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The Biden Department of Education's New and Final Title IX Rules, Explained

In April 2024, the Biden administration's Department of Education finalized new Title IX rules on sex-based harassment and other sex discrimination.¹ The new rules became law on August 1, 2024, and apply to alleged sex discrimination that occurs on or after August 1, 2024.² All schools that receive funds from the Department of Education, whether directly or indirectly, must comply with these new rules.³

Note: Sex-based harassment is a form of sex discrimination. Sex-based harassment includes sexual harassment (including sexual assault), dating violence, domestic violence, stalking, gender-based harassment that doesn't have a sexual component, anti-LGBTQI+ harassment, and harassment based on pregnancy or related conditions.

Biden's new changes to the Title IX rules undo many of the harmful rules put in place in 2020 by the Trump administration ("2020 rules"),⁴ which pushed schools to ignore many incidents of sexual harassment and to use uniquely unfair and burdensome investigation procedures for sexual harassment complaints that are not required for investigations of any other type of student or staff misconduct. In short, the 2020 rules relied on and reinforced the harmful and false myth that people who report sexual harassment—primarily girls and women—tend to be lying and therefore must be subjected to more scrutiny.

The Biden administration's new Title IX rules are consistent with Title IX's broad mandate to prohibit sex discrimination in education. They restore and enhance many of Title IX's protections against sex-based harassment and other sex discrimination. The new rules also formalize greater protections against discrimination for LGBTQI+ students and for pregnant and parenting students. Read this explainer to learn about the Biden administration's new, finalized changes to the Title IX rules.

Key Terms

- A **complainant** is someone who reports that they are a victim of sex-based harassment (or other sex discrimination).
- A **respondent** is someone who is reported to have engaged in sex-based harassment (or other sex discrimination).

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I. WHAT MUST SCHOOLS DO TO PROTECT STUDENTS FROM SEX-BASED HARASSMENT?

Background: Sex-based harassment, including sexual harassment, is widely prevalent in K-12 schools and institutions of higher education. However, most students do not report the harassment to their schools for many reasons, including fear of punishment or being disbelieved, the emotional difficulty of reporting and re-living what happened, or a fear that reporting would make the situation even worse. For example, 21% of girls ages 14-18 are kissed or touched without their consent, but only 2% of them report the incident to their schools.⁵ Similarly, in college, 32% of women, 32% of transgender and nonbinary students, and 9% of men have been sexually assaulted since enrolling, but among survivors, only 12% of women, 21% of transgender and nonbinary students, and 10% of men reported the sexual assault to their institutions.⁶

When student survivors do come forward to ask for help, they are often ignored, disbelieved, or even punished.⁷ Many survivors end up withdrawing from classes, transferring to another school, or withdrawing from school altogether.⁸ These harms disproportionately fall on women and girls of color, disabled survivors, LGBTQI+ survivors, and pregnant and parenting survivors, all of whom face stereotypes casting them as less credible when they report sexual harassment.⁹ Ultimately, 34% of college survivors end up being pushed out of school.¹⁰

The Trump administration exacerbated these challenges by issuing Title IX rules in 2020 that made it even harder for students to report sexual harassment and receive the support they need to learn and feel safe in school. The Biden administration's new Title IX rules undo many of the harmful Trump changes and restore and strengthen many of Title IX's protections against sex-based harassment and other sex discrimination.

A. WHEN SCHOOLS MAY BE LIABLE FOR HARASSMENT

Under the new Title IX rules, schools must respond to a much wider range of incidents of sex-based harassment than under the 2020 rules, consistent with decades of prior Department of Education policy.¹¹

1. DEFINITIONS OF HARASSMENT

Previously, under the 2020 Title IX rules, schools were

required to ignore Title IX complaints of sexual harassment that did not meet one of three stringent definitions: (i) "quid pro quo" sexual harassment by a school employee (e.g., "I'll give you an A if you have sex with me," or "I'll give you an F if you don't have sex with me"); (ii) an incident that met federal definitions of "sexual assault," "dating violence," "domestic violence," or "stalking"; or (iii) "unwelcome" conduct on the basis of sex that was so "severe, pervasive, and objectively offensive" that it "effectively **denie[d]**" a person equal access to a school program or activity.¹² This meant many victims were forced to endure repeated and escalating levels of abuse before their complaint could even be investigated.

Under the new rules, schools must respond to all forms of sex-based harassment, which includes not only sexual harassment but also harassment on the basis of sex stereotypes, sex characteristics (including intersex traits), sexual orientation, gender identity (e.g., intentional misgendering—see **Part II** below), and pregnancy or related conditions (see **Part III** below).¹³

Two of the three categories of sex-based harassment—(i) "quid pro quo" harassment¹⁴ and (ii) sexual assault, dating violence, domestic violence, or stalking¹⁵—remain largely the same as in the 2020 rules. However, the third category ("hostile environment harassment") requires schools to respond to (iii) "unwelcome" sex-based conduct when it is so "severe or pervasive" and "objectively and subjectively" offensive that it "**limits** or denies" a person's ability to participate in or benefit from an education program or activity.¹⁶ Schools must assess whether "severe or pervasive" conduct creates a hostile environment by considering several factors, such as the frequency of the conduct and the extent to which it impacts a person's ability to learn.¹⁷ This change is consistent with not only the definition of sex-based harassment that existed prior to the 2020 rules¹⁸ but also with the current definitions of race- and disability-based harassment, which ensures that victims of intersectional harassment (e.g., a Black woman harassed because of her race and sex) can file complaints under a uniform standard.¹⁹ It means that schools must respond to a wider range of sex-based harassment, rather than being encouraged to sweep reports under the rug, and that more students who experience harassment will be able to get help from their schools.

2. OFF-CAMPUS HARASSMENT

Previously, under the 2020 Title IX rules, schools were required to ignore Title IX complaints of sexual harassment

that occurred during study abroad programs, outside of a school program or activity, or outside of a context that was under the school's "substantial control."²⁰ This meant schools were required to dismiss Title IX complaints by students who were sexually assaulted while studying abroad, at a fraternity that wasn't officially recognized by their university, or in off-campus housing, or who were harassed or stalked online outside of a school-sponsored program. This was the case even when a student was required to attend class with their rapist or abuser—or even a class taught by their rapist or abuser.

Under the new rules, schools must address *incidents* of sex-based harassment (or other sex discrimination) that occur "under the [school's] education program or activity in the United States," which includes any off-campus or online harassment that occurs inside the U.S. in any of these contexts: (i) during a school program, (ii) on a school's online or digital platform, (iii) in an official student organization's building, or (iv) under a school's disciplinary authority.²¹ For example, schools must address incidents that occur during field trips, online classes, and athletic programs, as well as on school-sponsored devices, internet networks, and digital platforms, including artificial intelligence programs.²² If a school has the disciplinary authority to address other types of student or staff misconduct outside of school, it must also address sex-based harassment that occurs outside of school.²³ Teacher-on-student sexual harassment is likely to constitute sexual harassment in the school's program even if occurs off campus and outside of a school-sponsored activity.²⁴

In addition, schools must address any *hostile environment* that arises in any of contexts (i)-(iv), even if the underlying incident occurred off campus, online, or outside the U.S.²⁵ For example, if a student reports that they were sexually assaulted by their professor during a study abroad program, a school does not have to investigate the *harassment* because it occurred outside of the U.S., but it must still address the resulting *hostile environment* that exists when the student and professor return to campus by offering supportive measures and taking other actions as detailed in **Part I.B.**²⁶ However, if a school investigates other off-campus student misconduct (e.g., theft), it must also investigate off-campus sex-based harassment (or other sex discrimination),²⁷ because schools cannot treat sex discrimination differently from other student misconduct. To evaluate whether a hostile environment exists, schools must use the "hostile environment" factors listed in the definition of "sex-based harassment" (see **Part I.A.1**).²⁸

3. UNAFFILIATED COMPLAINANT

Previously, under the 2020 rules, schools were required to dismiss Title IX complaints of sex-based harassment by individuals who were not students or employees of the school *at the time they filed a complaint*, even if they were complaining of harassment they experienced as a student or employee and even if their harasser was still enrolled in or employed by the school.²⁹

Under the new rules, schools must address complaints of sex-based harassment (or other sex discrimination) by individuals who are not students or employees of the school, so long as the individual was participating or trying to participate in the school's program or activity *at the time of the harassment*.³⁰ This means schools no longer have to dismiss Title IX complaints filed by visiting students after they decide not to enroll at the school, by former students after they transfer or graduate, or by former employees after they leave their employment at the school—enabling these individuals to get relief under Title IX where they could not under the previous rules.

4. UNAFFILIATED RESPONDENT

Previously, under the 2020 Title IX rules, schools were allowed to dismiss sexual harassment complaints at any time if the respondent transferred, graduated, or, in cases where the harasser was an employee, retired—even if an investigation was already pending.³¹

Under the new rules, schools can still dismiss Title IX complaints of sex-based harassment (or other sex discrimination) if the respondent has transferred, graduated, or retired.³² However, if a school dismisses a complaint because the respondent has transferred, graduated, or retired, it must still provide supportive measures to the complainant (see **Part I.B.2** below), and the Title IX coordinator must still take measures to prevent further sex discrimination in the school's program and to protect both the complainant and all students from such discrimination.³³ As described in the preamble to the rules, these preventive and protective measures can range from the Title IX coordinator barring a third party (for example, a former student or employee) from visiting the school's campus if the coordinator discovers that they are attending school events and engaging in harassment, to conducting staff trainings on how to monitor for risks of sex discrimination in a specific class, department, athletic team, or program where discrimination has been reported in the past.³⁴

5. NOTICE OF HARASSMENT

Previously, K-12 schools had to respond to sexual harassment when any employee had “actual knowledge” of any incident of sexual harassment.³⁵ However, institutions of higher education only had to respond if the Title IX coordinator or a school official with “the authority to institute corrective measures” had “actual knowledge” of the incident.³⁶ This meant institutions of higher education did not have any obligation to respond when a student told a residential advisor, teaching assistant, or professor that they were experiencing sexual harassment unless the school had designated these employees as school officials with “the authority to institute corrective measures.”

Under the new rules, schools with knowledge of sex-based harassment (or other sex discrimination) occurring in a school program or activity must address it.³⁷

In K-12 schools, all employees, except those designated as “confidential employees,” must report possible sex discrimination to the school’s Title IX coordinator.³⁸

Confidential employees. The new rule allows (but does not require) schools to designate one or more employees as “confidential employees.” Students who report sex-based harassment (or other sex discrimination) to a “confidential employee” will not have this information disclosed to any other school employee. A “confidential employee” is an employee who is not required to report possible sex discrimination to a school’s Title IX coordinator because: (i) their communications are privileged or confidential under federal or state law (e.g., school psychologists, pastoral counselors); (ii) the school has designated them as confidential for the purpose of providing services to victims of sex discrimination (e.g., guidance counselors, ombudspersons, sexual assault response center staff); or (iii) they receive information about sex discrimination while conducting an Institutional Review Board-approved study about sex discrimination at an institution of higher education.⁴¹

In institutions of higher education, non-confidential employees with (i) “the authority to institute corrective measures” or (ii) “responsibility for administrative leadership, teaching, or advising” must report possible sex discrimination to the Title IX coordinator.³⁹ All other non-confidential employees must *either* report possible sex discrimination to the Title IX coordinator *or* explain to the victim how to report it themselves.⁴⁰

In institutions of higher education, Title IX coordinators are not required to respond to possible sex-based harassment that they learn of from a public awareness event on such harassment, such as a “Take Back the Night” rally, unless it presents an “imminent” and “serious threat” to the health or safety of the complainant or any students, employees, or other persons.⁴² However, non-confidential employees must still report all possible sex-based harassment that they learn of from a public awareness event to the Title IX coordinator (or explain to the victim how to report it), and the Title IX coordinator still must use this information to prevent sex-based harassment (e.g., by using it to develop tailored training to address the harassment).⁴³

B. HOW SCHOOLS MUST RESPOND TO HARASSMENT

1. STANDARD OF CARE

Previously, the Title IX rules allowed a school’s response to sexual harassment to be “unreasonable,” as long as it was not “**clearly** unreasonable” or “deliberately indifferent.”⁴⁴ This allowed schools to provide sexual harassment victims with less support and, in some cases, even to mistreat student survivors.

Under the new rules, if a school has knowledge of possible sex-based harassment (or other sex discrimination) in its program or activity, it must take more action—specifically “prompt and effective action” to (i) end the harassment, (ii) prevent the harassment from recurring, and (iii) remedy the effects of the harassment on all people harmed.⁴⁵ This includes a requirement that schools offer supportive measures to the complainant (see **Part I.B.2** below).⁴⁶

2. SUPPORTIVE MEASURES

Previously, schools were required to provide supportive measures to all complainants, even if there was no investigation or informal resolution. Supportive measures for complainants could not be “disciplinary,” “punitive,” or “unreasonably burden[some]” on the respondent, but they could *reasonably* burden a respondent.⁴⁷ However, given other 2020 rules that favored respondents over complainants, many schools mistakenly believed that they could not impose certain supportive measures designed to preserve and restore complainants’ access to education, such as one-way (“unilateral”) no-contact orders to prohibit harassers from contacting their victims. Instead, many schools, to avoid “unreasonably” burdening the respondent, wrongly forced victims to change their own classes and

dorms to avoid their rapist or abuser.

