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WHAT IS OLD IS NEW: IMPLEMENTING THE TITLE IX FINAL RULE IN MINNESOTA SCHOOLS

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NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel.

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On August 1, 2024, the Title IX Final Rule went into effect. The Title IX Final Rule made numerous changes to the prior Title IX regulations. This presentation focuses on many of the more significant changes that Minnesota schools and school districts should be aware of.

I. EXPANSION OF TRAINING REQUIREMENTS

- A. The Title IX Final Rule expanded the training requirements for schools and school districts. Most noteworthy is the requirement that all employees must be trained on certain aspects of Title IX, including, but not limited to, the school or school district's obligation to address sex discrimination in its education program or activity, the scope of conduct that constitutes sex discrimination, and the applicable notice and information requirements outlined in the Title IX regulations. *See* 34 C.F.R. § 106.8(d)(1) (as amended).
- B. In addition to the training requirements in Part A above, all investigators, decisionmakers, and other persons who are responsible for implementing the school or school district's grievance procedures or who have the authority to modify or terminate supportive measures under § 106.44(g)(4) must be trained on the following topics to the extent related to their responsibilities:
 - 1. The school or school district's obligations under § 106.44, as stated above;
 - 2. The school or school district's grievance procedures;
 - 3. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
 - 4. The meaning and application of the term "relevant" in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance.
- C. In addition to the training requirements in Part A above, facilitators of an informal resolution process must be trained on the rules and practices associated with the school or school district's informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.
- D. In addition to the training requirements in Parts A, B, and C above, the Title IX Coordinator and any designees must be trained on their specific

responsibilities under 34 C.F.R. §§ 106.8(a), 106.40(b)(3), 106.44(f) and (g), the school or school district's recordkeeping system requirements, and any other training necessary to coordinate the school or school district's compliance with Title IX. The Title IX Coordinator must receive training regarding the specific actions to prevent discrimination and ensure equal access.

See 34 C.F.R. § 106.8(d) (as amended).

In addition, under the Title IX Final Rule, training must be “promptly” completed upon hiring or change of position that alters the individual's duties under Title IX, and annually thereafter. *See* 34 C.F.R. § 106.8(d) (as amended).

II. CLARIFYING THE SCOPE OF SEX DISCRIMINATION

- A. Discrimination on the Basis of Sex.** The Title IX Final Rule expanded “discrimination on the basis of sex” to include discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. 34 C.F.R. § 106.10 (as amended).
- B. Sex-Based Harassment.** Formerly defined as sexual harassment, sex-based harassment is now defined, by regulation, as sexual harassment and other harassment on the basis of sex that also satisfies one or more of the following conditions:
1. *Quid pro quo harassment.* An employee, agent, or other person authorized by the school or school district to provide an aid, benefit, or service under the school or school district'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;
 2. *Hostile environment harassment.* 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 or school district's education program or activity (*i.e.*, creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

- a. The degree to which the conduct affected the complainant's ability to access the school or school district's education program or activity;
 - b. The type, frequency, and duration of the conduct;
 - c. The parties' ages, roles within the school or school district's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
 - d. The location of the conduct and the context in which the conduct occurred; and
 - e. Other sex-based harassment in the school or school district's education program or activity; or
3. *Specific offenses.* The following offenses constitute sex-based harassment:
- a. "Sexual assault" meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation¹;
 - b. "Dating violence" meaning violence committed by a person:
 - i. Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - ii. Where the existence of such a relationship shall be determined based on a consideration of the following factors: (1) length of relationship, (2) type of relationship, and (3) frequency of interaction between the persons involved in the relationship.
 - c. "Domestic violence" meaning felony or misdemeanor crimes committed by a person who:
 - i. Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of

¹ See https://ucr.fbi.gov/nibrs/2018/resource-pages/nibrs_offense_definitions-2018.pdf.

the jurisdiction of the school or school district, or a person similarly situated to a spouse of the victim;

- ii. Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
- iii. Shares a child in common with the victim; or
- iv. Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

d. “Stalking” meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- i. Fear for the person’s safety or the safety of others; or
- ii. Suffer substantial emotional distress.

