

# Digging into the 2024 Title IX Regulations (Higher Ed)



April 25, 2024



1

---

---

---

---

---

---

---

---

## Disclaimers and Basics



- This presentation does not constitute legal advice.
- Yes, we are recording this.
- Yes, we will send the slides out.
- Watch for an email after this that will have links to the recording and the slides.
- You will be able to find the recording at [www.brickergraydon.com/titleix](http://www.brickergraydon.com/titleix)
- Yes, you may post these slides. (But spoiler: you won't have to starting August 1st!)

---

---

---

---

---

---

---

---

## Our Presenters



- Erin Butcher (Ohio)
- Melissa Carleton (Ohio)
- Kasey Havekost (Florida)
- Rebecca Joseph (Ohio)
- Josh Nolan (Ohio)
- Kylie Stryffeler (Virginia)

1

---

---

---

---

---

---

---

---



## Big Picture Thoughts

---

---

---

---

---

---

---

---

### Basics



- 1,577 pages in the unofficial version (16 + 1,561)
- The official version will be published in the Federal Register on April 29, 2024.
  - This version will be much shorter because of the formatting used.
  - It will be these page numbers that will be used from now on.
- How do you read these?
  - Start on page 1521 (of the electronic version) where the new regulations start.
  - Read the new regulations.
  - Go back to the beginning and read the preamble.
  - Now read the regulations again.

---

---

---

---

---

---

---

---

### Did They Hit The Mark?



- In its press release, ED says that the final rules do all of the following:
  - Protect against all sex-based harassment and discrimination.
  - Promote accountability and fairness.
  - Empower and support students and families.

Watch for these themes as we work through the details.

---

---

---

---

---

---

---

---

Things You Can STOP Doing August 1st



- Posting training materials (though they still must be available for inspection upon request)
- Barring informal resolution in student vs. employee cases
- Permitting advisors in the non-106.46 process (unless Clery requires them)
- Holding hearings?
  - Case law/state law may require this anyway

---

---

---

---

---

---

---

---



Sex Discrimination

Definition: 106.10, p. 1522

---

---

---

---

---

---

---

---

Prohibition – 106.31



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

---

---

---

---

---

---

---

---

Scope – 106.10



- Discrimination on the basis of sex includes discrimination on the basis of:
  - Sex stereotypes
  - Sex characteristics
  - Pregnancy or related conditions
  - Sexual orientation
  - Gender identity

---

---

---

---

---

---

---

---

Where an Exception Applies... 106.31



- A recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to **more than de minimis harm**, except as permitted by:
  - The exceptions laid out in 20 USC 1681(a)(1) through (9) and 106.12 through 106.15
  - The exceptions in 20 USC 1686 and corresponding regulations 106.32(b)(1)
    - [Housing]
    - 106.41(b) [Athletics]
- Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to **more than de minimis harm** on the basis of sex.

---

---

---

---

---

---

---

---

Application – 106.11



- Applies to all sex discrimination occurring under a recipient's education program or activity in the United States
- Includes:
  - Conduct occurring in a building owned/controlled by recognized student organization; and
  - Conduct that is subject to the recipient's disciplinary authority
- Recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

---

---

---

---

---

---

---

---



## Sex-Based Harassment

Definition: 106.2, pp. 1513-1514

---

---

---

---

---

---

---

---

### Definition of Sex-Based Harassment – 106.2, p. 1513-1514



Sex-based harassment prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in 106.10, that is:

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

---

---

---

---

---

---

---

---

### Definition of Quid Pro Quo – 106.2, p. 1513



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

---

---

---

---

---

---

---

---

**Definition of Hostile Environment – 106.2, p. 1513-1514 (1 of 2)**



- Unwelcome sex-based conduct that, based on the totality of the circumstances, is **subjectively and objectively offensive** and is **so severe or pervasive** that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).
- Title VII standard, for reference: "must be so severe or pervasive" with reasonable-person standard for charging party

---

---

---

---

---

---

---

---

**Definition of Hostile Environment – 106.2, p. 1513-1514 (2 of 2)**



- Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
  - The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
  - The type, frequency, and duration of the conduct;
  - The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  - The location of the conduct and the context in which the conduct occurred; and
  - Other sex-based harassment in the recipient's education' program or activity

---

---

---

---

---

---

---

---

**Specific Offenses**



- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

Note: The domestic violence definition aligns with but does not adopt the full VAWA definition that applies to victim services (e.g. verbal, psychological, economic, or technological abuse).

