



## Title IX Model Regulations Summary

In 2024, the Biden Education Department radically rewrote Title IX's implementing regulations to push gender ideology in schools, colleges, and universities, to destroy equal educational opportunities for women and girls, to sideline parents, and to gut free inquiry, freedom of speech, and disciplinary due process protections on campuses across the country.

The Defense of Freedom Institute for Policy Studies has drafted a model regulatory code that removes gender ideology from the Department's Title IX regulations; prohibits discrimination in education on the basis of sex; ensures equal athletic opportunities for women and girls in schools, colleges, and universities; protects student privacy in bathrooms, locker rooms, and other intimate facilities; and ensures free inquiry, free speech, and due process on campus. DFI's model regulatory code's provisions include:

- Defining sex and related terms such as mother and father as binary, biological classifications at birth that are not dependent on any internal sense of gender identification (§ 106.2)
- Removing the provisions in the 2024 regulations extending Title IX to prohibit discrimination on the basis of gender identity and other concepts (current § 106.10) and deleting the requirement that schools permit an individual to use bathrooms, locker rooms, and showers based on gender identity rather than his or her biological sex (current § 106.31(a)(2))
- Ensuring the availability of sex-separated intimate facilities, requiring recipients to restrict access to sex-separated facilities based on biological sex, and directing recipients to comply with the request of any person not to share a bedroom or bathroom with a member of the opposite biological sex (§§ 106.32, 106.33)
- Discarding the 2024 regulations' definition of "hostile environment harassment," which mandates speech codes on campus that subvert the First Amendment, in favor of a definition of sexual harassment rooted in Supreme Court caselaw (§ 106.2)
- Requiring due process protections for students and employees accused of sexual harassment—including by banning the infamous single-investigator model—and extending these protections to all formal complaints of sex discrimination, sexual harassment, and sexual misconduct (§ 106.45)
- Removing the requirement in the 2024 regulations that Title IX Coordinators act as

all-powerful compliance police on and off campus to focus their role on ensuring that student and employee complaints of discrimination, harassment, and misconduct are addressed with supportive measures and, where appropriate, remedies and sanctions (§§ 106.11, 106.44)

- Prohibiting discrimination on the basis of sex for the purpose of remedying generalized past discrimination (*i.e.*, “affirmative action”) (§§ 106.3(b), 106.4(a))
- Specifying that nothing in the regulations requires recipients to violate the constitutional right of parents to direct the upbringing and education of their children (§ 106.6(d))
- Requiring that recipients post their Title IX training materials on their websites (§ 106.8(g))
- Empowering faith-based institutions by specifying in more detail the process through which the Department would grant them an assurance of exemption from complying with Title IX (§ 106.12)
- Allowing greater discretion for state and local education authorities to offer single-sex elementary and secondary schools and for the Department to require such single-sex schools and programs based on lagging academic achievement by members of one sex (§ 106.34(b), (c))
- Retaining longstanding requirements that nothing in Title IX or its regulations requires or prohibits any recipient to provide or pay for any benefit or service related to an abortion (§ 106.40(b))
- Adding field hockey, volleyball, lacrosse, and martial arts to the list of contact sports for which recipients may operate separate teams in the interest of protecting students from physical harm (§ 106.41(b))
- Recognizing that Title IX regulations do not mandate the availability of particular books or other materials, such as sexually explicit materials, in school libraries (§ 106.42)
- Clarifying that retaliation prohibited under Title IX does not implicate constitutionally protected speech by students and employees (§ 106.71(c))

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# Title IX Model Regulations

Code of Federal Regulations, Title 34, 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.

The purpose of this part is to effectuate Title IX, 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, Public Law 93–380, 88 Stat. 484.

### § 106.2 Definitions.

As used in this part, the term:

*Actual knowledge* means notice of sex discrimination, sexual harassment, or sexual misconduct, or of allegations of such behavior, to any official of the educational institution who has authority to institute corrective measures on behalf of the educational institution, or to any employee of an elementary or 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.

*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.

*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.

*Applicant*, as used in the definition of educational institution in this section and as used in § 106.4, 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.

*Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

*Complainant* means an individual who is alleged to have been subjected to conduct that could constitute sex discrimination, sexual harassment, or sexual misconduct under Title IX or this part.

*Confidential employee* means an employee of a recipient whose communications are privileged or confidential under Federal or State law. The employee's confidential status, for purposes of this part, is only with respect to information received while the employee is functioning

within the scope of their duties to which privilege or confidentiality applies.

*Dating violence* means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant.

*Department* means the Department of Education.

*Disciplinary sanctions* means consequences imposed on a respondent following a determination under Title IX that the respondent engaged in sex discrimination, sexual harassment, or sexual misconduct under Title IX or this part.

*Domestic violence* means felony or misdemeanor crimes committed against a complainant by a person who:

- (1) Is a current or former spouse, intimate partner, or a person similarly situated to a spouse of the complainant;
- (2) Is cohabitating, or has cohabitated, with the complainant as a spouse or intimate partner;
- (3) Shares a child in common with the complainant; or
- (4) Commits acts against a complainant who is protected from those acts under the family or domestic violence laws of the jurisdiction where the acts took place.

*Educational institution* means a local educational agency (LEA) as defined by section 8101 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7801(30)), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education.

*Elementary school* means elementary school as defined by section 8101 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7801(19)), and a public or private preschool.

*Faith-based institution* means an educational institution which is controlled by a religious organization.

