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PROTECTIONS AGAINST DISCRIMINATION ON THE BASIS OF SEX, INCLUDING SEXUAL ORIENTATION AND GENDER IDENTITY, AND PREGNANCY AND RELATED CONDITIONS UNDER THE NEW TITLE IX FINAL RULE

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On April 19, 2024, the Biden Administration, through the U.S. Department of Education (“ED”), released its final rule “to fully effectuate Title IX’s promise that no person experiences sex discrimination in federally funded education.”¹ The final rule includes a “preamble” of more than 1,500 pages of in-depth discussion of ED’s rationale and analysis of substantive feedback received in the 240,000 comments submitted on the proposed rule back in September 2022. The new rule amends the existing Title IX regulations and goes into effect on August 1, 2024.

This overview details the protections the new rule provides in three main areas: 1) protections for LGBTQ+ students and educators; 2) protections for pregnancy and related conditions; and 3) changes to requirements for schools to prevent, investigate, and respond to complaints of sex discrimination and sex-based harassment.

Protections for LGBTQ+ Students & Educators: Preventing Discrimination on the Basis of Sexual Orientation and Gender Identity

Following on ED’s long-standing interpretation, its prior guidance, and the Supreme Court’s rationale in *Bostock v. Clayton County*, the rule makes clear that discrimination on the basis of sexual orientation and gender identity (as well as

¹ ED’s [press release](#) announcing the final rule links to a [fact sheet](#) (quoted here), an [unofficial copy of the final regulations](#), a [summary](#) of the major provisions of the rule, and a [resource for drafting](#) nondiscrimination policies and grievance procedures.

discrimination based on sex stereotypes and sex characteristics) is prohibited sex discrimination.² Although this is not a new interpretation, this is the first time this explicit protection against sexual orientation and gender identity discrimination has been formalized in Title IX regulations, giving it the force of law.

The rule specifically provides that schools may not separate or treat any person differently based on sex in a manner that subjects them to “more than de minimis harm,” except in the limited circumstances authorized under Title IX, such as sex-separated sports and housing. Under the new rule, preventing someone from participating in a program or activity consistent with their gender identity subjects that person to more than de minimis harm, and is therefore prohibited.

➤ Key requirements to be aware of:

- **Sex-segregated activities and facilities:** Under the new rule, transgender bathroom bans are prohibited, as are other blanket denials of participation in school programs or activities based on gender identity. This is because such bans on the use of school facilities or participation in activities consistent with a student’s or educator’s gender identity cause more than de minimis harm.³
- **Pronouns:** Repeated misgendering of a student or educator may be illegal sex-based harassment. This is because sex-based harassment includes harassment based on gender identity or nonconformance with sex stereotypes. In the preamble discussions about pronouns, ED notes that whether verbal conduct such as misgendering constitutes harassment is “necessarily fact-specific.” A “stray remark,” such as a misuse of language, is not considered harassment, but repeated misgendering or deadnaming that is “severe or pervasive” could be considered prohibited harassment.⁴
- **School athletics:** The new rule does not address school athletics, and thus leaves open the question of whether and under what circumstances transgender student athletes may be barred from sex-separated school sports. ED introduced a separate proposed rule on this issue, which it has announced it will finalize and issue separately.
- **State law preemption:** Title IX’s requirements, including its protections against discrimination based on sexual orientation and gender identity, preempt any state laws that conflict. Schools must comply with Title IX’s requirements even if these requirements conflict with state law, and they cannot have policies or practices that discriminate based on sexual orientation or gender identity.⁵ Although it is well recognized that federal law generally supersedes conflicting state law, some Republican governors

² 34 C.F.R. §§ 106.2, 106.10.

³ 34 C.F.R. § 106.31(a)(2).

⁴ 34 C.F.R. § 106.2; Unofficial Rule, pp. 148-51.