---

---

---

---

---

---

---

---



# "Actual Knowledge"

---

---

---

---

---

---

---

---

## Language in 2020 Title IX Regulations



- Under 2020 Title IX Regulations, notice to trigger "actual knowledge" for purposes of liability was limited to:
  - For K-12: any employee, except those deemed confidential (prior to the 2020 Title IX Regulations, "actual knowledge" had been limited to designated school employees).
  - For post-secondary institutions: the Title IX Coordinator any official who has the authority to institute corrective measures on behalf of a recipient (prior to the 2020 Title IX Regulations, "actual knowledge" extended to any employee)

---

---

---

---

---

---

---

---

## Section 106.44's Notice Requirements – Elementary or Secondary School Recipients



Must require **all of its employees who are not confidential employees** to notify the Title IX Coordinator when employee has information about conduct that reasonably may constitute sex discrimination under Title IX (106.44(c)(1))

---

---

---

---

---

---

---

---

**Section 106.44's Notice Requirements – Post-secondary recipients (and the rest)**



- (i) Any employee who is not a confidential employee **and** who either
  - Has authority to institute corrective measures on behalf of the recipient **or**
  - Has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity
- o To notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX; **AND**
- (ii) All other employees not covered above, to:
  - Notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX; or
  - Provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX
  - Acknowledgment that post-secondary institutions have student-employees, and will have to make an individualize determination for any overlap in responsibilities above for student or employee role
  - Acknowledgment that the requirements above in (i) and (ii) do not apply where the employee is the subject of sex discrimination at issue

[106.44(C)(2)(4)]

---

---

---

---

---

---

---

---

---

---

**Confidential employee requirements**



- A recipient must notify all participants in the recipient's education program or activity how to contact its confidential employees (exclusion of post-secondary IRB research)
- A recipient must require confidential employee to explain to any person who informs them of conduct that reasonably may constitute sex discrimination under Title IX:
  - o Employee is a confidential employee and not required to notify Title IX Coordinator about conduct that reasonably may constitute sex discrimination
  - o How to contact Title IX Coordinator and make a complaint
  - o That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate informal resolution or formal grievance process

---

---

---

---

---

---

---

---

---

---

**Jurisdiction**




---

---

---

---

---

---

---

---

---

---



Language in 2020 Title IX Regulations



- Under 2020 Title IX Regulations, we knew Title IX extended to a recipient's education programs or activities, against a person in the United States.
- We also knew that a recipient's education programs and activities could extend to some off-campus locations where the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and any building owned or controlled by a student organization that is officially recognized by a post-secondary institution. (2020 Title IX Regulations 106.30(a) - the 2024 Title IX Regulations remove 106.30(a).)

---

---

---

---

---

---

---

---

Clarification of extra-jurisdictional conduct



- Section 106.11 Application contemplates when conduct outside of the United States fall under Title IX.
- The Regulations apply "to every recipient and to all sex discrimination occurring under a recipient's **education program or activity in the United States**" (as in the 2020 Regulations)....

**AND**

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

---

---

---

---

---

---

---

---

Obligation to address



- To be clear 2024, Title IX Regulations still do not extend Title IX to conduct outside of the United States, or in scenarios outside of the educational program or activities of a recipient (e.g., in a private residence).
- The 2024 Title IX Regulations obligate a recipient to consider the extra-jurisdictional conduct to the extent it contributes to a sex-based hostile environment under a recipient's education program or activity in the United States.
- This does not mean the recipient has to make a Title IX determination about that extra-jurisdictional contributing conduct.

---

---

---

---

---

---

---

---

Why it matters in sex-based hostile environments



- Extra-jurisdictional conduct can impact the elements in sex-based harassment (106.2 definition, addressed above):
  1. The **degree** to which the **conduct affected the complainant's ability to access** the recipient's education program or activity;
  2. The type, **frequency**, and **duration** of the conduct;
  3. The parties' ages, roles within the recipient's education program or activity, **previous interactions**, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  4. The location of the conduct and the **context** in which the conduct occurred; and
  5. Other sex-based harassment in the recipient's education program or activity.

