



Title IX and Beyond: Implementing the 2024 Regulations

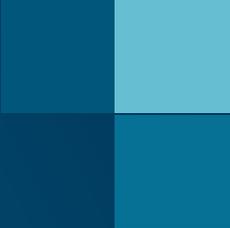
ABHE Webinar – June 4, 2024

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The information, advice, and suggestions contained in this training are not legal advice. Please consult with your school's General Counsel's Office if you have any legal questions.

Effective Date – August 1, 2024

If conduct occurred prior to August 1, 2024 – Use 2020 Regulations

If conduct occurred after August 1, 2024 – Use 2024 Regulations

If there is a pattern of conduct that overlaps – No clear answer

New regulations do not explicitly address eligibility criteria for athletic teams - forthcoming

Impact on Religious Exercise and the Religious Exemption

Applicability of Title IX

Receipt of Federal Financial Assistance

Q: Is tax-exempt status federal financial assistance?

A: No

Impact on Religious Exercise

Status Quo Ante

Title IX forbids sexual orientation and gender identity discrimination:

- ED OCR enforcement actions
- 1/20/21 executive order
- ED OCR & DOJ guidance
- court decisions

Impact on Religious Exercise

Status Quo Ante

- Sex-separated private spaces?
- Athletics?
- Pronouns?
- Health plan coverage?

Impact on Religious Exercise

Under the Final Rule

- Confirms that Title IX reaches sexual orientation and gender identity discrimination
- Final rule itself does not flesh out what constitutes gender identity discrimination

Religious Exemption-Status Quo Ante

The Statute: 20 U.S.C. § 1681(a)(3)

"this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization"

Religious Exemption-Status Quo Ante

The Regulation: 34 C.F.R. § 106.12(c) – Eligibility

- Institution is a school or department of divinity;
- Faculty, students, or employees are required to be members of the controlling religious organization;
- Explicit statements in official publications regarding being part of a religious organization;
- Institution has a doctrinal statement that community members must affirm and adhere to;
- Institutional mission statement that is based on religious beliefs; or
- Any other evidence to show the institution is controlled by a religious organization

Religious Exemption-Status Quo Ante

The Regulation: 34 CFR § 106.12(b) – Assurance of Exemption

- Q: Is the process mandatory?
- A: No.

Religious Exemption-Final Rule

The final rule makes *no changes* to the religious exemption regulations.

Lawsuits Challenging the 2024 Final Rule

- **At least 11 lawsuits have been filed challenging the final rule**
- **Five filed by ADF (along with states and school districts)**
- **Kansas case involves female athlete at Christian college**

Definitions

**Re-
Definition
of “Sex”**

“Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”

Section 106.10

Complaint – Section 106.2

- **No more “Formal Complaints”**
- **Oral or Written Request to the school**
- **Objectively understood as a request to investigate and make a determination about alleged sex discrimination**
- **More than general questions about the grievance process**
- **Does not need to contain “magic words”**

Sex-Based Harassment includes the bases under Section 106.10 and when it takes the form of:

- **Quid Pro Quo harassment (new def.)**
- **Hostile Environment Harassment (new def.)**
- **Specific offenses (sexual assault, dating violence, domestic violence, and stalking) (added def.)**

Section 106.2

**Sex-Based
Harassment
Defined**

Sexual Harassment

2020 Regulations

Quid Pro Quo

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

Section 106.30

Sex-Based Harassment

2024 Regulations

Quid Pro Quo

An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.

Section 106.2

Sexual Harassment 2020 Regulations Hostile Environment

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

Section 106.30

Sex-Based Harassment 2024 Regulations Hostile Environment

Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.

Section 106.2

Education Programs and Activities

2020 Regulations

Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs

Section 106.44(a)

Education Programs and Activities

2024 Regulations

Conduct that is subject to the recipient's disciplinary authority

Section 106.11

“The Department therefore reiterates that a recipient should not focus its analysis on whether alleged conduct happened “on” or “off” campus but rather on whether the recipient has disciplinary authority over the respondent's conduct in the context in which it occurred.”

