

# Title IX: 2024 Updates

Presented by: Esperanza Luján & Linda M. Trujillo



WALSH GALLEGOS  
KYLE ROBINSON & ROALSON P.C.

# What We'll Cover:

- ❑ Title IX Overview
- ❑ Expanded Definitions
- ❑ Defining Education Program or Activity and Level of Harm
- ❑ Pregnancy and Pregnancy – Related Conditions
- ❑ Reporting and Grievance Procedures
- ❑ Supportive Measures and Informal Resolution
- ❑ Safeguards – Retaliation

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# Title IX Overview

# Title IX Prohibits Sex Discrimination

- ❑ Title IX of the Education Amendments of 1972 (20 U.S.C. §1681) “No person in the United States 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,” absent certain exceptions
- ❑ Civil action for deprivation of rights (42 U.S.C. §1983) A person who, acting under color of state law, deprives an individual of his or her federal constitutional or statutory rights is liable to that individual in an action in law (*a monetary award*) or equity (*an order requiring the respondent do something or refrain from doing something*)
- ❑ U.S. Department of Education The Department has authority to issue rules effectuating this prohibition on sex discrimination that are consistent with the objectives of the statute. New Rules are effective August 1, 2024

# Expanded Definitions

# “Sex Discrimination” Definition Expanded

## ❑ Previous Regulation

- “Sex Discrimination” was not defined and was used interchangeably with “discrimination on the basis of sex.”

## ❑ Updated Regulation

- “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.”
- Sex-based harassment is a form of sex discrimination and includes the above bases

# A New Definition for Sex-Based Harassment<sup>7</sup>

- Three Categories of “Sex-Based Harassment:”
  - Quid Pro Quo harassment
    - When an employee conditions a benefit on a person’s participation in unwelcome sexual conduct
  - Specific Offenses
    - E.g., sexual assault, dating violence, domestic violence, and stalking
  - Hostile Environment
    - Unwelcome sex-based conduct
- Only the standard for a Hostile Environment has substantively changed

# “Hostile Environment Harassment” Expanded<sup>8</sup>

- ❑ Previous Regulation
  - 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 District’s education program or activity
- ❑ Updated Regulation: Sex-based harassment is a form of sex discrimination
  - 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 District’s education program or activity (*i.e.*, creates a hostile environment)



# Hostile Environment Harassment – Factors

- ❑ Degree the conduct affected Complainant's ability to access an education program or activity
- ❑ Type, frequency, duration of conduct
- ❑ Location of conduct
- ❑ Context in which conduct occurred
- ❑ Parties' ages and roles relevant to evaluating the effect of conduct; and
- ❑ Other sex-based harassment in District's education program or activity

# “Sex Discrimination” – What Is Not Covered<sup>10</sup>

The updated regulations currently do not apply to

- ❑ Sex-separated living facilities
- ❑ Athletic teams

# Defining Education Program Or Activity and Level of Harm

# What Conduct Is Included in an “Education Program or Activity?” 12

- Updated Regulation
  - Conduct occurring in locations controlled by the District remain
  - New: 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 District’s education program or activity or outside the United States.”
  - According to DOE commentary, *the focus is whether the district or school has disciplinary authority over the conduct in the context in which it occurred – (e.g. field trips, online classes, conduct via school-sponsored devices or the internet)*

# De Minimis Harm

- ❑ Title IX permits different treatment or separation on the basis of sex in *certain limited circumstances*
- ❑ Updated Regulation
  - In those limited circumstances, a District “must not carry out such a different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than *de minimis harm*.”
  - The new regulation further clarifies that “[a]dopting 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.”

# Pregnancy And Pregnancy-Related Conditions

# Pregnancy and Related Conditions

- ❑ Previous Regulation
  - “Pregnancy, childbirth, termination of pregnancy, or recovery therefrom.”
- ❑ Updated Regulation
  - Pregnancy, childbirth, termination of pregnancy, *or lactation*
  - Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
  - Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions

# Pregnancy and Related Conditions Cont'd...<sup>16</sup>

- ❑ Student Participation
- ❑ Updated Regulation
  - When informed of a student's pregnancy, a district employee must promptly provide the student, or a person legally entitled to act on their behalf, the contact information for the Title IX Coordinator; unless the employee reasonably believes that the Coordinator has already been notified
  - The District must not require supporting documentation from a student unless doing so is necessary and reasonable



