



National School Boards Association
1680 Duke St. FL2, Alexandria, VA 22314-3493
Phone: (703) 838.6722 • Fax: (703) 683.7590
www.nsba.org

September 12, 2022

Catherine Lhamon, Assistant Secretary, Office for Civil Rights
U.S. Department of Education
400 Maryland Ave. SW, PCP-6125
Washington, DC 20202
Via <http://www.regulations.gov>

Re: Nondiscrimination on the Basis of Sex in Education Programs or
Activities Receiving Federal Financial Assistance
Docket Number: ED-2021-OCR-0166
Docket RIN: 1870-AA16
Federal Register Number: 2022-13734

Dear Assistant Secretary Lhamon:

The National School Boards Association (NSBA) shares the Department of Education’s commitment to ensure that no person experiences sex discrimination, sex-based harassment, or sexual violence in education. Our mission is to ensure equity and excellence in public education through school board leadership. We believe that public education is a civil right necessary to the dignity and freedom of the American people and that each child deserves equitable access to an education that maximizes their individual potential. NSBA is dedicated to assisting school districts as they develop and implement policies to address discrimination and to promote student rights,¹ and is pleased to comment on the Title IX notice of proposed rulemaking (NPRM).

¹Among many policy statements expressing its commitment to safe, supportive learning environments, and preventing discrimination against all students, NSBA’s Delegate Assembly has adopted the following:

Beliefs, Art. II, § 3.2: NSBA believes that school boards should ensure that students and school staff are not subjected to discrimination on the basis of socioeconomic status, race, color, national origin, religion, gender, gender identity, age, pregnancy, disability, or sexual orientation.

Beliefs, Art. IV, § 2.9: NSBA supports state and local school board efforts to become more proactive in the elimination of violence and disruptive behavior at school, school-sponsored events, during school bus travel and while traveling to and from school. Such behavior includes, but is not limited to, physical violence, “bullying” by any means, disrespect of fellow students and school personnel, and other forms of harassment.

Beliefs, Art. IV, § 2.12: NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Such policies should include an effective complaint mechanism. Districts should institute in-service programs to train all school personnel, including volunteers to recognize and prevent harassment against employees and students. Districts should investigate complaints, initiate education programs for students, and institute programs to eliminate harassment.


The leading advocate for public education

The Title IX regulations that became effective August 14, 2020 (“2020 regulations”) amid the COVID-19 pandemic created some new challenges for K-12 school districts and provided some clarity as well. The 2020 regulations’ extensive investigation and adjudication procedures have proven to be a poor fit for many K-12 school environments. The procedures required school districts, already facing attendance and operational challenges during the pandemic, to layer a new detailed procedural framework akin to a criminal proceeding onto known discipline and Title IX complaint procedures in practice for many years. Other provisions, however, such as the clear definition for sexual harassment, have been relatively helpful to school districts as they strive to implement consistent and clear policies.

Now, two years later, the Department has issued another set of proposed Title IX regulations (“2022 proposed regulations”) just as schools return to relatively normal operations in the wake of the pandemic. In addition to the specific concerns described below, we ask that the Department consider the overarching realities school districts now face. They are supporting a student population experiencing mental health and academic challenges as a result of pandemic-related isolation and hardship. They are struggling to make sense of legal requirements related to sex and gender identity that in many states differ from national directives. And they are experiencing staff shortages not seen in recent memory.² According to The National Center for Education Statistics, forty-four percent of public schools reported having at least one teaching vacancy and forty-nine percent reported having at least one non-teaching staff vacancy as of January 2022.³ As the Department considers whether to revise the proposed 2022 regulations, we urge you to consider the challenges faced by K-12 school leaders and to address the specific issues described below.