See 34 C.F.R. § 106.2 (as amended).

It is noteworthy that while the definition of sex-based harassment has been broadened, the Title IX Final Rule did not adopt a specific definition of consent.

- C. Education Program or Activity.** The Title IX Final Rule eliminated the definition of an education program or activity. However, it does state that a school or school district 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 school or school district’s education program or activity or outside the United States. 34 C.F.R. § 106.11 (as amended).
- D. Knowledge.** The Title IX Final Rule eliminated “actual knowledge” and replaced it with “knowledge of conduct that reasonably may constitute sex discrimination.” This new “knowledge” standard triggers a school or school district’s duty to respond to sex discrimination in a prompt and effective manner. 34 C.F.R. § 106.44(a) (emphasis added).
- E. Reasonably Prompt Timeframes.** The Title IX Final Rule requires “reasonably prompt timeframes for the major stages of the grievance

procedures” including: evaluation, investigation, determination, and appeal. 34 C.F.R. § 106.45(b)(4) (as amended).²

III. BARRIERS TO REPORTING

Under the Title IX Final Rule, a school or school district must require its Title IX Coordinator to:

- A. Monitor the school or school district’s education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or its regulations; and
- B. Take steps reasonably calculated to address such barriers.

34 C.F.R. § 106.44(b) (as amended).

IV. PUBLICATION OF NOTICE OF NONDISCRIMINATION

A. Notice of Nondiscrimination. Schools and school districts must provide a Notice of Nondiscrimination to students, parents, guardians, or other authorized legal representatives of elementary and secondary students, employees, applicants for admission and employment, and all unions and professional organizations that have collective bargaining or professional agreements with the school or district. Under the Title IX Final Rule, the Notice of Nondiscrimination must now include the following elements:

- 1. A statement that the school or school district does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates;
- 2. A statement that inquiries about the application of Title IX and its regulations to the school or school district may be referred to the Title IX Coordinator, the Office for Civil Rights, or both;
- 3. The name or title, office address, email address, and telephone number of the school or school district’s Title IX Coordinator;

² The Title IX Final Rule also states that the grievance procedures must include “a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay.” 34 C.F.R. § 106.45(b)(4) (as amended)

4. How to locate the school or school district's nondiscrimination policy and grievance procedures; and
5. How to report information about conduct that may constitute sex discrimination under Title IX; and how to make a complaint of sex discrimination under Title IX.

34 C.F.R. § 106.8(c)(1) (as amended).

B. Publication of Notice of Nondiscrimination. The Notice of Nondiscrimination must be prominently included on the school or school district's website, and in each handbook, catalog, announcement, bulletin, and application form that it makes available to persons entitled to the Notice of Nondiscrimination (students, parents, guardians, other authorized legal representatives of students, employees, applicants for employment or admission, and unions), or which are otherwise used in connection with the recruitment of students or employees. 34 C.F.R. § 106.8(c)(2) (as amended).

Key note: If necessary, due to the format or size of a publication, the school or school district may instead include in those publications a statement that the school or school district prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator, and provide the location of the notice on the school district's website. *Id.*

V. CONFIDENTIAL EMPLOYEES

A. Confidential Employee. "Confidential employee" means:

1. An employee of a school or school district whose communications are privileged or confidential under federal or state law. The employee's confidential status is only with respect to information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies; or
2. An employee of a school or school district whom the school or school district has designated as confidential for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those services, the employee's confidential status is only with respect to information received about sex discrimination in connection with providing those services.

34 .F.R. § 106.2 (as amended).

- B.** Under the Title IX Final Rule, a school or school district must notify all participants in the school or school district’s education program or activity of how to contact its confidential employees, if any, excluding any employee whose confidential status is only with respect to their conducting an Institutional Review Board-approved human subjects research study designed to gather information about sex discrimination. 34 C.F.R. § 106.44(d)(1) (as amended).

