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The Fundamentals of Title IX

Title IX, Education Amendments of (1972)

“No person . . . shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under **any education program or activity** receiving Federal financial assistance”



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Timeline of Title IX...



1972
Title IX signed into law

1975
Title IX Athletics Regulations signed by President Ford

1980
Title IX oversight given to Office of Civil Rights (OCR)

1988
Equity in Athletics Disclosure Act

2001-2017
"Dear Colleague" Letters

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Timeline of Title IX (continued)...



2020
New Title IX regulations become effective August 14, 2020

March 2021
U.S. Department of Education's comprehensive review of Title IX

June 2021
OCR confirms Title IX applies to discrimination based on sexual orientation and gender identity

June 2022
NPRM with proposed Title IX Regulations released

April 2023
NPRM on athletic eligibility under Title IX

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Timeline of Title IX (continued)...

April 19, 2024
Department of Education released Final Title IX Rule

August 1, 2024
Final Title IX Rule becomes effective

Signature Series
THE EDUCATION LAW GROUP AT BOWLES RICE

HOT OFF THE GRILL
TITLE IX
IT'S NO PICNIC

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THERE ARE ONLY 76 DAYS LEFT TO GET IN COMPLIANCE

Do you feel the heat?
It's time to get cooking!

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What's all this smoke about?

Purpose and overview of the 2024 Title IX Regulations according to the U.S. Department of Education



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A Dash of Background Information:

- The 2024 Title IX regulations amend the current Title IX regulations that have been in place since 2020.
- These new regulations are the result of more than 240,000 public comments that have been received by the Department of Education (“Department”) since July 2022.



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Purpose of the 2024 Regulations

The purpose of the new regulations is to effectuate Title IX, which is designed to eliminate discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.

On the basis of sex includes not just gender, but discrimination based on sex characteristics, sex stereotypes, pregnancy and related conditions, sexual orientation and gender identity.



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Objectives of the 2024 Regulations

- Provide full protection from sex-based harassment
- Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities – and to prevent its reoccurrence and remedy its effects.



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Objectives of the 2024 Regulations

- Require schools to provide supportive measures to complainants and respondents affected by conduct that may constitute sex discrimination, including sexual violence and other forms of sex-based harassment.
- Require schools to respond promptly and effectively to all complaints of sex discrimination with a fair, transparent, and reliable process that includes trained, unbiased decisionmakers to evaluate all relevant and not otherwise impermissible evidence.



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Objectives of the 2024 Regulations

- Provide schools with the flexibility to adapt their regulations' grievance procedure requirements to their educational communities so that all schools can implement Title IX's promise of nondiscrimination fully and fairly in their educational environments.
- Protect students, employees, and applicants from discrimination based on pregnancy or related conditions.



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Objectives of the 2024 Regulations

- Prohibit discrimination against LGBTQI+ students, employee, and others.
- Protect people from harm when they are separated or treated differently based on sex in school.
- Protect student, employees and others from retaliation.



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Objectives of the 2024 Regulations

- Support the right of parents and guardians to act on behalf of their elementary and secondary school children.
- Ensure that schools communicate their nondiscrimination policies and procedures.
- Prohibit schools from sharing personal information.



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Overview of the 2024 Regulations

- The final regulations DO NOT include new rules governing eligibility criteria for athletic teams.
- *HOWEVER*, it does reference separation on the basis of sex and recognize that preventing a person from participating in a recipient's education program or activity consistent with their gender identity subjects that person to more than de minimis harm (§106.31(a)(2))



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What is new on the Title IX menu?

New provisions you must know
to avoid getting burned



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New additions to the 2024 Regulations:

- Address discrimination based on pregnancy or related conditions
- Address discrimination based on employment applications
- Prohibit the separation of or treating any person different on the basis of sex



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Pregnancy and Related Conditions



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- Although previous Title IX rules have prohibited discrimination on the basis of pregnancy and childbirth, the new 2024 regulations clarify that students and employees are protected from discrimination based on **PREGNANCY AND OTHER RELATED CONDITIONS.**



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Pregnancy or related conditions means:

- (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
- (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.



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Title IX and Pregnancy: Protections for Students

- A county board of education must not adopt or **implement** a 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.
- A county board of education 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.**



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Title IX and Pregnancy: Protections for Students

- A county board of education 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 recipient ensures that the separate portion is comparable to that offered to student who are not pregnant and do not have related conditions. (Say what?)