---

---

---

---

---

---

---

---

Definition of "Complainant" - 106.2, p. 1506



- Student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX
- A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX **and** who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination

---

---

---

---

---

---

---

---

Definition of "Student" - 106.2, p. 1515



- Student is "a person who has gained admission."
- Admission is defined to include "selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient." (p. 208)

---

---

---

---

---

---

---

---

**Definition of "Respondent" - 106.2, p. 1512**



- A person who is alleged to have violated the recipient's prohibition on sex discrimination

---

---

---

---

---

---

---

---

**Definition of "Complaint" - 106.2, p. 1506**



- An oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX

---

---

---

---

---

---

---

---



**Duties of a Title IX Coordinator**

*See pages 1-1577*

---

---

---

---

---

---

---

---

**Initiation of Complaint by TIXC**



- 8 Considerations for initiation by TIXC (§ 106.44(f)(1)(v) – (vi))
  - (1) Complainant's request not to proceed
  - (2) Complainant's reasonable safety concerns re: initiation
  - (3) Risk that additional acts of sex discrimination might occur w/out a complaint
  - (4) Severity of the alleged sex discrimination
    - Would a finding of responsibility result in removal/imposition of another sanction?
  - (5) Age and Relationship of the parties
    - Was Respondent an employee of the recipient?
  - (6) Scope of the alleged sex discrimination
    - Information suggesting a pattern? Ongoing sex discrimination? Impacting multiple individuals?
  - (7) Availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred
  - (8) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures

---

---

---

---

---

---

---

---

**Initiation of Complaint by TIXC – tell Complainant**



- If initiating, notify Complainant and address reasonable concerns
- Regardless of initiating:
  - Take other appropriate prompt and effective steps to ensure sex discrimination does not continue
- NOTE: TIXCs are not required to analyze the 8 considerations if the conduct, as alleged, could not constitute sex discrimination

---

---

---

---

---

---

---

---



**Supportive Measures and  
Emergency Removal**

**Definition: 106.2, p. 1515**  
**See also 106.44(h) and (i)**

---

---

---

---

---

---

---

---

**Definition of Supportive Measures – 106.2, p. 1515**



Individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:

- o Restore or preserve that party's access to the recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment; or
- o Provide support during the recipient's grievance procedures or during the informal resolution process. [NOTE: specific discussion of Supportive Measures in 106.44 and 106.45]

---

---

---

---

---

---

---

---

**List of Example Supportive Measures – 106.44(g)**



- Counseling
- Extensions of deadlines and other course-related adjustments
- Campus escort services
- Increased security and monitoring of certain areas of the campus
- Restrictions on contact **applied to one or more parties**
- Leaves of absence
- Changes in class, work, housing, or extracurricular or any other activity, **regardless of whether there is or is not a comparable alternative**
- **Training and education programs** related to sex-based harassment

---

---

---

---

---

---

---

---

**Consult with Disability Services re Supportive Measures**



- If a student is a student with a disability under Section 504, the Title IX Coordinator may consult with your office of disability services in determining appropriate supportive measures. See 106.44(g)(6)(ii)

---

---

---

---

---

---

---

---

**Appeals re: Supportive Measures**



- Must have the ability to seek modification or reversal from an appropriate and impartial employee

---

---

---

---

---

---

---

---

**Emergency Removal from educational program or activity**



- Must undertake an individualized safety and risk analysis
- Must determine that an "**imminent and serious threat** to the health or safety of **a complaint or any students, employees, or other persons** arising from the allegations of sex discrimination justifies removal"
- Must provide respondent with notice and an opportunity to challenge

Note: Institutions still have the right to put employee respondents on administrative leave. See 106.44(i)

Note: Reference to interaction with ADA/504

---

---

---

---

---

---

---

---



**Student with a Disability**

**Definition: 106.2, p. 1515**  
**See also 106.8(e), p. 1521**

---

---

---

---

---

---

---

---

**Definition of Student with a Disability –  
106.2, p. 1515**



- A student who is an individual with a disability under Section 504, or a child with a disability as defined by the IDEA.
- TIXC "may consult, as appropriate" with disability support services to help comply with Section 504. Such consultation = "legitimate educational interest."
- Recipients must establish criteria in its annual notification of FERPA rights to permit its Title IX Coordinator to constitute a school official with legitimate educational interests when performing functions to carry out § 106.8(e)