⁵ 34 C.F.R. § 106.6.

have announced that they will not comply with the new rule, and Texas already has filed a lawsuit seeking to prevent the enforcement of the rule. Other lawsuits will certainly follow, particularly in states that have passed laws that require or promote discrimination in schools based on gender identity (e.g., bathroom bans, pronoun restrictions). Unless and until any portion of the new rule is enjoined, states and school districts must comply with these requirements.

Protections for Pregnancy and Related Conditions

The final rule builds on the existing requirement in effect since 1975, which provides that schools may not discriminate based on pregnancy or related conditions, including childbirth, termination of pregnancy, and recovery. The rule clarifies and updates existing protections to include lactation as a related condition, and to require lactation time and space for students and employees. The new rule also contains provisions that apply only to students with pregnancy-related needs, in particular, a process for notification about rights, and reasonable modifications as necessary to ensure equal access to the education program or activity.

➤ Key requirements to be aware of:

- **Educator obligations to notify students about pregnancy-related rights:** When a student or a student’s parent informs a school employee of the student’s pregnancy or related condition, the employee must provide the student with the Title IX coordinator’s contact information and advise them that the coordinator can work with them to ensure equal access to education programs and activities.⁶ Information about the student’s pregnancy or related condition must be kept confidential.
- **Student Rights** - The school is required to:⁷
 - Inform the student about the school’s obligations, its notice of nondiscrimination, and restrictions on disclosure of personal information;
 - Provide the student with the option of individualized, reasonable modifications as needed to ensure they can equally access programs and activities;
 - Allow the student a voluntary leave of absence at least for any medically necessary time period; and
 - Ensure access to a clean, private space for lactation.
- **Employee rights** – In addition to existing rights to be free from discrimination based on pregnancy or related conditions, the new rule provides additional rights to educators:

⁶ 34 C.F.R. § 106.40(b)(2).

⁷ 34 C.F.R. § 106.40(b)(3).

- Employees must be provided with reasonable break time for lactation and access to a clean, private lactation space.⁸
- Employees who need leave for pregnancy or a related condition but who do not have sufficient accumulated leave time or who do not qualify for FMLA leave must be given voluntary leave without pay for a reasonable period. They must be reinstated to their same status or comparable position at the end of that leave.⁹
- Note that school employees also have rights under the [Pregnant Workers Fairness Act](#) (PWFA) and the [PUMP Act](#).

Requirements and Procedures for Preventing, Investigating and Responding to Complaints of Sex Discrimination and Harassment

The new rule maintains much of the general structure and intent of the process requirements established by the prior version of the rule issued in 2020 regarding how schools are to address Title IX complaints. The new rule continues to require equitable treatment of complainants and respondents, including equal access to relevant, permissible evidence, and the opportunity to present and respond to evidence and witnesses. However, the new rule also makes significant changes to the scope of schools' obligations and to some of the process requirements.

On one hand, the rule expands the types of complaints that schools must address through their Title IX grievance process, but it also streamlines the required process established in the 2020 rules and gives schools more flexibility in responding to complaints. Like the 2020 rules, the new rule maintains some differences in procedures and requirements for postsecondary institutions compared to K-12 schools. The rule also adds training requirements.

- Major expansions and changes to schools' responsibilities:
 - **Schools' Title IX grievance process must be applied to all sex-based discrimination** (not just sexual harassment). This means schools must use the grievance process on all complaints of sex discrimination, including those based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity;¹⁰ any harassment based on sex, inclusive of these specific bases;¹¹ and retaliation, including peer retaliation.¹²

⁸ 34 C.F.R. § 106.57(e)(1)-(2).

⁹ 34 C.F.R. § 106.57(d).

¹⁰ 34 C.F.R. § 106.10.

¹¹ 34 C.F.R. § 106.2.

¹² 34 C.F.R. § 106.71.

