



New Title IX Regulations

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Disclaimer

These materials are intended to assist school officials in understanding and implementing the new Title IX regulations promulgated by the United States Department of Education that take effective August 1, 2024, and are not a substitute for specific legal advice from the school district's counsel. While we will attempt to thoroughly address the new grievance procedure requirements, it is not possible to include discussion of every aspect in this presentation. Thus, this information must be understood as a tool for addressing the latest requirements, rather than an exhaustive statement on legal obligations. Changes will, no doubt, be periodically incorporated into these materials, as school officials begin to implement this entirely novel process.

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In a nutshell...

The Gettysburg Address

272 words

The Constitution

4 pages

The New Title IX Regulations

1,577 pages



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Fast Facts!

- These regulations are effective **August 1, 2024**
- These regulations have far more flexibility than the 2020 regulations
- There's *about* a 65% change of regulations from 2020, so more change than not

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Outline for Changes to be Covered

- 1 The new scope of Title IX
- 2 What is sex-based harassment? And what's this gender identity headline about?
- 3 Changes to the role of the Title IX Coordinator
- 4 Updates to training requirements and postings
- 5 Changes to Evidence
- 6 What is the new grievance procedure?
- 7 When Title IX, FERPA, the IDEA, and section 504 collide: who wins?
- 8 Protections for pregnancy and pregnancy-related conditions

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01 ✨ New Scope ✨

The Scope of Sex Discrimination, and Title IX Itself

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What does Title IX cover?

Discrimination based on:

- sex stereotypes,
- sex characteristics,
- pregnancy or related conditions,
- sexual orientation, and
- gender identity.

Sex based harassment:

- Quid pro quo harassment
- Hostile environment harassment
- Sexual assault
- Dating violence
- Domestic violence
- Stalking

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Where does Title IX cover?

Title IX requires a recipient to address all sex discrimination occurring under its education program or activity in the United States. Under the final regulations, conduct that occurs under a recipient's education program or activity includes, but is not limited to:

- Conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution; and
- Conduct that is subject to the recipient's disciplinary authority.

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Where does Title IX cover?

Under the final regulations, a recipient is required to address a sex-based hostile environment in its education program or activity in the United States, 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.

- Downstream or in-program effects of external conduct

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02 ✨ Sex-Based Harassment ✨

The Start of a Whole New Set of Definitions

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Sex Discrimination

Sex discrimination refers to **any** discrimination based on sex, including, but not limited to, sex-based harassment.

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Sex-Based Harassment

Sex-based harassment is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex including:

- Sex stereotypes;
- Sex characteristics;
- Pregnancy or related conditions;
- Sexual orientation; and
- Gender identity.

Sex based harassment can take the form of **quid pro quo harassment, specific offenses, and hostile environment**

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Quid Pro Quo Harassment

“This for that”

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

E.g. when an employee conditions a benefit on a person’s participation in unwelcome sexual conduct

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Specific Offenses

Examples in the regulations include:

- Sexual assault
- Dating violence
- Stalking
- Domestic violence

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Hostile Environment Harassment

OLD DEFINITION: “. . .so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”

NEW DEFINITION: Unwelcome sex-based conduct that is sufficiently severe **or** pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.

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Hostile Environment: Totality of the Circumstances

Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

- The degree to which the conduct affected the complainant’s ability to access the recipient’s education program or activity;
- The types, frequency, and duration of the conduct;
- The parties’ ages, roles within the recipient’s education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- The location of the conduct and the context in which the conduct occurred; and
- Other sex-based harassment in the recipient’s education program or activity

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Gender Identity

The final regulations prohibit a recipient from separating or treating any person differently based on sex in a manner that subjects that person to more than **de minimis harm**, except in the limited circumstances where the statute allows otherwise, such as in the context of sex-separate living facilities and sex-separate athletic teams.

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Gender Identity

The final regulations clarify that policies and practices that prevent a student from participating in a recipient's education program or activity **consistent with their gender identity** impose more than de minimis harm on that student on the basis of sex, and therefore generally violate Title IX's nondiscrimination mandate.