---

---

---

---

---

---

---

---

**Students with Disabilities**



"The rights of students with disabilities warrant the attention and concern demonstrated by the obligations set forth in § 106.8(e), and the inclusion of this provision in the final regulations will provide clarity for students with disabilities about what to expect from their educational institutions when they are involved in Title IX grievance procedures as complainants or respondents." (p. 284)

---

---

---

---

---

---

---

---



**Informal Resolution**

**See 106.44(k)**

---

---

---

---

---

---

---

---

**Informal Resolution (IR) 106.44(k) - Expanded**



- Formal complaint no longer required.** IR is permitted when a recipient
- Receives a formal complaint of sex discrimination, or
  - Receives information about conduct that reasonably may constitute sex discrimination.
- Expanded to higher ed student/employee claims.** IR is not permitted
- For complaints that include allegations that an employee engaged in sex- based harassment of an elementary or secondary school student, or
  - When such a process would conflict with federal, state or local law.

---

---

---

---

---

---

---

---



**Grievance Process**

**See 106.44, 106.45, and 106.46**

---

---

---

---

---

---

---

---

**Definition of Relevant – 106.2, p. 1511-1512**



- Related to the allegations of sex discrimination under investigation as part of the grievance procedures under 106.45, and if applicable 106.46.
- Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

---

---

---

---

---

---

---

---



**Definition of Remedies – 106.2, p. 1512**



- Measures provided, as appropriate, to a complainant or any other person the recipient identifies as having had their equal access to the recipient's education program or activity limited or denied by sex discrimination.
- These measures are provided to restore or preserve that person's access to the recipient's education program or activity after a recipient determines that sex discrimination occurred.

---

---

---

---

---

---

---

---

**Recipient's Response to Sex Discrimination – 106.44, p. 1545**



- Recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively
- Who has a responsibility to notify the Title IX Coordinator when they have "information about conduct that reasonably may constitute sex discrimination?"
  - Non-confidential employees who have authority to institute corrective measures on behalf of the recipient
  - Non-confidential employees who have responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity
  - **\*\*For all other non-confidential employees – must either 1) notify the Title IX Coordinator or Provide the contact information of the Title IX Coordinator and provide information about how to make a complaint of sex discrimination**

---

---

---

---

---

---

---

---

**Which Grievance Process Applies? (Assuming Jurisdiction)**



- Are you a postsecondary institution?
  - If yes: Go to next question.
  - If no: 106.45 applies.
- Is one of the parties a student?
  - If yes: Go to next question.
  - If no: 106.45 applies.
- Do the allegations include sex-based harassment?
  - If yes: 106.45 + 106.46 apply
  - If no: 106.45 applies.

---

---

---

---

---

---

---

---

**106.45(a)(2) - Who can file a complaint?**



- Applies only to respondent individuals (not respondent institution)
- Sex-Based Harassment complaints can be filed by:
  - complainant,
  - parent/guardian or other authorized legal representative with the legal right to act on behalf of a complainant
  - Title IX Coordinator
- Sex Discrimination (non SBH) complaints can be filed by:
  - All of the above, plus any student or employee
  - Any other person who was participating or attempting to participate in the institution's education program or activity at the time of the alleged sex discrimination

---

---

---

---

---

---

---

---

**Other Notable Features of 106.45 Process**



- Must provide notice to parties if deadlines are delayed for various stages of the process
- If you have different procedures for different situations, you must explain this
- Must provide notice of allegations to the parties - but this notice includes less information than 2020 regulations require
- All dismissal is discretionary - and you must offer an appeal process
- Must provide evidence or description of evidence (but they can still see evidence upon request) for party's response ("reasonable opportunity")
- Prevent unauthorized disclosure of evidence

---

---

---

---

---

---

---

---

**Investigator as Decision-Maker – 106.45**



- Decision-maker must question parties and witnesses to assess credibility to the extent credibility is in dispute and relevant
- Simplified requirements for written determination
- Appeals must be comparable to other procedures
- Your policy must describe sanctions and supportive measures

---

---

---

---

---

---

---

---

**No Advisors Under 106.45**



- 106.45 does not require nor prohibit advisors
- Clery Act still requires advisor of choice in situations involving sexual assault, dating violence, domestic violence, and stalking