Under the new rules, schools must offer supportive measures to all complainants who report any type of sex-based harassment (or other sex discrimination), even if there is no investigation or informal resolution,⁴⁸ and even if their complaint is dismissed.⁴⁹ The new rules, like the previous rules, also require supportive measures not to be “disciplinary,” “punitive,” or “unreasonably burden[some]” on any party, but they can *reasonably* burden a party.⁵⁰ For example, schools can:

- Provide a complainant with a one-way no-contact order, counseling, extensions of deadlines and other course-related adjustments (e.g., withdrawals, transcript adjustments, tuition reimbursements), leaves of absence, and other types of supportive measures that are “reasonably available.”⁵¹
- Have an educational conversation with the respondent or make involuntary changes to a respondent’s seat, classes, work, housing, extracurriculars, or other activities, even if there isn’t a comparable alternative to offer the respondent.⁵²
- Partially remove a respondent from a program or activity or put a respondent on paid administrative leave as a supportive measure.⁵³
- If there is an investigation or informal resolution, provide both parties with supportive measures to enable them to participate in an investigation or informal resolution.⁵⁴

Schools do not need to provide a complainant and respondent with identical supportive measures.⁵⁵ Schools cannot inform one party of another’s supportive measures unless it is necessary to provide the supportive measure or to restore a party’s access to education.⁵⁶ If a complainant or respondent is negatively affected by their school’s decision to provide, deny, change, or end a supportive measure, or if there is a material change in circumstances, the school must give them an opportunity to challenge the school’s decision.⁵⁷

3. INFORMAL RESOLUTIONS

Previously, schools were allowed to use an informal resolution process, such as mediation or a restorative process, to resolve any complaint of student-on-student sexual harassment—at any time before making a determination regarding responsibility.⁵⁸ An informal resolution was allowed as long as all parties: (i) received

written notice of their rights and obligations, (ii) understood the potential consequences, including the records that could be shared in a subsequent school or court proceeding, (iii) gave written consent to the process, (iv) could withdraw at any time before the end to do a traditional investigation, and (v) were not required to participate in an informal resolution or to waive their right to an investigation in order to continue accessing any educational benefit.⁵⁹

Under the new rules, schools can continue to use an informal resolution process, including mediation or a restorative process, to resolve any report or complaint of sex discrimination—at any time before making a determination regarding responsibility—unless it is a complaint of employee-on-student sex-based harassment in a K-12 school or it is prohibited by another law.⁶⁰ The new rules impose similar requirements as the previous rules for conducting informal resolutions (see above), although notice and consent do not have to be in writing.⁶¹ Even if all parties agree to an informal resolution, a school can refuse to do it if, for example, either party has a history of violence, there is a credible threat of self-harm or harm to others, there are repeat allegations against the respondent, or the school believes the alleged conduct would pose a future risk of harm to others.⁶² An informal resolution agreement is binding only on the parties, which means a complainant cannot use an informal resolution to request, for example, training for a respondent’s entire fraternity, athletics team, or academic department.⁶³

4. RETALIATION

Previously, the Title IX rules prohibited any school or person from threatening, discriminating against, or otherwise punishing anyone in order to interfere with their Title IX rights or because they reported sexual harassment or otherwise participated or refused to participate in a sexual harassment investigation.⁶⁴ This meant that complainants could not be punished for conduct that was related to the reported sexual harassment or that was discovered as a result of them reporting the sexual harassment.⁶⁵ In addition, a complainant could not be punished for making a false statement during an investigation simply because the school ultimately decided in the respondent’s favor.⁶⁶ Complaints of retaliation had to be investigated using “prompt and equitable” procedures.⁶⁷

Under the new rules, no school or person can threaten, discriminate against, or otherwise punish anyone in order to interfere with their Title IX rights (same as before) or because they reported any type of sex discrimination

(not just sexual harassment) or participated or refused to participate in any school effort to address sex discrimination (not just in an investigation).⁶⁸ (The one exception is that schools can require their own employees to be a witness in or to assist with a Title IX proceeding.⁶⁹) This means schools can discipline a complainant for conduct related to the reported harassment as long as the discipline is not done for a retaliatory purpose, but they cannot discipline a complainant for any conduct—even conduct unrelated to the reported harassment—if the discipline is done with a retaliatory purpose.⁷⁰ For example, a school can punish a complainant for missing class after being sexually assaulted or for violating a drug or alcohol policy during their assault as long as this is not done to retaliate against the complainant for reporting their sexual assault.⁷¹ However, a school cannot discipline the complainant for an earlier, unrelated attendance or alcohol violation in order to retaliate against the complainant for their current sexual assault complaint.⁷²

In addition, the new rules specifically prohibit a school from punishing a complainant for making an allegedly false statement or for engaging in consensual sexual activity simply because the school ultimately decides in the respondent's favor.⁷³ If a student reports retaliation, the school must offer that student supportive measures, and if the student makes an oral or written complaint of retaliation, the school must investigate the complaint.⁷⁴

5. PRIVACY, SAFETY, AND AUTONOMY

Previously, a victim of sexual harassment (or a minor K-12 victim's parent or guardian) could file a complaint with the school to initiate an investigation.⁷⁵ In addition, a Title IX coordinator could file a complaint without the complainant's consent for any reason they deemed necessary. The previous rule provided no factors to guide a coordinator's decision and simply said that coordinators had "flexibility" to make their decision as long as they did so "thoughtfully and intentionally."⁷⁶ During a sexual harassment investigation, schools could not restrict the parties' ability to discuss the allegations or gather evidence.⁷⁷ Schools were not prohibited from disclosing personally identifiable information obtained while complying with Title IX, so long as the disclosures were made consistent with federal privacy laws.⁷⁸ The previous rules took no position on nondisclosure agreements, so long as they complied with the previous rule.⁷⁹

Under the new rules, in cases of sex-based harassment, it is still the case that only a victim (or a minor K-12 victim's

parent or guardian) can make a complaint to initiate an investigation.⁸⁰ For other types of sex discrimination, any student, employee, or other person participating or trying to participate in the school's program or activity can make a complaint.⁸¹ However, a Title IX coordinator cannot initiate an investigation of sex-based harassment (or other sex discrimination) without the complainant's consent unless the coordinator evaluates a list of factors and concludes that the conduct either: (i) poses an imminent and serious health or safety threat or (ii) prevents the school from ensuring equal access to education.⁸² If a minor K-12 student and their parent disagree about whether to make a complaint, the Title IX coordinator can defer to the parent, unless there is a risk of serious physical harm or suicidality to the child (in which case the Title IX coordinator would not have to defer to either the child's or parent's wishes).⁸³

During an investigation of sex-based harassment (or other sex discrimination), schools must take reasonable steps to protect the privacy of parties and witnesses, as long as this does not restrict the parties' ability to gather evidence and consult with their support networks.⁸⁴ This means schools can restrict disclosures of evidence that is obtained solely through an investigation.⁸⁵ An institution of higher education investigating a complaint of sex-based harassment involving one or more students can delay notifying the respondent of the allegations until it addresses reasonable safety concerns for the complainant or other people.⁸⁶

Furthermore, a school cannot disclose any individual's personally identifiable information (PII) that is obtained through the course of complying with Title IX unless one of these exceptions is met: (i) the individual gives written consent, (ii) the school discloses a minor K-12 student's PII to their parent or guardian, (iii) the school must disclose the PII to comply with Title IX or another federal law, or (iv) the school must disclose the PII to comply with a state law that does not conflict with Title IX or FERPA (a federal privacy law).⁸⁷ This means that if a school learns about a *minor K-12* student's experience of sexual assault or dating violence because the student reports the harassment or files a complaint with the school, then the school can disclose this information the student's **parent or guardian**.⁸⁸ This also means that for students of all ages, a school cannot inform the **police** that a student allegedly filed a "false" criminal report of sexual assault or dating violence based solely on information received by the school in a Title IX investigation, unless the state has a law that requires such a disclosure.⁸⁹ However, even if one of these PII exceptions is met, schools still cannot disclose PII if doing so creates a hostile

environment. For example, it could be a violation of Title IX if a school discloses a student's sexual orientation or gender identity broadly to other students or employees that results in the student experiencing sex-based harassment.⁹⁰

Finally, the new rule continues to take no position on nondisclosure and confidentiality agreements, so long as they comply with the new rule.⁹¹

6. CONFLICTS BETWEEN FEDERAL AND STATE LAW

Previously, the Title IX rules suggested that schools could not comply with a state or local law that required stronger protections for victims of sexual harassment than the federal regulations.⁹²

Under the new rules, it is clear that schools can comply with state or local laws that provide greater protections from sex-based harassment (or other sex discrimination) than those set out in the federal rules, as long as the state or local law does not conflict with the federal regulations.⁹³ This reaffirms that Title IX is a floor, not ceiling, for civil rights protections.

C. HOW SCHOOLS MUST INVESTIGATE HARASSMENT

The new rules require all schools to follow specific procedures when investigating complaints of sex-based harassment (or other sex discrimination).⁹⁴ Institutions of higher education that investigate complaints of sex-based harassment involving one or more students must follow additional specific procedures.⁹⁵

Schools can choose to adopt a single procedure for all Title IX complaints or different procedures for different types of complaints, as long as they use the same procedure for all parties within the same complaint and have consistent principles for choosing when a certain procedure is used.⁹⁶ For example:

- A school can adopt three different procedures for student-on-student, employee-on-student, and employee-on-employee complaints.⁹⁷
- A K-12 school can choose to provide a description of the evidence to younger students facing less severe consequences and access to the evidence itself to older students facing more severe consequences.⁹⁸
- An institution of higher education can choose to conduct a live hearing with cross-examination where suspension or

expulsion is at stake and all parties are 18 or older and to conduct interviews for all other cases.⁹⁹

Finally, schools can adopt additional procedures not required by the new rules, as long as the procedures apply equally to both parties.¹⁰⁰

1. TIME FRAME & DELAYS

Previously, schools had to investigate sexual harassment in a "prompt" manner, but they could impose "temporary" delays for "good cause," including if there was an ongoing criminal investigation.¹⁰¹ In addition, schools' sexual harassment investigations had to take a *minimum* of 20 days—as schools were required to allow the parties at least 10 days to inspect and respond to the evidence and at least 10 days to review and respond to the school's investigative report summarizing the evidence.¹⁰²

Under the new rules, schools must not only conduct "prompt" investigations but also set "reasonably prompt timeframes" for all major stages of an investigation of sex-based harassment (or other sex discrimination).¹⁰³ In addition, schools can still impose "reasonable" delays for "good cause," which may include accommodating the absence of a party, advisor, or witness, or, in some cases, an ongoing criminal investigation.¹⁰⁴ Furthermore, depending on the type of investigation and, in some cases, the school's discretion, the parties have a right to review and respond either to the evidence, a description of the evidence, or an investigative report summarizing the evidence,¹⁰⁵ but there is no longer a required minimum number of days for this process.

2. PRESUMPTION OF NON-RESPONSIBILITY

Previously, schools were required to presume that the respondent was not responsible until the end of an investigation of sexual harassment and to provide written notice to all parties of this presumption at the start of an investigation.¹⁰⁶

Under the new rules, schools must apply the same presumption in all investigations of sex-based harassment or other sex discrimination (not just sexual harassment).¹⁰⁷ In addition, *when an institution of higher education investigates a complaint of sex-based harassment involving one or more students*, it must provide written notice to all parties of this presumption at the start of the investigation.¹⁰⁸ The presumption does not apply when the complaint alleges that the school (not an individual) violated Title IX.¹⁰⁹

3. ADVISORS AND SUPPORT PERSONS

Previously, all schools were required to allow the parties to choose anyone (e.g., parent, teacher, attorney) to be their advisor.¹¹⁰ The parties' advisors could *attend* all meetings or hearings and review all evidence and investigative reports, but the school could choose to apply equal restrictions on the advisors' *participation* in a meeting or hearing.¹¹¹ Institutions of higher education had to allow a party's advisor to cross-examine the other party and witnesses at a live hearing and, if a party did not have an advisor, had to provide one for the purpose of cross-examination.¹¹² Schools could give both parties an equal right to bring additional support persons.¹¹³

Under the new rules, an institution of higher education investigating a complaint of sex-based harassment involving one or more students is required to allow the parties to choose anyone (e.g., parent, teacher, attorney, confidential employee, union rep) to be their advisor, subject to the same rights and restrictions as in the 2020 rules, except that an advisor need not be provided by the institution if it does not allow cross-examination.¹¹⁴ Institutions can give both parties an equal right to bring additional support persons.¹¹⁵

*In all other investigations of sex-based harassment (or other sex discrimination) (i.e., all Title IX investigations at institutions of higher education that do not allege sex-based harassment involving a student and all Title IX investigations at K-12 schools), schools can (but are not required to) give both parties an equal right to bring an advisor and/or additional support persons.*¹¹⁶

4. QUESTIONING PARTIES AND WITNESSES

Previously, institutions of higher education had to allow each party's advisor to directly cross-examine the other party and all witnesses at a live hearing.¹¹⁷ Advisors had the right to ask any questions of a party or witness unless they sought irrelevant or impermissible evidence (see **Part I.C.5** below).¹¹⁸ The live hearing had to be conducted virtually if any party requested it, using technology that allowed all participants to see and hear one another.¹¹⁹

In K-12 schools, the parties had the right to submit written questions for the decisionmaker to ask on their behalf, as long as they did not seek irrelevant or impermissible evidence.¹²⁰

In all schools, the decisionmaker had to determine whether a proposed question was permissible under the rules and explain any decision to exclude a question.¹²¹ The

decisionmaker could not be the same person as the Title IX coordinator or investigator.¹²²

Note: The 2020 rules also originally included an "exclusionary rule," which required institutions of higher education to ignore all oral or written statements made by a party or witness who did not submit to cross-examination.¹²³ Fortunately, a federal judge struck down this exclusionary rule in July 2021 in a lawsuit brought by the National Women's Law Center and other advocates,¹²⁴ and the Department of Education stopped enforcing the exclusionary rule.¹²⁵

Under the new rules, questioning of parties and witnesses is only required to the extent that credibility is in dispute and relevant to evaluating the allegations of sex-based harassment (or other sex discrimination).¹²⁶ In addition, the decisionmaker can be the same person as the Title IX coordinator or investigator.¹²⁷

Institutions of higher education that investigate complaints of sex-based harassment involving one or more students: If credibility is at issue, the institution must either:

- Have an investigator or decisionmaker interview each party or witness in **individual meeting(s)**, whether in-person or virtual. The parties can propose questions and follow-up questions for the investigator or decisionmaker to ask, as long as they don't seek irrelevant or impermissible evidence;¹²⁸ or
- Have a decisionmaker question the parties and witnesses at a **live hearing**. The school must also let the parties propose questions and follow-up questions to be asked either by the decisionmaker or by their advisors during cross-examination, as long as they don't seek irrelevant or impermissible evidence. If the advisors are allowed to conduct cross-examination, and a party does not have an advisor, the school must provide them with an advisor (who may or may not be an attorney).¹²⁹ The live hearing must be conducted virtually if any party requests it, using technology that allows all participants to see and hear one another.¹³⁰

In addition, institutions of higher education that investigate complaints of sex-based harassment involving one or more students must follow these requirements:

- The decisionmaker must determine whether a proposed question seeks irrelevant or impermissible evidence and must explain any decision to exclude a question. If a

question is unclear or harassing, the party must be given an opportunity to rephrase it so that it is clear and non-harassing.¹³¹

- If a party or witness does not respond to a relevant and permissible question, the school can choose to place less weight, no weight, or full weight upon their statements. However, decisionmakers cannot draw an inference about whether sex-based harassment occurred based solely on a person's refusal to respond to such questions.¹³²
- The school must give the parties a transcript or recording of the individual meetings or live hearing, so that they can propose follow-up questions.¹³³

In all other investigations of sex-based harassment (or other sex discrimination) (i.e., all Title IX investigations at institutions of higher education that do not allege sex-based harassment involving a student and all Title IX investigations at K-12 schools), the school must provide all parties an equal opportunity to present witnesses and evidence and, if credibility is at issue, to use a process that enables the decisionmaker to assess the credibility of the parties and witnesses.¹³⁴

5. IMPERMISSIBLE EVIDENCE

Previously, schools were prohibited from asking questions or using evidence about:

- Any individual's privileged information, unless the person holding the privilege waived it.¹³⁵
- A party's medical or mental health records, unless the party provided written consent.¹³⁶
- A complainant's "sexual predisposition" or "prior sexual behavior," unless the prior sexual behavior: (i) involved a person other than the respondent and was offered to prove mistaken identity, or (ii) involved a "specific incident" with the respondent and was offered to prove "consent."¹³⁷

Under the new rules, schools are similarly prohibited from asking questions or using evidence about:

- Any individual's privileged or *confidential* information, unless the person holding the privilege or *confidentiality* waives it.¹³⁸
- A party's or witness's medical or mental health records (including a disabled student's Section 504 Plan or Individualized Education Plan), unless the individual gives

written consent.¹³⁹

- A complainant's "sexual interests" or "prior sexual conduct," unless the prior sexual conduct falls into the same two exceptions as before (see above).¹⁴⁰ The new rules also explicitly add that consensual "prior sexual conduct" (and consent-related communications) between the parties does not prove or imply that the complainant consented to the alleged sex-based harassment.¹⁴¹

6. STANDARD OF PROOF

Previously, when investigating sexual harassment, schools could choose between using the "preponderance of the evidence" standard (i.e., "more likely than not") or the "clear and convincing evidence" (i.e., "highly and substantially more likely than not"), as long as they used the same standard when investigating students and employees.¹⁴²

Note: The preponderance standard is the same standard that is used by courts in all civil rights cases¹⁴³ and is the only standard of proof¹⁴⁴ that recognizes complainants and respondents have equal stakes in the outcome of a proceeding—which is their ability to access education, as survivors are also pushed out of school programs and activities as a result of the harassment. In contrast, the "clear and convincing evidence" standard tilts the scales in favor of respondents. By allowing schools to apply the "clear and convincing evidence" standard only in investigations of sexual harassment (but not other types of misconduct), the 2020 rules reinforced the harmful rape myth that sexual harassment reports are inherently less credible than reports of other types of misconduct and therefore need to be subjected to greater scrutiny.

