their biological sex, even if that offends or "harms" some students who do not identify with their biological sex.

THE NEW RULE specifically allows schools to cause more than de minimis harm to students by excluding them from participating on sex-separated athletics teams consistent with their "gender identity," but it also prohibits discrimination on the basis of "gender identity" in athletics programs. What are school boards to make of this seeming contradiction? The Department originally proposed two separate rules, one in 2022 (which became the new Title IX Rule) and then an additional "Athletics Rule" in 2023. At this time, the Athletics Rule has been delayed indefinitely. Pointing to the Athletics Rule, the Department has stated that the new Rule does not impact athletics; however, it does not explain what the new Rule's general prohibition of "gender identity" discrimination means for athletics programs. In determining what the new Rule means for sex-separated sports, school boards should know that the Biden-Harris administration has made clear—even before it issued the new Rule—that it interprets Title IX to require schools to allow males who identify as females to compete in women and girls' sports, and the refusal to do so could constitute unlawful discrimination. *See* DOJ Statement of Interest in *B.P.J. v. West Virginia State Board of Education* at https://www.justice.gov/crt/case-document/file/1405541/dl?inline.

For all other facilities or activities that Congress did not specifically list in its statutes, the Department under the Biden-Harris administration has declared that schools must allow individuals to access any private spaces, events, or other programming based on how they identify. *Id.* The Department stated that "sex separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination," while at the same time stating that if a school "denies a transgender student access to a sex-separate facility or activity consistent with that student's gender identity," it will violate Title IX. *Id.* In short, according to the Department, schools must let individuals use whatever bathroom or locker room matches their "gender identity."

This new de minimis harm standard will create significant confusion for schools trying to implement the new Rule. As a federal court observed, the new Rule "accommodates a reality in which student housing remains sex-segregated while students are free to choose the bathrooms and locker rooms they use based on gender identity." *Tennessee et al. v. Cardona*, 2:24-cv-00072 (E.D. Ky., June 17, 2024). Of course, this defies all logic and essentially eliminates the protections and privacy interests Congress so clearly laid out in law.

Most of the discussion by the Department regarding de minimis harm appears in its responses to public comments. Nevertheless, these statements reveal a dangerous and short-sighted plan that will put the privacy and safety interests of students in harm's way. The Department has dismissed the public's concerns about student privacy and safety as "unsubstantiated and generalized." 89 Fed. Reg. at 33,820.

Since the new Rule requires schools to let anyone use a bathroom or locker room corresponding with the gender with which they identify, any adult—even a visiting adult—could enter a school bathroom or locker room of their choosing, undermining the safety and privacy of students. Refusal by schools to allow this could subject the school to a discrimination complaint for causing more than de minimis harm to that person.

Making the problem even worse, the Department puts the burden on schools to simply accept an individual's gender identity without question or documentation. *Id.* at 33,819. In fact, in the Department's view, "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements,"—including requesting a student to produce a birth certificate—"imposes more than de minimis harm." *Id.* at 33,819.

In its attempt to redefine sex under the new Rule to include "gender identity," the Department has essentially erased the biological categories of male and female on which Title IX's nondiscrimination guarantee is based, even though it included no definition of either "sex" or "gender identity" in the new Rule.

Diminished Sexual Harassment Standard

As part of its ban on sex discrimination in schools, the Department has long banned harassment of an individual based on sex. **Sex-based harassment takes three forms: (1) quid pro quo harassment, which occurs when a school employee conditions receipt of a benefit on an individual's participation in unwanted sexual conduct; (2) sexual assault; and (3) hostile environment harassment.** New § 106.2. The third, hostile environment harassment, is the most common and will be the focus of this discussion.

Now, on top of expanding the scope of sex discrimination, the Department is changing the standard for hostile environment harassment too.

In the late 1990s, SCOTUS heard two cases involving Title IX that shaped the legal standard for harassment. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). In those cases, SCOTUS defined "sexual harassment" as conduct that is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 650. Known as the *Gebser/Davis* framework, many schools across America adopted that standard to assess complaints of harassment on school grounds. The Department officially adopted the *Gebser/Davis* standard in 2020, defining sexual harassment as "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." Former § 106.30(a)(2).

While the new Rule will impact recipients of federal funding as discussed in this guide with regard to potential investigations by OCR, the same standard does *not* apply to courts. The *Gebser/Davis* framework is still good law and is the standard courts will apply.

This *Gebser/Davis* standard is a high one, and rightfully so. First, it captures the main purpose of Title IX: ensuring equal access to education regardless of sex. Second, it ensures that protected speech—including so-called "hate speech" and offensive speech—is not swept into the definition for harassment; it requires harassment to be more than just offensive. Third, it requires schools to be objective in how they assess claims of harassment to determine whether discrimination on the basis of sex has occurred.

Under the new Rule, the standard for harassment has changed drastically. The new Rule bans "[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 (i.e., creates a hostile environment)." 89 Fed. Reg. at 33,884. The new Rule requires schools to consider facts—such as frequency and duration of the alleged harassment and the ages and roles of the individuals involved—on a case-by-case basis to determine whether harassment occurred.

From the start, this new Rule shifts the standard away from being objective and neutral, requiring schools to examine harassment from both an objective *and* subjective perspective. Then, it lowers the threshold for establishing harassment by only requiring schools to consider whether conduct is severe (meaning serious) *or* pervasive (meaning frequent), a departure from the *Gebser/Davis* standard that required *both* elements to be met. Finally, the new Rule does not merely require a

school to respond to harassment that *denies access* to educational opportunities, but it even requires such a response when harassment merely "*limits* the ability to participate" in an educational program.