Under § 106.31(a)(2), a recipient must provide access to sex-separate facilities, **including bathrooms and locker rooms**, in a manner that does not cause more than de minimis harm.

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Athletics?



03 Title IX Coordinators

Let's Reoutline the Role!



Title IX Coordinator Responsibilities

1. Coordinating compliance with Title IX;
2. Take action when learning of possible sex discrimination including:
 1. Treating complainant and respondent equitably;
 2. Offering and coordinating supportive measures for the complainant and respondent;
 3. Notifying the complainant and respondent of the grievance procedures and informal resolution process;
 4. Initiate the grievance procedure/informal resolution process;
 5. Determine whether to file a complaint absent a complainant

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Title IX Coordinator Responsibilities

3. Dismiss complaints if you deem them not to fall under Title IX;
4. Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur

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New Standard for Action for Coordinators

OLD REGULATIONS: require a recipient to respond to possible sexual harassment when it has “actual knowledge” of the harassment (i.e. notice of sexual harassment or alleged sexual harassment)

NEW REGULATIONS: require a recipient to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.

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No More “Actual Knowledge”

Instead of requiring a school district to have “actual knowledge” as from 2020, now it is redefined to state that the district must have “knowledge of conduct that may constitute sex discrimination”

This is broader

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What is Prompt?

- A reasonably prompt response to sex discrimination “is judged in the context of the recipient’s obligation to provide students and employees with education programs and activities free from sex discrimination.”

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What is Effective Action?

- "With respect to effective action, the Department considers effective action to mean that a Title IX Coordinator, upon learning of conduct that reasonably may constitute sex discrimination, takes reasonable steps calibrated to address possible sex discrimination based on all available information."

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Filing a Complaint as a Title IX Coordinator

8 Factors to Weigh Before Filing a Complaint as the Coordinator:

1. The complainant's request not to proceed with initiation of a complaint
2. The complainant's reasonable safety concerns regarding initiation of a complaint
3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated
4. The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence
5. The age and relationship of the parties, including whether the respondent is an employee of the recipient
6. The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals
7. The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred
8. Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures

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04 ✨ Training Requirements & Postings ✨

Who Must Train, How Often, and What Materials are Necessary to Post and Give Out

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Who must train?

It is now required that **all employees** be trained on the school district's obligation to address sex discrimination, the scope of conduct that constitutes sex discrimination under Title IX (including the definition of "sex-based harassment"), and all applicable notification and information requirements.

Training must be completed, not just made available

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How often must we be trained?

All persons identified as requiring training must receive training promptly upon hiring or change of position, and annually thereafter.

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More Specialized Training For...

All:

- investigators,
- decisionmakers,
- other persons responsible for implementing the Title IX grievance procedures or
- anyone who has the authority to modify or terminate supportive measures

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Specialized Training

All employees involved in carrying out Title IX duties:

- The definition of sex-based harassment;
- How to remain unbiased in an investigation;
- “Relevance” in relation to evidence and questioning;
- Evidence which is permissible vs. impermissible;
- The district’s grievance procedure; and
- The informal resolution process

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Specialized Training

Title IX Coordinators and their designees:

- Title IX Coordinator specific responsibilities;
- The recordkeeping system and requirements; and
- All training provided to the above individuals

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Training Materials

Training materials *no longer need to be published* on the district's website. Instead, training materials must be made available for public inspection *upon request*.

Nothing in the final regulations precludes a district from formalizing how a public inspection request must be made—and thus exercising discretion in how it facilitates the inspection of such materials and the method in which the public inspection must occur.

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05 ✨ Evidence ✨

Permissible v. Impermissible Evidence

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Evidence

Decisionmakers must undergo an objective evaluation of all “relevant” evidence

The new regulations define relevant to be: “related to the allegations of sex discrimination. Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.”

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Permissible vs. Impermissible

An investigator must collect all evidence and the onus is on the school district to determine which evidence is **permissible**, and thereby allowed for consideration in our decision-making of responsibility and shared with the parties, and what evidence is impermissible and must be excluded and not shared with the parties.