Under the new rules, when investigating sex-based harassment (or other sex discrimination), schools must use the preponderance standard, unless the school uses the "clear and convincing evidence" standard in all other "comparable" investigations, including for *all* other types of harassment, discrimination, and physical assault.¹⁴⁵ This means a school cannot use the "clear and convincing evidence" standard to investigate complaints of sex discrimination if it uses the preponderance standard to investigate *any* complaints of race, disability, or religious discrimination or non-sexual assault.¹⁴⁶

7. APPEALS

Previously, schools were required to offer appeals to both parties in sexual harassment investigations from a dismissal of a complaint or from a determination regarding

responsibility based on: (i) a procedural irregularity, (ii) new evidence, or (iii) a Title IX official's bias or conflict of interest that affected the outcome.¹⁴⁷ In addition, the decisionmaker for the appeal could not have taken part in the initial investigation, determination, or dismissal of the complaint; and could not be the Title IX coordinator.¹⁴⁸ Schools could also offer additional bases for appeal to both parties equally.¹⁴⁹

Under the new rules, schools must still offer appeals to the complainant in investigations of sex-based harassment (or other sex discrimination) from a dismissal of a complaint and ensure that the decisionmaker for the appeal did not take part in the initial investigation or dismissal of the complaint.¹⁵⁰ In addition, schools must offer both parties the same appeal rights as are offered in *all* other comparable proceedings, including for all other types of harassment, discrimination, and physical assault.¹⁵¹ Schools can also offer additional bases for appeal to both parties equally, even if they are not offered in other comparable proceedings.¹⁵²

In addition, institutions of higher education investigating a complaint of sex-based harassment involving one or more students must offer an appeal to both parties from a dismissal of a complaint or from a determination regarding responsibility based on: (i) a procedural irregularity, (ii) new evidence, or (iii) a Title IX official's bias or conflict of interest that would change the outcome.¹⁵³

8. NOTICES, REPORTS, AND RECORDS

Previously, complainants had to file a signed written complaint in order to request an investigation.¹⁵⁴ When a formal complaint was filed, schools had to provide the parties with written notice of the allegations and procedures.¹⁵⁵ Once an investigation began, schools had to provide written notice of any meetings or hearings, the decision, and any delay, dismissal, or appeal decision.¹⁵⁶ Parties also had the right to inspect and respond in writing to the evidence **and** investigative report; to submit written questions in K-12 schools for the decisionmaker to ask the other party and witnesses; and to inspect a recording or transcript of the live hearing at institutions of higher education.¹⁵⁷ All schools had to keep records of all investigations, supportive measures, informal resolutions, and training materials for at least seven years.¹⁵⁸

Under the new rules, complainants can make an **oral or written** complaint to request an investigation of sex-based harassment (or other sex discrimination).¹⁵⁹ Complainants need not use any particular "magic words" in their complaint

so long as their request can be objectively understood by a reasonable person as a request for the school to investigate.¹⁶⁰ In addition, schools must continue to keep records of all investigations, supportive measures, informal resolutions, and training materials for at least seven years.¹⁶¹

Institutions of higher education that investigate complaints of sex-based harassment involving one or more students must continue to provide the parties with **written** notice of the allegations, procedures, meetings or hearings, decision, and any delay, dismissal, or appeal decision.¹⁶² The parties have the right to inspect and respond to the evidence **or** investigative report; submit questions for the decisionmaker or their advisors to ask the other party and witnesses; and to inspect a recording or transcript of any meeting or live hearing.¹⁶³

In all other investigations of sex-based harassment (or other sex discrimination) (i.e., all Title IX investigations at institutions of higher education that do not allege sex-based harassment involving a student and all Title IX investigations at K-12 schools), schools must provide the parties with written notice of the decision and **oral or written** notice of the allegations, procedures, and any delay, dismissal, or appeal decision.¹⁶⁴ The parties have the right to inspect either the evidence **or** a description of the evidence and respond orally or in writing to it.¹⁶⁵

D. WHAT SCHOOLS MUST DO TO PREVENT HARASSMENT

1. TRAINING

Previously, the Title IX rules required only Title IX staff (i.e., Title IX coordinators, investigators, decisionmakers, and informal resolution facilitators) to be trained on Title IX and sexual harassment.¹⁶⁶ Among other things, Title IX staff had to be trained on the 2020 rules' narrow definition of sexual harassment, the scope of a school's "education program or activity," how to conduct an investigation or informal resolution, and how to avoid prejudging the facts, conflicts of interest, and bias.¹⁶⁷ Advisors who were not Title IX staff were not required to be trained.¹⁶⁸ All training materials had to be published on the school's website.¹⁶⁹

Under the new rules, *all employees* must be trained on a school's Title IX duties to address sex discrimination, what conduct constitutes sex discrimination (including the definition of sex-based harassment), and their duty to report possible sex discrimination to the Title IX coordinator.¹⁷⁰ Additional training is required for *Title IX staff* (i.e., Title

IX coordinators, investigators, decisionmakers, informal resolution facilitators) and others who implement grievance procedures or have the authority to modify or terminate supportive measures on how to respond to and investigate or informally resolve complaints of sex discrimination.¹⁷¹ Finally, *Title IX coordinators* must also be trained on their specific responsibilities to oversee Title IX compliance, including by coordinating supportive measures and preventing discrimination against pregnant and parenting students.¹⁷² Advisors who are not employees or Title IX staff are still not required to be trained.¹⁷³ Schools may train employees on trauma-informed practices, as long as the training complies with Title IX's requirement to be fair, unbiased, and impartial toward both complainants and respondents.¹⁷⁴ All training materials must be available for inspection but do not have to be published on the school's website.¹⁷⁵

2. PREVENTION & ADDRESSING BARRIERS TO REPORTING

Previously, the Title IX rules did not require schools to prevent sexual harassment or address barriers to reporting.

Under the new rules, schools must prevent known sex-based harassment (or other sex discrimination) from recurring, even if the underlying complaint is dismissed.¹⁷⁶ If a school's initial preventive actions are ineffective, it must take additional actions.¹⁷⁷ Furthermore, the Title IX coordinator must identify and address barriers to reporting sex-based harassment (or other sex discrimination).¹⁷⁸ For example, a school can identify barriers to reporting by conducting a climate survey or focus groups.¹⁷⁹ Then, it can address those barriers by, for example, conducting trainings for a specific department, displaying information about the Title IX coordinator more prominently, creating more user-friendly Title IX materials, or adopting an amnesty policy for complainants who violate drug or alcohol policies during their harassment.¹⁸⁰

II. WHAT MUST SCHOOLS DO TO PROTECT LGBTQI+ STUDENTS FROM DISCRIMINATION?

Key Terms

- **LGBTQI+** is an acronym that stands for lesbian, gay, bisexual, transgender, queer/questioning, and intersex. The "+" symbol indicates that this umbrella term includes additional community members such as nonbinary people, asexual and/or agender people, and more.¹⁸¹
- A **transgender** person is someone whose gender identity differs from their sex assigned at birth.¹⁸²
- A **nonbinary** person is someone whose gender identity does not fit binary categories of "woman/girl" or "man/boy." Some nonbinary people may identify themselves as both nonbinary and transgender, and some do not.
- An **intersex** person is born with or develops variations in physical sex characteristics (including hormones, chromosomes, or anatomy) that do not align with the binary sex categories of "male" or "female."¹⁸³

Background: All students deserve to learn in safe and inclusive environments, yet LGBTQI+ students consistently face high rates of discrimination in the form of assault, harassment, bullying, and blame by school faculty when seeking help for mistreatment.¹⁸⁴ An overwhelming majority (76%) of LGBTQI+ students ages 13 to 21 report being verbally harassed during any given school year because of their sexual orientation, gender identity, or gender expression, and nearly one-third of students (31%) reported being physically harassed on these bases.¹⁸⁵ Over half of LGBTQI+ students (58.9%) report experiences with anti-LGBTQI+ policies and practices in schools that restricted writing, learning, and self-expression related to LGBTQI+ topics; prevented students from accessing facilities aligned with their gender; or led to discipline for activities that non-LGBTQI+ students are not disciplined for, such as holding hands with a girlfriend or boyfriend, or writing about their identity in a class assignment.¹⁸⁶

Transgender, nonbinary, and intersex students especially face significant discrimination while in school: 80% of adults who were out as transgender or perceived as transgender

while they were in K-12 schools experienced mistreatment in school, including verbal harassment, physical attacks, or denial of access to equal education,¹⁸⁷ and almost 25% of transgender and nonbinary students are sexually assaulted in college.¹⁸⁸ Intersex youth also report high rates of mistreatment, with 45% of intersex students experiencing gender-based harassment or discrimination from teachers or faculty during the past year.¹⁸⁹

These high rates of in-school victimization have been exacerbated by ongoing state and local attacks on LGBTQI+ students' rights to learn in safety. Many anti-LGBTQI+ laws single out transgender, nonbinary, and intersex students for discrimination by denying them safe and equal access to sex-separated programs and facilities, including school restrooms, locker rooms, and sports; censoring books about and classroom discussion on LGBTQI+ people, history, and health; and forcing schools to out LGBTQI+ students with no consideration for individual students' needs and safety.¹⁹⁰ These discriminatory laws send a message to the school community that LGBTQI+ students are "acceptable" targets for further harassment and disproportionate discipline,¹⁹¹ which exacerbates poor health outcomes (e.g., depression, suicidality)¹⁹² and poor academic outcomes (e.g., lower attendance, grades, and graduation rates).¹⁹³

In the wake of the Trump administration rolling back LGBTQI+ students' civil rights protections, along with hostile politicians' legislative attacks, the Biden administration's new rules affirm these vulnerable students' rights to be free from sex discrimination under Title IX.

A. DEFINITION OF DISCRIMINATION

Previously, the Title IX rules did not expressly address LGBTQI+ students and the sex discrimination they face—despite overwhelming legal precedent, even before the Supreme Court's *Bostock v. Clayton County* decision in 2020, recognizing that Title IX and other antidiscrimination laws prohibit discrimination based on sexual orientation and gender identity.¹⁹⁴ In *Bostock*, the Supreme Court confirmed that sex discrimination includes sexual orientation and gender identity discrimination, because an individual's sexual orientation and gender identity are "inextricably bound up with sex."¹⁹⁵ Since then, federal courts have continued applying this standard to Title IX to affirm anti-discrimination protections for transgender and queer students.¹⁹⁶

Under the new Title IX rules, the rule text expressly clarifies

that sex discrimination under Title IX includes discrimination based on actual or perceived sexual orientation (including asexuality or bisexuality), gender identity (including transgender or nonbinary status), sex characteristics (including intersex traits), or sex stereotypes.¹⁹⁷

B. ACCESS TO FACILITIES AND PROGRAMS

Under the new Title IX rules, the text clarifies, consistent with federal court decisions and Title IX's broad promise of equality, that schools must allow transgender, nonbinary, and intersex students (and some non-student individuals)¹⁹⁸ to participate in sex-separated classes and activities (including physical education classes), use restrooms and locker rooms, and dress and groom themselves consistent with their gender identity.¹⁹⁹ In the case of nonbinary students, a school can coordinate with the student (or a minor K-12 student's parent or guardian) to determine how to best ensure equal access to sex-separated programs and activities.²⁰⁰ Schools can ask a student or someone else (e.g., parent, teacher, coach, counselor) to confirm the student's gender, but they cannot require any student to submit to invasive medical inquiries or burdensome documentation requirements—especially when their state has barred access to amended birth certificates or gender-affirming care.²⁰¹

C. ATHLETICS

Background: Participating in school sports is an essential part of an education. Sports participation is linked to higher grades, standardized test scores, and graduation rates, in addition to increased psychological well-being and feelings of connectedness to the school community.²⁰² Playing sports also teaches students the values of self-discipline, teamwork, and allows them to develop important leadership skills.²⁰³ These benefits are especially important for LGBTQI+ youth, whose experiences of harassment and discrimination in school create higher risks of poor mental health and academic outcomes.²⁰⁴ Unfortunately, at least 25 states have enacted laws or policies that prohibit many or all transgender, nonbinary, and intersex students from playing school sports, either in K-12 schools, institutions of higher education, or both.²⁰⁵ These sports bans both deprive students of the benefits of playing school sports and make them an obvious target for bullying and assault by singling them out for stigma.

Anti-trans politicians have attempted to garner support for these discriminatory laws by pushing the lie that banning

transgender, nonbinary, and intersex students from school sports is necessary to “protect cisgender women and girls.” However, sports bans threaten the safety of transgender and intersex women and girls and nonbinary students and cisgender women and girls. This is because sports bans promote body policing of all students by enabling schools to single out *any* student that does not conform to stereotypical characteristics of how girls and women “should” look. States have already turned to body policing to enforce their sports bans by, for example, forcing students to submit to “sex verification”—invasive and unscientific practices (e.g., hormonal or chromosomal testing, disclosures of reproductive health information, even genital exams of young students) imposed for the purpose of “proving” someone is “truly” a girl or woman.²⁰⁶ This means any girl or woman who is especially tall, muscular, or strong; has short hair or a deep voice; or excels at her sport will be subject to scrutiny. This dangerous scrutiny already occurs domestically²⁰⁷ and internationally.²⁰⁸ Black and brown girls and women are especially vulnerable to excessive scrutiny, given the racist and sexist history governing sports bodies have displayed in forcing them to submit to sex verification to reinforce white-centric ideals of femininity in sports.²⁰⁹

Previously, the Title IX rules did not explicitly address transgender, nonbinary, and intersex students’ participation in school sports.

