TITLE IX REGULATION 2020 — SUMMARY

The following summary of the Title IX regulation includes the 2020 provisions addressing sexual harassment. The 2020 revisions mark the third Notice of Proposed Rulemaking (NPRM) effectuated since the Title IX regulation was adopted in 1975.* The changes related to sexual harassment are extraordinary in length and detail. The language is more typical of OCR policy clarifications, interpretations, or Dear Colleague letters, which do not require a public comment process, than regulations and NPRMs, which do require a public comment process. Various organizations have filed legal action to rescind the 2020 provisions. There have been indications that the new Administration may rescind the 2020 changes. However, because of the very formal manner in which these revisions were implemented, via NPRM with changes to the actual Title IX regulatory language, rescinding the revisions to the Title IX regulation may require up to two years, and potentially longer (although a simple NPRM to rescind all 2020 changes may accelerate this time frame).

The summary herein includes the language from the summary of the Title IX regulation prior to the 2020 revisions (at pages 361-365 of the Manual), which is repeated here for convenient reference. Not all sections of the regulation are summarized, as certain sections are self-explanatory and do not require further clarification. To provide an overview of the 2020 changes to the Title IX regulation:

- The regulation now contains seven Subparts rather than six, and each Subpart concludes with an added section addressing "severability," which all contain the same language.
- Added paragraphs at section 106.6 address "preservation of rights."
- Section 106.8 includes revised language regarding designation of a coordinator, dissemination of policy, and adoption of grievance procedures.
- Added paragraphs at Section 106.12 regarding religious exemptions do not represent new policy.
- Section 106.30 has been added to the regulation and provides definitions related to sexual harassment.
- Section 106.44 has been added to the regulation and concerns an educational institution's response to sexual harassment.
- Section 106.45 has been added to the regulation; this exceptionally extensive section addresses the grievance process for formal complaints of sexual harassment and contains highly detailed requirements, including the requirement for a live hearing with cross-examination that is recorded by audiovisual means, audio, and/or transcript.
- A new Subpart F has been added addressing retaliation.
- The procedural provisions formerly at Subpart F are now at Subpart G.
- Citations following each section have been altered, with a generic reference to the Title IX statutory citation (20 U.S.C. 1681 *et seq.*) following the list of sections (in effect, the regulation's table of contents) and immediately prior to Subpart A.

* NPRMs were effectuated that deleted a provision in section 106.31 concerning dress codes (1982); and allowed for single sex schools and classes at the secondary education level (2006).

SUMMARY/BACKGROUND

Key Points:

- Effective date: July 21, 1975
- Implements 1972 Title IX statute.
- Provides greater specificity than Title IX statute.
- Prohibits sex discrimination in federally funded education programs.
- Revised significantly in 2020.

The regulation implementing the Title IX statute went into effect July 21, 1975, and is at 34 C.F.R. Part 106. "34" designates the volume for the U.S. Department of Education; "C.F.R." stands for Code of Federal Regulations; and "Part 106" is the section of 34 C.F.R. that is the Title IX regulation. Originally, the Title IX regulation was at 45 C.F.R. Part 86 under the U.S. Department of Health, Education, and Welfare (HEW). In 1980, HEW split into the Department of Education (ED) and the Department of Health and Human Services (HHS). HHS retained the codification at 45 C.F.R., while ED's regulations were codified at 34 C.F.R. Although HHS retains a Title IX regulation at 45 C.F.R. Part 86, ED has primary Title IX enforcement responsibilities for most education programs. The text of the 1979 Intercollegiate Athletics Policy Interpretation and the September 1975 guidance, included in Part Three of the Manual, contain the old HEW codification for the Title IX regulation since they were issued prior to the creation of the Department of Education. All references in these documents to Part "86" may be read now as Part "106," while all section (§) numbers are the same; in effect, the list of athletics program components at § 86.41(c) in the Policy Interpretation is now at § 106.41(c).

The Title IX regulation was written in the early 1970s by HEW employees and published for public comment in proposed form in the *Federal Register* on June 20, 1974. Nearly 10,000 comments were received, the great majority of which concerned athletics. The Title IX regulation was revised, reorganized, and submitted to Congress in final form. Congress neither approved nor disapproved the Title IX regulation within the designated time frame; President Gerald Ford approved it, and the Title IX regulation became law July 21, 1975.