Pg 198

Education Programs and Activities 2020 Regulations

Does not include incidents
outside of the United States

Section 106.44(a)

Education Programs and Activities 2024 Regulations

“A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.”

Section 106.11

Reporting

Employee Notification Requirements – Section 106.44(c)(2)

- **Category 1 Employees – Must notify TIXC**
 - **A Non-Confidential Employee**
 - **Authority to institute corrective measures**
 - **Responsibility for administrative leadership, teaching, or advising**
- **Category 2 Employees – Notify TIXC or Provide contact info**
 - **A Non-Confidential Employee**
 - **Any employee not in Category 1**
- **Flex Point: Consider making every non-confidential employee mandatory reporters**

Employee Notification Requirements

- **Student Employees – schools must reasonably determine and specify what obligations student employees have - Section 106.44(c)(3)**
- **Pregnancy or related conditions – when a student informs an employee – Section 106.40(b)(2)**
 - **Provide TIXC contact information**
 - **Inform the student that the TIXC can take special actions to prevent sex discrimination and ensure equal access**
- ***Schools can require employees to do more (notify TIXC)**
- **Confidential Employees must provide TIXC's contact information**

Initial Process

**Supportive
Measure
Challenge –
Section
106.44(g)(4)**

- **Timely opportunity for a party to challenge a decision about SM**
- **Can challenge a decision to provide, deny, modify, or terminate SM**
- **Appropriate and Impartial Employee**
 - **Not the person who made the decision being challenged**
 - **Must have authority to modify or reverse the decision**
- **Opportunity to seek to alter SM upon a material change in circumstances**

Emergency Removal– Section 106.44(5)

- Largely the same as in the 2020 Regulations
- Individualized safety and risk analysis
- Imminent and serious threat to health and safety
 - Replaces “immediate”
 - Removes “physical”
- Imminent – not active but likely to occur
- Notice and opportunity to challenge immediately
- Temporary not permanent
- Partial emergency removal is still permitted

- **Employee Respondent – including student employees**
- **Employment responsibilities**
- **During the grievance procedure**
- **Administrative Leave is defined as “Temporary separation from one’s employment, generally with pay and benefits.” Pg. 528**

**Administrative Leave –
Section 106.44(i)**

Informal Resolutions – Section 106.44(k)

- Available anytime prior to a determination of a policy violation
- Discretion to offer it lies with the institution (policy and case-by-case)
- Must be voluntary – no requirement or pressure on the parties
- Is now allowed when the Respondent is an employee and the Complainant is a student (unless K-12)
- No Formal Complaint is required
- May offer whenever an institution receives information about conduct that may constitute sex discrimination or a complaint of sex discrimination is made

Two Grievance Procedures 106.45 and 106.46

Section 106.45- General Requirements

- Sex discrimination cases and sex-based harassment cases not involving a student
- Grievance procedure must include:
 - Equitably treatment (b)
 - No conflicts (b)
 - Presumption of non-responsibility (b)
 - Prompt timeframes (b)
 - Privacy protection (b)
 - Objective evaluation of evidence (b)
 - Exclude certain evidence (b)
 - Parties may present fact witnesses (f)
 - Access to relevant evidence (f)
 - Opportunity to respond to evidence (f)
 - Preponderance of the evidence (h)

Section 106.46- Additional Requirements

- Sex-Based Harassment cases involving a student
- Must include all the requirements under 106.45 plus:
 - Written notice of allegations, dismissals, delays, meetings and proceedings (c)
 - Access to Advisors (c),(e)
 - May allow for expert witnesses (e)
 - Extensions for good cause (e)
 - Assessing witness credibility (f)
 - Each party may propose questions (f)
 - Inferences based on refusal (f)

- **10 and 10 timeframes**
- **Directly related evidence**
- **Redeemed the single investigator model. DM can also be the investigator or TIXC**
- **Live hearings are not mandatory**

Regulations no longer required

Individual and Live Hearings

When credibility is both in dispute and relevant to evaluating one or more of the allegations