Sexual Harassment Definition

The 2020 regulations defined sexual harassment by delineating the specific conduct that constitutes sexual harassment for Title IX purposes. Unlike prior guidance, which had defined sexual harassment broadly,⁴ the 2020 regulations defined the term narrowly to include “(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

² “The Nevada State Education Association estimated that roughly 3,000 teaching jobs remained unfilled across the state’s 17 school districts as of early August. In a January report, the Illinois Association of Regional School Superintendents found that 88 percent of school districts statewide were having ‘problems with teacher shortages.’ And in the Houston area, the largest five school districts are all reporting that between 200 and 1,000 teaching positions remain open.” Hannah Natanson, *‘Never seen it this bad’: America faces catastrophic teacher shortage*, The Washington Post, (Aug. 4, 2022), <https://www.washingtonpost.com/education/2022/08/03/school-teacher-shortage/>.

³ The National Center for Education Statistics, *U.S. Schools Report Increased Teacher Vacancies Due to COVID-19 Pandemic*, New NCES Data Show, (Mar. 3, 2022), https://nces.ed.gov/whatsnew/press_releases/3_3_2022.asp.

⁴ Department of Education, Dear Colleague Letter: Sexual Violence, April 4, 2011: [RESCINDED] <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>, at 3. This guidance defined prohibited “sexual harassment” as “unwelcome conduct of a sexual nature” including “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature,” and “sexual violence.” It went on to explain in a footnote, “Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment....” *Id.* at note 9.

person equal access to the recipient's education program or activity; or (3) 'sexual assault' ..., 'dating violence' ..., 'domestic violence' ..., or 'stalking' as defined in federal law. 34 CFR §106.30. With this definition, school boards and administrators knew in fairly clear terms what the Department considered to be prohibited sexual harassment, especially in egregious circumstances involving quid pro quo sexual harassment, sexual assault, dating violence, domestic violence, and stalking. In other scenarios, the standard was the familiar "severe, pervasive, or objectively offensive" standard articulated by the Supreme Court in *Davis v. Monroe County Board of Education*, 526 US 629 (1999) for damages cases.

In its 2022 proposed regulations, the Department sets out a broader definition of "sex-based" harassment that will be more difficult to apply in the K-12 setting. The proposed definition includes "domestic violence" and a complex standard for "hostile environment harassment" that must be evaluated "subjectively and objectively" based on the totality of the circumstances.⁵ A school must consider a list of factors, including "other sex-based harassment in the recipient's education program or activity."

⁵ "Sex-based harassment prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that is:

- (1) 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;
- (2) Hostile environment harassment. Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits 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 the following:
 - (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
 - (ii) The type, frequency, and duration of the conduct;
 - (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;
 - (iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
 - (v) Other sex-based harassment in the recipient's education program or activity.
- (3) 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 who is or has been in a social relationship of a romantic or intimate nature with the victim;
 - (iii) Domestic violence meaning felony or misdemeanor crimes of violence 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."

Given the range of conversation and conduct school personnel encounter, this complex definition will be burdensome to apply. School officials address student conduct tinged with sexual meaning daily. Often in middle and high schools, unwelcome sexual banter, flirtation, or other typical conduct between teenagers may well warrant attention and discipline but may not rise to the level of a Title IX sexual harassment claim or federal investigation. As a Spending Clause statute, Title IX, its regulations, and jurisprudence have not provided sufficient notice to public schools that they are to sweep up every sexual phrase exchanged between students into Title IX authority. Most middle school principals could attest that a majority of discipline issues involving students would be covered by the “sexual harassment” definitions provided from past guidance. The new proposed definition adds complexity to the “unwelcome sex-based conduct” definition echoed from past guidance and leaves little room for school officials to make judgment calls. School officials of course must assess the severity of any concerning conduct between students, but also must weigh the thought processes, age, maturity, and developmental stage of the students themselves.