# Pregnancy and Related Conditions Cont'd...<sup>17</sup>

## □ Updated Regulation Cont'd

- Title IX Coordinators must coordinate actions to be taken by a District once informed of a student pregnancy
  - Inform the student (and, if applicable, a person who has a legal right to act on behalf of the student) of the District's obligations, restrictions on District's disclosure of personal information, and the District's notice of nondiscrimination
  - Provide the student with the option of individualized, reasonable modifications as needed to prevent discrimination and ensure equal access to the Districts education program or activity
  - Allow the student a voluntary leave of absence for, at a minimum, the medically necessary time period, and reinstatement upon return
  - Ensure the student has access to a clean, private space for lactation
- Obligation from previous regulation to allow for voluntary access to separate portions of the District's education program or activity remains in place

# Pregnancy and Related Conditions Cont'd...<sup>18</sup>

## □ *Employees*

- Updates are substantively similar in most regards, with two exceptions

## □ Updated Regulation

- Prohibition against certain policies, practices, or procedures, identical to the prohibition for the same in student participation
- District must provide “reasonable break time for an employee to express breast milk or breastfeed as needed ... [and] must ensure that an employee can access a lactation space” with identical standards as the space provided for students

# Reporting And Grievance Procedures

# Reporting Sex Discrimination

- *Who can make a complaint of sex discrimination*
  - A complainant
  - A parent, guardian, or other authorized legal representative; and
  - The Title IX Coordinator (after making determination specified in § 106.44(f)(1)(v))
  - For complaints of sex discrimination other than sex-based harassment
    - Any student, employee, or 3<sup>rd</sup> party actor who is *or was* participating or attempting to participate in the District's education program or activity at the time of the alleged sex discrimination
      - Now includes former students or employees

# Obligation to Report Sex Discrimination

- ❑ Previous Regulation
  - Action only required when a District had "*actual knowledge* of sexual harassment" and the District "must respond promptly in a manner that is *not deliberately indifferent*."
- ❑ Updated Regulation
  - Response is required when a District has "*knowledge of conduct* that *reasonably may constitute* sex discrimination."
  - Response must be done "promptly and *effectively*."

# Obligation to Report Cont'd...

## □ Coordinator Responsibilities

- Ensure all employees are trained on the District's obligation to address sex discrimination, the scope of conduct that constitutes sex discrimination, and all applicable notification and information requirements
- Monitor for barriers to reporting information about sex discrimination and take steps reasonably calculated to address such barriers.
- In the absence of a complaint or after the withdrawal of allegations, a Coordinator may initiate a complaint after notifying and discussing it with the complainant
- Even if no complaint is initiated, the Coordinator must take other appropriate, prompt, and effective steps to ensure that sex discrimination does not continue or recur within the education program or activity

# Grievance Procedures - Outline

- ❑ General Requirements
- ❑ Notice of an Allegation
- ❑ Dismissal of a Complaint / Consolidation of a Complaint
- ❑ Investigation
- ❑ Credibility of Parties and Witnesses
- ❑ Determination
- ❑ Supportive Measures

# Grievance Procedures - Investigations

- What has stayed the same
  - Burden of proof and responsibility is on the District to gather evidence, not the parties
  - Equal opportunity for parties to provide permissible inculpatory or exculpatory evidence that is relevant



# Grievance Procedures - Investigations

- Updated Regulation
  - Removed all references to the presence of an advisor (for either party) during the grievance process except for proceedings involving a postsecondary institution
  - Removed the requirement for an investigative report at the K-12 level
  - District must review all evidence and determine what is relevant and what is permissible
  - District must provide an equal opportunity for parties to access relevant and not otherwise impermissible evidence or an accurate description thereof; provide an opportunity to respond to the evidence; and take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures

# Grievance Procedures – Credibility of Parties and Witnesses

- ❑ Previous Regulation:
  - Questions regarding credibility were only permitted during a live hearing, which were permitted for elementary and secondary schools but required for postsecondary schools
- ❑ Updated Regulation:
  - Regardless of educational level, the 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 the credibility is both in dispute and relevant to evaluating one or more allegation of sex discrimination.”