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Impermissible Evidence

Three categories of evidence has been deemed impermissible:

1. Evidence that is protected under a privilege or confidentiality (unless waived)
2. Records made or maintained by a physician, psychologist, or other recognized professional in connection with treatment
3. Evidence relating to the Complainant's sexual interests or prior sexual conduct

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06 Grievance Procedure

More Options, More Flexibility, More Confusion?

§106.45

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The Big Changes: An Overview

- Decisionmakers may be the **same person** as the Title IX Coordinator or investigator
- We must take reasonable steps to protect **privacy** of parties and witnesses
- We must objectively evaluate relevant and not otherwise impermissible **evidence**
- Complaints may be **consolidated** under certain circumstances
- Complaints may be oral or written

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The Big Changes: An Overview

- Districts are prohibited from disciplining a party, witness, or other participant for making a **false statement** or for engaging in consensual sexual conduct based solely on the determination of whether sex discrimination occurred
- Parties are permitted to choose to participate in an **informal resolution process** if one is provided by the recipient even if no complaint is filed.
- Former students or employees may now file Title IX complaints

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Confidential v. Non-Confidential Employees

The proposed regulations require that districts require certain employees to notify the recipient's Title IX Coordinator of conduct that may constitute sex discrimination under Title IX:

Nonconfidential Employees: Any employee at an elementary school or secondary school who is not a confidential employee must notify the T9 Coordinator of information about conduct that could reasonably construe sex discrimination

Confidential Employees: obligated only to provide an individual with the Title IX Coordinator's contact information and information about reporting.

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Confidential Employees

1. An employee of a district whose communications are privileged or confidential under Federal or State law;
2. An employee of a district whom the recipient has designated as confidential under this part for the purpose of providing services to persons related to sex discrimination; or
3. An employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination

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Intake & Evaluation

Upon notice of sexual discrimination allegations, the T9 Coordinator must:

- Treat parties equitably
- Offer and coordinate supportive measures
- Notify the Complainant of procedures, and in event of a complaint being filed, the Respondent
- Initiate grievance procedures or Informal Resolution as requested

Or the T9 Coordinator may initiate a complaint as explained

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Consolidation of Complaints

A district may consolidate complaints of sex discrimination 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 arise out of the same facts or circumstances.

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Notice of Allegations we Provide to Parties

- Not required to be written*
- Must be amended if additional allegations come forward or the allegations are dismissed

Required Pieces:

- Grievance Procedures
- Informal Resolution Process (if any)
- Identities of the parties
- Description of the alleged conduct
- Dates and locations of the alleged conduct
- Prohibition of retaliation
- Equal opportunity to access relevant evidence

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Timelines

- There are no strict timelines: the grievance procedure must outline “reasonably prompt timeframes, as well as allow reasonable extensions of such timeframes for god cause.”
- These reasonably prompt timeframes must apply to:
 - Evaluation
 - Investigation
 - Determination
 - Appeal

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Supportive Measures

- Must not unreasonably burden either party
- Must be designed to protect the safety of parties/the educational environment, or to provide support during the resolution process
- May not be imposed for punitive/disciplinary reasons
- May be modified or terminated at the end of the resolution process
- **Parties may challenge a decision to provide, deny, modify, or terminate supportive measures applicable to that party**
 - **Must be heard by an impartial employee with the ability to modify or reverse the original decision**

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Informal Resolutions

- Prior to determination, districts *may* offer informal resolution
- This does not require a complaint!
- Informal resolution is not permitted in situations in which an employee is accused of sex discrimination against a student.

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Informal Resolutions

- Participation in informal resolution must be **voluntary**.
- The facilitator for the informal resolution process must not be the same person as the investigator or the decisionmaker in the recipient's grievance procedures.
- Any person designated by a recipient to facilitate an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent, and must be trained.

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Informal Resolutions

Before beginning the informal resolution process, the district must provide notice to the parties that explains:

- The allegations;
- The requirements of the informal resolution process;
- That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the district's grievance procedures;
- the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;

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Informal Resolutions

Before beginning the informal resolution process, the district must provide notice to the parties that explains:

- The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and
- What information the recipient will maintain and whether and how the district could disclose such information for use in grievance procedures, if grievance procedures are initiated or resumed.

