

2024 Title IX Regulations

Independent Colleges & Universities of Texas

SCHNEIDER —————
EDUCATION &
EMPLOYMENT
————— LAW



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter¹ explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.² Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape,

DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct

Education Secretary Betsy DeVos released final regulations for schools dealing with sexual misconduct, giving them the force of law for the first time and bolstering due-process rights.



The rules preserve Education Secretary Betsy DeVos's broad goals in overhauling Title IX. Anna
MoneyMaker/The New York Times



REGULATION



AUGUST

1

Reminder: Texas Wrinkle



Institution's SH policy must be approved by "the institution's governing board before final adoption" and reviewed every two years by the institution with revisions also requiring governing board approval before being finalized. TEX. EDUC. CODE § 51.282.

NEWS & COMMENTARY

How the Impact of Bostock v. Clayton County on LGBTQ Rights Continues to Expand

The effects of this landmark Supreme Court victory are amplified in states, federal agencies, and courtrooms throughout the U.S.



FEDERAL

New Title IX Rule Has Explicit Ban on Discrimination of LGBTQ+ Students

The new rule expands the definition of sex discrimination but doesn't address transgender athletes' participation in school sports



By [Libby Stanford](#) — April 19, 2024 ⌚ 6 min read

What Is “Sex Discrimination” Prohibited by IX?

- Clarifies extends to discrimination based on “sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”
- Lawful: single-sex clubs and activities, single-sex athletics, single-sex living facilities.
- Sex separation in certain circumstances is not presumptively unlawful (*e.g.*, bathrooms, locker rooms)

What Is “Sex Discrimination” Prohibited by IX?

- “In the limited circumstances in which Title IX 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 . . .
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.”
- Sex-separate athletics teams rules next



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Texas sues Biden administration over expanded protections for LGBTQ+ students in conservative-friendly court

By [Devan Cole](#), CNN

🕒 3 minute read · Updated 3:46 PM EDT, Mon April 29, 2024

3. In addition, the new regulations promise to repeat the disaster that was the Department's ill-advised 2011 Dear Colleague Letter, which had a detrimental impact on publicly funded education across the country, including in Texas. The Final Rule walks back many of the constitutional safeguards issued by the Trump Administration to ensure that students accused of harassment have access to a fair hearing. At the same time, the Final Rule redefines harassment to include constitutionally protected activity. Not only does this put Texas schools in a no-win situation—where adherence to the Constitution risks the loss of federal funds—but students and faculty risk having their futures upended merely for refusing to go along with the Biden Administration's radical agenda.

IN THE
Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,
Petitioner,
v.

G. G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE CARDINAL NEWMAN SOCIETY,
JOHN PAUL THE GREAT CATHOLIC UNIVERSITY,
THOMAS AQUINAS COLLEGE, THE THOMAS MORE
COLLEGE OF LIBERAL ARTS, WYOMING CATHOLIC
COLLEGE, IGNATIUS ANGELICUM LIBERAL STUDIES
PROGRAM, DR. BYRON JOHNSON, AND NATIONAL
CATHOLIC BIOETHICS CENTER AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

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September 27, 2016 *Counsel for Amici Curiae*

Susan NEESE, et al., Plaintiffs,
v.

Xavier BECERRA, in his official capacity as the Secretary of the
United States Department of Health and Human Services, et al.,
Defendants.

[2:21-CV-163-Z](#)

United States District Court, N.D. Texas, Amarillo Division.

Signed November 11, 2022.

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The Fillmore Law Firm LLP, Fort Worth, TX, Christopher L. Jensen, Marvin W.
Jones, Sprouse Shrader Smith PLLC, Amarillo, TX, Gene Patrick Hamilton,
America First Legal Foundation, Washington, DC, for Plaintiffs Susan Neese,
James Hurly.