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Title IX and Pregnancy: Obligation of Schools

- When a student (or parent) informs **any employee** of the pregnancy or related condition, the employee must promptly provide the student with the Title IX coordinator's contact information and advise the person that the Title IX coordinator can coordinate:
 - Specific actions to prevent sex discrimination AND
 - Ensure equal access to educational programs



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Title IX Coordinator Obligations

- Title IX coordinator must inform the student and the person acting upon their behalf of their rights under Title IX and the right to privacy of their personally identifiable information.
- The school system must make reasonable modifications to its policies, practices and procedures to prevent discrimination and provide equal access to programs.



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What is a reasonable modification?

- It depends! The Title IX coordinator must consult with the student to come up with the modifications.
 - (Think accommodations and the interactive process.)
- A modification that would fundamentally alter the nature of the program is **not** a reasonable modification.
- If the student accepts the modification, then it must be implemented!



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What are some reasonable modifications?

- Breaks during class to express milk, breastfeed, or attend to health needs, including eating, drinking and restroom breaks
- Intermittent absences to attend medical appointments
- Access to online or homebound services
- Changes in schedule or course sequence
- Extensions of time for coursework and rescheduling of tests and examination



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What are some reasonable modifications?

(continued...)

- Allowing a student to sit or stand, carry water or keep it nearby
- Counseling
- Change in physical space/furniture/supplies
- Voluntary access to separate and comparable programs or activities



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Title IX and Pregnancy: Student Absences and Documentation

- Voluntary leaves of absence
 - At a minimum, for the time deemed medically necessary
 - If there is greater leave available, then for that leave
 - When the student returns, they must be reinstated to the academic status they left and to the extracurricular status when the leave began



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Title IX and Pregnancy: Student Absences and Documentation

- A school must excuse a student's absences because of pregnancy or childbirth for as long as the student's doctor deems the absences medically necessary.
- When a student returns to school, she must be allowed to return to the same academic and extracurricular status as before her medical leave began.



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Title IX and Pregnancy: Student Absences and Documentation

- Schools cannot require a pregnant student to produce a doctor's note in order to stay in school or participate in activities, including interscholastic sports, unless the same requirement to obtain a doctor's note applies to all students being treated by a doctor.
- Even when a student is in the later stages of pregnancy; schools should not presume that a pregnant student is unable to attend school or participate in school activities.



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Title IX and Lactation

- Lactation space – **other than a bathroom** – must be provided to students and employees
 - Must be clean
 - Must be shielded from view
 - Must be free from intrusion from others
 - May be used for expressing milk for breastfeeding
- PUMP Act
 - Breaks required as often as needed for a year after the child's birth



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Title IX and Pregnancy: Protections for Employees

- Protections for return from leave apply to employees
- Employment policies, procedures and practices must not treat persons differently based on current, potential or past parental, family or marital status of an employee or applicant or that is based on whether the employee or applicant is the head of household or principal wage earner



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Title IX and Pregnancy: Employee Absences and Documentation

- Must be treated comparably to other employees with temporary medical conditions
- Voluntary leaves of absence **MUST** be provided to employees even if they do not have enough accrued leave or have not qualified yet for leave. Leave is without pay and must be reasonable. At the end of the leave, the employee **MUST** be reinstated without any loss of right, benefit, or opportunity.



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Title IX and Pregnancy: Intersection with new W. Va. Code §18-34-2

- W. Va. Code §18-34-2 provides for:
 - Excused absences for up to 8 weeks for students
 - Excused absences for antenatal care recommended by provider
 - A doctor's excuse is required for the initial 8 weeks and separate doctor's excuses after that (do you require that of every student?)



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Title IX and Pregnancy: Intersection with new W. Va. Code §18-34-2

- Provide an excused absence for a student with a sick child, with a doctor’s excuse for a sick child (do you do that for every student?)
- Under 18-34-2, county boards shall make **reasonable efforts to encourage** the parent to remain on track for graduation by providing academic support options, including, but not limited to, work provided virtually and a homebound instructor for weekly visits to ensure accountability.

• Does that comply with Title IX?



