

# Title IX 2.0: Navigating the New Terrain

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October 2023

# Navigating IX: Where Are We?

- Current Regulations (8/2020) in full force & effect
  - *Cardona* struck “exclusionary” rule
- New Administration-January 2021
  - Significant focus-LGTBQ+ protections
- Title IX NPRM-June 2022/Athletics Rule NPRM-April 2023
  - Originally promised in May, delayed to October.....now?
- State Law/Court Decisions
  - Continued litigation of Title IX disputes
  - Don’t forget state law
  - New Rule will likely face legal challenges

# Significant Developments

- *Bostock*
  - Supreme Court case establishing protections for LGBTQ employees from discrimination under Title VII
  - ED issued position that *Bostock* extends to Title IX
- *Tenn v. Department of Ed*
  - OCR enjoined from enforcing its extension/interpretation of *Bostock* in 20 states with conflicting laws

# *State of Tenn v. US Dept of Education*

- 20 States challenged ED guidance/position extending *Bostock* to Title IX context
- Guidance conflicts with state laws limiting athletic team participation based on sex assigned at birth & access to bathroom/locker rooms
- Unclear what will happen after rule becomes final as likely additional challenges await
- *Pursuant to a Federal court order, the Department has been preliminarily “enjoined and restrained from implementing” this document against the states of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, South Dakota, and West Virginia. See State of Tenn., et al. v. U.S. Dep’t of Educ., No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022).*

# Proposed Title IX Rule Highlights

Scope & Application

Sex-Based Discrimination

Sex-Based Harassment

Notice, Reporting & Monitoring

Pregnancy & Related Conditions

Supportive Measures

Grievance Procedures

Informal Resolution

Training

# Sex-based Discrimination

*“On the Basis of Sex”*

- Sex characteristics
- Sex stereotypes
- Pregnancy or related conditions
- Sexual Orientation
- Gender ID

# Applicability/Jurisdiction

- Includes all sex discrimination
- Educational program or activity (EPA)
- Geographical limits removed/outside US & EPA
  - Under school's disciplinary authority
  - *Contributes* to hostile environment in Education Program or Activity

# Sex-based Harassment

- One of Three Prongs
- Hostile Environment
- Unwelcome sex-based conduct:
  - Severe OR
  - Pervasive
  - Objectively AND subjectively offensive
  - Denies OR limits
  - Totality of the circumstances/five factor fact-specific inquiry



# Sex-based Harassment: Totality of the Circumstances

Five factor fact-specific inquiry:

1. Degree to which conduct affected complainant's ability to access EPA
2. Type, frequency duration
3. Parties ages, roles, previous interactions and other relevant factors
4. Location, context and control over recipient
5. Other harassment in EPA