We ask the Department to consider narrowing the scope of the new “sex-based harassment” definition in light of the extensive enforcement activity that is likely to result, based on school districts’ experiences when a similarly broad definition was enforced through guidance. The Department’s 2011 Dear Colleague Letter, later rescinded, broadly defined sexual harassment as “unwelcome conduct of a sexual nature” that includes “requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”⁶ This definition encompassed a range between unwanted verbiage to serious claims of rape and proved to be unworkable in many instances for school districts in that all claims, regardless of severity, could be deemed sexual harassment and thus subject to OCR investigation. For example, in one Georgia school district, the behavior of a three-year-old student triggered an investigation because the student “touched” another student “inappropriately.” In another Georgia district, high school students who exchanged insults – one with a sexual connotation – during an argument involving thrown slushies were also subjected to an investigation. School districts saw a significant rise in the number of claims and were required to expend resources and time to investigate all of them, regardless of how serious or specious. School districts found it difficult to process, navigate, and deliberate the volume of claims, often to the detriment of more serious claims.

The 2022 proposed regulations state that the determination of hostile environment harassment is a fact specific inquiry that includes consideration of (iv) “other sex-based harassment in the recipient’s education program or activity.” Districts could interpret this as encouraging top-down inspection of district operations with regard to sex-based discrimination, when in some cases there is only one complaint. NSBA urges the Department to clarify that this is not the case. School districts should not be subject to a much larger investigation by OCR in order to consider this subsection (iv). That would give the Department’s an unduly large scope of coverage of Title IX liability, as OCR could come in for a comprehensive review of all programs based on that language.

⁶ Department of Education, Dear Colleague Letter: Sexual Violence, April 4, 2011 [RESCINDED], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

NSBA suggests that school districts be granted deference to manage incidents at the lowest level, consistent with state rules and local district processes, particularly where there are questionable issues of fact. Therefore, NSBA urges the Department to retain the sexual harassment definition in the 2020 regulations because it minimizes litigation and reduces school districts' obligations to apply extensive Title IX procedures to any behavior remotely tinged with sexual innuendo or terminology, thereby placing a greater emphasis on claims of more severe and pervasive conduct for formal investigation. A definition that recognizes the realities of the multiplicity of contexts faced by school officials is better suited to the operational realities administrators face daily, and more likely to enhance the ability of schools to focus their limited resources on serious claims that rise to the level of sexual discrimination and harassment.

Broadened Boundaries for School Districts' Title IX Responsibilities

The 2020 Title IX regulations limit K-12 schools' responsibility to address all off-campus conduct that could be sexual harassment, while still acknowledging the importance of schools providing supportive services regardless of where or when the conduct occurred. That approach is more within reach for school districts than that of OCR's 2014 guidance letter, which required schools to "process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct ... had continuing effects on campus."⁷ Schools were required to address those "continuing effects" by providing "appropriate remedies for the complainant, and, where necessary, the broader school population," even in instances where the districts had no power to prevent or control the misconduct.⁸

Even under the 2020 regulations' limited reach with respect to off-campus conduct, school officials sometimes determine that they need to address certain behavior that occurs off-campus to meet other legal obligations and to keep the school environment safe for all students. When harassing behavior or bullying occurs online, for example, the impact on other students and the school community as a whole can be severe. As NSBA has explained to the Supreme Court of the United States, when such behavior is brought to school officials' attention, they may decide to address it.⁹ But we believe the distinction in the 2020 Title IX regulations between on-and off-campus activity makes clear that, although school officials may choose to address such conduct, they are not legally required to do so under Title IX.

The 2022 proposed regulations change this approach by obligating a recipient "to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or

⁷ Department of Education, Office for Civil Rights, [RESCINDED] Questions and Answers on Title IX and Sexual Violence (April 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>, at 29.