On top of that, the new Rule has "clarified" who can make a discrimination complaint, including one alleging harassment. Now, *any* person "who was participating or attempting to participate in the recipient's education program or activity" at the time of the alleged harassment can file a complaint requiring a response from the school. *Id.* at 33,882. Practically speaking, that means a school could be liable for discriminating against students, teachers, parents, chaperones, applicants, visiting students, visiting parents, visiting coaches and teams, independent contractors, and any other guest on school grounds.

Schools investigating complaints of harassment must filter them through the complainant's perspective, reeling back the objective approach under the prior rule that afforded due process to the accused. For students and teachers, this raises First Amendment concerns because investigators may be tempted to focus too much on how the accused's words or actions made someone feel subjectively. It is important for school boards to emphasize in their policies that such assessments must also remain objective.

The Department has significantly lowered the standard for harassment by requiring schools to assess complaints from the subjective perspective of the complainant (rather than an objective observer) under the "severe *or* pervasive standard" (rather than the severe *and* pervasive standard) and to consider whether perceived harassment merely limits (as opposed to effectively bars) the complainant's participation in an educational program. Allowing school officials to consider the totality of the circumstances on a case-by-case basis only broadens the scope of their authority and what they may rely on to find harassment. Together with the vague and overly broad definition of "sex" by the Department, and the expansion of who may file a complaint, this change means the floodgates will burst open to complaints of discrimination in schools.

HOW THIS WILL PLAY OUT FOR STUDENTS, TEACHERS, AND ADMINISTRATORS

Because harassment must now be assessed from an objective *and* subjective point of view, it is up to individual students and teachers to guess whether

students (or anyone else visiting campus) will be offended by the words they want to say. There are a few problems with this. First, offensive speech is firmly protected by the First Amendment, but the Rule's new standard appears to depart from the constitutional standard. Anything that offends could be reported to school administrators and may be subject to punishment. Second, while it is nearly impossible to know what will offend another person, there is an increased tendency for some to argue that anything that contradicts one's view of gender identity is not only offensive but somehow constitutes harm. Such speech may even include so-called "micro-aggressions" of which the speaker is not aware but a listener has predetermined to be sexist.

And that is just the tip of the iceberg. Once a school puts itself in the shoes of the complainant, the school must consider whether the conduct complained of is severe *or* pervasive. Take "misgendering" (using pronouns that match the biological sex of an individual rather than preferred pronouns that do not match the individual's biological sex) for instance. On this view, misgendering could certainly be considered to be "severe." And if a student or teacher has sincere personal or religious beliefs that lead to their opposition of gender ideology, and for that reason consistently refuses to use nonbiological pronouns of another individual, then misgendering could also be considered pervasive. Likewise, if a female athlete were to tell her coach that she feels unsafe sharing a locker room with a male teammate who identifies as a girl, it could be considered severe because she refuses to accept the so-called gender identity of her teammate, and if she brings up this concern a second or third time, it could be considered pervasive.

Furthermore, what does it mean to "limit" a classmate's ability to participate in school and extracurricular activities? All it would take is for a student to report to administrators that he was offended by a comment of a classmate and therefore feels uncomfortable around the classmate. Even though the individual's access to education has not been denied, his ability to participate in school could be considered "limited" under the new Rule.

With these changes, harassment will no longer be a legal term that schools can readily identify and investigate. Instead, it will become a malleable standard, forcing schools to respond to a much broader category of complaints that sweep in protected speech or face losing federal funding. And in turn, given the subjective nature of "gender

identity" under this new Rule, each school will be required to let individuals define harassment for themselves based on how they identify. Whether a student, teacher, or administrator engages in harassment will ultimately depend on what a student—or parent, or chaperone, or visiting coach, or visiting contractor, or visiting community member—perceives to be offensive.

The Department arguably left the new Rule vague on purpose. Instead of clearly defining what constitutes harassment prohibited under Title IX, it opted to force schools to determine how to investigate and assess complaints of harassment. This lack of clarity and guidance will create an environment of unconstitutional self-censorship in every school, where individuals who do not want to risk any sort of complaint, investigation, or punishment will choose silence instead of expression. And if schools adopt new policies that ban misgendering or other forms of speech under the new rule, those policies could both discriminate against students' views about gender and biological sex while also compelling them to affirm beliefs they may not agree with by requiring them to use nonbiological pronouns or else face punishment.

Final takeaways

- Re-defining sex discrimination to include discrimination on the basis of an undefined concept of "gender identity" will likely motivate schools to impose broad restrictions on speech and behavior in violation of the First Amendment to avoid any potential sanctions by the federal government.
- School boards should be mindful of significant First Amendment issues raised by the new Rule. The vague definitions of "sex" and "harassment" create uncertainty. School districts should be aware there are risks of litigation on both sides—and, whether or not they choose to implement the new Rule, they may face consequences.
- In addition to broadening and redefining sex, the Department has lowered the standard for harassment. Once again, if an individual claims that they have been offended, schools must consider such a complaint on both objective and subjective grounds, whether the alleged behavior was severe or pervasive, and whether it even "limited" a person's ability to participate in the program or activity. Together with the new gender identity standard, this will create an environment of censorship and compulsion because everyone will be forced to conform their words and actions to how each individual identifies.

What you need to know

- The new Title IX Rule does not require schools to bypass parental involvement when students request to change their names, pronouns, or bathroom use.
- Public schools should defer to parents' decisions regarding gender identity transitions for their children, as affirmed by statements by the Department in the preamble of the Rule.

HOW DOES THE NEW RULE APPLY TO PARENTAL INVOLVEMENT IN STUDENT REQUESTS TO CHANGE NAMES AND PRONOUNS AT SCHOOL?

Many school districts around the country have adopted policies to allow minor students to change their gender identity at school (names, pronouns, and bathroom use) without parental notice or consent. To justify these policies, some school districts have invoked Title IX, even though nothing in the Title IX regulations prior to the new Title IX Rule requires or even suggests that school districts should circumvent parents in this way. But school districts may be wondering, what does the new Rule say about this issue?