The new rules do not address it either. Although the Biden administration previously planned to finalize its proposed athletics rule with the rest of the 2024 rules, it indicated in March 2024²¹⁰ that it will instead delay the athletics rule until after the November 2024 general election.²¹¹

D. ANTI-LGBTQI+ HARASSMENT

Under the new Title IX rules, schools must take steps to address sex-based harassment, including anti-LGBTQI+ harassment, consistent with the requirements detailed in **Part I** above. The new rules clarify that sex-based harassment includes harassment that is based on a student’s actual or perceived sexual orientation (including asexuality or bisexuality), gender identity (including transgender or nonbinary status), sex characteristics (including intersex traits), or sex stereotypes.²¹²

Although the Department of Education has clarified that one instance of unintentional misgendering does not constitute sex-based harassment,²¹³ we expect that the Department will continue to investigate complaints of misgendering

based on the facts of individual students’ situations, consistent with federal case law and the Department’s recent investigations and case resolutions.²¹⁴ For example, in 2022, the Department found that a California school district violated Title IX when it did not protect a transgender student from being harassed, including being misgendered, over several months, which negatively impacted her grades and mental health.²¹⁵ In 2023, the Department entered a resolution agreement with a Wisconsin school district that failed to stop the repeated misgendering and other harassment of a nonbinary student by multiple classmates and teachers and misclassified the sex-based harassment as “peer mistreatment.”²¹⁶

E. PRIVACY AND SAFETY

Previously, the Title IX rules did not address privacy or safety protections for LGBTQI+ students.

Under the new rules, a school cannot disclose any individual’s personally identifiable information (PII) that is obtained through the course of complying with Title IX unless: (i) the individual gives written consent, (ii) the school discloses a minor K-12 student’s PII to their parent or guardian, (iii) the school must disclose the PII to comply with Title IX, FERPA (a federal privacy law), or another federal law, or (iv) the school must disclose the PII to comply with a state law, which does not conflict with Title IX or FERPA.²¹⁷

This means that if a school learns about a *minor K-12 student’s* LGBTQI+ status or receipt of gender-affirming care because the student reports experiencing anti-LGBTQI+ harassment or other discrimination, then the school *can* disclose this information to the student’s **parent or guardian**.²¹⁸ For students of all ages, a school cannot disclose a student’s receipt of gender-affirming care to the **police** unless the school obtains this information in a context outside of compliance with Title IX (e.g., overhearing two students talking), or the state has a law that requires such a disclosure.²¹⁹

Furthermore, even if a disclosure of a student’s LGBTQI+ status would meet one of the above PII exceptions, such a disclosure to **other students or employees** can nonetheless create a hostile environment in violation of Title IX.²²⁰ Similarly, forcibly outing a student is prohibited under Title IX if done for the purpose of retaliating against the student.²²¹ Likewise, a school violates Title IX if it maintains a policy that discloses students’ sexual orientation or gender

identity but only applies it to LGBTQI+ students.²²²

Finally, as discussed above in **Part II.B**, schools cannot require any student to submit to invasive medical inquiries or burdensome documentation requirements to establish their gender identity.²²³

III. WHAT MUST SCHOOLS DO TO PROTECT PREGNANT AND PARENTING STUDENTS FROM DISCRIMINATION?

Background: Pregnancy and parenthood should not derail a student's education. Unfortunately, pregnant and parenting students continue to face barriers to completing their education, including stigmatization, discrimination, and denial of accommodations. They may also lack access to resources such as high-quality, affordable child care, which makes it harder for them to remain in school. Only half of teenage mothers earn a high school diploma by age 22²²⁴ and less than 2% of teen mothers graduate from college by age 30.²²⁵ Unlawful discrimination plays a major role in this dropout rate, even though the first Title IX rules regarding pregnancy and related medical conditions were introduced in 1975. After the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which eliminated the constitutional right to abortion, the Department of Education issued guidance to clarify the scope of Title IX protections for pregnant students.²²⁶ The new rules provide updated protections to ensure pregnant and parenting students have equal access to education and receive the support they need to thrive in school.

A. COVERED DISCRIMINATION

Previously, schools could not discriminate against students because of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions.²²⁷ Schools also could not exclude a student from an education program or activity, including athletic programs, because of pregnancy or a related medical condition.²²⁸ Additionally, schools could not apply a rule concerning a student's or applicant's "actual or potential" parental, family, or marital status if the rule treated students differently on the basis of sex.²²⁹

Under the new rules, schools cannot discriminate based on actual or perceived "current, potential, or past" pregnancy or related conditions,²³⁰ which now explicitly includes lactation, as well as childbirth, termination of

pregnancy (including abortion or miscarriage), and "medical conditions" or "recovery" related to any of these conditions (including menstruation or menopause).²³¹ For example, a school cannot withhold a scholarship, housing, or access to an extracurricular activity from a student because they sought or had an abortion and cannot prevent a student from using the restroom to address menstrual needs.²³²

In addition, schools still cannot "adopt or implement any policy, practice, or procedure" based on a student's or applicant's "current, potential, or past" parental, family, or marital status if it treats them differently on the basis of sex.²³³ Unfortunately, the rule continues to be insufficient in addressing protections for students based on their parental status: while schools cannot treat mothers less favorably than fathers, schools can treat parenting students worse than non-parenting students or non-birthing parents (parents who did not give birth to their child) worse than birthing parents, as long as they do so equally across genders.²³⁴

B. HOW SCHOOLS MUST PREVENT DISCRIMINATION

Previously, the Title IX rules did not clarify the role that employees and Title IX coordinators played in preventing discrimination when a school knew of a student's pregnancy or related condition.

Under the new rules, when school employees are informed of a student's pregnancy or related conditions by the student or their legal representative, they must promptly provide the student with the Title IX coordinator's contact information.²³⁵ (However, an employee is not required to ask students unprompted or make assumptions about a student's pregnancy or related condition or to give a Title IX coordinator's information to a student if they are not informed directly by the student—e.g., the coordinator overhears two students talking.²³⁶)

Then, the Title IX coordinator must take specific actions to prevent discrimination and ensure equal access to education, including promptly informing the student of their Title IX rights and providing reasonable modifications, voluntary access to a separate and comparable program, voluntary leaves of absence, and a lactation space, as detailed below in **Parts III.B.1-4**.²³⁷ After the school takes initial actions to provide the student with reasonable modifications, the school must make additional modifications if a new need emerges related to the student's

pregnancy or related conditions.²³⁸

Documentation: Under the new rules, a school cannot require a student who is pregnant or has a related condition to submit documentation to obtain a reasonable modification, separate and comparable program, leave of absence, or lactation space unless the student's documentation is necessary and reasonable for the school to determine whether and what specific actions to take.²³⁹

Documentation is not necessary or reasonable if: (i) the student's need is obvious (e.g., bigger uniform); (ii) the modification is allowing a student to have water nearby, use a bigger desk, sit, stand, take breaks, or fulfill lactation needs; (iii) prior documentation is sufficient; or (iv) documentation is not required of students who are not pregnant or do not have a related condition.²⁴⁰

When documentation is necessary and reasonable for certain modifications (e.g., medically ordered bed rest, lifting restriction during clinical placement), it must be limited to basic information like the extent and duration of the modification, not unnecessary and invasive details about the pregnancy itself (e.g., how a student will get a legal or illegal abortion).²⁴¹ In addition, schools may presume that students who request a reasonable modification, leave of absence, or comparable program related to an abortion intend to obtain a legal abortion.²⁴²

1. EXCLUSION OR SEPARATION

Previously, schools were generally prohibited from excluding a student from an education program or activity based on the student's pregnancy or related condition.²⁴³ If a school required students with other temporary medical conditions to provide a physician's note in order to participate in an education program or activity, then the school could require a similar note for students who were pregnant or had a related condition.²⁴⁴ If a school operated a separate program for pregnant or parenting students, it had to be comparable to those offered to students who were not pregnant or parenting, and the student's participation in the program had to be voluntary.²⁴⁵

Under the new rules, schools are prohibited to a greater extent from excluding or involuntarily separating students who are pregnant or have a related condition from an education program or activity. Specifically, schools cannot require students who are pregnant or have a related condition to provide a doctor's note or other certification from a healthcare provider or any other person (not just a physician) that the student is able to participate in a class,

program, or extracurricular activity, unless: (i) the certified level of health is necessary for class, program, or activity; (ii) *all* students must provide such certification; and (iii) the information is not used as a basis for discrimination against the student.²⁴⁶ As with the previous rule, if a school operates a separate program for students who are pregnant or have a related condition, it must be comparable to those offered to students who are not pregnant and do not have a related condition, and the student's participation in the program must be voluntary.²⁴⁷

2. LEAVES OF ABSENCE

Previously, schools had to excuse leaves of absence for pregnancy or related conditions for as long as the student's physician deemed medically necessary.²⁴⁸ Upon the student's return, the student had to be reinstated to their status prior to their leave.²⁴⁹

Under the new rules, the previous protections are expanded to clarify that any leave of absence for pregnancy or a related condition must be voluntary.²⁵⁰ At a minimum, students must be able to take a voluntary leave of absence from their program for a period deemed medically necessary by a healthcare provider (not just a physician).²⁵¹ If the school maintains a leave policy that provides more leave than is medically necessary or offers a more generous leave policy to students with other temporary medical conditions, the student can choose to take additional leave under that policy.²⁵² Upon return, the student must be reinstated to their prior academic status and, where practicable, their prior extracurricular status.²⁵³ Schools can also offer leaves of absence to students based on parental or caregiver status as long as they do not treat students differently based on gender.²⁵⁴ (See **Part III.B.3** for shorter absences that do not amount to a leave of absence and are instead considered reasonable modifications.)

3. REASONABLE MODIFICATIONS

Previously, students who were pregnant or had a related condition only had a right to accommodations and other policies to the extent that they were also offered to temporarily disabled students.²⁵⁵ The Department of Education clarified through a guidance document that accommodations included homebound instruction, tutoring, access to an elevator, a larger desk, or permission for more frequent trips to the bathroom.²⁵⁶

Under the new rules, students who are pregnant or have a related condition have an affirmative right to reasonable modifications, unrelated to the rights that students have

based upon their temporary disability status.²⁵⁷ The Title IX coordinator must consult with the student to determine what modifications are necessary, and the student may accept or reject a modification offered by the school or request an alternative modification.²⁵⁸ A modification is not reasonable and need not be offered if it would “fundamentally alter” the nature of the school’s program or activity (e.g., completely waiving clinical components, exams, or entire senior year).²⁵⁹ If there are two or more reasonable modifications that would address a student’s needs while preventing sex discrimination and ensuring equal access to the school’s programs, the school has discretion in which modification it will offer.²⁶⁰

Reasonable modifications include but are not limited to: breaks during class to attend to health needs, express milk, or breastfeed/chestfeed; changes in physical space or supplies (e.g., larger desk, footrest, changed seat, elevator access, sitting or standing, keeping water nearby, modified uniform); intermittent absences for medical appointments; coursework extensions, rescheduled exams, or untimed exams; changes in course schedule or sequence (e.g., making up missed class, switching to a comparable course, deferring a course, repeating a course); reduced or modified duties in a clinical course; or access to tutoring, taped lectures, or online or other homebound education.²⁶¹

Schools can also offer reasonable modifications to students based on parental or caregiver status, as long as they do not treat parenting or caregiving students differently based on gender.²⁶²

For all reasonable modifications, schools cannot treat pregnancy or related conditions worse than any other temporary medical conditions.²⁶³ For example, if a school offers more generous breaks to students with other temporary medical conditions than are required as a reasonable modification under Title IX, then the school must offer the same breaks to students who are pregnant or have a related condition, even if it would not be a reasonable modification or would constitute a fundamental alteration under Title IX.²⁶⁴

4. LACTATION SPACE

Previously, the Title IX rules were silent on lactation accommodations, but the Department of Education recommended that schools designate a private room for students to breastfeed/chestfeed, pump milk, or address other needs related to breastfeeding/chestfeeding during the school day.²⁶⁵

Under the new rules, schools must ensure there is a clean, accessible, and private lactation space that is not a bathroom where students can pump or express breastmilk or chest milk. Further, where students are allowed to bring their children into the school’s program or activity, they may also use the lactation space to breastfeed or chestfeed.²⁶⁷

C. HOW SCHOOLS MUST RESPOND TO HARASSMENT

Previously, the Title IX rules did not explicitly mention schools’ obligation to address harassment of pregnant or parenting students.

Under the new rules, it is clear that harassment based on pregnancy or related conditions (e.g., childbirth, termination of pregnancy, lactation, related medical conditions, recovery from these conditions) is a form of prohibited sex-based harassment under Title IX. Schools must maintain grievance procedures to address this form of harassment in a prompt and equitable manner, consistent with the requirements detailed above in **Part I** above for all types of sex-based harassment.²⁶⁸

The new rules are insufficient in protecting students based on their parental status, however. Although schools cannot treat parents differently based on gender (e.g., schools cannot ignore harassment of mothers while addressing harassment of fathers), schools can ignore harassment of parenting students (versus non-parenting students), as long as they do so equally across genders.²⁶⁹

D. PRIVACY AND SAFETY

Previously, the Title IX rules did not address privacy protections for students who are pregnant or have a related condition, including termination of pregnancy through abortion or miscarriage.