The Title IX regulation is divided into "subparts" A through G, and athletics programs are addressed under Subpart D, which covers treatment of students. The seven subparts are:

Subpart A — Introduction
Subpart B — Coverage
Subpart C — Discrimination on the Basis of Sex in Admission and Recruitment Prohibited
Subpart D — Discrimination on the Basis of Sex in Education Programs or Activities Prohibited
Subpart E — Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited
Subpart F — Retaliation
Subpart G — Procedures

Subpart A: Introduction (Sections 106.1 to 106.9)

§ 106.2 Defines many terms used in the regulation.

§ 106.3(a) Revised 2020 language does not change the requirements regarding remedial action and self-evaluation.

§ 106.3(b) Permits affirmative action and may be cited to justify disproportionately higher amounts of scholarship aid to women to overcome conditions that limited their participation.

§ 106.6(b) Institutions are not relieved of their obligations to comply with Title IX because of any state or local law.

§ 106.6(c) Institutions are not relieved of their obligations to comply with Title IX because of any athletics organizations' rules.

§ 106.6(d) This paragraph, added in 2020, states that institutions are not required to restrict or deprive a person of any rights under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution or any rights guaranteed against government action.

§ 106.6(e-h) These paragraphs — (e), (f), (g), and (h) — added in 2020, state that institutions' obligations to comply with Title IX are not obviated or alleviated by the General Education Provisions Act/Family Educational Rights and Privacy Act (paragraph e), or state or local law (paragraph h). Nothing in Title IX may be interpreted as an exemption or reduction of individual rights under Title VII of the Civil Rights Act of 1964 (paragraph f), or legal rights of parents or guardians (paragraph g).

§ 106.8(a) This paragraph has been revised, as of 2020, to incorporate provisions formerly at § 106.9(a) regarding notification of policy, while maintaining certain provisions from § 106.8(a) regarding designation of an employee. Institutions are required to designate at least one employee to coordinate efforts to comply with Title IX, and the 2020 revisions require this individual to be referred to as the "Title IX Coordinator." This individual(s) is to be identified for students and employees. This paragraph also confirms that any person may report sex discrimination in person, by mail, by phone, by email, or other means of reporting, and that such reports may be made any time, "including during non-business hours[.]"

§ 106.8(b) This paragraph has been revised, as of 2020, to incorporate provisions previously under § 106.9 regarding dissemination of policy and requirements for publications. The reorganization and revised language do not create any substantively new requirements.

§ 106.8(c) This paragraph has been revised, as of 2020, to incorporate the provisions formerly at § 106.8(b) of the regulation. Institutions are required to adopt and publish grievance procedures that promptly and equitably resolve student and employee complaints of sex discrimination. The grievance process must comply with § 106.45 (added in 2020) for formal complaints as defined in § 106.30 (also added in 2020).

§ 106.8(d) This paragraph, added in 2020, includes a peculiar provision that this section applies only to sex discrimination occurring against a person in the United States.

§ 106.9 This section has been changed, as of 2020, to address only "severability," in effect: if any provision or application of Subpart A is held invalid, the remainder of Subpart A remains in effect.

Subpart B: Coverage (sections 106.11 to 106.18)

Subpart B explains that all recipients of federal funds are covered by the Title IX regulation; however, the following programs or institutions are exempt:

§ 106.12 Institutions that are controlled by a religious organization to the extent that the Title IX requirements are inconsistent with the religious tenets of the organization; although the 2020 changes include revised language in paragraph (b) and the addition of paragraphs (c) and (d), these revisions do not fundamentally alter OCR's long-standing policy.

§ 106.13 Military academies.

§ 106.14 Social (not professional) fraternities and sororities; YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls; voluntary youth service organizations.

§ 106.15(d) Private undergraduate institutions and education programs from the admission and recruitment provisions of Subpart C of the regulation.