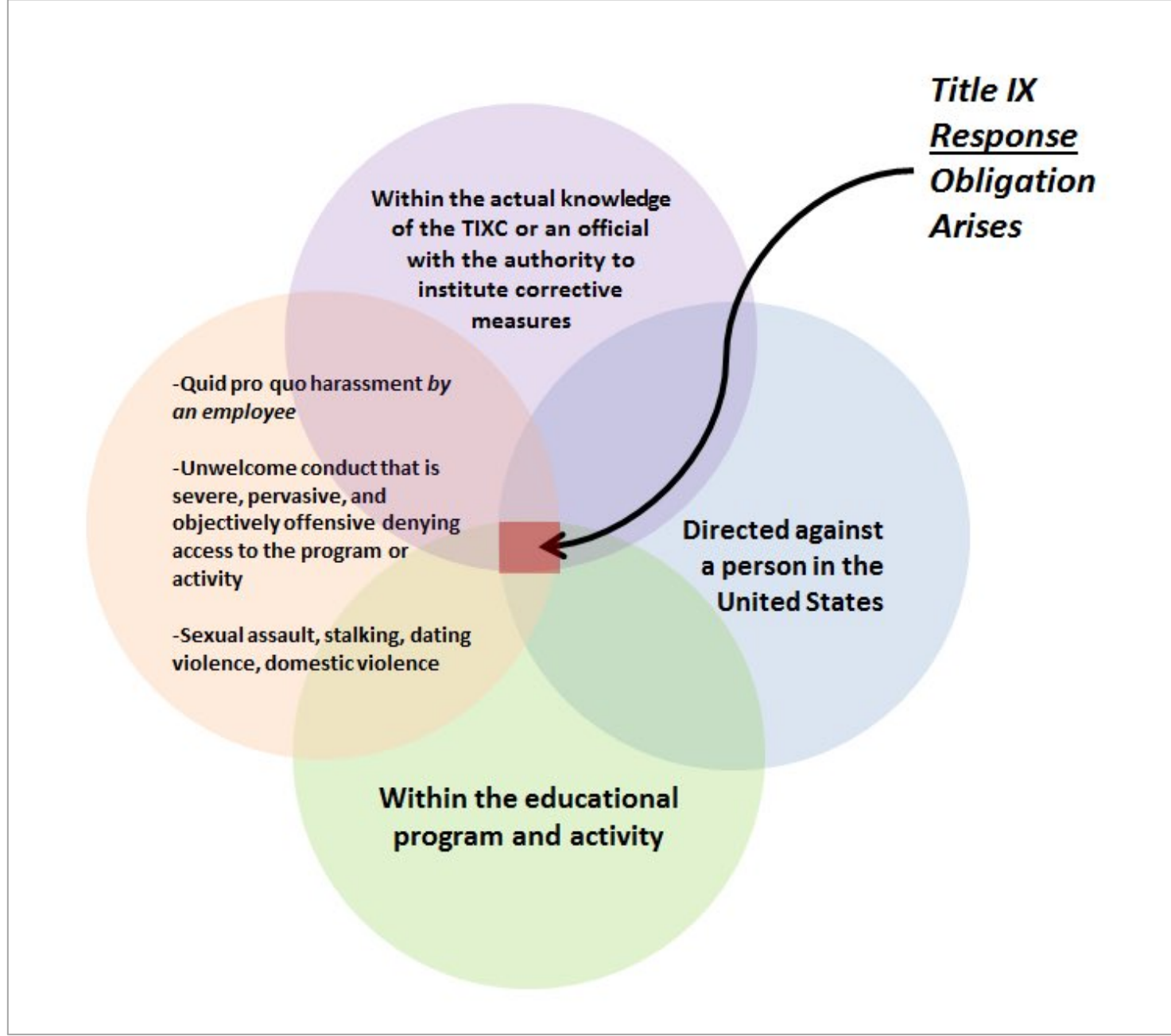
Jeremy S. B. Newman, Christopher D. Dodge, U.S. Department of Justice, Civil
Division, Federal Programs, Washington, DC, Jordan Landrum Von Bokern, U.S.
Department of Justice, Washington, DC, Brian Walters Stoltz, U.S. Attorney's
Office, Dallas, TX, for Defendants.