Under the new rules, schools are not required to document their compliance with Title IX when taking actions to *prevent discrimination* against students who are pregnant or have a related condition in order to protect their privacy.²⁷⁰ This means a school does not have to document when a student informs it of their pregnancy or related condition, or when it provides a student who is pregnant or has a related condition with reasonable modifications, a separate and comparable program, leave of absence, or lactation space. However, a school must still document its actions to *address harassment or other discrimination* based on pregnancy or

a related condition—e.g., if a student physically harassed by their peers for being visibly pregnant or is excluded from a physical education class because they are menstruating.²⁷¹

In addition, as discussed above in **Part III.B**, schools cannot require a student who is pregnant or has a related condition to submit documentation to obtain a service described in **Parts III.B.1-4** unless the documentation is necessary and reasonable. Even then, schools cannot require documentation of unnecessary and invasive details, such as how a student will get a legal or illegal abortion.²⁷² Schools may presume that students who request a service related to an abortion intend to obtain a legal abortion.²⁷³

Finally, a school cannot disclose any individual's personally identifiable information (PII) obtained through the course of complying with Title IX, unless: (i) the individual gives written consent, (ii) the school discloses a minor K-12 student's PII to their parent or guardian, (iii) the school must disclose the PII to comply with Title IX or another federal law, or (iv) the school must disclose the PII to comply with a state law, which does not conflict with Title IX or FERPA (a federal privacy law).²⁷⁴

This means that if, for example, a school learns about a *minor K-12 student's* pregnancy, abortion, miscarriage, or other related condition because the student requests an excused absence or reports being harassed on that basis, then the school *can* disclose this information to the student's **parent or guardian**.²⁷⁵ However, for students of all ages, a school *cannot* disclose a student's abortion or miscarriage to the **police** unless the school obtains this information in a context outside of compliance with Title IX (e.g., overhearing two students talking), or the state has a law that requires such a disclosure.²⁷⁶

E. PREGNANT AND PARENTING EMPLOYEES

Previously, the Title IX rules prohibited schools from engaging in sex-based discrimination in employment actions. This specifically included leave policies for pregnancy, childbirth, termination of pregnancy, leave for persons of "either sex" to care for children or dependents, or any other leave.²⁷⁷

Under the new rules, schools cannot adopt or apply practices, procedures, or employment actions on the basis of sex, which includes "current, potential, or past" parental, family, or marital status.²⁷⁸ Schools also cannot discriminate against employees or applicants for employment due

to "current, potential, or past" pregnancy or related conditions.²⁷⁹

If an employee is pregnant or has a related condition:

- The school cannot treat the employee worse than an employee with any other temporary medical condition for job-related purposes such as leave policies, disability income, and seniority.²⁸⁰
- If there is no leave policy or the employee has insufficient leave, the school must allow them to take a voluntary leave of absence without pay for a reasonable period of time.²⁸¹ (However, if the school has a more generous leave policy for employees who have any other temporary medical condition, then it must apply that policy to the employee who is pregnant or has a related condition.²⁸²)
- The school must, at a minimum, provide the employee with modifications that employees with any other temporary medical condition are provided.²⁸³ If the employee is also a student, they have a right to reasonable modifications (see **Part III.B.3**) as pregnancy-related needs impact their employment.²⁸⁴
- The school must provide the employee with a clean, accessible, and private lactation space other than a bathroom and with reasonable break time to express breast milk/chest milk or breastfeed/chestfeed.²⁸⁵

IV. WHAT MUST SCHOOLS DO TO ADDRESS OTHER SEX DISCRIMINATION?

For the first time, the new Title IX rules impose detailed requirements on school procedures to address all types of sex discrimination, including sex discrimination that does not constitute sex-based harassment or discrimination based on LGBTQI+ status, pregnancy or related conditions, or parental, family, or marital status.

Previously, the Title IX rules did not create any specific requirements for grievance procedures addressing complaints of other sex discrimination, aside from requiring a prompt and equitable resolution.²⁸⁶ They also did not discuss the availability of supportive measures for students who reported other sex discrimination or schools' obligation to prevent other sex discrimination.

Under the new rules, schools must prevent and respond

to all other sex discrimination as detailed above in **Part I** wherever “(or other sex discrimination)” is mentioned.²⁸⁷ This includes conducting trainings, offering supportive measures, prohibiting retaliation, and, if requested, conducting an investigation or informal resolution. In situations where a *complaint* alleges that the school’s policy or practice (instead of a person) is the cause of the other sex discrimination, the school need only investigate using a set of procedures that are “prompt and equitable,”²⁸⁸ rather than applying the specific investigation procedures that are detailed above in **Part I.C.**

V. CAN RELIGIOUS SCHOOLS ENGAGE IN SEX DISCRIMINATION?

Background: Title IX provides that schools controlled by religious organizations are not required to follow any Title IX provisions that are inconsistent with their religious tenets.²⁸⁹ For years, schools have claimed religious exemptions under Title IX to be able to discriminate against women, pregnant and parenting students, students who access or are seeking access to abortion or birth control, and LGBTQI+ students—all in the name of religion. In 2020, the Trump administration made changes to the Title IX rules that allow more schools to claim a religious exemption and create less transparency around exemptions. The Biden administration has not reversed these changes.

Before the 2020 rules, a school could request a religious exemption from Title IX if it was *controlled by a religious organization*, as set out in the Title IX statute and earlier Department of Education memoranda.²⁹⁰ Schools would notify the Department of Education in advance of their intent to rely on a religious exemption, as this was the best way to ensure exemption claims were sincere.

Currently, a school can claim a religious exemption from Title IX even if it is not actually controlled by a religious organization—for example, if: (i) it is a divinity school, (ii) it requires its students or staff to follow a certain religion, (iii) its charter claims it is controlled by a religious organization, (iv) it has a doctrinal statement of religious beliefs or practices that it requires its students to follow, or (v) its mission statement refers to religious beliefs.²⁹¹ In addition, schools are not required to give the Department of Education, students, or their families any advance notice that they do not follow part of Title IX’s nondiscrimination mandate and can instead assert a religious exemption *after* they are already under investigation for violating Title IX.²⁹²

While this was allowed in practice before the 2020 rules, schools often requested prior acknowledgment of their religious exemption from the Department of Education. Allowing schools to engage in discrimination without providing advance notice about an exemption from Title IX is inconsistent with the Title IX rule requirement that schools must provide notice of their nondiscrimination policies and has made it more difficult for current and prospective students and their families to make informed decisions when choosing a school.²⁹³

Note: The new rule allows schools to include information about its religious exemptions in their notices of nondiscrimination.²⁹⁴ In addition, the Biden administration’s Department of Education has stated that schools cannot claim a religious exemption if they have a “tenuous relationship” to a religious organization or “loose ties” to religious teachings or principles, and that the Department will still investigate if a school’s religious tenets do not apply to the alleged sex discrimination at issue.²⁹⁵

FOOTNOTES

- 1 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106), <https://www.federalregister.gov/d/2024-07915>.
- 2 *Id.* at 33841. Incidents occurring before August 1, 2024, must be addressed under the Title IX rules in place at the time of the incident. *Id.*
- 3 *Id.* at 33526. This includes charter schools and private institutions of higher education that receive federal student loans, grants, and work study funds. *Id.* at 33527, 33866. The Title IX rules also apply to education programs of other entities that receive funds from the Department of Education, including public libraries, museums, and youth legal (“juvenile justice”) facilities. *Id.* at 33634, 33825.
- 4 National Women’s Law Center, *DeVos’s New Title IX Sexual Harassment Rule, Explained* (May 12, 2020), <https://nwlc.org/resource/devos-new-title-ix-sexual-harassment-rule-explained>.
- 5 Kayla Patrick & Neena Chaudhry, National Women’s Law Center, *Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence 1-2* (2017), <https://bit.ly/3wD6V54>.
- 6 David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* at A7-27, A7-56, (Oct. 15, 2019), <https://bit.ly/3P2SR14> [hereinafter AAU Report]. These statistics reflect the percentage of students who were subjected to nonconsensual sexual contact through force, incapacitation, coercion, or without voluntary agreement (for example, 25.9% of college women were sexually assaulted by force or incapacitation; 26.1% by force, incapacitation, or coercion; and 31.6% by force, incapacitation, coercion, or without voluntary agreement), as well as the percentage of students who did not report that they had been subjected to nonconsensual sexual contact through force or incapacitation. *Id.*
- 7 Sarah Nesbitt & Sage Carson, Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout 12-16* (2021), <https://www.advocatesforyouth.org/wp-content/uploads/2024/06/Know-Your-IX-2021-Cost-of-Reporting.pdf>.
- 8 *Id.* at 4-6.
- 9 Shiwali Patel, Elizabeth X. Tang, Hunter F. Iannucci, *A Sweep As Broad As Its Promise: 50 Years Later, We Must Amend Title IX to End Sex-Based Harassment in Schools*, 83 La. L. Rev. 939, 961-64 (2023), <https://digitalcommons.law.lsu.edu/lalrev/vol83/iss3/9>.
- 10 Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. Coll. Student Retention: Res., Theory & Prac. 234, 244 (2015), <https://bit.ly/3TllZna>.
- 11 See, e.g., Dep’t of Educ., Office for Civil Rights, *Q&A on Campus Sexual Misconduct* (Sept. 22, 2017; rescinded Aug. 14, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [hereinafter 2017 Guidance]; Dep’t of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter 2014 Guidance]; Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter 2011 Guidance]; Dep’t of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5512 (Jan. 19, 2001; rescinded Aug. 14, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> [hereinafter 2001 Guidance]; Dep’t of Educ., Office for Civil Rights, *Sexual Harassment Guidance*, 62 Fed. Reg. 12034 (Mar. 13, 1997) [hereinafter 1997 Guidance].
- 12 34 C.F.R. § 106.30(a) (2020) (defining “sexual harassment”); see also § 106.45(b)(3)(i) (2020).
- 13 34 C.F.R. § 106.10 (2024).
- 14 § 106.2 (2024) (defining “sex-based harassment”). In cases of quid pro quo harassment, a person’s acquiescence or failure to object to the conduct does not mean that the conduct was welcome. 89 Fed. Reg. at 33496. A student who is authorized to provide an educational aid, benefit, or service can be a quid pro quo harasser. *Id.* And an aid, benefit, or service may be academic or extracurricular. *Id.*
- 15 § 106.2 (2024) (defining “sex-based harassment”). For **sexual assault**, schools may adopt their own definition of “consent” (consistent with state law) and may consider a student’s age and developmental level (consistent with disability law). 89 Fed. Reg. at 33520-21. Coercive or controlling behavior by an intimate partner that does not meet the definition of **dating violence** or **domestic violence** may still constitute sex-based harassment if it meets the definition of “hostile environment harassment.” *Id.* at 33521-22. In addition, schools may treat acts of “verbal, psychological, economic, or technological abuse that does not constitute criminal behavior” from a current or former spouse or intimate partner as **domestic violence** for Title IX purposes. Letter from Dep’t of Educ., Office for Civil Rights, to S. Daniel Carter (June 10, 2024), <https://safecampuses.biz/wp-content/uploads/2024/06/OCR061024.pdf>. For **stalking**, a reasonable person is a reasonable person in the complainant’s position, and treatment or counseling is not required to show “substantial emotional distress.” 89 Fed. Reg. at 33522-23. **Sex trafficking** may constitute sex-based harassment if it meets the definition of “hostile environment harassment.” *Id.* at 33518.
- 16 § 106.2 (2024) (defining “sex-based harassment”). Conduct is considered “severe or pervasive” if it “limits or denies” a person’s ability to participate in or benefit from an education program or activity. 89 Fed. Reg. at 33508. The “limit” standard does not require any particular harm, such as lower grades or attendance. *Id.* at 33511. Conduct can be harassment even if the harasser does not act with animus. *Id.* Harassment can be “pervasive” if it is “widespread, openly practiced, or well-known to students and staff (such as sex-based harassment occurring in the hallways, graffiti in public areas, or harassment occurring during recess under a teacher’s supervision).” *Id.* at 33509. Students and schools can also look at sexual harassment law in the employment context under Title VII to assess when conduct is “severe or pervasive,” as the standard for hostile educational environment parallels the one for a hostile workplace environment. *Id.*
- 17 § 106.2(2)(i)-(v) (2024). Schools cannot ignore a complainant simply because they are “high functioning,” not “traumatized enough,” or not a “perfect victim.” 89 Fed. Reg. at 33513. If multiple respondents create a hostile environment for a complainant, the school must address it even if each respondent’s individual conduct does not meet the “severe or pervasive” standard. *Id.* at 33514.
- 18 See, e.g., 2017 Guidance, *supra* note 11; 2014 Guidance, *supra* note 11; 2011 Guidance, *supra* note 11; 2001 Guidance, *supra* note 11; 1997 Guidance, *supra* note 11.
- 19 Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying 2* (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>; Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter on Prohibited Disability Harassment* (July 25, 2000), <https://www2.ed.gov/about/offices/list/ocr/docs/disabharasstr.html> (defining disability-based harassment as “severe, persistent, or pervasive”); Dep’t of Educ., Office for Civil Rights, *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11448 (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html> (defining race-based harassment as “severe, pervasive or persistent so as to interfere with or limit” a person’s ability to participate in or benefit from a school program or activity).
- 20 §§ 106.44(a), 106.45(b)(3)(i) (2020); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30105, 30199 (May 19, 2020), <https://www.federalregister.gov/d/2020-10512> [hereinafter Trump Rule]. See also Dep’t of Educ., Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment*, 8-10 (July 2021; updated June 28, 2022; rescinded Aug. 1, 2024), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf> [hereinafter 2021 Guidance].
- 21 § 106.11 (2024). Online harassment may include nonconsensual distribution of intimate images (including deepfake images), cyberstalking, sending sex-based pictures or cartoons, and harassment on social media platforms, in remote learning, by school email or phone, or on a school’s website. 89 Fed. Reg. at 33515.
- 22 *Id.* at 33529.
- 23 *Id.* at 33533-34.
- 24 *Id.* at 33533.
- 25 § 106.11 (2024).
- 26 89 Fed. Reg. at 33532, 33852.
- 27 *Id.* at 33533-34.
- 28 *Id.* at 33530 (citing § 106.2 (2024)).
- 29 § 106.30(a) (2020) (defining “formal complaint”). There was an exception if the student was an applicant who intended to enroll in the school, or an alumnus who intended to stay involved in alumni programs. *Id.*