# Grievance Procedures - Determination

- ❑ Previous Regulation
  - Could use either the preponderance of the evidence standard or the clear and convincing evidence standard so long as its application was uniform
- ❑ Updated Regulation
  - Must use the preponderance of the evidence standard, unless the clear and convincing evidence standard is used in all other comparable proceedings, including other discrimination complaints, in which case it may be used in determining whether sex discrimination occurred
  - Notification of determination simplified, now only requiring the determination, the rationale used, and the procedures and permissible bases for the Complainant and Respondent to appeal

# Grievance Procedures - Determination

- Updated Regulation:
  - When there is a determination that sex discrimination occurred, the Title IX Coordinator is required to coordinate the imposition of any disciplinary sanctions on a respondent, and take any other appropriate, prompt, and effective steps to ensure that sex discrimination does not continue or recur
  - No disciplinary sanctions can be taken against a respondent until the completion of the grievance procedure
  - No party, witness, or other participant in a grievance procedure be disciplined for making a false statement or for engaging in consensual sexual conduct - based solely on the District's determination whether sex discrimination occurred. (Other policies or laws – e.g. Code of Conduct and Public School Code)

# Grievance Procedures - Appeal

Rules governing the appeal of a District's determination have been simplified

- ❑ Updated Regulation
  - A District must offer an appeal process that, at minimum, is the same as the District offers in all other comparable proceedings if any, including proceedings relating to other discrimination complaints
  - Requires a new decision-maker (e.g. Superintendent, Board)

# Supportive Measures And Informal Resolution

# Supportive Measures

- ❑ *Offer and Coordinate Supportive Measures*
- ❑ Previous Regulation
  - Supportive measures were available to both complainants and respondents, but the Title IX Coordinator was only required to contact the complainant with information about them
- ❑ Updated Regulation
  - The Coordinator is required to offer and coordinate supportive measures for the complainant, as appropriate. If the District has initiated grievance procedures or offered an informal resolution process, the Coordinator is required to offer and coordinate supportive measures for the respondent, as appropriate

# Informal Resolutions

## □ Updated Regulation

- May be used in response to a formal complaint or when a District “receives information about conduct that reasonably may constitute sex discrimination.”
- District must determine if informal resolution is appropriate and *may decline* to allow for it despite the wishes of the parties
- May not be used to resolve an allegation that an employee engaged in sex-based harassment of an *elementary or secondary school student*, or if such a process would conflict with Federal, State, or Local law
- Facilitator must not be the same as the Investigator or Decisionmaker in the formal grievance procedure and must not have a conflict of interest or bias for or against either party. Facilitators must be trained on the rules and practices of the informal process and how to serve impartially



# Safeguards – Retaliation

# Retaliation

- ❑ Definition of retaliation has not substantively changed, but whose actions may be considered retaliatory has
- ❑ Previous Regulation
  - “No [District] or other person may” engage in retaliation
- ❑ Updated Regulation
  - Clarifies that retaliation can be performed “by the [District], a student, or an employee or other person authorized by the [District] to provide aid, benefit, or service under the [District’s] education program or activity.”
  - *Peer retaliation* is now its own identified category, defined as “retaliation by a student against another student.”

# Retaliation Cont'd...

New Regulations clarify that certain categories of action are not considered retaliation

## ❑ Previous Regulation

- The exercise of rights protected under the First Amendment
- Violations for making a materially false statement in bad faith during a grievance proceeding

## ❑ Updated Regulation

- Previous clarifications removed
- New clarification that a District *may require certain employees or agents to participate in and assist with a Title IX investigation, proceeding, or hearing*

# Title IX New Regulations - Supporting Information

## *Fact Sheet:*

<https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf>

## *Summary:*

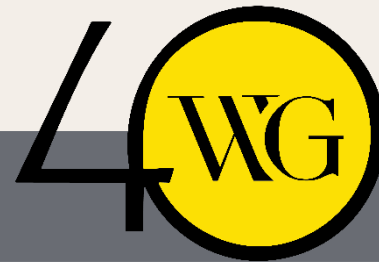
<https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-summary.pdf>

# Any Questions



**Linda M. Trujillo**  
ltrujillo@wabsa.com

**Esperanza Luján**  
elujan@wabsa.com



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ANNIVERSARY

Walsh Gallegos Kyle Robinson & Roalson P.C.  
500 Marquette Avenue NW, Suite 1310  
Albuquerque, New Mexico 87102  
Phone: 505-243-6864  
Fax: 505-843-9318  
Web: [www.WalshGallegos.com](http://www.WalshGallegos.com)

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