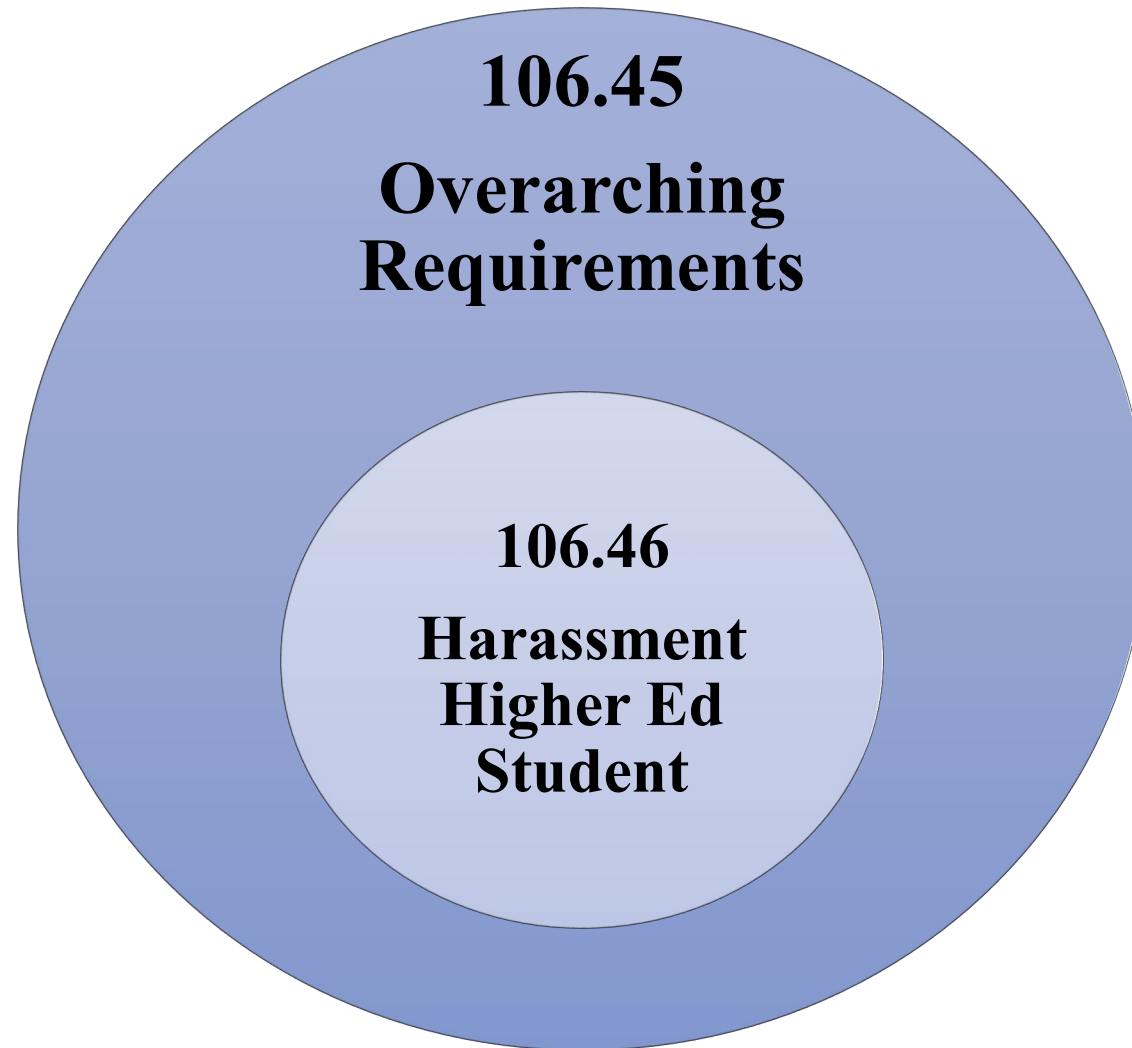
# Notice & Reporting

- Actual Knowledge is removed
- K-12 all employees mandated reporters
- All employees have obligation to either:
  - Provide T9C info to reporting party, or
  - Report information to T9C
  - Exception for confidential employees
- Monitoring barriers to reporting

# Supportive Measures & Emergency Removals

- Reviewable/appealable
- Allow burdening respondent during pendency of grievance process
  - Must allow review prior to imposition if possible
  - Must be removed at conclusion of grievance process
  - Must be no more restrictive than necessary to restore/preserve complainant's access
  - May not be punitive/disciplinary
- K-12 must coordinate with IEP team
- Emergency Removals
  - Justified if immediate and serious threat exists that arises from the allegations
  - Not limited to “physical threat”

# Grievance Procedures § 106.45 & § 106.46



# Grievance Procedure (General) § 106.45

- Applies to All complaints
- Seven overarching “basic” requirements
- No “Formal Complaint” requirement
  - Complaints may be verbal or written
- Less Prescriptive
- No Live Hearing
- No Cross-Examination

# Grievance Procedure Basic Requirements

## § 106.45

1. Treat parties equitably
2. No conflict of interest or bias
  - T9C and/or Investigator may be decision-maker
3. Statement of non responsibility
4. Reasonably prompt timeframes for major stages
5. Reasonable steps to protect privacy
6. Objective evaluation of all relevant evidence
7. Exclude privileged/protected evidence

# What's Not in §106.45 Grievance Procedures?

- No requirement for a formal complaint
  - Greater potential for Informal Resolution options
- No written notice requirements
- No requirement for a live hearing
- No requirement for cross-examination
- No requirement to provide written investigative report
- No requirement to provide 10-day review periods for review of evidence

# Grievance Procedure §106.46

- Sex-based Harassment involving a student at Postsecondary institution
- Everything in General PLUS
- Additional Due Process protections (similar to current)
  - Written notice with sufficient time to prepare
  - Live hearings and cross-exam optional
    - If offered, similar to current rules
  - Must have method of testing credibility
    - Decision-maker may ask during live hearing *or* in individual meetings
- Right to an Advisor



# Pregnancy & Related Conditions

- All employees must provide T9C contact info
- Recipient's Obligations
  - Provide notice of rights
  - Voluntary reasonable modifications
  - Allow voluntary access to separate/comparable portion of program
  - Voluntary LOA
  - Lactation space

# Informal Resolution § 106.44(k)

- If deemed appropriate by T9C
- Not permitted in Student v. Employee matters
- No formal complaint/may be offered at any time
- Both parties voluntarily agree
- Facilitator must be trained
- Facilitator may not be Investigator or Decision-maker
- Process is confidential (information may not be used in grievance process)

# Transgender Athletes Proposed Rule 106.41(B)(2)

If a recipient adopts or applies a sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:

- (i) be substantially related to the achievement of an important educational objective, and
- (ii) minimize the harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

# Training

- ALL employees must be trained
- Specific training for specific employees
  - T9 Team
  - Anyone Implementing Grievance Procedure OR with Authority to Modify/Terminate Supportive Measures
  - Facilitators of Informal Resolution
- Training must be posted on institutional website

# Current Rule

- No Single Model Investigator
- Sexual Harassment: Severe, Pervasive, Objectively Offensive
- Grievance Process After Formal Complaint of Sex Harassment
- Live Hearing & Cross Exam
- Training for T9 Team
- Scope limited to educational program & activity
- In the US

# Proposed Rule

- Investigator Can Make Decision
- Sex-based Harassment: Severe *or* Pervasive
- Grievance Process for All Reports of Discrimination
- Hearing & Cross Exam Optional
- Training for All Employees
- “Impact” within EPA
- Not limited to US

# Key Take-Aways & Closing Thoughts

- New Rules delayed from October/effective date TBD
- Overlap with existing law
  - State law, judicial decisions, VAWA/Clery, Title VII, etc
- Expect more workload: think about staffing
- Plan on expanded training requirements
- Review pregnancy related policies/ensure sufficient lactation space
- Consider developing informal resolution options if not already in place



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Thank you!