The short answer is nothing—at least directly. The text of the new Rule does not expressly address parental notice and consent (whether for or against) when a minor student seeks to change gender identity at school. That said, **both the current Title IX regulations and the new Rule provide, "Nothing in Title IX or this part may be read in derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person . . . ." New § 106.6(g).** If and when the issue is litigated, this provision will be the first thing courts will look to, and it cuts strongly against any argument that Title IX somehow requires disregarding parents' decisions about what is best for their child.

Moreover, although the text of the new Rule does not directly address the issue, the *preamble* does, and it lands squarely in favor of deferring to parents. Multiple commenters on the proposed rule raised concerns with the Department that the generic nondiscrimination provisions might be *interpreted* to require disregarding the parents' decisions about names, pronouns, and bathroom use for their own children (given that some school districts have tried to argue this). 80 Fed. Reg. at 33,821–22. More specifically, the commenters asked the Department to clarify "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school

if their parent opposes the change and whether the proposed regulations would lead to claims that a parent is mistreating a child if the parent does not affirm the child's gender identity." *Id.* at 33,821.

The response by the Department was an emphatic "no." The Department began by noting that it "acknowledges and respects the rights of parents and their fundamental role in raising their children," and then emphasized that "nothing in the final regulations disturbs parental rights," pointing to § 106.6(g). *Id.* Even more clearly, **the Department explained that "[w]hen a parent and minor student disagree about how to address sex discrimination against that student, *deference to the judgment of a parent, guardian, or other authorized legal representative with a legal right to act on behalf of that student is appropriate."*** *Id.* at 33,822 (emphasis added). In other words, if a student and the parents disagree about "name and pronouns," a school district should defer to the parents.

The Department also made clear that "nothing in these final regulations prevents a recipient from disclosing information about a minor child to their parent who has the legal right to receive disclosures on behalf of their child." Thus, not only must schools allow parents to make this decision, but they also cannot hide or withhold from parents that their child has requested to change name, pronouns, or bathroom use at school. The Department finished its discussion by "reiterat[ing] that nothing in the final regulations restricts any right of a parent to act on behalf of a minor child or requires withholding of information about a minor child from their parents." *Id.*

If the Department were to change positions, then citing to the preamble would be powerful in litigation. School districts that decide to keep gender identity transitions secret from parents put themselves at serious risk of litigation.[2] Even though the Department has indicated in the new Rule that it will defer to parents, its intent has been clear from the start: to compel conformity to gender ideology in schools. Thus, although school districts cannot be required under the Rule to hide gender identity transitions from parents, school boards should be cautious and monitor any guidance documents that the Department puts out on the matter which might try to put pressure on schools in another way.

Final takeaways

- School districts cannot withhold information from parents about their child's gender identity changes at school.
- Deference to parental judgment is emphasized in the preamble of the new Rule, which does not require school districts to act against parents' wishes in these matters.

2 While the preamble to a final rule is not treated with the same force of law as the text of the adopted regulations, *e.g.*, *AT&T Corp. v. Fed. Commc'ns Comm'n*, 967 F.3d 840, 847 (D.C. Cir. 2020), it can still "inform the interpretation of the regulation," *Peabody Twentymile Mining, LLC v. Sec'y of Lab.*, 931 F.3d 992, 998 (10th Cir. 2019).

What you need to know

- The Family Educational Rights and Privacy Act ("FERPA") governs the privacy and access rights of parents and students regarding educational records. It ensures parental access and consent for the disclosure of student records.
- Schools may disclose student records without parental consent only under certain circumstances.
- When there is a conflict between FERPA and Title IX requirements, Title IX generally takes precedence. Title IX investigations may require sharing personally identifiable information under specified exceptions.

WHAT IS FERPA?

The Family Educational Rights and Privacy Act ("FERPA") went into effect on November 19, 1974. *See* 20 U.S.C. § 1232g and 34 C.F.R. § 99. **FERPA sets requirements "for the protection of privacy of parents and students," particularly when it comes to the educational records that schools keep for their students.** 34 C.F.R. § 99.2.

FERPA mandates that schools allow parents to inspect and review their children's educational records as a condition of receiving federal funding. Schools must fulfill a parent's request within 45 days, cannot charge fees that would prevent access, and cannot destroy records if there is an outstanding request. Educational records include files related to a student, but exclude personal notes, law enforcement records, employee records, and certain medical records. Schools must also inform parents of their FERPA rights annually, including the right to inspect, amend, and consent to disclosures of educational records, and to file complaints with the Department for non-compliance.

Disclosure of student records generally requires parental consent, but there are exceptions for certain officials, other schools, financial aid applications, and emergencies, among others. Schools can disclose directory information without consent if the school provides notice and an opportunity for parents to opt-out. FERPA enforcement is handled by the Office of the Chief Privacy Officer of the Department, which investigates complaints and ensures compliance. Non-compliance can result in enforcement actions, including litigation or withholding federal funds.

WHAT DOES FERPA HAVE TO DO WITH TITLE IX?

There have been questions about how FERPA and Title IX interact for decades, so this issue is not a novel one. However, it is still important for schools to know what the new Rule says about FERPA. How the two relate has already been discussed by the Department and Congress in both 1994 and 2001.

In 1994, as a part of the Improving America's Schools Act, Congress amended the General Education Provisions Act ("GEPA"), which includes FERPA, to state that nothing in GEPA shall be construed to "affect the applicability of Title IX of the Education Amendments of 1972." 20 U.S.C. § 1221(d).

Then, in 2001, the Department issued Revised Sexual Harassment Guidance[3] which clarified that the rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding, and that FERPA does not override federally protected due process rights of a person accused of sexual harassment.