Subpart C: Discrimination on the Basis of Sex in Admission and Recruitment Prohibited (Sections 106.21 to 106.24)

This subpart requires nondiscrimination on the basis of sex for admission and recruitment to the institution for those institutions covered by Title IX per Subpart B. There are no changes to Subpart C with the exception of the *Federal Register* and other citations following the paragraphs, and the addition of § 106.24 regarding severability.

Subpart D: Discrimination on the Basis of Sex in Education Programs or Activities Prohibited (Sections 106.30 to 106.46)

§ 106.30 This entire section, added in 2020, provides definitions only for the issue of sexual harassment and specifically for: actual knowledge; complainant; consent; formal complaint; respondent; sexual harassment; sexual assault; supportive measures; elementary and secondary school; and postsecondary institution. Briefly, these definitions cover:

Actual knowledge — of sexual harassment allegations by appropriate institution officials;

Complainant — the alleged victim of sexual harassment;

Consent — clarifying that institutions are not required to adopt a particular definition of consent with respect to sexual assault;

Formal complaint — which contains highly specific requirements regarding format;

Respondent — the alleged perpetrator of sexual harassment;

Sexual harassment and assault — conditioning benefits upon participation in unwelcome sexual conduct; unwelcome conduct so severe as to deny someone equal access to the education program or activity; and/or sexual assault, dating violence, domestic violence, or stalking as defined by specified laws;

Supportive measures — non-disciplinary, non-punitive individualized services as deemed appropriate that do not unreasonably burden either party; this definition contains unusual detail regarding supportive measures;

Elementary and secondary school — as defined by law;

Postsecondary institution — as defined by law.

§ 106.31 This section contains general provisions for nondiscrimination on the basis of sex in education programs and extracurricular activities. Cheerleaders, drill teams, dance teams, etc., and membership for such teams or clubs are addressed by this section. Cheerleading teams are viewed as extracurricular activities rather than athletics teams when they provide entertainment, thus acting in a support role, at events for other intercollegiate or interscholastic teams. Benefits and awards for athletes, such as team banquets, letter jackets, trophies, rings, or other gifts, may be addressed by this section. Banquets and awards do not specifically fall under the factors within the 13 athletics program components, and OCR might not include analyses of these benefits in their athletics investigations. However, if discrimination is alleged, OCR may choose to review these benefits under the publicity, support services, or equipment and supplies program components, or under this section — 106.31. Regardless of which sections of the regulation are cited, discriminatory treatment for banquets, awards, etc., is prohibited. Similarly, allegations regarding the number of officials assigned to men's and women's competitive events may be investigated under this section, the support services program component, or as an event management issue under the locker rooms, practice and competitive facilities program component. Although OCR has not issued formal policy, an esports team should be reviewed under this section as an extracurricular activity, not as an intercollegiate or interscholastic team under § 106.41.

§ 106.32 This section concerns student housing, including athletes' housing. Ordinarily, OCR addresses athletes' housing under the housing and dining facilities and services program component at § 106.41(c)(9) and does not cite § 106.32.

§ 106.33 This section allows institutions to provide separately, by gender, shower, toilet, and locker room facilities, and applies to locker rooms provided to intercollegiate athletes. Generally, OCR addresses locker rooms for athletics teams under the program component for locker rooms, practice and competitive facilities at § 106.41(c)(7) and does not cite § 106.33.

§ 106.34 This section was revised substantially in 2006 to allow elementary and secondary schools to offer single-sex schools, classes, and extracurricular activities that previously were prohibited by the Title IX regulation. A general standard stipulates that, should a school choose to offer single-sex classes or extracurricular activities, such programs be based on improving the educational achievement of students. A school offering such programs is required to evaluate at least every two years whether it meets this general standard. Student enrollment in such programs is voluntary. If a recipient of federal funds chooses to offer a single-sex school, it must provide students of the excluded sex a substantially equal single-sex school or coeducational school. If a school offers a single-sex class or extracurricular activity, it may be required to provide students of the excluded sex with a substantially equal single-sex class or extracurricular activity. The provisions of this section do not apply to interscholastic, club, or intramural athletics.