*Father* means a person whose biological sex at birth is male and who is a parent of a person who has been born or is unborn. The term “father” includes any biological father, adoptive father, foster father, stepfather, or legal custodian or guardian whose biological sex at birth is male.

*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.

The exemption of an entity from Federal taxation under section 501 of the Internal Revenue Code [26 U.S.C. 501] does not constitute Federal financial assistance under this part.

*Formal complaint* means a document filed by a complainant or signed by the Title IX Coordinator alleging sex discrimination, sexual harassment, or sexual misconduct against the institution or a respondent and requesting that the educational institution investigate the allegation(s). 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.

*Housing* means a structure or portions of a structure that offers sleeping accommodations. This term includes both long-term and short-term accommodations, such as a hotel room or dormitory room, in any location.



*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.

*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 of Education.

*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.

*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.

*Intimate facilities* means a location designated for individuals to dress or undress with a reasonable expectation of privacy, including bathrooms, locker rooms, showers, and changing rooms.

*Mother* means a person whose biological sex at birth is female and who is a parent of a person who has been born or is unborn. The term “mother” includes any biological mother, adoptive

mother, foster mother, stepmother, or legal custodian or guardian whose biological sex at birth is female.

*Parental status* means status as a mother or father. Parental status includes status as the mother or father of an unborn child.

*Party* means a complainant or respondent.

*Postsecondary institution* means an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education that serves postsecondary school students.

*Pregnancy* means a mother's carrying a developing embryo, fetus, or other unborn offspring within her body.

*Pregnancy or related conditions* means:

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

*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 (1), (2), or (3) of this definition, any part of which is extended Federal financial-assistance.

*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.

*Relevant* means related to the allegations of sex discrimination, sexual harassment, or sexual misconduct under investigation as part of the grievance procedures under § 106.45. Questions are relevant when they seek evidence that may aid in showing whether the alleged conduct occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged conduct occurred.

*Remedies* means measures provided, as appropriate, to a complainant to restore or preserve that person's access to the recipient's education program or activity after a recipient determines under Title IX that the complainant was subject to sex discrimination, sexual harassment, or sexual misconduct in an education program or activity.

*Respondent* means a person who is alleged to have committed conduct that could constitute sex discrimination, sexual harassment, or sexual misconduct under Title IX or this part.

*Retaliation* means intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide an

aid, benefit, or service under the recipient's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX or this part.

*Secondary school* means secondary school as defined by section 8101 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (20 U.S.C. 7801(45)), and an institution of vocational education that serves secondary school students.

*Sex* means biological sex, male or female, at birth.

*Sexual assault* means any sexual act directed against another person, forcibly or against that person's will; or not forcibly or against the person's will where the complainant is incapable of giving consent.

*Sexual harassment* means conduct on the basis of sex that satisfies one or both of the following:

- (1) An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;
- (2) Unwelcome sex-based 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.

*Sexual misconduct* means sexual assault, dating violence, domestic violence, or stalking as defined in this section.

*Stalking* means engaging in a course of conduct of a sexual nature directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

*Student* means a person who has gained admission.

*Student with a disability* means a student who is an individual with a disability as defined in the Rehabilitation Act of 1973, as amended, 29 U.S.C. 705(9)(B), (20)(B), or a child with a disability as defined in the Individuals with Disabilities Education Act, 20 U.S.C. 1401(3).

*Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge that are designed to restore or

preserve equal access to the recipient's education program or activity without unreasonably burdening any individual.-

*Title IX* means Title IX of the Education Amendments of 1972 (Pub. L. 92-318; 20 U.S.C. 1680–1689), as amended.

### **§ 106.3 Remedial action.**

**(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) Discriminatory treatment on account of past discrimination or perceived imbalance.** Recipients are prohibited from excluding any person from participation in, denying any person the benefits of, or discriminating against any person under an education program or activity on the basis of sex in order to remedy past alleged discrimination or on account of a perceived imbalance between individuals of each sex participating in or receiving the benefits of any federally supported program or activity.

### **§ 106.4 Assurance required.**

**(a) General.** Except as provided in § 106.12(b) of this part, 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 Title IX and this part. An assurance of compliance with Title IX and 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.

**(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 Assistant Secretary 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.

### **§ 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.

### **§ 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.

(b) *Effect of State or local law or other requirements.* The obligation to comply with Title IX and this part is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or this part.

(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. Such rules and regulations do not include religious tenets of any faith-based institution on the basis of which such institution is exempt from the application of Title IX or this part.

(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;

(3) Deny to any parent the liberty, guaranteed by the U.S. Constitution, to direct the upbringing and education of children under their control; or

(4) 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 Title IX and this part is not obviated or alleviated by FERPA, 20 U.S.C. 1232g, or its implementing 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, guardians, or other authorized legal representatives*. 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, subject to paragraph (e) of this section, including but not limited to making a formal complaint through the recipient's grievance procedures for complaints of sex discrimination, sexual harassment, or sexual misconduct.

### **§ 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.

### **§ 106.8 Designation of coordinator; nondiscrimination policy; grievance procedures; notification and publication of nondiscrimination policy; training; students with disabilities; and recordkeeping.**

(a) *Designation of a Title IX Coordinator*. Each recipient must designate and authorize at least one employee, referred to herein as a Title IX Coordinator, to coordinate its efforts to comply with its responsibilities under Title IX and this part and to receive formal complaints of sex discrimination, sexual harassment, and sexual misconduct in the institution's education program or activities. If a recipient has more than one Title IX Coordinator, it must designate one of its Title IX Coordinators to retain ultimate oversight over those responsibilities.