Two Realistic Possibilities

1. Limited injunction
2. Full injunction

The blackboard is covered in a dense array of handwritten mathematical content. At the top left, there is a double integral: $\int_{-1}^2 (\int_{x^2}^{x+2} xy dy) dx$. Next to it is a probability function $P(x) = 2x, 50$ and a small pyramid diagram. To the right, a 3D box is drawn with dimensions $2x$, $6x$, and z , and a formula $K+M \cdot J \cdot I^2$. Further right, a cylinder is sketched. The middle section features a graph of a curve with a point marked, and a list of numbered problems: (5) $\frac{W-4}{Wb}$, (6) $\frac{(28-1t^3)}{b^5 + -4}$, and (7) 9.3×10^{-5} . Below these, a boy in a blue shirt is seen from behind, pointing at the board. To his left, there are more equations like $(a-b)(a-b) = a^2 + b^2$ and a graph of a function with shaded areas P_1, P_2, P_3 . To his right, there are more complex formulas, including $E=mc^2$, $M = \sqrt{1 - \frac{v^2}{c^2}}$, and various geometric diagrams like a cone and a cylinder. The bottom of the board is filled with more equations, such as $9 + 4 = 13$ and $9 \frac{9}{4} = 18$, along with a small diagram of a triangle and some chemical-like structures.



What: Hostile Environment Definition

Expansion: “Or” not “And”

- “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)”
- Hypothetical First Amendment issues
- Modestly broader standard – more reports covered by regulations

Where: On-Campus Effects of Off-Campus Harassment

- Conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is **subject to the recipient's disciplinary authority**
- A recipient has an obligation to address a sex based hostile environment under its education program or activity, even when **some conduct** alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

Oral or Written Complaints – Obligation to Respond

- No magic words
- Reasonably, objectively understood as request to investigate and make determination
- “actual knowledge” and “formal complaint” are no more: instead “with knowledge of conduct that may constitute . . .”
- Knowledge of conduct that reasonably may constitute sex discrimination in education program or activity must respond promptly and effectively
- Factors outlined for initiation without complainant participation

Mandatory Reporter Requirements

- “Any employee who is not a confidential employee and who **either has authority to institute corrective measures on behalf of the recipient or has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity** to notify the Title IX Coordinator when the employee has **information about conduct that reasonably may constitute sex discrimination under Title IX**”
- All others except confidential: “(A) Notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part; or (B) **Provide the contact information of the Title IX Coordinator and information about how to make a complaint of sex discrimination to any person who provides the employee with information about conduct that reasonably may constitute sex discrimination under Title IX or this part.**”

Mandatory Reporter Requirements: Confidential Employees

Three types of confidential employees:

1. Privileged or confidential
2. Designated as confidential
3. IRB-approved research study

Obligation: if reasonably constitutes sex discrimination:

- Status as confidential
- How to contact IX Coordinator
- How to make a complaint
- How Title IX Coordinator can help

SB 212: Mandatory Reporting

- Under SB 212, employees of public, private and independent institutions of higher education who, “in the course and scope of employment,” witness or receive information about an incident that the employee “reasonably believes to constitute sexual harassment, sexual assault, dating violence, or stalking” against a student or employee must “promptly report” the incident to the institution’s Title IX coordinator or deputy Title IX coordinator. TEX. EDUC. CODE § 51.252.
- Law specifically exempts an enrolled student from the definition of “employee.” Id. § 51.251(3).
- A report under section 51.252 must include “all information concerning the incident known to the reporting person that was relevant to the investigation and, if applicable, redress of the incident, including whether the alleged victim expressed a desire for confidentiality.” Id. § 51.252.

Title IX Coordinator Response to Sex Discrimination

- General: Recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively.
- Title IX Coordinator (or a designee) Requirements:
 - Treat the complainant and respondent equitably
 - Offer and coordinate supportive measures
 - Notify the complainant/respondent of the grievance procedures and the informal resolution process, if available and appropriate.
 - Initiate own complaint when appropriate (8 factors to be considered)

Supportive Measures

- Supportive measures must not **unreasonably** burden either party and must be designed to protect the safety of the parties or the recipient's educational environment, or to provide support during process
- Must not impose such measures for punitive or disciplinary reasons
- “A recipient must provide a complainant or respondent with a timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the recipient's decision to provide, deny, modify, or terminate supportive measures applicable to them . . . A recipient 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.”

LIVE @ DISTANCE: Restorative Justice in Higher Education

Paige Duggins-Clay, J.D.
Scott Schneider, J.D.