The Department took the sentiments from GEPA and the Revised Sexual Harassment Guidance and put them into sections of the new Rule, with a few additional clarifications and caveats. The new Rule addresses various aspects of FERPA as discussed below.

WHAT LAW APPLIES WHEN PROVISIONS OF FERPA AND TITLE IX CONFLICT?

Importantly, the new Rule added § 106.6(e), which states that "[t]he obligation to comply with Title IX and this part is not obviated or alleviated by FERPA, 20 U.S.C. § 1232g, or its implementing regulations, 34 C.F.R. part 99." This language is not substantively different than what was in the preexisting regulations. **The obligation to comply with Title IX when it conflicts with FERPA is an existing obligation that continues under the new Rule.**

In the preamble of the new Rule, the Department states that a recipient school must fulfill its obligations under *both* Title IX and FERPA, unless there is a direct conflict that precludes compliance with both laws and their corresponding regulations. Whether there is a direct conflict is a "fact-specific determination that must be addressed on a case-by-case basis." This could impact how a Title IX investigation is conducted or what kind of information is relayed to parents.

3 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (rescinded), January 2001, https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

The Department goes on to explain in the new Rule's preamble that **if** there is a direct conflict between FERPA's requirements and Title IX's requirements, the requirements of Title IX override any conflicting FERPA provisions. This override is referred to as the "GEPA override." This override already exists in GEPA federal law, 20 U.S.C. § 1221(d), but now it is also explicitly stated in the Title IX regulations.

WHEN CAN SCHOOLS DISCLOSE PERSONALLY IDENTIFIABLE INFORMATION CONTAINED IN TITLE IX COMPLAINTS AND INVESTIGATIONS?

Title IX sometimes requires disclosure of a student's personally identifiable information. The new Rule highlights five exceptions to FERPA in this regard. Schools must not disclose personally identifiable information obtained in the course of complying with Title IX, except in five circumstances:

- First, when the recipient school has obtained prior written consent from a person with the legal right to consent to the disclosure;
- Second, when the information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue;
- Third, to carry out the purposes of the Title IX regulations, including action taken to address conduct that reasonably may constitute sex discrimination under Title IX in the recipient's education program or activity;
- Fourth, as required by federal law, federal regulations, or the terms and conditions of a federal award, including a grant award or other funding agreement; and
- Fifth, to the extent such disclosures are not otherwise in conflict with Title IX or its regulations, when required by state or local law, or when permitted under FERPA, 20 U.S.C. § 1232g, or its implementing regulations 34 C.F.R. part 99.

See New § 106.44(j). These exceptions are consistent with the exceptions already listed in FERPA.

The new Rule clarifies what records parents can access when the information of a student other than their own child is also included in the record. Specifically, § 106.45(f)(3)(i) of the new Rule says that if the school provides a description of the evidence in a complaint investigation, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party.

In the context of disciplinary proceedings, the Department has recognized that "if information cannot be segregated or redacted without destroying its meaning," then "a parent has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student." In this way, the new Rule makes clear that, **in the context of granting parties' access to evidence or a description of the evidence in grievance procedures, schools must not exclude evidence related to other students, even if the disclosure would otherwise violate FERPA.**

MAY SCHOOLS DISCLOSE INFORMATION ABOUT ANY SUPPORTIVE MEASURES TO THE OTHER PARTY TO THE TITLE IX PROCEEDINGS?

Schools may only disclose information about supportive measures to the other party to the Title IX proceedings if "necessary to provide the supportive measure or restore or preserve a party's access to the education program or activity, or when an exception in § 106.44(j) applies." New § 106.44(g)(5). Section 106.44(j)(2) specifically permits disclosures regarding supportive measures to parents of minors who are receiving the supportive measures. Because of this, the nondisclosure requirement does nothing to prevent parents from learning about supportive measures provided to their children.

HOW DOES FERPA INTERACT WITH TITLE IX WHEN IT COMES TO STUDENTS WITH DISABILITIES?

If a student involved in a Title IX complaint—either the one making the complaint or the one responding to it—has a disability, then the school must require the Title IX Coordinator to consult with members of the student's Individualized Education Program ("IEP") team or the people on the student placement team. New § 106.8(e). The placement team is a group of people, usually including teachers, administrators, and specialists, who work together to decide the most appropriate educational setting for a student with a disability. *Id.*

The goal of the required communication between the Title IX Coordinator and individuals on the IEP team and placement teams is to make sure the school is complying with the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act, which protect the rights of students with disabilities.

This situation might require sharing a student's personal information with the Title IX Coordinator, IEP team, and placement team—people who would normally not have access to the records without parental consent. However, the Department clarifies that under FERPA, "school officials" are allowed to access personal information from a student's records without parental consent if they have a legitimate reason to do so. 80 Fed. Reg. at 33,604. The Title IX Coordinator is considered a school official with a valid reason to access this information when handling cases involving students with disabilities. Schools should clearly explain this in their annual notification to parents about their FERPA rights, so they understand that the Title IX Coordinator can access this information.

Final takeaways

- Schools must provide parents the right to inspect, amend, and control disclosure of the educational records of their minor children.
- Schools are obligated to inform parents of their FERPA rights annually and ensure proper processes are in place for both FERPA and Title IX compliance.
- Title IX regulations may override FERPA provisions in cases where both laws apply. Schools should endeavor to comply with both federal laws to the extent possible.

PART TWO: Due Process Considerations

Part Two: Due Process Considerations

Administrative Requirements

What you need to know

- Each school district must designate at least one Title IX Coordinator to ensure compliance with Title IX regulations and oversee the handling of complaints related to sex-based discrimination.
- School districts must adopt and publish a comprehensive nondiscrimination policy, grievance procedures, and a notice of nondiscrimination to ensure the prompt and equitable resolution of complaints. These policies must be accessible to all students and employees.