(b) *Adoption, publication, and implementation of nondiscrimination policy and grievance procedures*.

(1) *Nondiscrimination policy*. Each recipient must adopt, publish, and implement a policy stating that the recipient 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 this part.

**(2) *Grievance procedures.*** Each recipient must adopt, publish, and implement grievance procedures consistent with the requirements of § 106.45 that provide for the prompt and equitable resolution of formal complaints of sex discrimination, sexual harassment, or sexual misconduct in the recipient's education program or activity.

**(c) *Notification of nondiscrimination policy.*** Each recipient must notify in writing 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 that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, that it is required by Title IX and this part not to discriminate in such a manner, and that any person may report sex discrimination, sexual harassment, or sexual misconduct to the Title IX Coordinator.

**(d) *Publication of Title IX Coordinator's contact information and nondiscrimination policy.*** Each recipient must prominently display the contact information of its Title IX Coordinator and the policy described in subsection (b) 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 subsection (c). 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.

**(e) *Training.*** The recipient must ensure that the persons described in paragraphs (e)(1) through (3) of this section receive training related to their duties under Title IX promptly upon hiring or change of position that alters their duties under Title IX or this part, and annually thereafter. This training must not rely on sex stereotypes.

**(1) *Investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures.*** All investigators, decisionmakers, including decisionmakers for appeals, and other persons who are responsible for implementing the recipient's grievance procedures must be trained on the following topics to the extent related to their responsibilities:

**(i)** The definitions of sex discrimination, sexual harassment, and sexual misconduct under Title IX and this part;

**(ii)** The scope of the recipient's education program or activity;

**(iii)** The recipient's obligations under § 106.44;



**(iv)** The recipient’s grievance procedures under § 106.45, including, for decisionmakers, any technology to be used at any live hearings offered by the recipient as part of such grievance procedures;

**(v)** How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and

**(vi)** The meaning and application of the term “relevant” in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under § 106.45.

**(2) Facilitators of informal resolution processes.** All facilitators of an informal resolution process under § 106.45(j) must be trained on the rules and practices associated with the recipient’s informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.

**(3) Title IX Coordinator.** In addition to the training requirements in paragraphs (e) (1) and (2) of this section, the Title IX Coordinator must be trained on the specific responsibilities set out under §§ 106.40(b), 106.44(b), the recipient’s recordkeeping system and the requirements of paragraph (g) of this section, and any other training necessary to coordinate the recipient’s compliance with Title IX.

**(f) 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 CFR 300.321, if any, or one or more members, as appropriate, of the group of persons responsible for the student’s placement decision under 34 CFR 104.35(c), if any, to determine how to comply with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, throughout the recipient’s implementation of grievance procedures under § 106.45. 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 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

**(g) Recordkeeping.**

**(1)** A recipient must maintain for a period of at least seven years records of:

**(i)** The details of all grievance procedures initiated in response to a formal complaint under § 106.45, including any determination regarding responsibility and any audio or audiovisual recording or transcript of any hearing, any disciplinary sanctions imposed on the respondent, and any remedies provided

to the complainant;

**(ii)** Any appeal under § 106.45(i) and the result of that appeal;

**(iii)** Any informal resolution processes carried out under § 106.45(j) and the result of those informal resolution processes; and

**(iv)** All materials used to provide training under paragraph (e) of this section. A recipient must make these training materials publicly available on its website; if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection and copying by members of the public.

**(2)** For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions taken, including the provision of supportive measures.

**(i)** 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.

**(ii)** 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.

### **§ 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.

## **Subpart B—Coverage**

### **§ 106.11 Application.**

**(a)** *Scope of application.* Except as provided in this subpart, this part applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States receiving Federal financial assistance.

**(b)** *Scope of education program or activity.* With respect to a recipient's duty to respond to sex discrimination, sexual harassment, or sexual misconduct under Title IX and this part, a recipient's education program or activity extends to locations, events, or circumstances

where the recipient exercises substantial control over both the respondent and the context in which any sex discrimination, sexual harassment, or sexual misconduct occurs, including conduct that occurs in a building owned, leased, or controlled by a student organization that is officially recognized by a postsecondary institution.

## **§ 106.12 Faith-based institutions.**

**(a) Application.** This part does not apply to a faith-based educational institution if the application of this part would not be consistent with the religious tenets of the institution.

**(b) Exemption from assurance of compliance requirement.** Faith-based educational institutions are not required to submit the assurance of compliance with Title IX and this part described in paragraph (a) of section 106.4 of this part as a condition of approval of Federal financial assistance if the application of Title IX or this part to any of its programs or activities would not be consistent with the religious tenets of the institution. Such an institution must include with any application for Federal financial assistance a statement explaining that it is not required to submit an assurance of compliance with Title IX and this part and identifying the provision or provisions of Title IX or this part that conflict with a specific religious tenet of the institution. This exemption does not apply to any assurances required of educational institutions as a condition of approval of Federal financial assistance pursuant to laws other than Title IX or implementing regulations other than those of this part.

**(c) Assurance of exemption.**

**(1)** 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 provision or provisions of Title IX or this part that conflict with specific religious tenets of the educational institution.

**(2)** In response to any statement submitted under paragraph (c)(1), the Assistant Secretary shall promptly determine the institution's eligibility for an exemption under this section. Upon a determination that the institution is eligible for the exemption, the Assistant Secretary shall issue to the institution the assurance of exemption from complying with Title IX or this part. Upon a determination that the institution is not eligible for the exemption, the Assistant Secretary shall submit to the institution a written explanation for the denial of assurance.