A school or school district must also require a confidential employee to explain to any person who informs the confidential employee of conduct that reasonably may constitute sex discrimination under Title IX or this part:

1. The employee’s status as confidential, including the circumstances in which the employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination;
2. How to contact the school or school district’s Title IX Coordinator and how to make a complaint of sex discrimination; and
3. That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures.

34 C.F.R. § 106.44(d) (as amended).

VI. ADDITIONAL ACCOMMODATIONS FOR STUDENTS AND EMPLOYEES

A. Parental, Family, Marital Status, Pregnancy, or Related Conditions for Students

1. **Pregnancy or Related Conditions.** “Pregnancy or related conditions” means:
 - a. Pregnancy, childbirth, termination of pregnancy, or lactation;
 - b. Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or

- c. Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

34 C.F.R. § 106.2 (as amended).

2. **Status Generally.** A school or school district must not adopt or implement any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex. 34 C.F.R. § 106.40(a) (as amended).
3. **Pregnancy or Related Conditions.** A school or school district must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions. A school or school district does not engage in prohibited discrimination when it allows a student, based on pregnancy or related conditions, to voluntarily participate in a separate portion of its education program or activity provided the school or school district ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions. 34 C.F.R. § 106.40(b)(1) (as amended).
4. **Responsibility to Provide Title IX Coordinator Contact and Other Information.** A school or school district must ensure that when a student, or a person who has a legal right to act on behalf of the student, informs any employee of the student's pregnancy or related conditions, unless the employee reasonably believes that the Title IX Coordinator has been notified, the employee promptly provides that person with the Title IX Coordinator's contact information and informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the school or school district's education program or activity. 34 C.F.R. § 106.40(b)(2) (as amended).
5. **Specific Actions to Prevent Discrimination and Ensure Equal Access.** A school or school district must promptly and effectively prevent sex discrimination and ensure equal access to the school or school district's education program or activity once the student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions. The Title IX Coordinator must coordinate these actions. 34 C.F.R. § 106.40(b)(3) (as amended).

6. **Notice Requirements.** The school or school district must inform the student, and if applicable, the person who notified the Title IX Coordinator of the student's pregnancy or related conditions and has a legal right to act on behalf of the student, of the school or school district's obligations of non-discrimination and provide the school or school district's notice of nondiscrimination. 34 C.F.R. § 106.40(b)(3)(i) (as amended).
7. **Reasonable Modifications.** The school or school district must make the following reasonable modifications:
 - a. Reasonable modifications to the school or school district's policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the school or school district's education program or activity. Each reasonable modification must be based on the student's individualized needs. In determining what modifications are required, the school or school district must consult with the student. A modification that a school or school district can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification. 34 C.F.R. § 106.40(b)(3)(ii)(A) (as amended).
 - b. The student has discretion to accept or decline each reasonable modification offered by the school or school district. If a student accepts a school or school district's offered reasonable modification, the school or school district must implement it. 34 C.F.R. § 106.40(b)(3)(ii)(B) (as amended).
 - c. Reasonable modifications may include, but are not limited to, breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom; intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time for coursework and rescheduling of tests and examinations; allowing a student to sit or stand, or carry or keep water nearby; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other changes to policies, practices, or procedures. 34 C.F.R. § 106.40(b)(3)(ii)(C) (as amended).

8. The school or school district must allow the student to voluntarily access any separate and comparable portion of the school or school district's education program or activity. 34 C.F.R. § 106.40(b)(3)(iii) (as amended).
9. **Voluntary Leave of Absence.** The school or school district must allow the student to voluntarily take a leave of absence from the school or school district's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's licensed healthcare provider. To the extent that a student qualifies for leave under a leave policy maintained by a school or school district that allows a greater period of time than the medically necessary period, the school or school district must permit the student to take voluntary leave under that policy instead if the student so chooses. When the student returns to the school or school district's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the voluntary leave began. 34 C.F.R. § 106.40(b)(3)(iv) (as amended).
10. **Lactation Space.** The school or school district must ensure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed. 34 C.F.R. § 106.40(b)(3)(v) (as amended).
11. **Limitation on Supporting Documentation.** A school or school district must not require supporting documentation unless the documentation is necessary and reasonable for the school or school district to determine the reasonable modifications to make or whether to take additional specific actions. Examples of situations when requiring supporting documentation is not necessary and reasonable include, but are not limited to, when the student's need for a specific action is obvious, such as when a student who is pregnant needs a bigger uniform; when the student has previously provided the school or school district with sufficient supporting documentation; when the reasonable modification because of pregnancy or related conditions at issue is allowing a student to carry or keep water nearby and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom; when the student has lactation needs; or when the specific action is available to students for reasons other than pregnancy or related conditions without