DESIGNATION OF TITLE IX COORDINATOR

Each school district must designate at least one qualified staff member as a Title IX Coordinator to oversee the intake of and response to Title IX complaints and ensure compliance with Title IX and its implementing regulations. Recipients that designate more than one employee to carry out this function must ensure that a single Title IX Coordinator is responsible for overseeing compliance with the law. New § 106.8(a).

NONDISCRIMINATION POLICY, GRIEVANCE PROCEDURES, AND NOTICE OF NONDISCRIMINATION

Recipients must develop and disseminate comprehensive nondiscrimination policies and grievance procedures that are easily accessible to all students, parents, employees, and others in the school community. New § 106.8(b), (c).

The new Rule, like the preexisting regulations, requires that the recipient send a notice of nondiscrimination to students, parents, employees, and others, stating that the recipient does not discriminate on the basis of sex in any education program or activity and containing information on how to inquire about and submit complaints regarding allegations of sex-based discrimination in violation of Title IX. Recipients must generally include this notice in written materials it makes available to the community.

EMPLOYEE TRAINING

The new Rule requires annual mandatory training for all employees on their Title IX obligations, to include the recipient's obligation to address sex discrimination in its education program or activity; the scope of conduct that constitutes sex discrimination under Title IX; and notification and information requirements with regard to a student's pregnancy or related conditions and conduct that could reasonably constitute sex discrimination. New § 106.8(d).

The new Rule also requires training for those involved in grievance procedures, facilitators of informal resolution processes, and Title IX Coordinators on their specific duties with respect to grievance procedures, impartiality requirements, and complying with Title IX and its implementing regulations.

RECORDKEEPING

The new Rule requires recipients to maintain, for a period of at least seven years, records of the informal resolution process or grievance procedures arising from all complaints of sex discrimination, including harassment. § 106.8(f). Recipients must also keep records of actions the Title IX Coordinator took in response to reports of conduct that reasonably may constitute sex discrimination, as well as all materials used to provide training required under the new Rule. *Id.* The new Rule requires recipients to make training materials available in response to a request for inspection by a member of the public.

Final takeaways

- Recipients must provide annual mandatory training for all employees on their Title IX obligations, including reporting requirements under the new rules. Recipients must provide specialized training for employees involved in its grievance procedures.
- Recipients must maintain records related to all reports and complaints of sex discrimination and actions responding to such reports and complaints.

What you need to know

- The new Rule requires schools to respond to any conduct that could "reasonably" constitute sex discrimination, even if it occurs outside of their education program or activity.
- K-12 schools must mandate that non-confidential employees report any behavior that may constitute sex discrimination to the Title IX Coordinator.
- The new Rule allows schools to offer a voluntary informal resolution process for addressing certain sex discrimination allegations, but not for cases involving a K-12 employee harassing a student.

OBLIGATION TO RESPOND TO SEX DISCRIMINATION

Under the regulations issued by the Department in 2020 ("the 2020 Rule"), a recipient that has "actual knowledge" of sexual harassment must respond to such harassment in a manner that is not "deliberately indifferent"—that is, not "clearly unreasonable in light of the known circumstances." § 106.44(a).

The new Rule applies to the recipient's obligations to respond to any sex discrimination, not just sexual harassment. According to the new Rule, the recipient must respond to any sex discrimination when it or any of its employees (including the employee accused of engaging in discrimination) has knowledge of conduct that could "reasonably" constitute such discrimination.

This reasonableness standard is much broader than the standard of the 2020 Rule and requires only an opinion that a "reasonable" person would believe that the alleged discrimination *might* have occurred. This standard is unclear regarding what information counts as sufficiently reliable and credible to the extent that it "reasonably may constitute" discrimination.

The new Rule thus requires recipients to respond to a much broader range of conduct and places the onus on the recipient to respond "promptly and effectively" to conduct that may resemble discrimination, even if it is not discrimination. For example, if a student complains in the presence of her P.E. teacher about being uncomfortable undressing in front of a biologically male classmate who identifies as female, the new Rule requires the P.E. teacher to report her "severe"

or potentially "pervasive" speech to the Title IX Coordinator, who must consider launching the recipient's grievance procedures for allegations of sex-based discrimination. This requirement thus mandates the policing of speech in schools and will open the door to an explosion of complaints of discrimination, including harassment, to which schools must respond.

APPLICATION

In line with Title IX's statutory text, the new Rule clarifies that it applies to sex discrimination occurring under a recipient's education program or activity in the United States.

However, **the new Rule provides that it also extends to buildings owned or controlled by an officially recognized student organization and conduct that is subject to the recipient's disciplinary authority.** New § 106.11. Thus, if a recipient's policy allows a student to be disciplined for any behavior outside the education program or activity—for example, online harassment after school hours—then it must also respond to reports of what reasonably may constitute sex discrimination in the same contexts.

The new Rule also provides that recipients have an obligation to address sex-based harassment in their education program or activity, even when some of the conduct contributing to the harassment occurred outside the program or activity or outside the United States. Thus, while recipients are not required, based on the plain meaning of Title IX, to respond to conduct occurring outside the education program or activity or in a different country, the new Rule requires them to consider such "external" behavior to evaluate whether there is sex-based harassment in their education programs or activities.

NOTIFICATION REQUIREMENT

The new Rule requires all non-confidential K-12 employees—that is, employees outside of school psychologists, guidance counselors, and others who owe a duty of confidentiality to those who consult them—to notify the Title IX Coordinator when they have information about behavior that "reasonably may constitute" sex discrimination. The new Rule specifies that this reporting requirement does not apply to an employee who has personally been subjected to conduct that reasonably may constitute sex discrimination under Title IX. New § 106.44(c), (d).

Recipients must provide the contact information for confidential employees to anyone participating or attempting to participate in the recipient's education programs or activities, including students, parents, and any community members who attend school events and activities (such as athletics competitions).