⁸ *Id.*

⁹ See Brief of National School Boards Association et al. as Amici Curiae in Support of Petitioner in *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021), <https://www.nsba.org/-/media/NSBA/File/legal-mahanoy-area-school-district-v-bl-amicus-brief-2021.pdf?la=en&hash=D45C85E6A43A17471C10E0FAB337996D7EF03AA2>, noting nothing in *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969) or subsequent decisions supports a categorical limit on school authority based on where speech originates and that under those rulings, schools are able to regulate student expressive activity that poses a reasonable threat of materially disrupting the school environment.

activity or outside the United States.”¹⁰ While schools acknowledge their responsibility to address a hostile environment existing at school, it is beyond the scope of most school districts’ resources to investigate activity that takes place outside of its’ property or programs, including instances that may occur out of the country. As the Supreme Court of the United States explained in 2021, school officials have limited authority to discipline students for their off-campus conduct and may only do so in appropriate cases.¹¹

To be clear, school districts understand that conduct taking place under school supervision, such as on a class trip or at an off-campus athletic competition that is part of the school program, falls within the purview of the school. If an event is not under the supervision of the school, however, and is outside of a school district’s legal authority, the school district should not be obligated to investigate alleged harassment that takes place there unless it has discriminatory effects at school. As a Spending Clause statute, the Title IX regulations must give school districts clear and concise warning that the Department considers the off-campus conduct in question to be subject to district regulation. Schools should have the responsibility to investigate only if it has control over the staff and students at the event.¹²

The Actual Knowledge Standard

As NSBA has pointed out in past comments, Section 106.30 of the 2020 regulations defines “actual knowledge” more expansively in the elementary and secondary school context than courts have defined the term in suits for money damages under Title IX. The 2020 regulations state that a school district will be deemed to have “actual knowledge” of sexual harassment whenever “any employee of an elementary or secondary school” (emphasis added) has notice of sexual harassment or allegations thereof.¹³ This includes not only teachers but also educational support staff, bus drivers, coaches, clerical, and cafeteria staff. Under the regulations, therefore, if any school staff person is aware of potential sexual harassment, the school district is potentially responsible. That broad knowledge requirement appears to be balanced, however, by limitations on its scope. Schools

¹⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390-01 (proposed July 12, 2022) (to be codified at 34 C.F.R. §106.11).

¹¹ See *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021). The court explained that three features of the off-campus setting weaken a school’s interest in policing student speech that occurs there, and thus limit the school’s authority to do so. “First, a school, in relation to off-campus speech, will rarely stand in loco parentis. ... Second, from the student speaker’s perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. ... Third, the school itself has an interest in protecting a student’s unpopular expression, especially when the expression takes place off campus.” *Id.* at 2046.

¹² See *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1025 (E.D. Cal. 2009) (school district exercised substantial control over both the harassed student and the context in which the known harassment occurred when a student attended a school sponsored football camp).

¹³ (a) As used in this part:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a). ... 34 CFR §106.30(a) (emphasis added).

are not presumed to have knowledge “based solely on vicarious liability or constructive notice” (though it is unclear how the two provisions are consistent), nor is the actual knowledge standard met when the only official of the recipient with actual knowledge is the respondent. The regulations also limit the scope of those considered to have “authority to institute corrective measures” so as to impute knowledge. 34 C.F.R. §160.30.

In the preamble accompanying the 2022 proposed regulations, the Department indicates that it is proposing changes to this standard intended to be “consistent with the definition in the 2020 amendments of ‘actual knowledge’ for recipients that are elementary schools or secondary schools, which imputes to the recipient the knowledge of any of its employees.” But the 2022 proposed regulations impose additional monitoring and reporting requirements designed, according to the preamble, to “ensure a recipient fulfills its legal duty to operate its education program or activity free from sex discrimination.” Under proposed § 106.44(a), schools must “take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.” K-12 schools must require all employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX. 34 C.F.R. § 106.44(c)(1). These new, prescribed monitoring and notice requirements appear to broaden school district responsibility further to address allegations of discrimination based on constructive, not just actual, notice.¹⁴