submitting supporting documentation. 34 C.F.R. § 106.40(b)(3)(vi) (as amended).

12. **Comparable Treatment to Other Temporary Medical Conditions.** A school or school district must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions with respect to any medical or hospital benefit, service, plan, or policy the school or school district administers, operates, offers, or participates in with respect to students admitted to the school or school district's education program or activity. 34 C.F.R. § 106.40(b)(4) (as amended).
13. **Certification to Participate.** A school or school district must not require a student who is pregnant or has related conditions to provide certification from a healthcare provider or any other person that the student is physically able to participate in the school or school district's class, program, or extracurricular activity unless:
 - a. The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
 - b. The school or school district requires such certification of all students participating in the class, program, or extracurricular activity; and
 - c. The information obtained is not used as a basis for discrimination prohibited by Title IX.

34 C.F.R. § 106.40(b)(5) (as amended).

B. Parental, Family, Marital Status, Pregnancy, or Related Conditions in Pre-Employment and Employment

1. **Status Generally.** A school or school district must not adopt or implement any policy, practice, or procedure, or take any employment action, on the basis of sex:
 - a. Concerning the current, potential, or past parental, family, or marital status of an employee or applicant for employment, which treats persons differently; or

- b. That is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

34 C.F.R. § 106.57(a) (as amended).

- 2. **Pregnancy or Related Conditions.** A school or school district must not discriminate against any employee or applicant for employment on the basis of current, potential, or past pregnancy or related conditions. 34 C.F.R. § 106.57(b) (as amended).
- 3. **Comparable Treatment to Other Temporary Medical Conditions.** A school or school district must treat pregnancy or related conditions as any other temporary medical conditions for all job-related purposes, including commencement, duration, and extensions of leave; payment of disability income; accrual of seniority and any other benefit or service; and reinstatement; and under any fringe benefit offered to employees by virtue of employment. 34 C.F.R. § 106.57(c) (as amended).
- 4. **Voluntary Leaves of Absence.** In the case of a school or school district that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a school or school district must treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment. 34 C.F.R. § 106.57(d) (as amended).
- 5. **Lactation Time and Space.** A school or school district must provide reasonable break time for an employee to express breast milk or breastfeed as needed and ensure that an employee can access a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed. 34 C.F.R. § 106.57(e) (as amended).

6. **Pre-Employment Inquiries**

- a. **Marital Status.** A school or school district must not make a pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is “Miss or Mrs.”
- b. **Sex.** A school or school district may ask an applicant for employment to self-identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by Title IX or this part.

34 C.F.R. § 106.60 (as amended).

VII. **CHANGES REGARDING BRINGING AND RESPONDING TO COMPLAINTS**

- A. **Designation of Title IX Coordinator.** Every school or school district must designate at least one Title IX Coordinator. 34 C.F.R. § 106.8(a) (as amended). The school or school district may delegate specific duties to one or more designees, but if there is more than one Title IX Coordinator, then one of the coordinators must retain the ultimate oversight of responsibilities and ensure consistent compliance with Title IX. *Id.* The Title IX Coordinator may receive complaints of sex-based harassment and sex discrimination, either by telephone, e-mail, mail to their office, or in person. Accordingly, the identity of the Title IX Coordinator and that person’s contact information must be provided to (1) applicants for admission and employment, (2) students, (3) parents or legal guardians, (4) employees, and (5) all unions and professional organizations that have collective bargaining or professional agreements with the school or district. *See* 34 C.F.R. § 106.8(c) (as amended).
- B. **Complaint.** “Complaint” means an oral or written request to the school or school district that objectively can be understood as a request for the school or school district to investigate and make a determination about alleged discrimination under Title IX and its regulations. 34 C.F.R. § 106.2 (as amended).
- C. **Who May Bring a Complaint**