- **Grievance procedures must be in writing.** All schools must adopt written grievance procedures that incorporate the due process requirements set out in the new rule.¹³
- **Broader definition of hostile environment harassment:** Harassment that creates a hostile environment is defined as “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 [school’s] education program or activity.”¹⁴

One major criticism of the 2020 rules was that the narrow definition of sexual harassment – requiring that conduct be both severe *and* pervasive, and that it effectively deny the person access to the education program – led to vast underreporting and allowed sex-based harassment to go unchecked. The new rule expands the scope of what will be considered sex-based harassment. For example, conduct such as repeated sex-based offensive “jokes”, which may not have been considered severe enough to qualify as harassment under the old rule, may now be prohibited if it is sufficiently widespread or repetitive enough to be considered “pervasive.”

In addition, the new rule makes clear that harassment need not be sexual in nature to violate Title IX; all unwelcome conduct that is based on sex, including sexual orientation and gender identity, may be harassment if it is subjectively and objectively so severe or pervasive that it limits or denies a person’s ability to participate in the school’s programs or activities.

- **Broader obligation to respond to possible sex discrimination:** Under the 2020 rules, school were only required to respond in a way that was not “deliberately indifferent” to sexual harassment about which they had “actual knowledge.” Under the new rule, schools will now have to respond “promptly and effectively” to any conduct they know of “that may reasonably constitute sex discrimination.” They must also take certain affirmative steps to notify students of their rights and to address barriers to reporting.¹⁵
- **Employee reporting requirements:** Complaints of possible sex discrimination need not be in writing; schools must respond to oral reports as well.¹⁶ At the K-12 level, any employee, other than one designated as a “confidential employee,”¹⁷ who receives information about conduct that may reasonably constitute sex discrimination must notify the Title IX coordinator. At the higher education level, non-confidential employees

¹³ 34 C.F.R. § 106.45(a)(1).

¹⁴ 34 C.F.R. § 106.2.

¹⁵ 34 C.F.R. § 106.44(a).

¹⁶ 34 C.F.R. § 106.2.

¹⁷ “Confidential employees” are those whose communications are privileged or confidential under federal or state law, as well as other employees that the school may designate as confidential for purposes of providing services to persons related to sex discrimination. 34 C.F.R. § 106.2.

who have authority to take corrective action, and those with certain administrative responsibilities are obligated to notify the Title IX coordinator; all other non-confidential employees must either notify the Title IX coordinator or provide the student with information about how to contact the Title IX coordinator and how to file a complaint.¹⁸

- **Privacy protections:** The new rule expands privacy protections, prohibiting schools from disclosing personally identifiable information obtained in complying with Title IX, with limited exceptions, such as disclosure of information to the parent of a minor.¹⁹
- **Supportive measures:** Schools will now be required to offer supportive measures to complainants, whether or not a formal complaint is filed, as well as to respondents, if needed during grievance procedures.²⁰

➤ Updates to streamline grievance process:

- Use of a single investigator model: Unlike the 2020 rules, which required separate investigators and decisionmakers, the new rules allow the Title IX coordinator or investigator to also serve as decisionmaker as long as they have no conflicts of interest or bias.²¹
- The new rule no longer requires specified periods of time for response to evidence, but requires schools to set “reasonably prompt timeframes” for all major stages of the investigation and decision-making process.
- Allows for voluntary informal resolution of complaints at any stage, except that informal resolution is never allowed for complaints that an employee engaged in sex-based harassment of a K-12 student.

➤ Training and Resources:

- The new rule requires schools to provide annual training to all employees about the school’s Title IX obligations, the scope of conduct that constitutes sex discrimination, and all applicable notification and information requirements. Additional training is required for all investigators, decisionmakers, and Title IX coordinators.²²
- ED has published a [resource to aid schools](#) in drafting Title IX nondiscrimination policies, notices, and grievance procedures, including model language.

¹⁸ 34 C.F.R. § 106.44(c).

¹⁹ 34 C.F.R. § 106.44(j).

²⁰ 34 C.F.R. § 106.44(f)(1)(ii). Supportive measures can include counseling, extensions on assignments, restrictions on contact, leaves of absence, training, and others, as long as they do not unreasonably burden either party. *Id.* at 106.44(g).

²¹ 34 C.F.R. § 106.45(b)(2).

²² 34 C.F.R. § 106.8(d).