---

---

---

---

---

---

---

---

**Features of 106.46**



- Notice of allegations is more robust; may delay provision of notice due to safety concerns
- Parties are entitled to advisor of choice
- Parties get notice/appeal for discretionary dismissal
- Discretion to determine whether parties may present expert witnesses - must apply equally to both parties
- Evidence or summary plus access to evidence

---

---

---

---

---

---

---

---

**106.46(f) Credibility Procedures**



- Asynchronous process – Parties submit questions, decision-maker asks questions and provides recording/transcript, parties submit follow-up questions, repeat
  - Investigator is permitted to conduct this process
- Hearing -
  - Option #1 – Decision-maker asks relevant, permissible questions submitted by parties
  - Option #2 (current procedures) – Advisors and decision-maker ask questions

---

---

---

---

---

---

---

---

**Non-Participation under 106.46(f)(4)**



- A decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible.
- The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to such questions.

---

---

---

---

---

---

---

---

**Initial Thoughts**



- Court decisions may "guide" whether you choose asynchronous or live hearings
- There are logistical issues with both hearing options. Option 1 could be integrated into the investigator model if there is good planning.
- Consider which option is appropriate where:
  - A party refuses to participate in the process
  - All relevant conduct is documented in objective evidence (texts, videos)
  - There are no disputed facts based on the evidence collected

---

---

---

---

---

---

---

---



**New Training Requirements**

**106.8(d), pp. 1519-1521**

---

---

---

---


---

---

---

---

### The Who and the When of Training Requirements 106.8(d)



---

**Who?**

1. "All employees"
2. Investigators, decisionmakers, and "other persons who are responsible for implementing the recipient's grievance procedures or have authority to modify or termination supportive measures."
3. "Facilitators of informal resolution process"
4. Title IX Coordinators or Designees.

**When?** Two periods of time:

1. "promptly upon hiring" or "change in position that alters duties under Title IX; and
2. "Annually thereafter"

---

---

---

---

---

---


---

---

---

---

### "All Employees"



---

- Recipient's obligation to address sex discrimination in its education program or activity
- The scope of conduct that constitutes sex discrimination, including definition of sex-based harassment
- All applicable notification requirements regarding student pregnancy (106.40(b)(2) - providing TIXC contact information and information about actions to ensure equal access and avoid discr.)
- All applicable notification requirements regarding response to sex discrimination (106.44(c) - NOTE: reporting requirements will be different depending on employee roles and status as student-employee)

---

---

---

---

---

---


---

---

---

---

### Title IX Team Training Requirement Summary



---

All Employee Topics	Recipient's Response to Sex Disc. (106.44)	Recipient's Grievance Procedures (106.45; poss. 106.46)	What is Relevant? What is Improbable Evidence?	Serve Impartially; Without Conflict of Interest and Bias.	Holding Prejudgment of Facts	Rules and Practices re: Informal Resolution (106.44(k))
Investigators	X	X	X	X	X	X
Decisionmakers	X	X	X	X	X	X
Resp. For Grievance Proc. /Mod. Sup. Measures	X	X	X	X	X	X
Informal Res.	X				X	X
Title IX Card.*	X	X	X	X	X	X

\* Title IX Coordinators and Designees have even more training requirements (106.8(f)(4))

---

---

---

---

---

---

---

---

---

---

**Title IX Coordinator/Designees**



**Title IX Coordinators and Designees have more training requirements:**

- o Responsibilities to pregnant students
- o Responsibilities under the grievance process, including with regard to supportive measures
- o Recipient's recordkeeping system and Title IX recordkeeping requirements
- o "Any other training necessary to coordinate the recipient's compliance with Title IX"

---

---

---

---

---

---

---

---

**Training Records**



- Keep them for seven years
- Must make them available for inspection upon request – no more required posting

---

---

---

---

---

---

---

---



**Retaliation**

**Definition: 106.2, pp. 1512-1513**  
*See also 106.71*

---

---

---

---

---

---

---

---

**Definition of Retaliation, 106.2, p. 1512 – 1 of 2**



- Intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity,
  - For the purpose of interfering with any right or privilege secured by Title IX or this part, or
  - Because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including an information resolution process, grievance procedures, and in any other actions taken by a recipient [to eliminate the discrimination, prevent its recurrence, and remedy its effects]

---

---

---

---

---

---

---

---

**Definition of Retaliation, 106.2, p. 1512 – 2 of 2**



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

---

---

---

---

---

---

---

---



**Athletics**

---

---

---

---

---

---

---

---

**Bricker Graydon**

**Athletics**

- Establishing separate athletic teams under § 106.41(b) = not de minimis harm.
- Preventing someone from participating in school including in sex-separate activities (athletics) consistent with their gender identity = de minimis harm?