Employment Applications



Title IX and Employment Applications

- A county board must not inquire as to marital status on an employment application, such as whether the applicant is a Miss or Mrs.
- A county board may ask an applicant 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.



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What has changed?

What you need to know to avoid mis-steaks



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Changes to the scope & Application of Title IX



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New (Expanded) Scope of Title IX

- §106.10 of the 2024 Regulations provides the scope of Title IX to be as follows:
- Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.



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Application of Title IX

- §106.10 of the 2024 Regulations provides that Title IX applies to every recipient and to all sex discrimination occurring under a recipient’s education program or activity in the United States.
- 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 U. S.**



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Changes to the Definitions



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Changes to the Definitions

The 2024 regulations modified or newly defined the following terms:

- Complaint
- Respondent
- Complainant
- Discrimination Based on Sex
- Sex-Based Harassment
- Quid Pro Quo Harassment
- Hostile Environment Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



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Definition of Complaint

2020 Regulations

- Previously “Formal Complaint”
- A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and **requesting that the recipient investigate the allegation of sexual harassment.**
- Required to be signed



2024 Regulations

- 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 or this part.**



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“Formal Complaint” Requirement Removed

- Department recognized that the “Formal Complaint” requirement caused confusion as to when a complaint was initiated and/or how to initiate a complaint.
- Under the 2024 regulations, a complaint is now an oral or in written communication.
- No magic words needed!
- Communication must be **objectively understood as a request to investigate and make a determination.**
 - Based on a fact-specific determination
 - More than a student/employee’s general question(s) about Title IX procedures



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What does it mean to have an “Objective Understanding...”?

- Communication must be **objectively understood as a request to investigate and make a determination.**
 - Based on a fact-specific determination
 - Using a reasonable person standard
 - Must be more than a student/employee’s general question(s) about Title IX procedures
- Who makes this decision?



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- Nothing in §106.47 prevents OCR from holding a recipient accountable for noncompliance with any provision of the final regulations, including its determination whether a complainant's communication with the recipient constitutes a complaint under the definition in § 106.2



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Complaint must still be documented, even if no written complaint required

- The 2024 regulations include recordkeeping obligations, similar to the 2020 regulations
- Boards will be required to maintain:
 - (1) for each complaint of sex discrimination, records documenting the informal resolution process or the grievance procedures and the resulting outcome, and
 - (2) for each notification that the Title IX Coordinator receives or information about conduct that reasonably may constitute sex discrimination under Title IX or the implementing regulations, records documenting the actions the board took to meet its obligations.



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Definition of Complainant

2020 Regulations

- “An individual who is alleged to be the victim of conduct that could constitute **sexual harassment**.”

2024 Regulations

- (1) A student or employee who is alleged to have been subjected to conduct that could constitute **sex discrimination under Title IX** or this part; or
- (2) 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 or this part and who was participating or attempting to participate in the recipient’s education program or activity at the time of the alleged sex discrimination
- Includes volunteers



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Broadened the Scope of Complainant

- Would now apply to “sex discrimination” not just sexual harassment.
- The 2024 Regulations broaden the definition of Complainant to include individuals who are **NOT CURRENTLY** enrolled or employed as long as that person was participating or attempting to participate in an education program or activity at the time of the alleged discrimination.
 - Former employees, former students, prospective students or employees



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Broadened the Scope of Complainant

- Why?
- Some may feel uncomfortable filing a complaint while still enrolled or employed
- Title IX also protects students, employees, and others who continue participating in the education program or activity from sex discrimination that may persist or may be remedied after the specific complainant no longer participates.
- Limiting responsibility to address sex discrimination to those circumstances in which a complainant continues participating in the program or activity fails to ensure that others who continue to participate benefit from the nondiscrimination guarantee in Title IX.



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“Participating or Attempting to Participate”

- Requires a fact-specific analysis to be made on a case-by-case basis.
- Under the 2024 regulations, the focus of the analysis is whether the participation or attempted participation occurred *at the time of the alleged sex discrimination*.
- Goal: “ensuring that a recipient operates its education program or activity free from sex discrimination because it addresses conduct that would have interfered with the complainant’s ability to participate in the recipient’s education program or activity”



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Concern over influx of years' old complaints?