If a school chooses not to offer single-sex classes or extracurricular activities, this section allows students to be separated on the basis of sex within a physical education class during activities involving contact sports; namely, basketball, boxing, football, ice hockey, rugby, wrestling, and those sports where "the purpose or major activity of which involves bodily contact." Additionally, students

may be separated within a physical education class based on skill, which may result in groups that are predominantly or exclusively of one gender. For example, when teaching tennis skills, a class may be divided into three groups — beginners, intermediate, and advanced. The result may be that one group is mostly or exclusively boys, another group has similar numbers of girls and boys, while the third group is mostly or exclusively girls. Otherwise, schools may separate classes on the basis of sex for courses on human sexuality. Choruses may be based on vocal ranges that result in a chorus of one or predominantly one sex.

§ 106.35 This section, also revised in 2006, prohibits excluding a student on the basis of sex from admission to vocational education institutions.

§ 106.36 This section regarding counseling and use of appraisal and counseling materials has not been revised.

§ 106.37 This section addresses financial aid for students including grants, aid established by a will or trust, fellowships, and scholarships. Athletic scholarships are addressed specifically at paragraph (c), which establishes requirements that are different than other forms of financial aid.

§ 106.38 An institution that employs students must comply with Subpart E addressing employment. Institution officials must also ensure that outside employers that the institution assists do not discriminate on the basis of sex.

§ 106.39 This section addresses student health insurance, including any insurance policy for athletics participants, and prohibits excluding coverage for gynecological care.

§ 106.40 Rules regarding students' marital or parental status that treat students differently on the basis of sex are prohibited. Paragraph (d) provides that pregnancy and related conditions shall be treated as any other temporary disability with respect to insurance or medical plans or services.

§ 106.41 This section contains the major regulatory provisions for athletics programs, which have not been changed by the 2020 revisions to the regulation. Paragraph (a) contains general nondiscrimination requirements for intercollegiate, interscholastic, club and intramural programs, and states that institutions may not offer these programs separately on the basis of sex. Paragraph (b), however, provides that teams may be offered separately on the basis of sex where selection for teams is based upon competitive skill or the sport involved is a contact sport. The regulation lists basketball, boxing, football, ice hockey, rugby, and wrestling as contact sports, and includes those sports where "the purpose or major activity of which involves bodily contact." Separation on the basis of sex for contact sports is permitted, not required. Paragraph (b) also explains when students of one gender must be allowed to try out for teams offered to the other gender (see pages 41-42 of the Manual for the explanation of this policy).

Those familiar with athletics programs may recognize that participation for intramural and club sports programs is often voluntary and not restricted based upon competitive skill. Thus, § 106.41(a) and (b) would require club and intramural teams to be coed except for contact sports. However, OCR adopted internal policy during the 1980s allowing an institution to offer intramural and club sports teams separately on the basis of sex if the purpose is to encourage women's participation.

Paragraph (c) requires equal athletic opportunity in intercollegiate, interscholastic, club, and intramural athletics programs in the ten program components of: accommodation of interests and abilities; equipment and supplies; scheduling of games and practice times; travel and per diem allowances; tutoring; coaching; facilities; medical and training facilities and services; housing and dining facilities and services; and publicity. Paragraph (c) also explains that different expenditures do not constitute noncompliance, but failure to provide necessary funds for teams for one sex may be considered in determining compliance (see pages 11-17 of the Manual regarding "Title IX and the Money" for additional clarification).

Paragraph (d) is obsolete. It explains the adjustment periods for compliance — one year for elementary school athletics programs and three years for high school and collegiate programs — which ended in 1976 and 1978, respectively.

§ 106.42 This section regarding textbooks and curricular material has not been revised.

§ 106.43 This section was added in 2006 and requires that any use of a single standard for measuring skill or progress in physical education classes not have an adverse effect on the members of one sex. This requirement was at § 106.34(d) prior to 2006.