**(3)** The Assistant Secretary shall retain a record of the assurances of exemption issued pursuant to paragraph (c)(2).

**(4)** The Assistant Secretary may rescind an assurance of exemption previously issued under paragraph (c)(2) if the Assistant Secretary determines at any time that the

educational institution is no longer entitled to the exemption or that the assurance of exemption was invalidly issued, in which case the institution shall be promptly notified of the rescission and the grounds for the rescission.

(5) An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption.

**(d) *Response to notification of investigation.***

(1) In the event the Department notifies an educational institution that it is under investigation for noncompliance with Title IX or 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 provision or provisions of this part which conflict with specific religious tenets of the educational institution, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

(2) Upon receiving any statement under paragraph (d)(1), prior to submitting to the educational institution any notice of noncompliance under Title IX or this part, the Assistant Secretary shall determine the institution's eligibility for an exemption under paragraph (a) of this section. Upon a determination that the institution is eligible for the exemption, the Assistant Secretary shall inform the institution that it is exempt from complying with the relevant provision or provisions. Upon a determination that the institution is not eligible for the exemption, the Assistant Secretary shall submit to the institution a written explanation why the institution is not eligible for an exemption and may proceed to issuing a notice of noncompliance.

**(e) *Eligibility.*** Any of the following in paragraphs (e)(1) through (6) of this section shall be sufficient to establish that an educational institution is a faith-based educational institution, 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 an organization that claims to control the institution.

(3) That the educational institution, in its charter or catalog, or other official publication, contains an explicit statement that it is a faith-based educational institution, or is committed to the doctrines or practices of a particular religion, and

the members of its governing body are appointed by any religious organization or an organ thereof, and it receives a significant amount of financial support from any 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 a faith-based educational institution, pursuant to 20 U.S.C. 1681(a)(3).

(f) *Disclosure of assurance.* An institution that seeks and receives an assurance of the exemption set forth in paragraph (a) of this section must disclose on its website, if any, and in institutional handbooks and catalogs that the institution has received an assurance from the Assistant Secretary.

(g) *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.

### **§ 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.

### **§ 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 and YWCA.* This part does not apply to the membership practices of the Young Men's Christian Association and the Young Women's Christian Association.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations with exemptions 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.

#### **§ 106.15 Admissions.**

**(a) *Administratively separate units.*** For purposes only of this section and subpart C, each administratively separate unit shall be deemed to be an educational institution.

**(b) *Application of Subpart C.*** Except as provided in paragraphs (c) and (d) 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.-

**(c) *Educational institutions.*** Except as provided in paragraph (d) 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.-

**(d) *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.

#### **§ 106.16 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 C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited**

#### **§ 106.21 Admission.**

**(a) *Status generally.*** Except as provided in paragraph (b) of this section, 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.

**(b) *Sex-based admissions policies.*** Any sex-based admissions policy of a recipient to which this subpart applies must be based on an exceedingly persuasive justification, serve important objectives, and be substantially related to the achievement of those objectives. The justification for such a policy must be genuine and must not rely on overbroad generalizations about the different talents, capacities, or preferences of the two sexes.

**(c) *Parental, family, or marital status; pregnancy or related conditions.*** 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) Must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions; and

(2) Must not:

(i) Adopt or implement any policy, practice, or procedure concerning the current, potential, or past parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(ii) Discriminate against any person on the basis of current, potential, or past pregnancy or related conditions, or adopt or implement any policy, practice, or procedure that so discriminates; and

(iii) Make a pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss or Mrs.” A recipient may ask an applicant to self-identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by this part.

#### **§ 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.

#### **§ 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).

(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.

#### **§ 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.

## **Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited**

### **§ 106.31 Education programs or activities.**

#### **(a) General.**

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

(2) This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of:

(i) A recipient to which subpart C does not apply; or

(ii) 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 restricted to members of one sex which are designed to provide opportunities to study abroad, provided that the recipient educational institution makes available reasonable opportunities for similar studies for members of the other sex.

**(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.

## **§ 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.

**(i)** Any recipient that provides housing must notify any person applying to reside in its housing, or requesting to take part in an education program or activity that includes the provision of housing, of its policies with regard to who may access such housing and under what circumstances they are permitted to access such housing.

**(ii)** A recipient that offers housing that is separated on the basis of sex must maintain and enforce a policy prohibiting students from being offered or assigned to housing that is designated for the opposite sex.

**(iii)** Subject to paragraph (b)(1)(iv) of this section, if a recipient maintains a policy restricting access to any housing or part of that housing to a single sex, then it must enforce that policy by taking reasonable steps to prohibit access to such housing by members of the opposite sex.

**(iv)** Notwithstanding paragraph (b)(1)(iii) of this section, a recipient that maintains sex-separated housing may permit access to such housing by members of the opposite sex for any purpose clearly identified in its policy regarding access to sex-separated housing.

**(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.

**(3)** A recipient must promptly comply with the request of any student, or a minor student's parent or legal guardian, to whom it provides housing, or who is entitled to and has applied for such housing, not to share a bedroom or intimate facilities with a member of the opposite sex.