- The Department of Education intends the 2024 regulations to be enforced prospectively and not retroactively.
- This means if a former student or employee files a complaint related to alleged conduct that occurred prior to August 1, 2024, the complaint would fall under the 2020 regulations could be dismissed under § 106.45(d)(1)(ii) if the respondent is not participating in the education program or activity and is not employed by the recipient,
 - or under § 106.45(d)(iv) if the allegations, even if proven, would not constitute sex discrimination under Title IX or this part.
- “[T]he benefits of allowing complaints by former students and employees...justify the potential risk and investigative challenges of a complaint filed after someone leaves a recipient institution.”



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What about Visitors?

- A visitor could be a complainant depending on a fact-based analysis into:
 - The reason for the visit, and
 - What the individual was doing at the time of the alleged discrimination.



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Definition of Respondent

2020 Regulations

- means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

2024 Regulations

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



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Discrimination Based on Sex

- The Department explained that it heard significant feedback from students, parents, recipients, advocates, and other concerned stakeholders that the 2020 amendments do not adequately clarify or specify the scope of sex discrimination prohibited by Title IX, and that the current definition of “sexual harassment” does not fully implement Title IX’s mandate.
- As a result, the 2024 regulations were drafted to clarify the definition of discrimination based on sex to include any discrimination based on sex, including, but not limited to, **sex-based harassment**.
- The Department projects a 10% increase in complaints to a recipient as a result of the change in the definition of sex-based harassment.



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Sexual Harassment v. Sex-Based Harassment

2020: Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).



2024: Sex-Based Harassment

- 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:
 - (1) Quid pro quo harassment;
 - (2) Hostile environment harassment; or
 - (3) Specific offenses
 - (i) Sexual assault meaning an offense classified as forcible or nonforcible sex offense under the FBI crime reporting system;
 - (ii) Dating violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the existence of certain factors (as later defined herein);
 - (iii) Domestic violence (as later defined herein)
 - (iv) Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) Fear for the person's safety or the safety of others; or (B) Suffer substantial emotional distress.



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Sex-Based Harassment, defined:

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- (1) **Quid pro quo harassment;**
- (2) Hostile environment harassment; or
- (3) Specific offenses.

• Quid Pro Quo Harassment:

- 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



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Quid Pro Quo Harassment

- Under the 2020 regulations, only employees could be accused of “quid pro quo” harassment.
- Under the 2024 regulations, scope of quid pro quo is expanded to employees, agents, or other person...
 - “other person” means that students are now included
- ...authorized by the recipient to provide aid, benefit, or service...
- Explicitly or impliedly conditioning the provision of such aid, benefit, or service on a person's participation in unwelcome sexual conduct.



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Hostile Environment Harassment

2020 Regulations

- Defined Sexual Harassment as conduct on the basis of sex that satisfied one of the following:
 - (2) Unwelcome **conduct** determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity

2024 Regulations

- Now officially "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 recipient'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 certain factors.



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Hostile Environment Harassment: Factors that must be considered

- (i) The degree to which the conduct affected the complainant's ability to access the education program or activity;
- (ii) The type, frequency, and duration of the conduct;
- (iii) The parties' ages, roles within the education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- (iv) The location of the conduct and the context in which the conduct occurred; and
- (v) Other sex-based harassment in the education program or activity



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- (2) Hostile environment harassment; or
- (3) Specific offenses.

Specific Offenses:

- (i) **Sexual assault** meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;
- (ii) **Dating violence** meaning violence committed by a person:
 - (A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - (B) Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (1) The length of the relationship;
 - (2) The type of relationship; and
 - (3) The frequency of interaction between the persons involved in the relationship;
- (iii) **Domestic violence** meaning felony or misdemeanor crimes committed by a person who:
 - (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;
 - (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
 - (C) Shares a child in common with the victim; or
 - (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or
- (iv) **Stalking** meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - (A) Fear for the person's safety or the safety of others; or
 - (B) Suffer substantial emotional distress.



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Changes to a district's obligations under title ix as related to:

Notice of Conduct



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- A county board of education with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively
- A county board of education must also address sex discrimination in its programs or activities.
- (QUERY – Where's the “actual knowledge?”)



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Notice of Conduct

- County boards must require **all** employees at elementary and secondary schools 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.
- County boards must let all participants in their education programs or activities know who is a **confidential employee** and how to contact them.



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Who is a “Confidential Employee”?