Spring 2024

Informal Resolution

- Does not require a complaint
- Expansion to include employee on student harassment
- Participation in informal resolution must be **voluntary**
- Fleshed out notification requirements in a helpful manner



discretion

/dɪˈskrɛʃ(ə)n/

noun

1. the quality of behaving or speaking in such a way as to avoid causing offence or revealing confidential information.
"she knew she could rely on his discretion"
synonyms: [circumspection](#), [care](#), carefulness, [caution](#), [wariness](#), chariness, guardedness; [More](#)
2. the freedom to decide what should be done in a particular situation.
"local authorities should **use their discretion** in setting the charges"
synonyms: [choice](#), [option](#), [judgement](#), [preference](#), [disposition](#), [volition](#); [More](#)

Grievance Procedures

Section 106.45

- All sex discrimination complaints that are not sex-based harassment
- Sex-based harassment complaints without a student Complainant or Respondent

Section 106.46

- All sex-based harassment complaints involving a student Complainant or Respondent

Notice Requirements

Section 106.45

- Not required to be written
- Must be amended if additional allegations come forward or allegations are dismissed

Grievance Procedures

- Informal Resolution Process, if any
- Identities of the parties
- Description of alleged conduct
- Dates and locations of the alleged conduct
- Equal opportunity to access relevant evidence

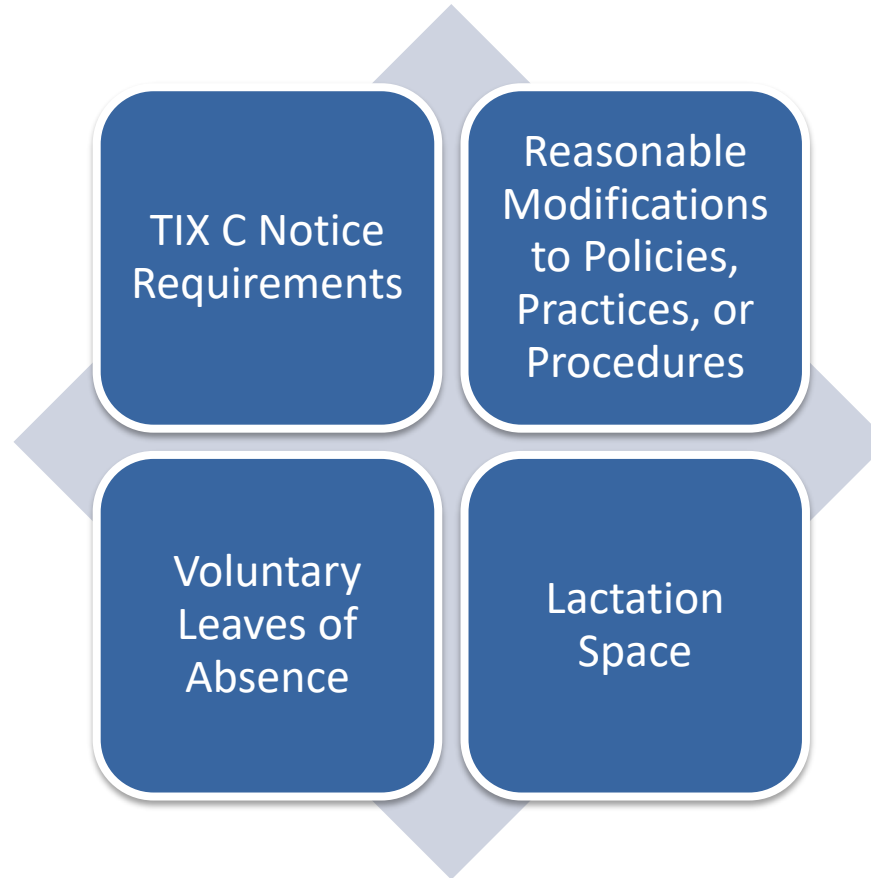
Section 106.46

- Must be written
- Sufficient time to prepare for initial interview
- May be reasonably delayed for safety concerns
- Everything in § 106.45
- Presumption of non-responsibility
- Right to Advisor of choice
- Equal opportunity to access investigation report

Grievance Procedures For Sex-Based Harassment Involving Students

1. Notice obligations (“detailed notice” taken out)
 2. Access to evidence issues --
No 10-day rules, but
reasonable opportunity to
respond to evidence
 3. Allow, but not require, live
hearings
 4. No cross-examination
requirements
 5. Single investigator model
- What to keep and
why?
 - Please spend some
time on your Student
Code of Conduct this
summer

Pregnancy and Related Conditions: Students



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