**(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.

(3) A recipient may render assistance described in paragraph (c)(2) of this section to any agency, organization, or person which provides all or part of such housing to students only of one sex, provided that the recipient ensures that the agency, organization, or person providing such housing does not offer or assign to any student housing that is designated for the opposite sex and maintains and enforces clear policies with regard to access to all or part of sex-separated housing by members of the opposite sex that it provides to applicants for such housing.

(4) A recipient that assists any agency, organization, or person in making housing available to any of its students must ensure that such agency, organization, or person promptly complies with the request of any student to whom it provides housing, or who is entitled to and has applied for such housing, not to share a bedroom or intimate facilities with a member of the opposite sex, and that no request for housing is denied on the basis of such a request.

### **§ 106.33 Intimate facilities.**

(a) A recipient may provide separate intimate 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.

(1) Subject to the exceptions listed in paragraph (a)(2) of this section, a recipient that offers intimate facilities that are separated on the basis of sex must maintain and enforce a policy prohibiting any person from entering any intimate facilities designated for the opposite sex.

(2) Notwithstanding paragraph (a)(1) of this section, a recipient that offers intimate facilities that are separated on the basis of sex may include in its policy concerning access to such facilities permission for any person to enter intimate facilities designated for the opposite sex for the purpose of responding to an emergency and for employees or contractors of the recipient to enter intimate facilities designated for the opposite sex for the purpose of performing repairs, inspections, maintenance, renovations, or similar activities.

(b) A recipient must promptly comply with the request of any person, or the person's parent or legal guardian in the case of a minor child, who uses or is entitled to use its intimate facilities not to use such intimate facilities in the presence of a member of the opposite sex.

## § 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) Physical education classes.** This section does not prohibit separation of students by sex within physical education classes or during any activities that are part of such classes.

**(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 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.*

**(i)** 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.

**(ii)** In determining whether to require a recipient to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex, the Department will consider factors including evidence that the academic performance of students of the excluded sex lags that of members of the sex to whom the recipient offers enrollment in the single-sex class or extracurricular activity.

**(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:

**(i)** The policies and criteria of admission;

**(ii)** 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;

**(iii)** The qualifications of faculty and staff;

**(iv)** Geographic accessibility;

**(v)** The quality, accessibility, and availability of facilities and resources provided to the class;

**(vi)** The academic performance of students enrolled in each class or extracurricular activity; and

**(vii)** 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.** A recipient may operate a single-sex public nonvocational elementary or secondary school.

**(2) Single-sex school for the excluded sex.**

**(i)** A recipient that provides a single-sex public nonvocational elementary or secondary school may be required to provide a substantially equal single-sex public nonvocational elementary or secondary school for students of the excluded sex.

**(ii)** In determining whether to require a recipient to provide a substantially equal single-sex public nonvocational elementary or secondary school for students of the excluded sex, the Department will consider factors including evidence that the academic performance of students of the excluded sex lags that of members of the sex to whom the recipient offers enrollment in the public nonvocational elementary or secondary school.

**(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:

**(i)** The policies and criteria of admission;

(ii) 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;

(iii) The quality and range of extracurricular offerings;

(iv) The qualifications of faculty and staff;

(v) Geographic accessibility;

(vi) The quality, accessibility, and availability of facilities and resources;

(vii) The academic performance of students enrolled in each class or extracurricular activity; and

(viii) 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.

#### **§ 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.

#### **§ 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.

#### **§ 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) 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 on the basis of sex;

(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) Subject to the requirements of paragraph (b)(2) of this section, 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 which require that awards be made to members of a particular sex specified therein.

(2) Any recipient that administers or assists in the administration of a legal instrument that restricts benefits to a particular sex, as described in paragraph (b)(1), must ensure that no student is denied, on the basis of sex, financial assistance for which they qualify based on nondiscriminatory criteria.

**(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.

**§ 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.

#### **§ 106.39 Health and insurance benefits and services.**

(a) 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.

(b) 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.

(c) Any recipient which provides full coverage health service shall provide gynecological care.

#### **§ 106.40 Parental, family, or marital status; pregnancy or related conditions.**

(a) *Status generally.* A recipient must not adopt or implement any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy or related conditions.*

(1) *Nondiscrimination.* A recipient must not discriminate in its education program or activity against any student based on her current, potential, or past pregnancy or related conditions. A recipient does not engage in prohibited discrimination when it allows a student, based on pregnancy or related conditions, to voluntarily participate in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions.

(2) *Response to notification of pregnancy.* Once a student, or a person who has a legal right to act on her behalf, notifies a recipient's Title IX Coordinator that the student is pregnant, the recipient must promptly—

(i) Inform the student, and if applicable the person who notified the Title IX Coordinator, of reasonable modifications and other measures available to her under this section;

(ii) Provide the student with reasonable modifications to the recipient's policies,

practices, or procedures because of her pregnancy on an individualized and voluntary basis when necessary to ensure equal access to the recipient's education program or activity;

**(iii)** Allow the student a voluntary leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by her physician or other licensed healthcare provider, followed by the reinstatement of the student, as practicable, to the status she held when the leave began; and

**(iv)** Ensure the availability following the student's pregnancy of a clean, private lactation space, which must be a space other than a bathroom, that she may use for expressing breast milk or breastfeeding.

**(3) *Limitation to reasonable modification requirement.*** Reasonable modifications to the recipient's policies, practices, or procedures described in paragraph (b)(2)(ii) of this section are not required if the recipient can demonstrate that making the modification would fundamentally alter its education program or activity.

**(4) *Comparable treatment to other temporary medical conditions.*** To the extent consistent with paragraph (b)(2) of this section, a recipient must 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.