- Confidential employees are:
 - Those persons whose communications are privileged and confidential under State or Federal law (like nurses, psychologists, etc.)
 - Those persons designated by the school system to receive confidential information for Title IX purposes (like school counselors, perhaps)
 - Must be designated by the school board if their communications are not protected by law



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Confidential employees are required to:

- Explain what it means to be a confidential employee and that they are NOT required to notify the Title IX coordinator of the possibility of sex discrimination
- Explain how to contact the Title IX coordinator to make a complaint
- Explain that the Title IX coordinator can offer supportive measures as well as initiate an informal resolution or an investigation



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Notice of Conduct

- A county board must require:
 - At all other locations (i.e. the bus garage? Central office?), employees who have the authority to institute corrective measures or has the responsibility for administrative leadership, teaching or advising in the educational programs or activities must notify the Title IX coordinator when the employee has information about conduct that reasonably may constitute sex discrimination.
- **AND . . .**



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- All other employees to either
 - Notify the Title IX coordinator when the employee has information about conduct that reasonably may constitute sex discrimination
- OR
 - Provide the contact information of the Title IX coordinator and information about how to make a complaint



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Exclusion to Notice of Conduct Requirements:

- This requirement does not apply to an employee who has personally been subject to conduct that reasonably may constitute sex discrimination.



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- Title IX Coordinators **MUST:**
 - Monitor barriers to reporting information that may constitute sex discrimination
 - Take steps reasonably calculated to address such barriers
- (HINT – Training, training, training)



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Changes to a district's obligations under title ix as related to:

Responding To Sex Discrimination



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Response to Sex Discrimination

- Once a Title IX coordinator receives notice of conduct that reasonably may constitute sex discrimination, they must do the following to:
 - Promptly and effectively end any sex discrimination,
 - Prevent its reoccurrence, and
 - Remedy its effects



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Title IX Coordinator's Response to Sex Discrimination

The Title IX coordinator must:

- Treat the complainant and respondent equitably (NOTE – it does not say equally)
- Offer and coordinate supportive measures for the **complainant**
- If the Title IX coordinator has initiated the grievance process or informal resolution, then offer and coordinate supportive measures for the respondent



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Title IX Coordinator's Response to Sex Discrimination (continued...)

The Title IX coordinator must:

- Notify the complainant or the person who reported the conduct of the grievance process and informal resolution process
- If there has been a complaint filed, notify the respondent of the grievance process and the informal resolution process
- If there has been a complaint filed or informal resolution process agreed upon, start the process



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Title IX Coordinator's Response to Sex Discrimination (continued...)

If the complaint is not filed, or if it is filed and withdrawn, or an informal resolution agreement is withdrawn, the Title IX coordinator **must**:

- determine whether the Title IX coordinator must file a complaint by going through a fact-specific determination that looks at very specific factors...



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The fact-specific determination must consider:

1. The complainant's request not to proceed
2. The complainant's reasonable safety concerns
3. The risk that additional acts might occur
4. The severity and whether the consequence for the actions, if true, would result in removal from school
5. The age and relationship between the parties (i.e. is one the supervisor; employees; etc.)



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The fact-specific determination must consider:

6. What is the scope – is it ongoing? More than one individual impacted?
7. The availability of evidence to help make a determination
8. Whether the discrimination could be ended without filing a complaint



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So when may the Title IX Coordinator initiate a complaint?

- 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 recipient from ensuring equal access on the basis of sex to its education program or activity**, the Title IX Coordinator may initiate a complaint.



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If the Title IX coordinator decides to initiate the complaint, they must:

- Notify the complainant of the decision prior to initiating the complaint and take reasonable steps to allay any concerns

NOTE: Regardless of whether a complaint is initiated, take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient's education program or activity



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Supportive Measures

- Title IX coordinator must offer supportive measures.
- Supportive measures include:
 - 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, 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.



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Supportive Measures

- Supportive measures:
 - Must not be unreasonable
 - May be modified or terminated after the grievance process or informal resolution
 - Complainant and respondent have the right to seek advice from an impartial employee who can reverse the decision regarding the modification or termination
 - Supportive measures must be kept confidential and only disclosed to those with a need to know



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Supportive Measures and HB 5650

- **Amends West Virginia Code § 18A-2-8, “Suspension and dismissal of school personnel by board; appeal”**
- Addresses whether and when suspended employees may be on school grounds and/or attend school events during their suspensions
- How might this impact supportive measures?