The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting

that the school or school district investigate and make a determination about alleged discrimination under Title IX:

1. A complainant;
2. A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant;
3. The Title IX Coordinator;

Under the Title IX Final Rule, with respect to complaints of sex discrimination other than sex-based harassment, in addition to the above persons, the following persons have a right to make a complaint:

4. Any student or employee; or
5. Any person other than a student or employee who was participating or attempting to participate in the school or school district's education program or activity at the time of the alleged sex discrimination.

34 C.F.R. § 106.45(a)(2) (as amended).

D. Responding to a “Report” or “Knowledge” of Sex Discrimination

1. Information conveyed about conduct that could constitute “sex discrimination” was received by the:
 - a. Title IX Coordinator; or
 - b. any employee who is not a confidential employee.

See 34 C.F.R. § 106.44(c) (as amended).

2. Upon receipt of this information, schools and school districts must respond promptly and effectively when they have knowledge of a complaint. *See* 34 C.F.R. § 106.45(a)(1) (as amended).

Key note: The Title IX Final Rule requires all employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX. 34 C.F.R. § 106.44(c)(1) (as amended). However, a confidential employee is not required to notify the Title IX

Coordinator about conduct that reasonably may constitute sex discrimination. *See* 34 C.F.R. § 106.44(d) (as amended).

E. Initiation of a Complaint by the Title IX Coordinator

In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, the Title IX Coordinator determines whether to initiate a complaint of sex discrimination that complies with the grievance procedures under 34 C.F.R. § 106.45. 34 C.F.R. § 106.44(f)(1)(v) (as amended).

To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following factors:

1. The complainant's request not to proceed with initiation of a complaint;
2. The complainant's reasonable safety concerns regarding initiation of a complaint;
3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
4. The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
5. The age and relationship of the parties, including whether the respondent is an employee of the school or school district;
6. The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
7. The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
8. Whether the school or school district could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45.

34 C.F.R. § 106.44(f)(1)(v)(A) (as amended).

If, after considering these and other relevant factors, the Title IX Coordinator determines that the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the school or school district from ensuring equal access on the basis of sex to its education program or activity, the Title IX Coordinator may initiate a complaint. 34 C.F.R. § 106.44(f)(1)(v)(B) (as amended).

VIII. CHANGES REGARDING GROUNDS FOR DISMISSAL OF COMPLAINTS

A. Immediate Dismissal of Complaint

1. The Title IX Final Rule eliminated the grounds for mandatory dismissal of a complaint.
2. Standard for Permissive Dismissal

Under the Title IX Final Rule, a complaint may be dismissed if:

- a. the school or school district is unable to identify the respondent after taking reasonable steps to do so;
- b. the complainant voluntarily withdraws any or all of the allegations in the complaint, the Title IX Coordinator declines to initiate a complaint under 34 C.F.R. § 106.44(f)(1)(v), and the school or school district determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX or its regulations even if proven;
- c. The respondent is not participating in the school or school district's education program or activity and is not employed by the school or school district; or
- d. The school or school district determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX or its regulations.

34 C.F.R. § 106.45(d)(1) (as amended).

3. Prior to dismissing the complaint, the school or school district must make reasonable efforts to clarify the allegations with the complainant. 34 C.F.R. § 106.45(d)(1)(iv) (as amended).

IX. RECORDKEEPING REQUIREMENTS

A. Recordkeeping. A school or school district must maintain the following for a period of at least seven years:

1. For each complaint of sex discrimination, records documenting the informal resolution process under 34 C.F.R. § 106.44(k) or the grievance procedures under C.F.R. § 106.45 and the resulting outcome;
2. For each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX or its regulations, including notifications under 34 C.F.R. § 106.44(c)(1) or (2), records documenting the actions the school or school district took to meet its obligations under 34 C.F.R. § 106.44; and
3. All materials used to provide training. A school or school district must make these training materials available upon request for inspection by members of the public.