- 30 § 106.2 (2024) (defining “complainant”). A complainant may be (but is not limited to) a postdoctoral trainee or fellow, volunteer, prospective student, guest speaker, member of the public (e.g., at a sporting event, summer camp, or tour), or visiting student athlete. 89 Fed. Reg. at 33483-84.
- 31 § 106.45(b)(3)(ii) (2020).
- 32 § 106.45(d)(1)(ii) (2024). Even if a school cannot identify an anonymous online harasser, it can still investigate to determine how unsafe conditions, lack of monitoring, or inadequate policies could have contributed to the harassment. 89 Fed. Reg. at 33684.
- 33 § 106.45(d)(4)(i)-(iii) (2024). See also § 106.44(f)(6) (2024).
- 34 89 Fed. Reg. at 33685-86; see also Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41446-47 (July 12, 2022), <https://www.federalregister.gov/d/2022-13734> [hereinafter Biden Proposed Rule] (campus ban).
- 35 § 106.30(a) (2020) (defining “actual knowledge”).
- 36 *Id.*; § 106.44(a) (2020).
- 37 §§ 106.44(a)(1), 106.44(c)(1)-(2) (2024).
- 38 § 106.44(c)(1) (2024).
- 39 § 106.44(c)(2)(i) (2024). Institutions of higher education have the discretion to determine which employees have the authority to institute corrective measures. 89 Fed. Reg. at 33575. Employees with **administrative leadership** responsibilities include deans, coaches, public safety supervisors, assistant or associate deans, and program directors; employees with **teaching** responsibilities include full-time, part-time, and adjunct faculty and graduate students who have full responsibility for teaching and grading students; and employees with **advising** responsibilities include academic advisors and advisors for student organizations, including fraternities and sororities. *Id.* (citing Biden Proposed Rule, 87 Fed. Reg. at 41439).
- 40 § 106.44(c)(2)(ii) (2024). Institutions of higher education have the discretion to determine which of these two actions these employees must take or to leave the discretion to these employees. 89 Fed. Reg. at 33574.
- 41 §§ 106.2 (2024) (defining “confidential employee”), 106.44(d) (2024); see also 89 Fed. Reg. at 33579-81.
- 42 § 106.44(e) (2024). This applies to public awareness events held on campus or on a school-sponsored online platform, not to off-campus events or disclosures made in academic assignments or on social media. 89 Fed. Reg. at 33587. Schools must evaluate whether there is an “imminent” and “serious threat” based on the set of factors listed in § 106.44(f)(1)(v). *Id.* at 33586.
- 43 § 106.44(e) (2024); see also 89 Fed. Reg. at 33586.
- 44 § 106.44(a) (2020); see also § 106.44(b)(2) (2020).
- 45 §§ 106.44(a), 106.44(f)(1) (2024); see also 89 Fed. Reg. at 33562. A school is legally required to respond to harassment even when the respondent is the only employee with knowledge of harassment, but the Department of Education recognizes that the school may be practically unable to respond until after a report or complaint is made to a second non-confidential employee. *Id.* at 33563.
- 46 §§ 106.44(f)(1)(ii), 106.44(g) (2024). Schools must also offer supportive measures to the respondent if needed to preserve or restore their access to education or to provide support during a grievance procedure or informal resolution. § 106.2 (2024) (defining “supportive measures”).
- 47 § 106.30(a) (2020) (defining “supportive measures”).
- 48 §§ 106.44(g) (2024), 106.2 (2024) (defining “supportive measures”).
- 49 § 106.45(d)(4)(i) (2024).
- 50 § 106.2 (2024) (“supportive measures”). A supportive measure is “disciplinary” if it does not remedy barriers to access for the other party; however, a supportive measure is not inherently disciplinary simply because it could also be a disciplinary sanction. 89 Fed. Reg. at 33608. A supportive measure may change from being reasonably burdensome to “unreasonably” burdensome at the end of an investigation, especially if the school decides in favor of the respondent. *Id.* at 33609.
- 51 § 106.44(g)(1) (2024); 89 Fed. Reg. at 33606 (withdrawals, transcript adjustments, tuition reimbursements).
- 52 § 106.44(g)(1) (2024); 89 Fed. Reg. 33607 (involuntary schedule changes), 33608 (seat change, educational conversation).
- 53 *Id.* at 33617 (partial removal), 33619 (paid administrative leave).
- 54 § 106.2 (2024) (“supportive measures”). The respondent may not receive supportive measures if there is no investigation or informal resolution. 89 Fed. Reg. at 33605.
- 55 *Id.* at 33611.
- 56 § 106.44(g)(5) (2024). For example, a school cannot tell a respondent that the complainant is receiving counseling, but it may tell a complainant that the respondent has moved to another dorm. 89 Fed. Reg. at 33612.
- 57 § 106.44(g)(4) (2024). A material change in circumstances may include a complainant’s withdrawal from a class that the respondent had to leave or a school’s finding that the respondent is not responsible. 89 Fed. Reg. at 33610.
- 58 §§ 106.45(b)(9), (b)(9)(iii) (2020).
- 59 §§ 106.45(b)(9), (9)(i), (9)(ii) (2020).
- 60 § 106.44(k)(1) (2024). Unlike the 2020 rules, the new rules allow schools to offer an informal resolution even when the complainant does not file a complaint. 89 Fed. Reg. at 33624-25. An informal resolution may include requiring a respondent to take steps to repair their relationship with the complainant without requiring face-to-face interaction. *Id.* at 33633.
- 61 § 106.44(k)(2)-(3) (2024). The school can choose to offer an informal resolution to the respondent first, even if the complainant has not agreed yet. 89 Fed. Reg. at 33629. If one of the parties breaches an informal resolution agreement or if the school learns of fraud by one of the parties, the school can void the agreement and initiate or resume an investigation. *Id.* at 33625.
- 62 § 106.44(k)(1)(i)-(ii) (2024); 89 Fed. Reg. at 33628.
- 63 § 106.44(k)(3)(v); 89 Fed. Reg. at 33630.
- 64 § 106.71 (2020).
- 65 *Id.* For example, a complainant could not be punished for being underage and intoxicated during their own sexual assault or for engaging in consensual sexual activity on school grounds prior to their assault—unless the school had a zero-tolerance policy that always imposed the same punishment for such conduct, regardless of the circumstances. 2021 Guidance, *supra* note 20, at 30.
- 66 § 106.71(b)(2) (2020).
- 67 § 106.71 (2020).
- 68 §§ 106.2 (2024) (defining “retaliation”), 106.71 (2024). For example, the following would constitute retaliation *only if* done with a retaliatory motive (i.e., in order to interfere with the person’s Title IX rights or because they participated or refused to participate in a school effort to address sex discrimination): giving someone lower grades or a poor performance review, not hiring or promoting someone, transferring someone to a role that requires fewer qualifications or more out-of-pocket expenses, outing someone as pregnant or LGBTQ+, or requiring someone to sign a confidentiality agreement in order to access their Title IX rights. 89 Fed. Reg. at 33831. A retaliatory motive may be proven by circumstantial evidence (e.g., a complainant is treated worse soon after they report sex discrimination, is treated differently than similarly situated persons, or is not treated in accordance with official school policy). *Id.* at 33832.
- 69 § 106.71 (2024). For example, if an employee complainant does not file a complaint and the Title IX coordinator decides it is necessary to make a complaint on the complainant’s behalf, then the school can require the complainant to be a witness in the ensuing investigation. 89 Fed. Reg. at 33830.
- 70 *Id.* at 33826-27.
- 71 *Id.* at 33827. Note that § 106.44(b) requires Title IX coordinators to monitor and address barriers to reporting; if a Title IX coordinator finds that fear of being disciplined for a drug or alcohol violation is a common barrier to reporting sexual assault, then the school may want to consider an amnesty policy that protects complainants from such discipline in order to address that barrier. *Id.*
- 72 *Id.* at 33826-27.
- 73 § 106.45(h)(5) (2024). Note that these disciplinary actions are prohibited but do not inherently constitute retaliation. 89 Fed. Reg. at 33711. However, if a school took these disciplinary actions with a retaliatory motive (e.g., in order to interfere with a person’s Title IX rights or because they participated or refused to participate in a school effort to address sex discrimination), then these actions would be considered retaliation as well and doubly prohibited. 89 Fed. Reg. at 33826.
- 74 § 106.71 (2024).
- 75 § 106.30(a) (2020) (defining “formal complaint”).

- 76 *Id.*; Trump Rule, 85 Fed. Reg. at 30136.
- 77 § 106.45(b)(5)(iii) (2020).
- 78 This includes laws like the Family Educational Rights and Privacy Act (FERPA), which permits disclosure of students' personally identifying information only when consent is given by a student (or a minor K-12 student's parent or guardian) or pursuant to an exception in the statute. 20 U.S.C. § 1232g.
- 79 Trump Rule, 85 Fed. Reg. at 30435.
- 80 § 106.45(a)(2)(i)-(ii) (2024). A bystander who witnesses sex-based harassment and personally experiences a hostile environment can make a complaint on behalf of himself instead of the target (e.g., a coach makes sexually charged comments to one player, and other players overhear and file complaints on their own behalf). 89 Fed. Reg. at 33654.
- 81 § 106.45(a)(2)(iv) (2024).
- 82 § 106.44(f)(1)(v) (2024). The factors include the complainant's safety concerns, the severity of the incident (e.g., whether a weapon was used), the parties' ages and relationship (e.g., whether the respondent is an employee), and how many people were impacted. *Id.*; 89 Fed. Reg. at 33594 (weapon). A respondent may no longer pose a health or safety threat if they have since resigned or transferred to another school. *Id.* at 33595.
- 83 *Id.* at 33821, 33596.
- 84 § 106.45(b)(5) (2024).
- 85 §§ 106.45(f)(4)(iii), 106.46(e)(6)(iii) (2024). For example, a school can prohibit the parties from disclosing the identities of witnesses or making widespread disclosures on social media (so long as the restriction is consistent with the First Amendment), but not from sharing information learned from personal experience or criticizing the school's procedure itself. 89 Fed. Reg. at 33674, 33730.
- 86 §§ 106.46(c)(3), 106.46(e)(6)(iii) (2024). Reasonable safety concerns include a history of violent or abusive conduct, substance abuse, or the need to move the complainant out of shared housing with the respondent. 89 Fed. Reg. at 33717.
- 87 § 106.44(j) (2024); 89 Fed. Reg. at 33622. For example, a school may be required to disclose a student's supportive measure to their professor in order to ensure compliance with Title IX, but it cannot tell the professor about the student's underlying complaint. *Id.* Or, a school may be required to report an employee respondent under a state mandatory reporting law, but it must ensure compliance with FERPA and other federal law when doing so. *Id.* at 33623. FERPA is a federal privacy law that requires schools to allow a student who is 18 or older (or the parent or guardian of a minor K-12 student) to examine the student's school records and that, with some exceptions, protects those records from being disclosed to other people without consent from the student (or a minor K-12 student's parent or guardian). Even where disclosure of certain PII is otherwise permissible, it is nonetheless prohibited if it is disclosed for the purpose of retaliation or creates a hostile environment (e.g., disclosing a student's sexual orientation or gender identity causes them to experience sex-based harassment). *Id.* at 33621-22.
- 88 § 106.44(j)(2) (2024); 89 Fed. Reg. at 33540, 33570, 33601.
- 89 § 106.44(j) (2024).
- 90 89 Fed. Reg. at 33622.
- 91 89 Fed. Reg. at 33672.
- 92 § 106.6(h) (2020).
- 93 § 106.6(b) (2024); 89 Fed. Reg. at 33542 ("Title IX and its implementing regulations 'preempt any State or local law with which there is a conflict'" (citing Trump Rule, 87 Fed. Reg. at 41405) (emphasis in original citation)).
- 94 § 106.45 (2024).
- 95 § 106.46 (2024). To determine whether a student-employee is a student for the purposes of § 106.46, a school must consider whether the individual's primary relationship with the school is educational or occupational and whether the alleged harassment occurred while they were learning or working, although these factors are not determinative. § 106.46(b); 89 Fed. Reg. at 33715.
- 96 *Id.* at 33664, 33680, 33695, 33749.
- 97 *Id.* at 33645.
- 98 *Id.* at 33695.
- 99 *Id.* at 33695, 33740.
- 100 § 106.45(j) (2024). At the same time, identical treatment of the parties is not required. For example, one party may need an accommodation, or an employee may have rights under a collective bargaining agreement that non-employees do not have. 89 Fed. Reg. at 33713-74.
- 101 § 106.45(b)(1)(v) (2020).
- 102 § 106.45(b)(5)(vi)-(vii) (2020).
- 103 §§ 106.45(b)(4), 106.46(e)(5) (2024). The major stages of an investigation include evaluation, investigation, determination, and appeal. § 106.45(b)(4) (2024).
- 104 §§ 106.45(b)(4), 106.46(e)(5) (2024); 89 Fed. Reg. at 33669. Schools can avoid the need for extensions by allowing witnesses to join by videoconference and by requiring parties to choose sufficiently available advisors. *Id.* at 33670. Furthermore, schools should not need an extension to provide reasonable disability accommodations and language assistance. *Id.*
- 105 §§ 106.45(f)(i)-(ii), 106.46(e)(6)(i)-(ii) (2024).
- 106 §§ 106.45(b)(1)(iv), 106.45(b)(2)(i)(B) (2020).
- 107 § 106.45(b)(3) (2024).
- 108 § 106.46(c)(1)(i) (2024).
- 109 The Department has stated that "§ 106.45(b)(3) [the presumption provision] would not apply to a sex discrimination complaint that does not allege that a person violated the [school's] prohibition on sex discrimination, but instead alleges the [school] violated Title IX." 89 Fed. Reg. at 33667. However, the Department has also confusingly stated that "[i]n those instances, the Department will *still* not presume that [the school] [acted] in a discriminatory manner until a determination is made at the conclusion of [its] grievance procedures." (emphasis added). *Id.*
- 110 § 106.45(b)(5)(iv) (2020).
- 111 §§ 106.45(b)(5)(iv), (vi), (vii) (2020).
- 112 § 106.45(b)(6)(i) (2020).
- 113 Trump Rule, 85 Fed. Reg. at 30242.
- 114 §§ 106.46(e)(2), 106.46(e)(6), 106.46(f)(1)(ii)(B) (2024); 89 Fed. Reg. at 33719 (union rep), 33721 (confidential employee), 33740 (institution not required to provide advisor if there is no cross-examination). A non-student in such an investigation is also entitled to an advisor. *Id.* at 33719.
- 115 § 106.46(e)(3) (2024). These can include expert witnesses and character witnesses. 89 Fed. Reg. at 33723-24.
- 116 § 106.45(j); 89 Fed. Reg. at 33719 (advisor).
- 117 § 106.45(b)(6)(i) (2020).
- 118 §§ 106.45(b)(1)(iii), 106.45(b)(1)(x), 106.45(b)(6)(i) (2020).
- 119 § 106.45(b)(6)(i) (2020).
- 120 §§ 106.45(b)(1)(iii), 106.45(b)(1)(x), 106.45(b)(6)(ii) (2020).
- 121 §§ 106.45(b)(6)(i)-(ii) (2020).
- 122 § 106.45(b)(7)(i) (2020).
- 123 § 106.45(b)(6)(i) (2020) ("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").
- 124 National Women's Law Center, *Federal Judge Vacates Part of Trump Administration's Title IX Sexual Harassment Rule* (Aug. 11, 2021), <https://nwl.org/resource/federal-judge-vacates-part-of-trump-administrations-title-ix-sexual-harassment>.
- 125 Dep't of Educ., Office for Civil Rights, *Dear Students, Educators, and Other Stakeholders Letter re Victim Rights Law Center et al. v. Cardona* (Aug. 24, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf>.
- 126 §§ 106.45(g), 106.46(f)(1) (2024). Credibility is in dispute if there are competing narratives, or the school relies on testimonial evidence to reach its decision. 89 Fed. Reg. at 33699. Credibility is *not* in dispute if a respondent admits to crucial facts or, for example, the school relies solely on the parties' text messages, and the respondent doesn't challenge their authenticity. *Id.* at 33741. If a school chooses to use a live hearing for complaints governed by § 106.45, it does not have to follow the procedures required in § 106.46. *Id.* at 33700.