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Investigation

School districts must provide for an adequate, reliable, and impartial investigation

- The burden is on the district to investigate and gather sufficient relevant evidence
- Equal opportunity must be given for parties to:
 - Provide fact witnesses and inculpatory and exculpatory relevant evidence
 - Access relevant evidence
 - Reasonable opportunity to respond to the evidence

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Assessing Credibility

- A district must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

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Confidentiality

“A [school district] must take reasonable steps to prevent and address the parties’ and their advisors’ unauthorized disclosure of information and evidence obtained solely through the grievance procedures.”

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Privacy

A district must not disclose personally identifiable information obtained in the course of complying with Title IX, except in the following circumstances:

- After obtaining prior written consent from a person with the legal right to consent to disclosure;
- When the information is disclosed to a parent/guardian/legal representative;
- To carry out the purposes of Title IX;
- As required by federal law, regulations, etc.; or
- 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.

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Questioning & Decision-Making

- The Decisionmaker must be able to question parties and witnesses to adequately assess credibility
- We only use preponderance of the evidence
- Decisionmakers will provide written determination of:
 - Rationale
 - Grounds for appeal, if applicable
- Then the T9 Coordinator will coordinate remedies and sanctions if there is a determination of a violation

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Dismissal of a Complaint

The **school district** may dismiss a complaint for any of the following reasons:

1. The district is unable to identify the respondent after taking reasonable steps to do so;
2. The respondent does not attend/is not employed by the district;
3. The complainant voluntarily withdraws the complaint, and the Title IX Coordinator determines not to continue the complaint on their behalf;
4. The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX

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Dismissal of a Complaint

- Dismissals may be appealed by either party
- Appeal decisionmaker cannot have been previously involved in the complaint

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Appeals

- At a minimum, appeals must be the same as offered for all other comparable proceedings
- Must offer all parties the opportunity to appeal on the following bases:
 1. Procedural irregularity that would change the outcome
 2. New evidence that would **change the outcome** and that was not reasonably available when the determination was made
 3. T9 Coordinator, Investigator, or Decisionmaker had a conflict/bias against the complainant or respondent **that would change the outcome**

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Retaliation

- Retaliation would be defined as intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in a recipient's Title IX process.
- A district would be prohibited from taking action against a student or employee under its code of conduct for the purpose of intimidating, threatening, coercing, or discriminating against someone because they provided information or made a complaint regarding sex discrimination.

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Retaliation

- “Peer retaliation” – retaliation by one student against another student

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07 ✨ Title IX and Other Laws ✨

When Title IX Comes Against FERPA, the IDEA, and Section 504

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FERPA

“When there is a direct conflict and redactions would preclude compliance with Title IX obligations, the GEPA override would require that the recipient comply with Title IX.”

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FERPA

- These Title IX regulations do not interfere with a parent’s or guardian’s rights under FERPA to obtain records or access information involving their child.
- These regulations do not interfere with parental rights related to knowing their child’s sexual orientation, gender identity, and pregnancy.

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FERPA

- Under FERPA, “a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.” U.S. Dep’t of Educ., Office of Planning, Evaluation, and Policy Development, Final Regulations, Family Educational Rights and Privacy, 73 FR 74806, 74832–33 (Dec. 9, 2008).
- In the context of Title IX grievance procedures, there is no direct conflict between Title IX and FERPA regarding the recipient’s disclosure of information contained in one student’s education records to another student to whom that information is also directly related.

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FERPA

- “FERPA does not override the due process rights of the parties, including, at minimum, the right to an explanation of the evidence and a meaningful opportunity to be heard.”
- A recipient must redact (or otherwise refrain from disclosing) information that is impermissible; however, a recipient must not redact information or evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible because such redaction would infringe on the right of the parties to receive access to the relevant and not otherwise impermissible evidence, as well as on the parties’ due process rights.