**(5) *Neutrality with respect to abortion.*** Nothing in this section or in this part shall be interpreted to require or prohibit any recipient to provide or pay for any benefit or service, including the use of facilities, related to an abortion, including with respect to the administration, operation, or offer of or participation in any benefit, service, plan, or policy that includes coverage of abortion services or abortifacient drugs.

## **§ 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, the recipient must allow members of the excluded sex 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, field hockey, volleyball, lacrosse, football, basketball, martial arts, 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 Assistant Secretary 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) *Certification to participate.*** A recipient may require a student who is pregnant to provide certification from a healthcare provider or any other person that the student is physically able to participate in the recipient's interscholastic, intercollegiate, club, or intramural athletics activity if the certified level of physical ability or health is necessary for participation in the



activity and the information obtained is not used as a basis for discrimination prohibited by this part.

**§ 106.42 Textbooks and curricular material.**

Nothing in this part shall be interpreted as requiring, prohibiting, or abridging in any way the use of particular textbooks or curricular materials or the availability of particular books or other materials in libraries.

**§ 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.

**§ 106.44 Recipient's response to sex discrimination, sexual harassment, and sexual misconduct.**

**(a) General.**

(1) A recipient with actual knowledge of sex discrimination, sexual harassment, or sexual misconduct in its education program or activity must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to such discrimination, sexual harassment, or sexual misconduct is clearly unreasonable in light of the known circumstances.

(2) A recipient's response to actual knowledge of sex discrimination, sexual harassment, or sexual misconduct in its education program or activity must treat complainants and respondents equitably by offering supportive measures to any complainant and by following grievance procedures that comply with § 106.45 before imposing any disciplinary sanctions or other actions that are not supportive measures against any respondent.

**(b) Title IX Coordinator requirements.**

(1) A recipient with actual knowledge of sex discrimination, sexual harassment, or sexual misconduct in its education program or activity must require its Title IX Coordinator to promptly contact the complainant to discuss the availability of supportive measures 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 process for filing a formal complaint.

(2) A recipient's restriction of rights protected under the U.S. Constitution shall not

satisfy its duty to respond to sex discrimination, sexual harassment, and sexual misconduct under this part.

**(c) *Response to a formal complaint.*** In response to a formal complaint, a recipient must follow grievance procedures that comply with § 106.45 of this part.

**(d) *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 individual justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision must not be construed to modify any rights under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq.

**(e) *Administrative leave.*** Nothing in this part precludes a recipient from placing an employee respondent on administrative leave from employment responsibilities during the pendency of the recipient's grievance procedures. This provision must not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq.

**(f) *Prohibited disclosures of personally identifiable information.*** A recipient must not disclose personally identifiable information obtained in the course of complying with this part, except in the following circumstances:

**(1)** When the recipient has obtained prior written consent from a person with the legal right to consent to the disclosure;

**(2)** 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;

**(3)** To carry out the purposes of this part, including action taken to respond to actual knowledge of sex discrimination, sexual harassment, or sexual misconduct in the recipient's education program or activity;

**(4)** As required by Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement; or

**(5)** To the extent such disclosures are not otherwise in conflict with Title IX or this part, when required by State or local law or when permitted under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.

## § 106.45 Grievance procedures for formal complaints.

### (a) *General.*

(1) A recipient's grievance procedures for the prompt and equitable resolution of formal complaints of sex discrimination, sexual harassment, and sexual misconduct must be in writing and include provisions that incorporate the requirements of this section.

(2) When a formal complaint alleges that a recipient's policy or practice discriminates on the basis of sex, the recipient is not considered a respondent.

(3) Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance procedures for handling formal complaints must apply equally to both parties.

### (b) *Basic requirements for grievance procedures.* A recipient's grievance procedures must:

(1) Treat complainants and respondents equitably, including by providing remedies to a complainant where a determination of responsibility has been made against the respondent, and by following grievance procedures that comply with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity;

(2) Require that any person designated as a Title IX Coordinator, investigator, decisionmaker, or facilitator of 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;

(3) 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 procedures;

(4) Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with written notice to the parties that includes the reason for the delay. Major stages include, for example, evaluation (*i.e.*, the recipient's decision whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal;

(5) Require an objective evaluation of all evidence that is relevant, as defined in § 106.2, and not otherwise impermissible under paragraph (b)(6) of this section—

including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person’s status as a complainant, respondent, or witness;

**(6)** Exclude the following types of evidence, and questions seeking that evidence, as impermissible (*i.e.*, must not be accessed or considered, except by the recipient to determine whether an exception in paragraphs (i) or (ii) applies; must not be disclosed; and must not otherwise be used), regardless of whether they are relevant:

**(i)** Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality; and

**(ii)** 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 recipient obtains that party’s or witness’s voluntary, written consent for use in the recipient’s grievance procedures;

**(7)** Describe the range of supportive measures available to complainants and respondents;

**(8)** 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;

**(9)** 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 and apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty;

**(10)** Include the procedures and permissible bases for the parties to appeal; and

**(11)** If a recipient adopts grievance procedures that apply to the resolution of some, but not all, formal complaints, articulate consistent principles for how the recipient will determine which procedures apply.

**(c) Notice of allegations.** Upon initiation of the recipient’s grievance procedures, a recipient must provide written notice of the allegations to the parties whose identities are known.