- 127 § 106.45(b)(2) (2024).
- 128 § 106.46(f)(1)(i)(A)-(B) (2024); 89 Fed. Reg. at 33739 (there can be multiple and virtual meetings).
- 129 § 106.46(f)(1)(ii)(A)-(B) (2024). Federal courts have held that public institutions of higher education in Kentucky, Michigan, Ohio, and Tennessee, and private institutions of higher education in Delaware, New Jersey, and Pennsylvania must allow advisors to conduct cross-examination if credibility is at issue. *Doe v. Univ. of Scis.*, 961 F.3d 203, 215 (3d Cir. 2020); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018). Some state laws also require institutions of higher education to conduct cross-examination. *E.g.*, Ky. Rev. Stat. Ann. § 164.370(3)(e)(2)(c); La. Rev. Stat. § 17:3394(H); Utah Code Ann. § 53B-27-602(6)(b).
- 130 § 106.46(g) (2024).
- 131 § 106.46(f)(3) (2024).
- 132 § 106.46(f)(4) (2024); 89 Fed. Reg. at 33745-46 (full weight). A school may choose to give full weight to statements made by a person who does not answer relevant and permissible questions if there is a reasonable justification for doing so (*e.g.*, unintentional refusal, inability to remember, or state law allows the complainant not to repeat their account of a sexual assault). *Id.*
- 133 §§ 106.46(f)(1)(i)(C), 106.46(g) (2024).
- 134 §§ 106.45(f)(2), 106.45(g) (2024).
- 135 § 106.45(b)(1)(x) (2020).
- 136 § 106.45(b)(5)(i) (2020).
- 137 § 106.45(b)(6)(i) (2020).
- 138 § 106.45(b)(7)(i) (2024).
- 139 § 106.45(b)(7)(ii) (2024); 89 Fed. Reg. at 33677 (504 Plan or IEP).
- 140 § 106.45(b)(7)(iii) (2024). “Sexual interests” include a complainant’s mode of dress, speech, and lifestyle. 89 Fed. Reg. at 33680. “Prior” sexual conduct includes any conduct before the end of a grievance procedure, even if it occurs *after* the alleged incident (including evidence of pregnancy, sexually transmitted infection, or use of birth control). *Id.* at 33679. A respondent’s sexual history is permissible evidence unless they file a counter-complaint as a complainant. *Id.* at 33678. A witness’s sexual history is permissible evidence, even if they are an alleged victim of the respondent, but they can refuse to answer questions. *Id.* at 33679.
- 141 § 106.45(b)(7)(iii) (2024); 89 Fed. Reg. at 33679 (consent-related communications).
- 142 § 106.45(b)(1)(vii) (2020).
- 143 Letter from Leadership Conference on Civil and Human Rights to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 7 (Jan. 30, 2019), <https://civilrights.org/resource/civil-and-human-rights-community-joint-comment-on-title-ix-nprm>.
- 144 Letter from National Women’s Law Center to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 33 (Jan. 30, 2019), <https://nwlc.org/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>.
- 145 § 106.45(h)(1) (2024); 89 Fed. Reg. at 33704.
- 146 If a school uses the preponderance standard for some comparable investigations and the “clear and convincing evidence” standard for other comparable investigations, then it *must* use the preponderance standard for Title IX investigations. 89 Fed. Reg. at 33704. However, even if a school uses the “clear and convincing evidence” standard for all other comparable investigations, it can still choose to use the preponderance standard for Title IX investigations. *Id.* at 33704-05.
- 147 § 106.45(b)(8)(i)(A)-(C) (2020).
- 148 § 106.45(b)(8)(iii)(B) (2020).
- 149 § 106.45(b)(8)(ii) (2020).
- 150 §§ 106.45(d)(3), 106.45(d)(3)(iii) (2024).
- 151 § 106.45(i) (2024).
- 152 §§ 106.45(j), 106.46(i)(2) (2024). For example, institutions can offer both parties the right to appeal sanctions. 89 Fed. Reg. at 33753.
- 153 § 106.46(i)(1) (2024). A decision against the weight of the evidence can be evidence of a decisionmaker’s bias. 89 Fed. Reg. at 33753.
- 154 § 106.30(a) (2020) (defining “formal complaint”).
- 155 § 106.45(b)(2) (2020).
- 156 §§ 106.45(b)(1)(v) (2020) (delay), 106.45(b)(3)(iii) (2020) (dismissal), 106.45(b)(5)(v) (2020) (meetings or hearings), 106.45(b)(7) (2020) (decision), 106.45(b)(8)(iii) (2020) (appeal).
- 157 §§ 106.45(b)(5)(vi)-(vii) (2020) (evidence and investigative report), 106.45(b)(6)(i) (2020) (recording or transcript), 106.45(b)(6)(ii) (2020) (submit questions).
- 158 § 106.45(b)(10) (2020).
- 159 § 106.2 (2024) (defining “complaint”).
- 160 § 106.02 (2024) (defining “complaint”); 89 Fed. Reg. at 33485.
- 161 § 106.8(f) (2024).
- 162 §§ 106.46(c)(1) (2024) (allegations and procedures), 106.46(d)(1) (2024) (dismissal), 106.46(e)(1) (2024) (meetings or hearings), 106.46(e)(5) (2024) (delay), 106.46(h) (2024) (decision).
- 163 §§ 106.46(e)(6)(i)-(ii) (2024) (evidence or investigative report), 106.46(f)(1)(i)(B) and 106.46(f)(1)(ii)(A) (2024) (submit questions), 106.46(f)(1)(i)(C) and 106.46(g) (2024) (recording or transcript).
- 164 §§ 106.45(b)(4) (2024) (delay), 106.45(c) (2024) (allegations and procedures), 106.45(d)(2) (2024) (dismissal), 106.45(d)(3)(vi) (2024) (appeal decision of dismissal), 106.45(h)(1)-(2) (decision, appeal decision).
- 165 § 106.45(f)(4)(i)-(ii) (2024).
- 166 § 106.45(b)(1)(iii) (2020).
- 167 *Id.*
- 168 Trump Rule, 85 Fed. Reg. at 30254 n. 1041.
- 169 § 106.45(b)(10)(i)(D) (2020).
- 170 § 106.8(d)(1) (2024).
- 171 § 106.8(d)(2)-(3) (2024); 89 Fed. Reg. at 33721.
- 172 § 106.8(d)(4) (2024).
- 173 89 Fed. Reg. at 33550.
- 174 *Id.* at 33550, 33658, 33750.
- 175 § 106.8(f)(3) (2024).
- 176 §§ 106.44(f)(1), 106.45(d)(4)(iii) (2024).
- 177 89 Fed. Reg. at 33591.
- 178 § 106.44(b) (2024).
- 179 89 Fed. Reg. at 33564-65, 33847.
- 180 *Id.* at 33565, 33827.
- 181 *Id.* at 33803.
- 182 *Id.*
- 183 *Id.*
- 184 GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation’s Schools* xvi–xvii (2022), <https://www.glsen.org/sites/default/files/2022-10/NCS-2021-Full-Report.pdf> [hereinafter GLSEN Survey].
- 185 *Id.* at 19.
- 186 *Id.* at 38–39.
- 187 National Center for Transgender Equality, 2022 U.S. Trans Survey: Early Insights, 22, <http://www.ustranssurvey.org>.
- 188 AAU Report, *supra* note 6, at ix.
- 189 Myeshia N. Price et al., The Trevor Project, *The mental health and well-being of LGBTQ youth who are intersex* 14 (2021), <https://www.thetrevorproject.org/research-briefs/the-mental-health-and-well-being-of-lgbtq-youth-who-are-intersex-dec-2021>.
- 190 See, *e.g.*, *id.*; Movement Advancement Project, *Bans on Transgender People Using Bathrooms and Facilities According to their Gender Identity*, https://www.lgbtmap.org/equality-maps/youth/school_bathroom_bans (last visited May 24, 2024); Movement Advancement Project, *Bans on Transgender Youth*

- Participation in Sports, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans (last visited May 24, 2024).
- 191 See, e.g., GLSEN Survey, *supra* note 184, at 41 (linking anti-LGBTQ+ policies to higher rates of school discipline of LGBTQ+ students); Maria Carrasco, *Students Feel Pain of State Anti-LGBTQ+ Bills*, Inside Higher Ed (Mar. 29, 2022), <https://www.insidehighered.com/news/2022/03/30/state-anti-lgbtq-legislation-hurts-college-students> (observing that “[s]ince the nationally coordinated attacks on transgender youth by state legislatures began, [there has been] a marked increase of bullying and violence against transgender youth”).
- 192 See GLSEN Survey, *supra* note 184, at 43; Anne Branigin, *Intersex youths are also hurt by anti-trans laws, advocates say*, Washington Post (July 16, 2022), <https://www.washingtonpost.com/nation/2022/07/16/intersex-anti-trans-bills/>; The Trevor Project, *The Trevor Project Research Brief: LGBTQ & Gender-Affirming Spaces* (2020), https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Affirming-Spaces_-December-2020.pdf.
- 193 See GLSEN Survey, *supra* note 184, at 34, 35, 36.
- 194 *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *aff’d sub nom. Bostock v. Clayton Cty.* 140 S. Ct. 1731 (2020) (Title VII’s prohibition on sex discrimination includes prohibition on sexual orientation discrimination); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (school action likely violated Title IX by barring transgender boy’s access to boys’ restroom); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217 (6th Cir. 2016) (the public interest weighs strongly in favor of enforcing Title IX to permit a transgender girl to use the girls’ bathroom, when preventing her from doing so would cause her irreparable harm); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 2017 WL 1230393 (7th Cir. 2017) (en banc) (Title VII’s prohibition on sex discrimination includes prohibition on sexual orientation discrimination); *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011) (discrimination based on transgender status constitutes sex discrimination under the Equal Protection Clause of the Constitution); *Schwenk v. Hartford*, 204 F.3d 1187, 1200-01 (9th Cir. 2000) (California’s Gender Motivated Violence Act protects transgender individuals); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001) (school likely violated Title IX by failing to respond to harassment based on sexual orientation); *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, 140 S. Ct. 1731 (2020) (Title VI protects workers from sex discrimination based on transgender status). See also *Parents for Priv. v. Barr*, 949 F.3d 1210, 1227 (9th Cir. 2020) (school policy allowing transgender students to restrooms consistent with their gender identity did not violate Title IX); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533-536 (3d Cir. 2018) (school policy allowing transgender students to restrooms consistent with their gender identity likely did not violate Title IX).
- 195 *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020); see also Dep’t of Justice, *Title IX Legal Manual, Title IX Cover Addendum post-Bostock*, <https://www.justice.gov/crt/title-ix#Bostock>.
- 196 See, e.g., See also *Hecox v. Little*, 104 F.4th 1061 (9th Cir. 2024), *as amended* (June 14, 2024) (Idaho law likely violated Equal Protection Clause by barring transgender girls and women from competing on girls’ and women’s school sports teams); *B.P.J. by Jackson v. W. Virginia State Bd. of Educ.*, 98 F.4th 542, 563-65 (4th Cir. 2024) (Title IX protects transgender girl’s access to girls’ athletics team); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *rehearing en banc denied* 976 F.3d 399 (Sept. 22, 2020) (Title IX protects transgender boy’s access to boys’ restroom). *But see Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022).
- 197 § 106.10 (2024); 89 Fed. Reg. at 33803 (perceived, asexual, bisexual, intersex, nonbinary), 33809-10 (transgender status).
- 198 Title IX applies to any “person,” including students, employees, applicants for admission or employment, visiting students, visiting lecturers, and other community members invited to campus. 89 Fed. Reg. at 33816.
- 199 §§ 106.10, 106.31(a)(2) (2024); 89 Fed. Reg. at 33816, 33819 (classes and activities, restrooms and locker rooms, dress and grooming codes). See also § 106.34(a)(1)-(2) (discussing physical education as a class, not athletics program). The final rule acknowledges that Title IX permits schools to engage in some differential treatment on the basis of sex in housing (e.g., establish different dorms for men versus women). 89 Fed. Reg. at 33818. However, schools must still address sex discrimination in sex-separated facilities and cannot adopt policies that categorically deny trans and nonbinary students access to housing consistent with their affirmed gender, because treating a trans or nonbinary student differently amounts to gender identity and sexual orientation discrimination and still violates Title IX. *Id.*
- 200 89 Fed. Reg. at 33818. Schools can also offer gender-neutral or single-occupancy restrooms and locker rooms to any student who wants more privacy. *Id.* at 33820.
- 201 89 Fed. Reg. at 33819.
- 202 See, e.g., Jennifer Y. Mak & Chong Kim, *Relationship Among Gender, Athletic Involvement, Student Organization Involvement and Leadership*, 25 Hum. Kinetics J. 89 (2016); Robert P. Dobosz & Lee A. Beatty, *The Relationship Between Athletic Participation and High School Students’ Leadership Ability*, 34 Adolescence 215 (1999); M. R. Eime et al., *A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport*, 10 Int’l J. of Behavioral Nutrition & Physical Activity 98 (2013).
- 203 *Id.*
- 204 GLSEN Survey, *supra* note 184, at 34.
- 205 Twenty-five states have enacted anti-trans sports bans through legislation, although five of those state bans are currently being blocked by court orders (Arizona, Idaho, Montana, Utah, and West Virginia). Movement Advancement Project, *Bans on Transgender Participating in Sports*, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans; *Hecox v. Little*, 479 F. Supp. 3d 930 (9th Cir. 2023); *Doe v. Horne*, 2023 WL 4661831 (D. Az. July 2023); *Roe v. Utah High School Activities Ass’n*, No. 2022 WL 3907182, at *1 (D. Utah Aug. 19, 2022). In addition, other states like Alaska are currently enforcing non-legislative, statewide policies that ban trans students from playing sports. Movement Advancement Project, *Bans on Transgender Participating in Sports*, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans.
- 206 H.B. 500, 65 Leg. Sess. (*Id.* 2020).
- 207 For example, in 2022, Utah established a commission to enforce its anti-trans sports ban, which, upon receiving complaints from the school community that a cisgender high school girl didn’t “look feminine enough” and was outperforming other students in her sport, launched an investigation into whether she was “truly a girl.” Marjorie Cortez, *After a girl beat their daughters in sports, Utah parents triggered investigation into whether she was transgender*, Desert News (Aug. 17, 2022), <https://www.deseret.com/utah/2022/8/17/23310668/school-investigates-female-athlete-transgender-complaint>. In January 2024, a cisgender high school girl in Utah was publicly accosted during a basketball game by a parent who believed her to be transgender simply because she was excelling in her sport. Robert Gherke, *An angry Utah parent accused a high school basketball player of being transgender. Will it keep happening?* THE SALT LAKE TRIBUNE (Jan. 27, 2024), <https://archive.fo/JHJrD>. Shortly after, a school board member suggested a different cisgender high school girl was transgender in a public social media post, which resulted in the second girl receiving violent threats. Even in her public “apology,” the school board member said she believed the second student was transgender because she had “a larger build,” which made it “normal to pause and wonder if people are what they say they are.” Courtney Tanner, *Utah school board member Nataline Cline questions high school athlete’s gender, causing social media uproar*, THE SALT LAKE TRIBUNE (Feb. 7, 2024), <https://www.sltrib.com/sports/2024/02/07/utah-school-board-member-nataline>.
- 208 For example, in 2023, women boxers Imane Khelif from Algeria and Lin Yu-Ting from Taiwan were forced to undergo sex testing by the International Boxing Association, which disqualified them from the 2023 world championships because they were found to have naturally-occurring levels of testosterone that were higher than in most women. During the Paris 2024 Olympics, both boxers again came under fire. Despite the International Olympic Committee announcing they were both eligible to compete on the women’s teams and the fact that they are both cisgender women, both women faced public vitriol, with anti-trans journalists and extremists publicly making grotesque comments about their bodies, questioning their gender, and mislabeling them as transgender. Christina Cauterucci, *What’s Going on With the Two Women Boxers Who “Failed” a Gender Test*, Slate (Aug. 1, 2024), <https://slate.com/culture/2024/08/olympic-boxers-gender-test-controversy-explained.html>.
- 209 For example, Caster Semenya, a Black woman and sprinter, was forced to submit to a battery of invasive medical tests because of her speed and success as an Olympic track athlete for the purpose of determining whether she was “feminine enough” to continue competing with women. Anna North, *“I Am a Woman and I Am Fast”: What Caster Semenya’s Story Says about Gender and Race In Sports*, VOX (May 3, 2019), <https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-gender-race-intersex-athletes>; Dawn Ennis, *IAAF Called Caster Semenya Biologically Male*, OUTSPORTS (June 19, 2019), <https://www.outsports.com/2019/6/19/18691210/iaaf-caster-semenya-biologically-male-testosterone-olympics-southafrica-athlete>. Dutee Chand, an Indian woman and sprinter, was subjected to similar racist and sexist scrutiny: When fellow athletes accused her “stride and musculature” of being too “masculine,” she was ordered by an international sporting body to undergo invasive medical exams, which resulted in her being banned from competing on the women’s team. Human Rights Watch, *They’re Chasing Us Away from Sport’: Human Rights Violations in Sex Testing of Elite Women Athletes* (Dec. 4, 2020), <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women#6040>.
- 210 The Biden administration’s regulatory agenda indicated in March 2024