§ 106.44 This entire section was added in 2020 and addresses an institution's response to sexual harassment. Institution officials are required to "respond promptly in a manner that is not deliberately indifferent." Restricting the rights of the respondent (alleged perpetrator) might not qualify as "not deliberately indifferent." The Title IX Coordinator must: promptly contact the complainant to discuss the availability of, and the complainant's wishes for, supportive measures, regardless of whether a formal complaint has been filed; and explain the process for filing a formal complaint. The institution must treat the complainant and respondent equitably by: providing supportive measures to the complainant; and by following the procedures of § 106.45 in regard to the respondent before any disciplinary actions may be imposed. Paragraph (a)(2) suggests that an incorrect conclusion by institution officials regarding responsibility might not provide evidence of discrimination or deliberate indifference — one interpretation of this language is that institution officials might not be liable for intentional discrimination when OCR finds a violation of Title IX. Under paragraph (c), institution officials may remove the respondent from the education program or activity on an emergency basis, so long as providing the notice and opportunity to challenge the decision immediately following the removal. Institution officials may also place an employee who is the respondent on leave during the grievance process.

§ 106.45 This entire section was added in 2020 and addresses the grievance process for formal complaints solely for the issue of sexual harassment. Paragraph (a) explains that institution officials' treatment of a complainant or respondent may constitute sex discrimination; in effect, both parties must be treated equitably. Paragraph (b) specifically addresses the grievance process, and the length of § 106.45(b) alone, which covers several pages and includes several dozen subparagraphs, is extraordinary.

An institution's grievance process must comply with this section. The Title IX Coordinator, investigators, decision-makers, and anyone who facilitates an informal resolution process must receive training on: the definition of sexual harassment in § 106.30; the scope of the education program or activity; how to conduct an investigation and grievance process including hearings, appeals, and on informal resolutions; and how to serve impartially. Decision-makers must receive training on: the technology used at a live hearing; issues of relevance of questions and evidence; and when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant. Investigators must receive training on issues of relevance to create an investigative report.

The grievance process shall include:

- "reasonably prompt time frames;"
- the range of possible disciplinary sanctions and remedies;
- the range of supportive measures available to complainants and respondents;
- a presumption of innocence of the respondent until a determination of responsibility is made at the conclusion of the grievance process;
- clarification of the standard of evidence to be used;
- appeal procedures.

Upon receipt of a formal complaint, an institution must provide written notice to the parties regarding:

- the grievance process;
- any informal resolution process;
- the allegations, to include the identities of the parties, the conduct alleged, and the date and location of the alleged incident;
- the right to an advisor or attorney of choice;
- any provision of the institution's code of conduct that prohibits knowingly making false statements or submitting false information.

This written notice must include a statement that the respondent is innocent until a conclusion of guilt is made at the end of the grievance process.

The institution must investigate the allegations of a formal complaint. The complaint of sexual harassment must be dismissed if the alleged conduct would not constitute sexual harassment even if proved, did not occur within the institution's education programs, or did not occur against someone in the United States. Otherwise, the complainant may choose to withdraw the complaint.

When investigating a formal complaint, the institution must:

- assume the burden of proof;
- provide equal opportunities for the parties to: present witnesses; have others, including an advisor or attorney, present during grievance proceedings; and review evidence obtained in the investigation;
- provide ten days for the parties to submit a written response to the evidence, which must be sent to both parties in electronic format or hard copy;
- not restrict the ability of either party to discuss the allegations;
- provide written notice of the date, time, location, participants, and purpose of all hearings, interviews, or meetings;
- create an investigative report, which must be sent to the parties at least ten days prior to the hearing.

Paragraph (b)(6) requires a live hearing, with cross-examination conducted directly, orally, and in real time by the party's advisor or attorney of choice (although the institution may restrict the extent of the advisors' involvement). Paragraph (b)(6) contains extraordinary detail, including outlining that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant unless to prove consent or that an individual other than the respondent is guilty of harassment. While § 106.45 references questions and evidence about the complainant's prior sexual behavior seven times, there is no mention regarding questions or evidence about the respondent's sexual predisposition or prior sexual behavior, although that might be presumed to be part of the complainant's allegations. This paragraph stipulates that the decision-maker must not rely on any statement of anyone not submitting to cross-examination at the live hearing, with certain exceptions. During the live hearings, all parties may be in the same location or appear virtually, with technology enabling all parties to see and hear the proceedings. The institution must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for review. Elementary and secondary institutions may, but need not, provide for a hearing.

Paragraph (b)(7) requires the decision-maker, who cannot be the Title IX Coordinator or investigator, to issue a written determination of responsibility, which must include: the allegations; the procedural steps of the investigation; findings of fact; conclusions and rationale for conclusions; sanctions imposed; remedies; and procedures and bases for appeal.