The Athletics NPRM ([Notification on the Draft of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Disability Criteria for Male or Female Athletic Teams](#)) was NOT a part of this rule.

---

---

---

---

---

---

---

---

**Bricker Graydon**

**Pregnancy and Parenting**

**Definitions: 106.2, p. 1509-1510**

---

---

---

---

---

---

---

---

**Bricker Graydon**

**Definition of Parental Status – 106.2, p. 1509-1510**

- The status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:
  - A biological parent;
  - An adoptive parent;
  - A foster parent;
  - A stepparent;
  - A legal custodian or guardian;
  - In loco parentis with respect to such a person; or
  - Actively seeking legal custody, guardianship, visitation, or adoption of such a person.

---

---

---

---

---

---

---

---



**Definition of Pregnancy or Related Conditions – 106.2, p. 1510**



- Pregnancy, childbirth, termination of pregnancy, or lactation;
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

---

---

---

---

---

---

---

---

**Key Regulations**



- Admissions – 106.21(c)
- Non-discrimination, notice, and **reasonable modifications** – 106.40
- Voluntary leaves of absence – 106.40(b)(3)(iv)
- **Lactation space** - 106.40(b)(3)(v)
- **Limitations on supporting documentation** – 106.40(b)(3)(vi)
- Comparable treatment to other temporary medical conditions – 106.40(b)(4)
- Certification to participate – 106.40(b)(5)

---

---

---

---

---

---

---

---



**Reporting Requirements & Confidential Employees**

**Definition: 106.2, p. 1506-1507**

---

---

---


---

---

---

---

---

**Authority, Administration, Teaching, Advising** 

Duties	Must Report to TIXC	Either report to TIXC or Provide contact info
Authority to institute corrective measures	x	
Administrators	x	
Faculty	X	
Advisors	X	
Non-confidential other employees		X
Confidential employees		X (with required explanations)
Student employees	Institution makes reasonable determination as to what applies	

---

---

---


---

---

---

---

---

**Definition of "Confidential Employees"** 

- Confidential/privileged under state law – only applies to information received while functioning in that confidential/privileged role
- Confidential/privileged as designated by policy
- Researchers who are conducting IRB-approved human research – only applies to information received while conducting the research

---

---

---


---

---

---

---

---

**"Take Back the Night" Exception** 

- If you learn of sex-based discrimination through a public educational event, you don't have to act in response, but you do have to use it to inform your preventive efforts. See 106.44(e)

---

---

---

---

---

---

---

---

**Bricker  
Graydon**

## Your Next Moves

---

---

---

---

---

---

---

---

**Bricker  
Graydon**

### Next Steps

- Determine the process necessary to approve the policy by the deadline.
  - Does your Board need to approve? If so, can they schedule a meeting over the summer?
  - Does any other group on campus need to approve (e.g. Faculty Senate) based on your policy approval requirements? If so, what is the timeline?
- Gather your stakeholders – Board members, faculty, staff, students, community members?
- Get feedback on what choices might fit your community best
- Make decisions about the options you will exercise in your policy.
- Work with counsel to integrate your choices—and your ethic of care—into the policy.

---

---

---

---

---

---

---

---

**Bricker  
Graydon**

### Our Next Moves

- Free Webinar: Title IX Litigation Update (Higher Education) - May 10th, 12 ET
- Free Webinar: What Higher Ed Board Members Need To Know About The New Title IX Regulations – May 15th, 12 ET
- Policy Boot Camp – Coming soon via Zoom for your team!

If you want to join our newsletter to make sure you don't miss out on future trainings, go to [www.brickergraydon.com/subscribe](http://www.brickergraydon.com/subscribe)

---

---

---

---

---

---

---

---



---

---

---

---

---

---

---

---