TITLE IX COORDINATOR REQUIREMENTS

Recipients must charge the Title IX Coordinator with treating any alleged victim of sex discrimination and the accused fairly. New §106.44(f)(1)(i).

The Title IX Coordinator is required to provide "supportive measures" to the person alleged to be a victim of discrimination (the "complainant") and must inform the complainant or, if the complainant is unknown, the person who reported the alleged discrimination of available grievance procedures. New § 106.44(f)(1)(ii). The new Rule defines "supportive measures" as "individualized measures" to "[r]estore or preserve [a] party's access to the recipient's education program or activity" or "[p]rovide support during the recipient's grievance procedures" that do not "unreasonably burden" any party to the complaint and are not imposed to punish or discipline any individual. New § 106.2.

The new Rule specifies that it does not prevent recipients from removing anyone on an emergency basis, following an "individualized safety and risk analysis" indicating an "imminent and serious" threat to any individual's health or safety, or placing any employee on administrative leave while grievance procedures are ongoing. New § 106.44(h), (i).

In response to a complaint alleging sex discrimination, the Title IX Coordinator must initiate either the informal resolution process or the formal grievance procedures. New § 106.44(f)(1)(iv). If neither the complainant nor any other individual files a complaint, or if it is withdrawn, the Title IX Coordinator must determine, based on factors listed in the new Rule and others, whether to initiate a complaint that triggers the recipient's grievance procedures. New § 106.44(f)(1)(v).

Even when there is no complaint, the Title IX Coordinator is required to take "prompt and effective" actions to ensure that sex discrimination does not continue or recur within the recipient's education programs or activities. New § 106.44(f)(1)(vii).

INFORMAL RESOLUTION

The new Rule allows the recipient, whether or not a complaint alleging sex discrimination has been filed, to offer an informal process for the resolution of some, but not all, sex discrimination allegations. This informal process is not available for any K-12 employee who is alleged to have engaged in the sex-based harassment of a student or when the process would conflict with federal, state, or local law. Before allowing the designation of a facilitator for informal resolution, the Title IX

Coordinator must also determine that doing so would not result in future risk of harm to others. New § 106.44(k).

If the Title IX Coordinator determines that an informal resolution process is appropriate, then the recipient must designate an impartial third party (who is not the investigator or the decisionmaker in the recipient's grievance procedures) who has been trained to facilitate the process and who helps determine what steps to take to resolve the allegations of sex-based discrimination.

The Title IX Coordinator must not pressure either of the parties into an informal resolution process and is required to give notice prior to initiating such a process that the parties may withdraw from the process at any time.

MONITORING FOR REPORTING BARRIERS

The new Rule demands that Title IX Coordinators actively assess their institution's education programs and activities for barriers to reporting alleged sex discrimination and address those barriers. New § 106.44(b).

This provision is limited to reporting barriers. Recipients are not required to direct their Title IX Coordinators to monitor or address potentially discriminatory speech or conduct pursuant to this provision. Moreover, recipients must be cautious about overreaching in response to this provision by, for instance, setting up a reporting form encouraging students and faculty to report each other's allegedly offensive speech, as such reporting forms can be unconstitutional when they create a chilling effect on speech and academic freedom. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1123 (11th Cir. 2022).

Final takeaways

- Schools are now required to respond to a broader range of conduct that may constitute sex discrimination, even if no formal complaint is made.
- While informal resolution is an option in some cases, schools must ensure that all parties consent voluntarily and can withdraw at any time.
- Title IX Coordinators must actively monitor for barriers to reporting discrimination and take steps to eliminate those barriers, but this requirement is not a license for school officials to chill speech and academic freedom.

What you need to know

- The new Rule allows anyone attempting to participate in educational programs or activities of a school district to file a complaint of sex discrimination, removing previous limits and time constraints.
- The new Rule does not guarantee an appeal for findings against the accused. It also lowers the standard of proof generally to "preponderance of the evidence," and allows for different standards for students and employees accused of the same conduct.
- The new Rule diminishes due process protections by permitting a single investigator to both investigate and decide on the outcome of complaints, while also eliminating requirements for written notifications and opportunities for parties to present and review evidence and have advisors present during grievance procedures.

BACKGROUND ON GRIEVANCE PROCEDURES

Federal courts have long required public schools to afford their students and employees due process before they are disciplined, terminated, or expelled. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975). In line with this constitutional requirement in the context of Title IX's prohibition of sex discrimination, Title IX regulations issued by the Department under various administrations have consistently maintained for decades that federal funding recipients establish and publish grievance procedures for the "prompt and equitable resolution of student and employee complaints" regarding prohibited discriminatory conduct. § 106.8(c).

Without more specific direction from the agency regarding procedural requirements under Title IX, however, recipients often ignored basic due process requirements for students and employees accused of sex discrimination—including sexual harassment and sexual assault resulting in termination and expulsion. To address this gap in due process protections, in 2020, the Department issued regulatory amendments that, for the first time, defined basic standards of due process required in Title IX grievance procedures.

The 2020 Rule, which still applies to schools covered by court injunctions blocking the new Rule, requires recipients to outline a grievance process for investigating and evaluating complaints of sexual harassment under Title IX that is carefully calibrated to require recipients to offer equitable procedural protections to both alleged victims of sexual harassment ("complainants") and those accused of such harassment ("respondents"). These procedures balance the due process rights of complainants and respondents, along with the need for discretion in light of the broad variety of regulated recipients, by requiring recipients to offer equitable and predictable procedures. Such procedures must include notifying the parties of all conduct alleged in the sexual harassment complaint, allowing the parties to present evidence fully and effectively to an unbiased decisionmaker (and question the evidence presented by others), and offering appeals on equal grounds to each party.