Paragraph (b)(8) requires that both parties must be offered an appeal, and outlines the bases and procedures for an appeal, which includes the requirement that the decision-maker for the appeal must not be the individual who was the decision-maker regarding responsibility, or the investigator, or the Title IX Coordinator.

Paragraph (b)(9) provides a process for informal resolution of the complaint.

Paragraph (b)(10) outlines record-keeping requirements and stipulates that the institution must keep records for seven years of each sexual harassment investigation and all related actions; this includes any audio or audiovisual recording or transcript required for the live hearings. This paragraph also contains the extraordinary requirement that the institution must make available on its website the training materials that are used to train Title IX Coordinators, investigators, decision-makers, and anyone who facilitates an informal resolution process.

Subpart E: Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited (Sections 106.51 to 106.62)

This subpart contains requirements for: employment criteria; recruitment; compensation; job classification and structure; fringe benefits; marital or parental status; effect of state, local, or other requirements on Title IX compliance; advertising; pre-employment inquiries; and when sex is a bona-fide occupational qualification. (By interagency agreement, individual complaints of employment discrimination under Title IX are referred to the Equal Employment Opportunity Commission to be investigated under Title VII of the Civil Rights Act of 1964. See pages 483-484 of the Manual.)

Subpart F: Retaliation (Sections 106.71 to 106.72)

This entire subpart was added in 2020, while the provisions for "Procedures," which were previously at Subpart F, are now at Subpart G. This 2020 version of Subpart F specifically prohibits retaliation against anyone filing a complaint or involved in any way in an investigation or proceeding. The institution is required to keep confidential the identity of the complainant, the respondent, and any witnesses, except as permitted or required by law or to conduct an investigation or related proceedings.

Subpart G: Procedures (Sections 106.81 to 106.82)

Prior to 2020, this subpart was at Subpart F. The provisions of this subpart for procedures remain unchanged (although there is clarification that the definitions in § 106.30 do not apply to 34 C.F.R. 100 or 34 C.F.R. 101). Subpart G adopts and incorporates by reference the procedural provisions of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin in federally funded programs. These provisions are at 34 C.F.R. §§ 100.6 to 100.11 of the Title VI regulation (34 C.F.R. Part 100), and at 34 C.F.R. § 101, which establishes practices and procedures for administrative hearings. The Title VI provisions are:

§ 100.6 Institutions shall maintain appropriate records and shall allow ED officials access to the information necessary to determine compliance.

§ 100.7 This section outlines the basic procedures for compliance reviews and complaint investigations, including: a complaint must be filed within 180 days of the alleged discrimination, unless the time frame is extended by OCR; noncompliance is to be resolved whenever possible by informal means; the complainant's identity is to be kept confidential except to the extent necessary to carry out the investigation and related proceedings; retaliation and intimidation are prohibited against complainants or those participating in any manner with an investigation or related proceeding.

§ 100.8 When noncompliance cannot be resolved through informal means, compliance may be effected by suspension or termination of federal financial assistance, "or by any other means authorized by law[,]" which may include referral to the Department of Justice for proceedings appropriate to enforce the rights of the United States. An institution may be denied federal funding for failing to furnish an assurance of compliance. An "order suspending, terminating or refusing to grant or continue Federal financial assistance" is not effective until: ED has advised institution officials of the failure to comply and has determined that compliance cannot be secured by voluntary means; after an opportunity for a hearing, there has been a finding on the record of failure to comply; and 30 days have expired since the Secretary of Education has submitted a full written report to the committees of the U.S. House of Representatives and Senate with legislative jurisdiction over the program involved.

§ 100.9 This section outlines the procedures for hearings, including: time frames, format for notice of time and place, evidence, hearing record, and written findings. Hearings are held before an administrative law judge, and institution officials and ED staff have the right to counsel.

§ 100.10 This section explains the procedures for: findings by the administrative law judge; requests for review by a reviewing authority; requests for review by the Secretary of Education; explanation of the content of final decisions to terminate or refuse federal funding; and actions that institutions may take to restore eligibility for federal funding.

§ 100.11 This section provides for judicial review of specific actions.