34 C.F.R. § 106.8(f) (as amended).

X. ADDITIONAL REQUIREMENTS FOR PROVIDING INTERIM SUPPORTIVE MEASURES

A. Offer and Coordinate Supportive Measures. The Title IX Coordinator is responsible for:

1. Offering and coordinating supportive measures for the complainant.
2. In addition, if the school or school district has initiated grievance procedures or offered an informal resolution process to the respondent, the Title IX Coordinator is responsible for offering and coordinating supportive measures, as appropriate, for the respondent.

34 C.F.R. § 106.44(f)(1)(ii) (as amended).

- B. Supportive Measures.** Supportive measures are non-disciplinary measures including, but not limited to: 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, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative; and training and education programs related to sex-based harassment.
- C. Not Unreasonably Burdensome.** Supportive measures must not unreasonably burden either party and must be designed to protect the safety of the parties or the school or school district's educational environment, or to provide support during the school or school district's grievance procedures. A school or school district must not impose such measures for punitive or disciplinary reasons. *See* 34 C.F.R. § 106.44(g)(2) (as amended).
- D. Confidentiality.** A school or school district must not disclose information about any supportive measures to persons other than the person to whom they apply, including information informing one party of supportive measures provided to another party, unless necessary to provide the supportive measure or restore or preserve a party's access to the education program or activity, or when an exception applies (e.g., prior written consent, disclosing to parent/guardian with legal right, as required by Federal law, Federal regulations, to the extent not in conflict with Title IX or its regulations, when required by State or local law, or when permitted under FERPA).
- E. Modification or Termination of Supportive Measures.** A school or school district may, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures, and or at the conclusion of the informal resolution, or the school or school district may continue them beyond that point. 34 C.F.R. § 106.44(g)(3) (as amended).

A school or school district must provide a complainant or respondent with a timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the school or school district's decision to provide, deny, modify, or terminate supportive measures applicable to them. The impartial employee must be someone other than the employee who made the challenged decision and must have the authority to modify or reverse the decision, if the impartial employee determines that the decision to provide, deny, modify, or terminate the supportive measure was inconsistent with the definition of supportive measures in 34 C.F.R. §

106.2. A school or school district must also provide a party with the opportunity to seek additional modification or termination of a supportive measure applicable to them if circumstances change materially. 34 C.F.R. § 106.44(g)(4) (as amended).

- F. Students with Disabilities.** If the complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with one or more members, as appropriate, of the student's Individualized Education Program (IEP) team, 34 CFR 300.321, or one or more members, as appropriate, of the group of persons responsible for the student's placement decision under 34 CFR 104.35(c), to determine how to comply with the requirements of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the implementation of supportive measures. 34 C.F.R. § 106.44(g)(6)(i) (as amended).

XI. CHANGES REGARDING INVESTIGATION PROCEDURES

- A. Notice of Interviews & Other Proceedings.** Under the Title IX Final Rule, schools and school districts are no longer required to provide written notice of interviews. However, it may still be advantageous to send written notice to parties as proof of offering opportunity to present evidence. The parties must be given equal opportunities to present witnesses, including both fact and expert witnesses, as well as other inculpatory and exculpatory evidence. 34 C.F.R. § 106.45(f)(2) (as amended).
- B. Advisors.** Under the Title IX Final Rule, complainants and respondents enrolled in elementary or secondary schools no longer have a right to an advisor during the grievance process or at their interviews.
- C. Single-Investigator Model.** The decisionmaker is responsible for reviewing the evidence, including any Investigator's report, and determining whether the respondent is responsible for the conduct alleged. The decisionmaker may be the same person as the Title IX Coordinator or Investigator. 34 C.F.R. § 106.45(b)(2) (as amended).

XII. ADDITIONAL REQUIREMENTS FOR REVIEWING AND EXCHANGING EVIDENCE

- A. Review of Evidence.** All parties must be given "an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible," consistent with 34 C.F.R. § 106.2 and 34 C.F.R. § 106.45(b)(7), in the manner set forth below. 34 C.F.R.