The Biden-Harris administration's new Title IX Rule overrides these basic due process protections. The new Rule—which applies to all complaints of sex discrimination and not just formal complaints of sexual harassment—demolishes many of these requirements and replaces them with a regime of maximum discretion for recipients to withhold basic elements of due process from students and employees in Title IX grievance procedures. The major changes with regard to K-12 schools are outlined in detail in the sections below.

WHO CAN MAKE A COMPLAINT

The new Rule requires recipients to initiate their grievance procedures in response to any complaint—written or unwritten—of sex discrimination under Title IX. New § 106.45(a)(2).

For complaints of all types of sex discrimination, including sex-based harassment as defined in the new Rule, the complainant may file such a complaint, as may that individual's parent, guardian, or other authorized legal representative. The Title IX Coordinator may also make such a complaint.

For complaints of sex discrimination other than sex-based harassment, any student or employee or anyone who was participating or attempting to participate in the recipient's education program or activity when the alleged discrimination occurred—no matter whether they were subjected to the discrimination or even witnessed its occurrence—may make a complaint that gives rise to the recipient's grievance procedures.

The new Rule provides no time limit for such a complaint and allows even those who are no longer participating in recipients' education programs or activities to initiate grievance procedures.

RETURN OF THE SINGLE-INVESTIGATOR MODEL

The new Rule specifically allows the recipient to designate a decision-maker with regard to a sex discrimination complaint who is also the Title IX Coordinator or the investigator of that complaint—a practice prohibited under the 2020 Rule due to concerns of bias. New § 106.45(b)(2).

The purpose of this prohibition in the 2020 Rule was to prevent an inherently biased "single-investigator model" from tainting the accuracy and legitimacy of the grievance procedures. This is because any Title IX Coordinator or investigator who has handled a complaint will have almost certainly encountered and formed opinions regarding evidence that is not before the decision-maker. The 2020 Rule properly separates these roles and reduces the risk that the outcome of the proceedings will be affected by the conscious or unconscious bias of the decision-maker.

The new Rule permits **but does not require** recipients to return to the single-investigator model, where the Title IX Coordinator, investigator, and decision-maker with regard to a sex discrimination complaint can be the same person. Thus, school boards can decline to adopt the single-investigator model to ensure due process for all parties during the investigation and decision-making process.

SPEECH RESTRICTIONS ON PARTIES

The new Rule requires the recipient to take "reasonable steps" to protect parties' and witnesses' privacy during grievance procedures arising from sex discrimination complaints under Title IX. New § 106.45(b)(5). Except as specified below, they do not require such steps that would prevent the parties from obtaining and presenting evidence; consulting with family members, confidential resources, or advisors; or preparing or participating in any other way in the grievance procedures.

The new Rule separately requires the recipient to take "reasonable steps" to stop parties from disclosing information or evidence they obtained through the grievance procedures, and to address disclosures that have occurred. Other than the disclosure of such information in administrative proceedings and

litigation related to the sex-based discrimination complaint, the new Rule provides no exception to this requirement. New § 106.45(f)(4)(iii).

This is a sweeping and potentially unconstitutional restriction on the rights to free speech and due process because it essentially operates as a gag order before individuals are deprived of their interest in receiving an education. In charting their policies in response to the new Rule, school boards must balance the likelihood of administrative enforcement by the Department against their interest in complying with the Constitution and avoiding relevant litigation risks from students and employees for denying their right to speak freely about allegations of sex discrimination.

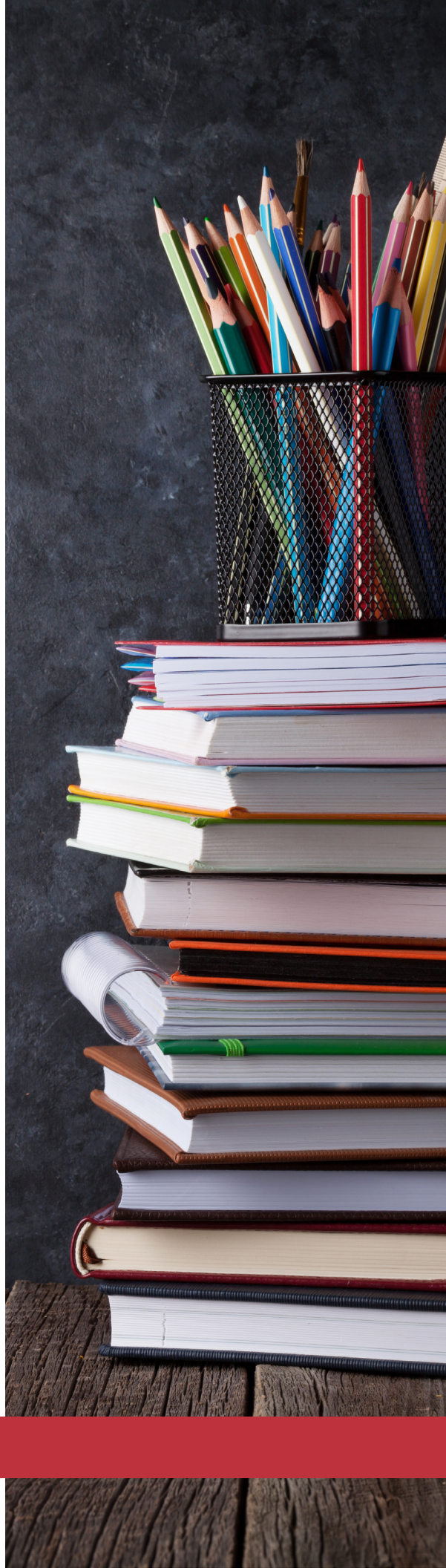
VERBAL COMPLAINTS AND NOTIFICATIONS

The 2020 Rule requires that recipients initiate their grievance procedures in response to "formal complaints" of sexual harassment, which must be in writing. The new Rule, by contrast, requires recipients to initiate their grievance procedures in response to any complaint—written or verbal—of sex discrimination. New §§ 106.2, 106.45(c).