105

Supportive Measures and HB 5650

Suspended employees:

1. cannot be barred from attending events open to the general public; and
2. cannot be barred from entering a school for the purpose of engaging in the normal functions of a parent or guardian with respect only to:
 - dependent children who attend school
 - dependent grandchildren who attend school
 - dependent foster children who attend school
 - other dependent family members who attend school
3. Unless . . .



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Supportive Measures and HB 5650

3. Unless . . .

- **the suspended employ’s presence would jeopardize the health, safety, or welfare of students;**
- the suspended employ’s presence would jeopardize the health, safety, or welfare of *employees*;
- **the suspended employ’s presence would jeopardize the health, safety, or welfare of visitors;**
- the suspended employ’s presence would *impact* the learning environment or the school-sponsored activity (*presumably in a negative way, though the bill does not say this*);



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Supportive Measures and HB 5650

3. Unless . . .

- **the suspended employ’s presence would prejudice an investigation involving the employee;**
- the suspended employ’s presence would prejudice disciplinary proceedings involving the employee;
- **the suspended employ’s presence would violate an order of a court or any law; or**
- the suspended employ’s presence would threaten damage to property.



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Supportive Measures and Students with Disabilities

- If the complainant or respondent is a student with a disability, the Title IX coordinator **MUST**:
 - Consult with one or more members of the student's IEP team or 504 team
 - Discuss how to comply with IDEA/504/Policy 2419 in the implementation of supportive measures



109

Title IX and Special Education

- What might be some best practices?
 - Call together the IEP/504 team and hold a manifestation meeting
 - Is the behavior a manifestation of the disability?
 - If the complainant has an IEP/504 plan, call an IEP/504 meeting to discuss
 - Are their goals that need to be developed, accommodations or modifications made to assist in self advocacy?
 - Social-emotional?



110

Title IX and Special Education

- Are there limitations to the complainant or respondent participating in the Title IX investigation?
 - How are these addressed by the IEP/504 team?
- What if the respondent's sexual misconduct is a manifestation of his or her disability?
 - How do we address it in the IEP/504 plan?



111

Informal Resolution

- Informal resolution may be offered to the parties at any time prior to a formal finding of responsibility.
- Neither party may be forced or pressured to participate in an informal resolution.
- Cannot be offered in the case of employee on student sex-based harassment or if such a process would conflict with Federal, State or local law.



112

Informal Resolution

- Prior to entering into an informal resolution, the parties must be provided with:
 - The allegations;
 - The requirements of the informal resolution process;
 - That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures;
 - That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;
 - The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and
 - What information will be maintained and what information may be used if the grievance process is initiated



113

Informal Resolution

- The facilitator, who conducts the informal resolution, must not be:
 - Biased or have a conflict of interest
 - The investigator or the decisionmaker
 - Must be trained



114

Informal Resolution

- Potential resolutions may include:
 - Restrictions on contact; and
 - Restrictions on the respondent's participation in one or more programs or activities or attendance at specific events, including restrictions that could have imposed as remedies or disciplinary sanctions



115

Changes under Title IX as related to:

The Grievance Process



116

The Grievance Process

- The grievance process is our written policy that describes what happens once a complaint of sex discrimination is made. The grievance process:
 - Must be in writing
 - Must treat complainants and respondents equitably
 - Must require that the person(s) designated as the Title IX coordinator, investigator or decision maker be free from bias or conflict of interest



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The Grievance Process

- The grievance process must:
 - Include a presumption that the respondent is not responsible for the alleged sex discrimination until a determine is made at the conclusion of the process
 - Establish reasonably prompt timeframes for the major stages of the grievance, including a process for seeking extensions
 - Require reasonable steps to protect privacy of the parties and witnesses



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The Grievance Process

- The grievance process must:
 - Require an objective evaluation of all relevant evidence
 - Exclude all evidence that is privileged or provided to a confidential employee; treatment records; and sexual interests or prior sexual conduct
- **GOOD NEWS!**
 - The decisionmaker may be the same person as the Title IX coordinator or the investigator



119

Taste Test!

How Does Your Policy Compare?

Make sure it is well-done before August 1



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How Does Your Policy Compare?