§ 106.45(f)(4) (as amended). A party must also have a “reasonable opportunity to respond to the evidence or to the accurate description of the evidence.” 34 C.F.R. § 106.45(f)(4)(ii) (as amended). Title IX no longer requires 10 days for parties to respond to the evidence. 34 C.F.R. § 106.45(b)(4) (as amended).

- B. Relevance.** Both investigators and decisionmakers are tasked with limiting their considerations to information that is “relevant” and not otherwise impermissible. The Title IX Final Rule defines “relevant” as “related to the allegations of sex discrimination under investigation as part of the grievance procedures under [34 C.F.R.] § 106.45...” The Title IX Final Rule further states that “[q]uestions 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.” 34 C.F.R. § 106.2 (as amended).

Under the Title IX Final Rule, the following evidence is impermissible regardless of whether it is relevant:

1. “Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality;”
2. “A party’s or witness’s records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless the school or school district obtains that party’s or witness’s voluntary, written consent for use in the school or school district’s grievance procedures; and”
3. “Evidence that relates to the complainant’s sexual interests or prior sexual conduct, unless evidence about the complainant’s prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant’s prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant’s consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred[.]”

See 34 C.F.R. § 106.45(b)(7) (as amended).

- C. Investigation Reports.** The new Title IX Final Rule does not contain any mention of an investigative report in the context of elementary and secondary education.
- D. Standard of Review.** The “preponderance of the evidence” standard must be used to determine whether sex discrimination occurred, unless the school or school district uses the “clear and convincing” standard of proof in all other comparable proceedings, including proceedings related to other discrimination complaints, in which case the school or school district can elect to use the “clear and convincing” standard to determine whether sex discrimination occurred. 34 C.F.R. § 106.45(h)(1) (as amended). The same standard of proof shall apply regardless of whether the respondent is a student or a staff member.
 - 1. “Preponderance of the evidence” is understood to mean a conclusion that a fact is more likely than not to be true.”
 - 2. “Clear and convincing evidence” means that a fact is highly probable to be true.
- E. Notification of Rights to a Hearing/Written Questions.** For elementary and secondary schools, the Title IX Final Rule eliminated the right to a hearing and to ask parties and witnesses written questions prior to a decision.

XIII. LESS RESTRICTIVE APPEAL PROCESS

The Title IX Final Rule eliminated the specific grounds for appeal. Instead, it states the school or school district must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints. 34 C.F.R. § 106.45(i) (as amended).

XIV. RETALIATION

Retaliation. “Retaliation” means intimidation, threats, coercion, or discrimination against any person by the school or school district, a student, or an employee or other person authorized by the school or school district to provide aid, benefit, or service under the school or school district’s education program or activity, for the purpose of interfering with any right or privilege secured by Title IX or its regulations, 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 including in an informal resolution process under 34 C.F.R. § 106.44(k), in grievance procedures under 34 C.F.R. § 106.45, and in any other actions taken by a school or school district under 34 C.F.R. § 106.44(f)(1). Nothing in this definition or in the Title IX Final Rule precludes a school or school district from requiring an employee or other person authorized by a school or school district to provide aid, benefit, or service under the school or school district's education program or activity to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing. 34 C.F.R. § 106.2 (as amended).

Peer Retaliation. “Peer retaliation” means “retaliation by a student against another student.” 34 C.F.R. § 106.2 (as amended).

Retaliation Requirements. A school or school district “must prohibit retaliation, including peer retaliation, in its education program or activity.” When a school or school district has information about conduct that reasonably may constitute retaliation under Title IX, the school or school district is obligated to comply with § 106.44. Upon receiving a complaint alleging retaliation, a school or school district must initiate its grievance procedures under 34 C.F.R. § 106.45, or, as appropriate, an informal resolution process under 34 C.F.R. § 106.44(k). 34 C.F.R. § 106.71 (as amended).

XV. QUESTIONS?