- **Questions asked by Investigator or Decision Maker (can be the same person)**
- **Allow party to propose questions for other party or witness to be asked by I/DM**
- **Provide each party with a recording or transcript of the individual meeting**
- **Allow for follow-up questions and meetings**

**Individual Hearings –
Section 106.46(f)(1)(i)**

**Live Hearings –
Sections
106.46(f)(1)(ii) &
106.46(g)**

- Largely the same as the 2020 regs
- Decision Maker will ask questions of his/her own
- Discretion to allow DM or Advisors to ask questions proposed by a party
- If the school allows for Advisors to ask questions, the school must provide an Advisor if the party does not have one already
- In-Person or virtual
- Must create a recording or transcript

Individual or Live Hearings – Section 106.46(f)(3, 4)

- Used to assess credibility
- Parties must be allowed to propose questions
- DM to determine if questions are relevant (Section 106.2-
"may aid") and not otherwise impermissible (Section
106.45(b)(7))
- DM must allow the party to clarify or revise unallowed
questions
- If a party or witness does not respond to questions:
 - DM can give little or no weight to prior statements
 - DM cannot draw inference based solely on refusal to
answer

Dismissals and Appeals

Dismissals – Sections 106.45 & 106.46

- Institution may dismiss a complaint when:
 1. Respondent cannot be identified
 2. Respondent is no longer enrolled or employed
 3. Complainant voluntarily withdraws any or all of the allegations in the complaint, Title IX Coordinator declines to initiate a complaint and allegations, if true, would not constitute sex discrimination
 4. The allegations, even if proven, would not constitute sex discrimination
- Either party may appeal a dismissal – no change

Appeals – Section 106.46(i)(1)

- May appeal determination and dismissals on the following bases:
 - Procedural irregularity that would change the outcome
 - New evidence that would change the outcome and that was not reasonably available when the determination or dismissal was made
 - Conflict of interest or bias that would change the outcome
 - Institution may implement additional appeal grounds
 - Pointer: check your state's law for mandatory grounds!

Pregnancy or Related Conditions

**Pregnancy or
Related
Conditions -
Sections
106.40(b)(1),(b)(
3),(b)(5)**

- **Discrimination/harassment based on pregnancy or related conditions is prohibited (current, potential, or past)**
- **Institution must provide reasonable "modifications" based on student's individualized needs**
- **Modification cannot fundamentally alter the EPA**
- **Student may take a voluntary leave of absence and reinstated to prior academic status**
- **Lactation spaces must be provided**
- **Limitations on requests for supporting documents or certification**

- **If a student informs an employee of a pregnancy or related condition, the employee must provide student with the contact information of the Title IX Coordinator**
- **Title IX Coordinator must (1) contact and (2) notify student of legal rights, nondiscrimination policy and process of requesting reasonable modifications**

**Reporting – Section
106.40(b)(2)-(3)**

Training

All Employee Training Requirements – Section 106.8(d)(1)

- The School's obligation to address sex discrimination in its education programs and activities;
- The scope of conduct that constitutes sex discrimination under Title IX, including the definition of sex-based harassment;
- Employee notification requirements – information about conduct that reasonably may constitute sex discrimination under Title IX
- Employee notification requirements – pregnancy
- Annually, upon hiring, change in position



Separate training is required for Title IX Coordinators (or designees), Investigators, Decision Makers (including appeal decision makers), Informal Resolution Facilitators, or anyone else who is responsible for the implementation of the grievance procedure or anyone with the authority to modify or terminate supportive measures.

Section 106.8(d)(2, 3, 4)



No requirement to post trainings to the school website. Training material used for Title IX Coordinators (or designees), Investigators, Decision Makers (including appeal decision makers), and Informal Resolution Facilitators must be saved and made available upon request by members of the public.

Section 106.8(f)(3)

Top Five Flex Points

Flex Points

1. Reporters: Statutory v. All
2. One v. Two Procedures
3. Single-Investigator Model v. 2020 Model
4. Live Hearing v. Individual Hearings
5. Questioner: DM v. DM/Advisor

Recommendations

1. All Employees
2. One Procedure (106.46)
3. It Depends:)
4. Live Hearing
5. Decision Maker

Questions