The Department proposes adding a requirement at [§ 106.44\(b\)](#) that a recipient must require its Title IX Coordinator to monitor barriers in the recipient's education program or activity to reporting information about conduct that may constitute sex discrimination under Title IX, and then the recipient must take steps reasonably calculated to address barriers that have been identified. Under proposed [§ 106.44\(c\)\(1\)](#), an elementary school or secondary school recipient would be obligated to require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX. The proposed regulations spell out specific employee obligations: “either notifying the recipient's Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX or providing the contact information of the recipient's Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with information about conduct that may constitute sex discrimination under Title IX.” Depending on the employee's role, the employee would be obligated to notify the Title IX Coordinator directly or provide the Title IX Coordinator's contact information and information about reporting.

With the proposed regulations' definition of sex-based harassment so broad, adding these additional prescribed procedures makes monitoring and reporting potential sex-based harassment in schools nearly a full-time job for school staff.

Just like the training burden associated with the changes in the 2020 regulations, the training burden imposed by the new monitoring and notice procedures is high. Schools are required to provide comprehensive training to ensure all employees understand Title IX protections, reporting

¹⁴ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390-01 (proposed July 12, 2022) (to be codified at 34 C.F.R. §106.44).

requirements, and how to properly convey required information. This burden is a heavy one for K-12 schools, which are experiencing staff shortages not seen in decades.

NSBA asks the Department to provide some flexibility for school districts on the monitoring, notice, and other listed procedures in proposed section 106.44 to avoid increased financial and legal impediments for K-12 school districts. Specifically, we urge the Department to make clear in the language of the regulation that schools are expected to make all reasonable efforts to implement the training and monitoring requirements.

Simplified Procedural Requirements

The 2020 regulations' complex and formal Title IX procedures pose significant challenges for many public K-12 school districts, especially in situations involving young children. Under these regulations, investigations can be unreasonably lengthy and conflict with and/or delay student and/or employee disciplinary investigative processes. For example, in Washington, state rules require that student discipline matters be resolved within the current academic term.¹⁵ In some collective bargaining states, school districts must operate under agreements that outline specific procedural rights for employees. In many states, most school investigations into bullying and harassment are completed within ten school days. But under the extensive procedures required by the 2020 Title IX regulations, a school's investigation and resolution of a sexual harassment claim could last three months or more.

Before the 2020 Title IX regulations, districts would have investigated and determined consequences in most student-to-student incidents involving sexual banter or verbal aggression in a matter of days. Under those regulations, if there is a potential for sexual harassment claim, schools must wait for a parent or guardian to decide whether they are going to file a complaint before interviewing the respondent, creating a period of limbo during which the school cannot investigate. This can be exceptionally challenging in a K-12 setting, where trained educators should be able to implement age and setting-appropriate responses, including questioning students involved in an incident.

NSBA urges the Department to keep the 2022 proposed regulations' approach, which allows for informal resolution of some Title IX complaints, so that educators have flexibility to address harassment situations consistent with the age of the student and the nature of the allegation.

IDEA/Section 504 Intersection

The 2022 proposed regulations specify that if a complainant or respondent in a Title IX sex-based discrimination incident is an elementary or secondary student with a disability, the Title IX Coordinator must consult with the student's Individualized Education Program (IEP) team or group of persons knowledgeable about the student under Section 504 (Section 504 team) to, as explained in the preamble, "help ensure that the recipient complies with IDEA the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq., and Section 504 of the

¹⁵ Wash. Admin. Code § 392-400-440 (2021).

Rehabilitation Act of 1973, 29 U.S.C. §794, throughout the recipient's implementation of grievance procedures.”¹⁶ NSBA agrees that it is important for a school district to consider a student’s disability and supports currently in place if that student is part of a Title IX investigation; but it may be burdensome and unnecessary to convene the entire IEP or Section 504 team in every such situation. School districts implementing this provision will have to consider a number of factors, including which team members have the proper training to make decisions about if and when a student with a disability can participate in a Title IX investigation or proceeding. School administrators have training in Title IX, but IEP team members, including special education staff, may not. Similarly, IEP team members will have specialized knowledge of the child and/or the disability, whereas the Title IX team may not. The student’s parents, who participate on the IEP team, will be involved as well.