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Students with Disabilities

- If a party in a Title IX dispute is a K-12 student with a disability, the school district must require the Title IX Coordinator to consult with 1+ members of the student’s IEP team to determine how to comply with the requirements of the IDEA and/or Section 504 throughout the implementation of the grievance procedure
- The regulations do not require IEP or Section 504 meetings, do not mandate consultation with full IEP teams or Section 504 teams, do not identify particular individuals within the IEP team or Section 504 team that must be part of the consultation, and do not specify the decision-making process

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Students with Disabilities

- The Title IX Coordinator may have access to the student with a disability's educational records in order to comply with their Title IX duties
- For an elementary school or secondary school student with a disability who is a complainant or respondent, supportive measures provided under Title IX may intersect with the decisions made by an IEP team or Section 504 team, including with regard to the provision of FAPE

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Emergency Removals

- Before a district may remove a student with a disability in compliance with Title IX, the district must undertake an individualized safety and risk analysis to determine whether an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal.
- The respondent must also be provided notice and an opportunity to challenge the decision immediately following the removal, and this provision must not be construed to modify any rights under the IDEA, Section 504, or the ADA.

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Title IX Applies to Students and Employees

“Congress did not limit the application of Title IX to students. See 20 U.S.C. 1681. Title IX, thus, applies to all sex discrimination occurring in a recipient’s education program or activity in the United States. The Department’s regulations have long addressed employees.”

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Title VII

- “The Department acknowledges that Title VII and Title IX impose different requirements in some respects and that many recipients will need to comply with both Title VII and Title IX. The Department disagrees that there are inherent conflicts in complying with the two laws and commenters did not identify any such conflict.”
- It has been stated multiple ways that when conflicts arise between district grievance procedures, employee handbooks, and collective bargaining agreements, or state laws, Title IX must be followed.

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08 Pregnancy etc.

Protections for Pregnancy and Pregnancy-Related Conditions

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Parental, Family, or Marital Status, Pregnancy or Related Conditions

- We cannot treat students, employees, or applicants differently based on sex in connection with parental, family, or marital status
- Requires us to take actions to prevent sex discrimination and ensure equal access to the education program or activity, such as by providing **reasonable modifications** for students, reasonable break time for lactation for employees, and lactation space for students and employees.

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We find out a student is pregnant. Now what?

- First, tell the Title IX Coordinator
- Title IX Coordinator will inform them of their rights related to pregnancy or pregnancy conditions
- Work with the student individually regarding if reasonable modifications must be made to aid in her education while she is pregnant
- Allow her a voluntary leave of absence for, at minimum, the medically necessary time period and reinstatement upon return
- Post-birth we must provide her a clean, private lactation space

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Reasonable Modifications

- Reasonable modifications to policies, practices or procedures:
 - Cannot fundamentally alter the education program/activity
 - The student can accept or decline
 - Cannot require documentation unless necessary to provide the modification
- A legally found example of unreasonable modifications includes:
 - Waiving requirements that demonstrate academic competency such as clinicals or examinations
 - Graduating early without completing all required credits

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Reasonable Modifications

- Providing lactation breaks;
- Rescheduling exams or tests;
- Providing a larger desk;
- Allowing leave from school and excused absences;
- Allowing the student to carry snacks and water;
- Bathroom breaks;
- Access to remote instruction;
- Tutoring;
- Taped lectures;
- Etc.

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Voluntary Leaves of Absences

- Students must be allowed to take a **voluntary** leave of absence related to pregnancy or related conditions for, at a minimum, a period that is deemed medically necessary **by their healthcare provider**.
- The regulations do not specify how this obligation will interact with compulsory attendance requirements*
- A student who must take leave at the beginning of the year cannot be required to withdraw and reapply to the district due to needing an absence for a pregnancy or related condition

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Pregnancy and Employees

- Comparable treatment to other temporary medical conditions
 - Leave commencement, duration, and extensions
 - Disability payment income
 - Seniority accrual
 - Any other benefit or service
 - Reinstatement
 - Fringe benefits
- Voluntary leaves of absences
- Lactation time and space

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2024 Texas Title IX Administrator Conference

October 15-16, 2024
Round Rock, TX

Registration now open at
www.edlaw.com



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Questions?

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