- Tab 5 – Your Policy
- Tab 6 – Notice of Policy and Notice of Nondiscrimination
- Tab 7 – Grievance Procedures for Complaints of Sex Discrimination



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The Grievance Process: Notice of Allegations

- We still have to provide the parties with a Notice of Allegation(s). It must include:
 - A copy of the grievance procedures
 - Sufficient information available at the time to allow the parties to respond to the allegations.
 - Sufficient information includes the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination under Title IX or this part, and the date(s) and location(s) of the alleged incident(s), to the extent that information is available to the recipient;



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The Grievance Process: Notice of Allegations (continued...)

- A statement that retaliation is prohibited; and
- A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence.
- If a description of the evidence is provided, the parties are entitled to an equal opportunity to access to the relevant and not otherwise impermissible evidence upon the request of any party.



123

The Grievance Process: Dismissing the Complaint

- The Title IX coordinator may evaluate the complaint and dismiss it if:
 - You cannot identify the respondent
 - The respondent is not in your program(s) or your employee
 - The complainant voluntarily withdraws the complaint (and the Title IX coordinator does not believe that it would be a violation if proven)
 - It would not be a violation even if proven



124

The Grievance Process: Dismissing the Complaint

- If the complaint is dismissed:
 - Notify the complainant of the dismissal and their right to appeal
 - If notice of allegations has been given, notify the respondent of the dismissal
 - Offer supportive measures
 - If a party appeals, implement the appeal procedures



125

The Grievance Process: Handling a Dismissal Appeal

- If there is an appeal:
 - The decisionmaker on appeal cannot have been involved in any of the process to date
 - The decisionmaker must be trained
 - Both parties have the right to make a statement on appeal
 - Notify both parties of the results of the appeal



126

The Grievance Process: The Investigation

- If the complaint is not dismissed (or dismissal is overturned on appeal), and Notice of Allegation(s) have been provided, it is time for the investigation to begin.
- **Let's get cookin'!**



127

The Grievance Process: Requirements of the Investigation

- The investigation must:
 - Ensure that the burden is on the District—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;
 - Provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that is relevant and not otherwise impermissible;
 - Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance; and



128

The Grievance Process: Requirements of the Investigation (continued...)

- The investigation must:
 - Provide each party with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, in the following manner:
 - The District must provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence. If the recipient provides a description of the evidence, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party;



129

The Grievance Process: Requirements of the Investigation (continued...)

- The investigation must:
 - Provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence; and
 - Take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures. For purposes of this paragraph, disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized.



130

The Grievance Process: Requirements of the Investigation

- *Wait, what? Where is the Rule of 10??*
- And what about this?
 - A District must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

Does this mean we should we make our investigators
our decisionmakers?



131

The Grievance Process: The Decision-Making Process

- The Standard of Proof:
 - Use **preponderance of the evidence** standard of proof to determine whether sex discrimination occurred
 - unless you use the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the you may elect to use that standard of proof in determining whether sex discrimination occurred.



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The Grievance Process: The Decision-Making Process

- The Standard of Proof:
 - Both standards of proof require the decision maker to evaluate relevant and not otherwise impermissible evidence for its persuasiveness; if the decision maker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decision maker must not determine that sex discrimination occurred.



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The Grievance Process: The Decision-Making Process

Once a decision is reached, the Decisionmaker must:

Notify the parties in writing of the determination whether sex discrimination occurred under Title IX including the rationale for such determination, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable;



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The Grievance Process: The Decision-Making Process

- If there is a determination that sex discrimination occurred, as appropriate:
 - require the Title IX Coordinator to coordinate the provision and implementation of remedies to a complainant and other persons identified as having had equal access to the education program or activity limited or denied by sex discrimination,



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The Grievance Process: The Decision-Making Process

- Coordinate the imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any such disciplinary sanctions, and
- Require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity.



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The Grievance Process: Disciplinary Sanctions

- Referenced but never specifically defined in the 2020 regulations
- “Disciplinary sanctions” means consequences imposed on a respondent following a determination **under Title IX** that the respondent violated the recipient’s prohibition on sex discrimination.
 - Does not preclude routine classroom management or the application of separate codes of conduct, including to conduct that has been determined through grievance procedures not to be sex discrimination or to conduct that would be prohibited regardless of whether sex discrimination occurred



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The Grievance Process: Disciplinary Sanctions

- The Department refused to specify what consequences can or must impose on a respondent or what factors to consider when determining what disciplinary sanctions to impose.
- The goal was to give school boards the discretion to make disciplinary decisions under their own policies and codes of conduct.
 - *i.e.:* may consider a respondent’s cumulative conduct history when imposing sanctions.