The new Rule removes the requirement of the 2020 Rule that recipients deliver notice of the allegations and other information relating to its grievance procedures to respondents in writing. The Rule thus permits **but does not require** recipients to give verbal notice of the information that must be communicated under these provisions.

DISMISSAL OF A COMPLAINT

The new Rule allows **but does not require** the recipient to dismiss a complaint alleging sex discrimination in various circumstances, including generally when the complainant withdraws allegations in the complaint or the recipient determines that the conduct alleged would not constitute discrimination even if proven. New § 106.45(d).



The new Rule requires that, prior to dismissing a complaint due to a determination that the allegations could not constitute sex discrimination even if proven, the recipient must take reasonable efforts to "clarify" the allegations with the complainant. The Rule does not require but also does not prohibit recipients from including the respondent or the respondent's advisor in such a "clarification" discussion to ensure that, if the allegations are changed, there was no improper coaching of, or pressure upon, a complainant to change the allegations in the complaint.

The new Rule upends the longstanding requirement of Title IX that grievance procedures be equitable because it requires the recipient to offer appeals from complaint dismissals—thus overwhelmingly benefiting complainants—while the new Rule offers no similar guarantee of appeals from responsibility determinations—which can benefit either the complainant or respondent depending on the determination. It only requires recipients to offer such appeals from responsibility determinations to the extent they offer such appeals "in all other comparable proceedings, if any . . . ." New § 106.45(i).

Recipients should recognize the imbalance that would result from not offering to both parties equitable opportunities to appeal adverse findings. Recipients should consider offering an equal opportunity to appeal at the end of the grievance procedures.

ACCESS TO THE EVIDENCE

The new Rule allows the recipient either to offer the parties access to relevant evidence or offer the parties an oral or written description of such relevant evidence. If the recipient only gives parties a description of the evidence, then, at the request of any party, it must provide the parties an equal opportunity to access the actual evidence. New § 106.45(f)(4).

Recipients should consider litigation risks involved in only offering a description of the evidence to the parties, rather than simply offering the parties access to all evidence directly related to the allegations of the complaint.

ADVISOR ASSISTANCE

The new Rule removes the requirement in the 2020 Rule that recipients provide the parties the same opportunities to have others present during the proceedings, including an opportunity to be accompanied by an advisor of their choice who may be an attorney. New § 106.45(f). While the new

Rule does not require schools to allow the parties to have others present or to have an advisor, like an attorney, participate in the proceedings, it **does not prohibit** schools from doing so.

EVALUATING ALLEGATIONS

The 2020 Rule requires schools to either provide a hearing to evaluate sexual harassment complaints or, absent such a hearing, provide some process allowing parties to ask, and receive responses to, questions of the other party or witnesses. § 106.45(b)(6)(ii).

The new Rule requires only questions from decision-makers, not from the parties, to assess the credibility of parties and witnesses. The new Rule only requires such questions when credibility is in dispute and relevant to evaluating responsibility for the allegations in the complaint of sex discrimination. New § 106.45(g).

The new Rule **does not prohibit** schools from holding a hearing or abiding by the baseline process described in the 2020 Rule if they choose to do so as part of a grievance procedure to determine responsibility for allegations of sex discrimination.

STANDARD OF PROOF

The new Rule refers to two different standards of proof to describe which standard the recipient must use in determining responsibility in grievance procedures arising from complaints of sex discrimination under Title IX. New § 106.45(h)(1).

Under the "preponderance of the evidence" standard, a decision-maker must only find that it is "more likely than not" that the respondent committed the conduct alleged in the complaint to find responsibility.

Under the more-demanding "clear and convincing evidence" standard, the decision-maker must find that there is clear and convincing evidence that the respondent committed the conduct alleged in the complaint.

While the 2020 Rule recognized that Title IX does not mandate either of these standards and allowed recipients to choose between them in sexual harassment proceedings, the new Rule generally requires the recipient to use the preponderance of the evidence standard of proof, which is not specified in the law, to determine responsibility in sex discrimination proceedings under Title IX. Only in the event that the recipient uses the clear and convincing evidence standard in

all other "comparable" proceedings, including those used to determine responsibility for other types of discrimination complaints, does the new Rule allow the recipient to use the clear and convincing evidence standard to evaluate allegations of sex discrimination.

The Department specifies that proceedings to determine responsibility for allegations of sex discrimination by students are not comparable to proceedings to determine responsibility for the same types of allegations against employees. 89 Fed. Reg. at 33,701. Thus, the new Rule allows **but does not necessarily require** the recipient to use a standard of proof to evaluate sex discrimination complaints against accused students that is different from the standard the recipient uses to evaluate complaints of the same conduct by employees.

Final takeaways

- The new Rule significantly reduces current federal due process standards for disciplinary procedures in schools that receive federal funding.
- Despite the lower standards, schools are generally not required to change their current grievance procedures and can largely continue to use their existing ones.
- Current grievance procedures meet federal due process standards and help protect the school from litigation by ensuring fairness in handling sex discrimination complaints.
- School boards should consider keeping these higher due process standards, even though the new Rule allows for more discretion.

Conclusion

It is important to recognize that Title IX is an evolving area of law, with ongoing litigation that may impact how the new Rule is applied in the future. The organizations that have contributed to this guide will continue to serve as legal and policy resources, providing updates as new court decisions are made and additional guidance becomes available. These updates will be posted on our respective websites, and our contact information is provided here for any further assistance. Ultimately, the decision to implement policies in response to the new Title IX Rule rests with school boards, and we encourage careful consideration of all relevant legal and practical factors when making these important choices.

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