**(1)** The notice must include:

- (i)** The recipient's grievance procedures under this section and any informal resolution process under paragraph (j) of this section;
- (ii)** Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination, sexual harassment, or sexual misconduct, and the date(s) and location(s) of the alleged incident(s), to the extent that information is available to the recipient;
- (iii)** 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 procedures;
- (iv)** A statement that retaliation is prohibited;
- (v)** A statement that parties are entitled to an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (f)(4) of this section;
- (vi)** A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence as set out in paragraph (f)(6) of this section; and
- (vii)** Any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance procedures.

**(2)** 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 under paragraph (c) of this section or that are included in a complaint that is consolidated under paragraph (e) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

**(d)** *Dismissal of a formal complaint.*

**(1)** If the conduct alleged in the formal complaint would not constitute sex discrimination, sexual harassment, or sexual misconduct even if proved, or 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 Title IX or this part.

**(2)** A recipient may dismiss a formal complaint, or any allegations therein, if at any time during the grievance procedures:

- (i) The recipient is unable to identify the respondent after taking reasonable steps to do so;
- (ii) The respondent is not participating in the recipient's education program or activity and is not employed by the recipient;
- (iii) The complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any of its allegations; or
- (iv) Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or its allegations.

(3) Upon dismissal, a recipient must promptly send written notice of the dismissal and the reasons for the dismissal to the complainant. If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must simultaneously send written notice of the dismissal and the reasons for the dismissal to the complainant and the respondent. This written notice must include a statement that a dismissal may be appealed and set out the bases on which an appeal may be made as required in paragraph (i) of this section and procedures to be used in such an appeal.

(e) *Consolidation of complaints.* A recipient may consolidate formal complaints against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination, sexual harassment, or sexual misconduct arise out of the same facts or circumstances. When more than one complainant or more than one respondent is involved, references in this section to a party, complainant, or respondent include the plural, as applicable.

(f) *Complaint investigation.* A recipient must provide for adequate, reliable, and impartial investigations of formal complaints. To do so, the recipient must:

- (1) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient—not on the parties;
- (2) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- (3) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- (4) 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 party in any meeting or grievance proceeding. 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;

**(5)** 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;

**(6)** Provide each party with an equal opportunity to access the evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint prior to the conclusion of the investigation, in the following manner:

**(i)** Prior to the completion of the investigative report required by paragraph (f) (7) of this section, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic or hard-copy format; and

**(ii)** The parties must have at least 10 days to submit a written response to the evidence, which the investigator will consider prior to completion of the investigative report.

**(7)** Create an investigative report that fairly summarizes relevant evidence that is not otherwise impermissible and, at least 10 days prior to any hearing or, in case there is no hearing, determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic or hard-copy format, for their review and written response.

**(g)** *Evaluating allegations and assessing credibility.*

**(1)** For postsecondary institutions, the recipient's grievance procedures must provide for a live hearing.

**(i)** At the live hearing, the decisionmaker(s) must permit each party or the 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. The recipient must permit an advisor to conduct such cross-examination, notwithstanding its discretion under paragraph (f)(4) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. If the live hearing concerns a formal complaint of sexual harassment or sexual misconduct, cross-examination must be conducted by the party's advisor of



choice and never by a party personally.

**(ii)** If a party does not have an advisor present at a live hearing concerning a formal complaint of sexual harassment or sexual misconduct, the postsecondary institution must provide, without fee or charge to that party, an advisor of the postsecondary institution's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

**(iii)** The recipient must make all evidence subject to the parties' inspection and review under paragraph (f)(6)(i) of this section available at the live hearing to give each party an equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

**(iv)** Only relevant cross-examination and other questions may be asked of a party or witness. Before any question is answered, the decisionmaker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

**(v)** Questions and evidence about the complainant's sexual predisposition or prior sexual conduct are not relevant, unless such questions and evidence about the complainant's prior sexual conduct 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 conduct with respect to the respondent and are offered to prove consent.

**(vi)** If a party or witness does not submit to cross-examination at the live hearing, the decisionmaker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decisionmaker(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.

**(vii)** Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location, or, at the postsecondary institution'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.

**(viii)** For live hearings concerning a formal complaint of sexual harassment or sexual misconduct, at the request of either party, the postsecondary institution must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decisionmaker(s) and parties to

simultaneously see and hear the party or the witness answering questions.

**(ix)** Postsecondary institutions must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

**(2)** For recipients that are not postsecondary institutions, the recipient's grievance procedures may, but need not, provide for a hearing.

**(i)** With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (f)(7) of this section and before reaching a determination regarding responsibility, the decisionmaker(s) must afford each party the opportunity to submit written, relevant questions directed to any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

**(ii)** With or without a hearing, questions and evidence that relate to the complainant's sexual predisposition or prior sexual conduct are not relevant, unless such questions and evidence about the complainant's prior sexual conduct are offered to prove that someone other than the respondent committed the alleged conduct, or if the questions and evidence concern specific incidents of the complainant's prior sexual conduct with the respondent and are offered to prove consent.