- that the proposed athletics rule is in the “Long-Term Actions” stage of rulemaking. Office of Information and Regulatory Affairs, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria For Male and Female Athletic Teams*, RIN: 1870-AA19 (Spring 2024), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1870-AA19>. This indicates the athletics rule will not be finalized until March 2025 at the earliest. See Office of Information and Regulatory Affairs, *Spring 2024 Unified Agenda of Federal Regulatory and Deregulatory Actions* (“Long-Term Actions are items under development, but for which the agency does not expect to have a regulatory action within the 12 months after publication of this edition of the Unified Agenda.”).
- 211 Laura Meckler, *Biden Title IX rules on trans athletes set for election-year delay*, Washington Post (Mar. 28, 2024), <https://www.washingtonpost.com/education/2024/03/28/title-ix-trans-athletes-biden>.
- 212 § 106.10 (2024); 89 Fed. Reg. at 33803 (perceived, asexual, bisexual, intersex, nonbinary), 33809-10 (transgender status).
- 213 89 Fed. Reg. at 33516.
- 214 Federal courts have used repeated misgendering of transgender students as one of many factors when determining whether a school subjected them to sex discrimination in violation of Title IX. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020), as amended (Aug. 28, 2020), rehearing en banc denied 976 F.3d 399 (Sept. 22, 2020) (concluding a policy to prohibiting transgender students from using restrooms consistent with their gender violated Title IX and the Equal Protection Clause, and observing the policy was instituted while the student was repeatedly harassed and misgendered.); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1042 (7th Cir. 2017) (striking down a school’s anti-transgender restroom ban, and observing the school repeatedly misgendered and deadnamed the plaintiff, a trans boy).
- 215 Dep’t of Educ., Office for Civil Rights, *Office for Civil Rights Announces Resolution of Sex-Based Harassment Investigation of Tamalpais Union High School District* (June 24, 2022), <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-sex-based-harassment-investigation-tamalpais-union-high-school-district>.
- 216 Dep’t of Educ., Office for Civil Rights, *U.S. Department of Education’s Office for Civil Rights Resolves Sex-Based Harassment Investigation in Rhinelander School District in Wisconsin* (July 6, 2023), <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-resolves-sex-based-harassment-investigation-rhinelanderschool-district-wisconsin>.
- 217 § 106.44(j) (2024); 89 Fed. Reg. at 33622-23.
- 218 § 106.44(j)(2) (2024); 89 Fed. Reg. at 33540, 33570, 33601, 33822.
- 219 §§ 106.44(j), 106.44(j)(5) (2024).
- 220 89 Fed. Reg. at 33622 (sexual orientation or gender identity, retaliatory purpose), 33811 (intersex traits). While FERPA allows a minor K-12 student’s parent or guardian to examine the student’s education records (including, for example, attendance records that use the student’s chosen name or extracurricular records that indicate their membership in a Gay-Straight Alliance), FERPA does not require schools to automatically disclose a minor K-12 student’s LGBTQI+ status to their parent or guardian in the absence of such a request for such specific education records. 20 U.S.C. §§ 1232g(a)(1) (A), (5)(A).
- 221 *Id.* at 33622.
- 222 § 106.10 (2024) (prohibiting differential treatment on the basis of sexual orientation or gender identity).
- 223 89 Fed. Reg. at 33819.
- 224 Kate Perper et al., *Child Trends, Diploma Attainment Among Teen Mothers* (2010), <https://www.childtrends.org/publications/diploma-attainment-among-teen-mothers>.
- 225 Generation Hope, *Home* (last visited May 30, 2024), <https://www.generationhope.org>.
- 226 Dep’t of Educ., Office for Civil Rights, *Discrimination Based on Pregnancy and Related Conditions* (Oct. 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-pregnancy-resource.pdf>.
- 227 § 106.40(b)(1) (2020).
- 228 *Id.*
- 229 § 106.40(a) (2020).
- 230 § 106.40(b)(1) (2024); 89 Fed. Reg. at 33756 (perceived and expected). This prohibition also protects applicants and employees. *Id.* However, schools are not required to offer reasonable modifications to applicants or employees. *Id.* at 33781.
- 231 § 106.2 (2024) (defining “pregnancy or related conditions”); 89 Fed. Reg. at 33756 and 33812-13 (menstruation and menopause). For example, disciplining a student who violates a dress code policy to cover up a menstrual leak is discrimination based on a pregnancy-related condition in violation of Title IX *Id.* at 33813. Other conditions related to pregnancy include dehydration, pregnancy-related fatigue, nausea and vomiting (or morning sickness), increased body temperature, anemia, bladder dysfunction, gestational diabetes, preeclampsia, and hypertension; polycystic ovary syndrome; infertility and fertility care; recovery from miscarriage, abortion, or stillbirth; ectopic pregnancy; prenatal or postpartum depression; and lactation-related swelling or leaking of breast tissue or mastitis. *Id.* at 33813 (PCOS), 33756-57.
- 232 *Id.* at 33758, 33813. A school that provides health insurance for other temporary medical conditions cannot deny coverage for treatment related to miscarriage, which is covered by Title IX’s protection against discrimination for “termination of pregnancy” and does not fall within the Title IX statute’s provision regarding neutrality with respect to abortion. *Id.* at 33758 (discussing 20 U.S.C. § 1688).
- 233 §§ 106.21(c)(2)(i), 106.40(a), 106.57(a) (2024). **Parental status** applies to a student’s entire time at school, not just immediately after childbirth or adoption, and it can apply to a student who is a caregiver for another person under 18 or someone older than 18 who is disabled—including a biological, adoptive, foster, or step-parent, or legal guardian. § 106.2 (defining “parental status”); 89 Fed. Reg. at 33765 (duration). **Family status** refers to the configuration of one’s family or role in a family. 89 Fed. Reg. at 33762.
- 234 89 Fed. Reg. at 33822 (mothers vs. fathers).
- 235 § 106.40(b)(2) (2024).
- 236 89 Fed. Reg. at 33767. An employee also does not need to notify a student who is not pregnant and does not have a related condition of the Title IX coordinator’s information (e.g., pregnant student’s partner, adopting student). *Id.* at 33768.
- 237 § 106.40(b)(3) (2024). The Title IX coordinator cannot omit informing a student of certain rights under § 106.40 based on the student’s current condition because, for example, a student who has a miscarriage may still lactate afterwards and need to know about their right to a lactation space. 89 Fed. Reg. at 33772.
- 238 89 Fed. Reg. at 33770.
- 239 § 106.40(b)(3)(vi) (2024).
- 240 *Id.* For example, a pregnant student experiencing morning sickness may need modifications such as a late arrival, breaks, or online instruction before their first prenatal appointment. 89 Fed. Reg. at 33789.
- 241 *Id.* at 33779 (abortion details), 33789-90 (necessary and reasonable documentation). When students request reasonable modifications, leaves of absence, or comparable treatment related to termination of a pregnancy, “[schools] have no education-related need to access information about how or where a student will obtain medical treatment.” *Id.* at 33779.
- 242 *Id.* at 33779.
- 243 § 106.40(b)(1) (2020).
- 244 § 106.40(b)(2) (2020).
- 245 § 106.40(b)(3) (2020).
- 246 § 106.40(b)(5) (2024).
- 247 §§ 106.40(b)(1), 106.40(b)(3)(iii) (2024). Whether a program is “comparable” depends on many factors, including admissions criteria; content of the curriculum; instructor qualifications; and quality and availability of books, technology, and facilities. 89 Fed. Reg. at 33783. A “comparable” program need not be “substantially equal”; for example, an online program may lack extracurricular or social interactions, and a program for pregnant students may include parenting classes. *Id.*
- 248 § 106.40(b)(5) (2020).
- 249 *Id.*
- 250 § 106.40(b)(3)(iv) (2024).
- 251 *Id.* If a school’s policy requires admitted students who need a leave of absence before classes start to withdraw and reapply, it must exempt students who are pregnant or have a related condition from that policy. 89 Fed. Reg. at 33785. The “fundamental alteration” standard for reasonable modifications (see **Part III.B.3**) does not apply to leaves of absence. *Id.* at

- 33785-86.
- 252** §§ 106.40(b)(3)(iv), 106.40(b)(4) (2024); 89 Fed. Reg. at 33792.
- 253** *Id.* Reinstatement to an extracurricular activity is not required in limited instances, such as if it has ended by the time the student returns. 89 Fed. Reg. at 33784.
- 254** See § 106.40(a) (2024).
- 255** § 106.40(b)(4) (2020).
- 256** Dep't of Educ., Office for Civil Rights, *Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972*, at 6, 9 (2013), <https://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf> [hereinafter 2013 Guidance].
- 257** § 106.40(b)(3)(ii)(A) (2024). A school must still offer a reasonable modification even if another requested modification is unreasonable. 89 Fed. Reg. at 33776. Schools are not required to offer reasonable modifications to applicants or employees. *Id.* at 33764, 33781.
- 258** § 106.40(b)(3)(ii)(A)-(B) (2024); 89 Fed. Reg. at 33775 (request alternative). If a student rejects an offered modification, the school does not have to make a new offer unless a new need arises. *Id.*
- 259** § 106.40(b)(3)(ii)(A); 89 Fed. Reg. at 33775. Schools are not required to completely waive academic requirements that demonstrate a student's competency or that jeopardize the school's accreditation because these would constitute fundamental alterations. *Id.* Many modifications are an alternative means to access a program or activity rather than a complete waiver of academic requirements, and thus do not constitute fundamental alterations. *Id.*
- 260** 89 Fed. Reg. at 33777.
- 261** § 106.40(b)(3)(ii)(C) (2024); 89 Fed. Reg. at 33775-77.
- 262** 89 Fed. Reg. at 33782.
- 263** § 106.40(b)(4) (2024). The same standard applies to applicants for admission. § 106.21(c)(1).
- 264** *Id.*; 89 Fed. Reg. at 33791-92.
- 265** 2013 Guidance, *supra* note 256, at 16.
- 266** § 106.40(b)(3)(v) (2024).
- 267** 89 Fed. Reg. at 33788 (“[I]f a student is already permitted to bring their child into the recipient’s education program or activity (e.g., through onsite childcare, a recipient’s visitor policy, or a State or local law), they may use lactation spaces for breastfeeding instead of pumping.”).
- 268** § 106.40(b)(3) (2024); 89 Fed. Reg. at 33781.
- 269** § 106.40(a); 89 Fed. Reg. at 33822.
- 270** 89 Fed. Reg. at 33778; see also § 106.8(f) (2024) (recordkeeping requirement applies to §§ 106.44, 106.45, and 106.46, but not § 106.40).
- 271** § 106.8(f) (2024) (recordkeeping requirement applies to §§ 106.44, 106.45, and 106.46).
- 272** § 106.40(b)(3)(vi) (2024); 89 Fed. Reg. at 33779 (abortion details).
- 273** *Id.* at 33779.
- 274** § 106.44(j) (2024); 89 Fed. Reg. at 33622-23.
- 275** § 106.44(j)(2) (2024); 89 Fed. Reg. at 33540, 33570, 33601, 33813.
- 276** §§ 106.44(j), 106.44(j)(5) (2024).
- 277** § 106.51(b)(6) (2020).
- 278** § 106.57(a) (2024).
- 279** § 106.57(b) (2024).
- 280** § 106.57(c) (2024).
- 281** § 106.57(d) (2024).
- 282** § 106.57(c) (2024); 89 Fed. Reg. at 33798.
- 283** § 106.57(c) (2024); 89 Fed. Reg. at 33798. The school may not require a employee who is pregnant or has a related condition to submit a doctor's note to receive modifications unless this is required of employees with any other temporary medical condition. *Id.*
- 284** 89 Fed. Reg. at 33797. When employment is part of the student's access to education programs or activities, § 106.40(b)(3)(ii) may require reasonable modifications. *Id.*
- 285** § 106.57(e)(1)-(2) (2024). A lactation space is not accessible if it is so far from the employee's workstation, office, or classroom that they cannot reasonably get there and back, lactate, and store their milk in the time given. 89 Fed. Reg. at 33799.
- 286** § 106.8(c) (2020).
- 287** §§ 106.44, 106.45 (2024).
- 288** § 106.45(a)(1) (2024).
- 289** 20 U.S.C. § 1681(a)(3).
- 290** 20 U.S.C. § 1681(a)(3). The Department of Education published a number of internal memoranda to its staff detailing how to assess whether a school was controlled by a religious organization in the 1970s and 1980s. Dep't of Educ., Office for Civil Rights, *Exemptions from Title IX, Private schools controlled by religious organizations (any application contrary to religious tenets exempt)*, <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html>.
- 291** § 106.12(c) (2020).
- 292** § 106.12(b) (2020).
- 293** See §§ 106.8(b)(1) (2024); 106.8(b)(1) (2020).
- 294** § 106.8(c)(1)(ii) (2024).
- 295** 89 Fed. Reg. at 33837-38; see also Trump Rule, 85 Fed. Reg. at 30477, 59961, 59957.