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The Grievance Process: Appeal Process

2020 Regulations

An appeal may be made on the following grounds:

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.



2024 Regulations

A recipient 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.



139

Title IX and the Grievance Process

- **Other things remain the same:**
 - Complaints may be consolidated
 - Cannot punish or discipline until a determination has been made and the appeal process has been finalized or expired
 - No discipline for making a false statements simply because the decision went against their complaint or statement



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The Grievance Process: Retaliation

- A District must prohibit retaliation, including peer retaliation, in its education program or activity.
- If retaliation is alleged or if the District finds that retaliation occurred, it must offer supportive measures and it must initiate a complaint.



141

The Grievance Process: Retaliation

- **Retaliation** means:
 - intimidation, threats, coercion, or discrimination against any person by the school district, a student, or an employee or other person authorized by the school district to provide aid, benefit, or service in an 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 in an informal resolution process, in grievance procedures, and if applicable in any other actions taken by a District.



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The Grievance Process: Retaliation

NEW:

- **Peer retaliation** means retaliation by a student against another student.



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Changes Under Title IX Related to: Training Requirements



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Required Trainings under Title IX

Promptly upon hiring or changing positions that alter their duties under Title IX, **and annually thereafter**, the following individuals must receive training:

1. All Employees
2. Investigators, Decisionmakers, or other persons who are responsible for implementing the grievance procedures or have the authority to modify or terminate supportive measures
3. Facilitators of the informal resolution process
4. Title IX Coordinator and designees



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Required Trainings for All Employees

- All employees must be trained on:
 - (i) The obligation to address sex discrimination in its education program or activity;
 - (ii) The scope of conduct that constitutes sex discrimination under Title IX and this part, including the definition of sex-based harassment; and
 - (iii) All applicable notification and information requirements under §§ 106.40(b)(2) and 106.44.



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Required Trainings for Investigators, Decisionmakers, and those with authority to modify supportive measures

- The trainings required for all employees, plus trainings on:
 - i. The obligations with respect to knowledge of conduct that reasonably may constitute sex discrimination, supportive measures, informal resolutions, and initiating a complaint;
 - ii. The grievance procedures;
 - iii. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
 - iv. 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



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Required Trainings for Facilitators of the Informal Resolution Process

- The trainings required for all employees, plus trainings on:
- the rules and practices associated with the informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.



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Required Trainings for Title IX Coordinators and Designees

- The trainings required for all employees, investigators, decisionmakers, those authorized to modify supportive measures, and facilitators of the informal resolution process, plus:
- Trainings on their specific responsibilities under the regulations, recordkeeping, and any other training necessary to coordinate compliance with Title IX.



149

Coordinate Title IX Training with House Bill 4830 Training Requirements?

- **West Virginia Code § 18-2-41, “Education and Prevention of the Sexual Abuse of Children”**
 - Must be provided to all public school employees when they are first hired and every three years thereafter.
- **West Virginia Code § 18-2C-5, “Harassment, Intimidation or Bullying Prohibition”**
 - Must be provided to all public school employees when they are first hired and every three years thereafter.



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Title IX and Other Statutes, Policies and Procedures



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Title IX and Other Statutes, Policies and Procedures

- Tab 4 Chart
 - How do Title IX and Policy 4373 work together?
 - Is it a code of conduct or Title IX violation?
 - Do you develop a different investigative model?



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Title IX and Other Statutes, Policies and Procedures

- Tab 8 and Tab 9
 - West Virginia Code 18-2-25; the case of Becky Pepper Jackson and the injunction that followed
- §106.31 Education Programs or Activities, provides:
 - (1) 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.



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Education Programs or Activities & Separation on the Basis of Sex

- (2) In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, 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 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b).
- 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.



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Title IX and Other Statutes, Policies and Procedures

- Tab 10
 - Review of case law and OCR determinations that may help guide us through the 2024 regulations



Wrapping Up

Evaluations



Remaining Questions



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**Thank you for joining us
today!**



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