**(iii)** The decisionmaker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

**(iv)** At any live hearing to evaluate a formal complaint of sex discrimination, sexual harassment, or sexual misconduct, the recipient must make all evidence subject to the parties' inspection and review under paragraph (f)(6)(i) of this section available at the hearing to give each party an equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

**(h)** *Determination regarding responsibility.*

**(1)** Following an investigation and evaluation of all relevant and not otherwise impermissible evidence under paragraphs (f) and (g) of this section, the decisionmaker, who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. This written determination must:

**(i)** Be based on the application of the standard of evidence described in

paragraph (b)(9) of this section;

**(ii)** Identify the allegations of sex discrimination, sexual harassment, or sexual misconduct;

**(iii)** Describe the procedural steps taken from the receipt of the formal complaint through the determination;

**(iv)** Identify the findings of fact supporting the determination;

**(v)** Set out conclusions regarding the application of the recipient's code of conduct to the facts;

**(vi)** Include 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

**(vii)** Provide notice to the parties of the recipient's procedures and permissible bases for an appeal.

**(2)** 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.

**(3)** The Title IX Coordinator is responsible for coordinating any remedies provided to a complainant and any disciplinary sanctions imposed on a respondent.

**(i)** *Appeals.*

**(1)** 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 of its allegations, on the following bases:

**(i)** Procedural irregularity that affected the outcome of the matter;

**(ii)** 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

**(iii)** A conflict of interest or bias on the part of anyone designated to carry out the recipient's grievance procedures that affected the outcome of the matter.

**(2)** A recipient may offer an appeal equally to both parties on additional bases, provided that the recipient includes such bases with its grievance procedures under this section.

**(3)** As to all appeals, the recipient must:

**(i)** Notify the other party in writing when an appeal is filed and implement appeal procedures equally for all parties;

**(ii)** Ensure that the decisionmaker(s) for the appeal is not the same person as the decisionmaker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

**(iii)** Ensure that the decisionmaker(s) for the appeal does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent;

**(iv)** Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

**(v)** Issue a written decision describing the result of the appeal and the rationale for the result; and

**(vi)** Provide the written decision simultaneously to both parties.

**(j)** *Informal resolution.*

**(1)** At any time after the filing of a formal complaint and before reaching a determination regarding responsibility, the recipient may facilitate an informal resolution process that does not involve a full investigation and adjudication as otherwise required in this section. 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 procedures with respect to the formal complaint. Prior to facilitating such a process, the recipient must provide to the parties written notice disclosing:

**(i)** The allegations in the formal complaint;

**(ii)** The requirements of the informal resolution process;

**(iii)** The right of any party to withdraw from the informal resolution process

and resume grievance procedures; and

(iv) Any consequences resulting from participating in the informal resolution process, including the circumstances under which, at the conclusion of the process, it precludes the parties from resuming grievance procedures with respect to the formal complaint and the records that will be maintained or could be shared.

(2) Prior to facilitating an informal resolution process, the recipient must obtain the parties' voluntary, written consent to the process.

(3) Notwithstanding any other provision of this part, a recipient must 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 participate in the recipient's grievance procedures with respect to formal complaints of sex discrimination, sexual harassment, or sexual misconduct.

(4) A recipient must not offer or facilitate an informal resolution process to resolve allegations that an employee engaged in sexual harassment or sexual misconduct against a student.

#### **§ 106.46 Assistant Secretary review of formal complaints.**

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 or this part by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

#### **§ 106.47 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 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 for employment, whether full-time or part-time, under any education program or activity operated by a recipient.

**(2)** A recipient shall not discriminate on the basis of sex in making any employment decisions in any education program or activity operated by such recipient 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 the recipient knows will subject 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 or related conditions, 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.

#### **§ 106.52 Recruitment.**

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees.

(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.

#### **§ 106.53 Compensation.**

A recipient shall not make or enforce any policy or practice which, on the basis of sex, makes distinctions in rates of pay or other compensation.

#### **§ 106.54 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 § 106.60.

#### **§ 106.55 Fringe benefits.**

(a) *“Fringe benefits” defined.* For purposes of this part, the term “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 § 106.53.

(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.

**§ 106.56 Parental, family, or marital status; pregnancy or related conditions.**

(a) *Status generally.* A recipient must not adopt or implement any policy, practice, or procedure, or take any employment action, on the basis of sex:

- (1) Concerning current, potential, or past parental, family, or marital status of an employee or applicant for employment, which treats persons differently; or
- (2) That 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 or related conditions.* A recipient must not discriminate against any employee or applicant for employment on the basis of her current, potential, or past pregnancy or related conditions.

(c) *Comparable treatment to other temporary medical conditions.* A recipient must treat pregnancy or related conditions as any other temporary medical conditions 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, provided that nothing in this section or in this part shall be interpreted to require any recipient to provide or pay for any benefit or service related to an abortion.

(d) *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.

**(e) Lactation time and space.**

**(1)** A recipient must provide reasonable break time for an employee to express breast milk or breastfeed as needed.

**(2)** A recipient 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.

**§ 106.57 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.

**§ 106.58 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.

**§ 106.59 Pre-employment inquiries.**

**(a) Marital status.** A recipient must not make a 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 ask an applicant for employment to self-identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by Title IX or this part.

**§ 106.60 Sex as a bona-fide occupational qualification.**

**(a)** 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.

**(b)** 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.

**(c)** Nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment requiring access to housing or intimate facilities used only by members of one sex.

### **§ 106.61 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 F—Retaliation**

### **§ 106.71 Retaliation.**

**(a) General.** A recipient must prohibit retaliation in its education program or activity.

**(b) Procedures for resolving formal complaints of retaliation.** Upon receiving a formal complaint alleging retaliation, a recipient must initiate its grievance procedures under § 106.45, or, as appropriate, an informal resolution process under § 106.45(j).

**(c) 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.

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

### **§ 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**

### **§ 106.81 Procedures.**

The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein. These procedures may be found at 34 CFR 100.6 through 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.