NSBA urges the Department to provide K-12 school districts some flexibility in the size of the “team” that must be consulted when a student with a disability is involved in a Title IX complaint or investigation. In some situations, it may be appropriate and efficient for one or two members of the IEP or Section 504 team to meet with the Title IX Coordinator to consult on the student’s disability-related needs and supports. Similarly, schools should have flexibility to determine who ultimately makes the decision about the investigation. For example, the IEP “team” may believe that the complainant or respondent should not testify in the investigation, but the Title IX Coordinator believes the testimony is necessary. School districts should be able to determine who makes that difficult call, in the context of the many dynamics at play.

Because the IDEA, Section 504, and related federal laws and regulations already require schools to provide appropriate education and substantial procedural protections to students with disabilities, the Department should also consider adjusting the 2022 proposed regulations to require consideration of a student’s disability – rather than consultation with the entire team – when that student is involved in a Title IX complaint or investigation, and eventual referral to the IEP or 504 team, as appropriate. The extensive protections afforded by federal law for students with disabilities would require the school to provide appropriate supports for the student.

Similarly, with respect to discipline procedures for students with disabilities, the Department should clarify how the emergency removal permitted under proposed section § 106.44(c) interacts with the requirement that an IEP team conduct a manifestation determination regarding a student with a disability subject to disciplinary removal of more than ten school days. As the Department knows, the IDEA requires school districts to conduct such a determination “within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct.” 20 U.S.C. §1415(k)(1)(E) and (F); 34 C.F.R. §300.530(e) and (f). If the manifestation determination team decides that the behavior at issue was caused by, or had a direct and substantial relationship to, the child's disability, it must follow further procedures including functional behavior analysis and often a return to the original placement. *Id.*

¹⁶Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390-01 (proposed July 12, 2022) (to be codified at 34 C.F.R. §106.8(e)).

The Department should clarify whether a school district must conduct a manifestation determination as required under the IDEA before an emergency removal permitted by the 2022 proposed Title IX regulations. If a student with a disability is subject to a Title IX emergency removal of more than ten school days, a manifestation determination team would be required under IDEA, but the Title IX process may be incomplete. This may mean the manifestation team would be forced to make its decision before there has been any finding of what exactly happened. A clarification of how the two provisions apply would be helpful for schools.

Pregnancy and Associated Conditions – Accommodations Required

In the 2022 proposed regulations, the Department has broadened the scope of coverage of what it considers to be required of recipients to accommodate students and employees experiencing pregnancy and related conditions or parenting. The new requirements are much more specific than in the past, which can be helpful, but in at least one instance, the specificity may remove some needed flexibility. The proposed regulations require recipients to ensure the availability of a lactation space *other than a bathroom* that is: 1) clean; 2) shielded from view and 3) free from intrusion from others. In many school districts, space is at a premium. School psychologists already have trouble finding rooms to do testing, and administrators have trouble finding rooms for in-school suspensions. The proposed accommodation requirements may be more practicable for institutions of higher education, but they may be unworkable for small K-12 school buildings. Some flexibility for the pregnancy and associated accommodations requirements would be appreciated in the K-12 school context.

Conclusion

NSBA appreciates this opportunity through regulatory Notice and Comment to reiterate our common purpose to keep schools free from discrimination based on sex. The new proposed Title IX Rule presents some unintended legal, fiscal, and practical challenges, many of which could be remedied through thoughtful and concerted discussion.

We continue to be available to OCR and the Department to provide the perspective of school boards and their counsel. NSBA stands ready to work in partnership with OCR on these and other issues of importance to our members, and to the nation's public school children.

Sincerely,

Francisco M. Negrón, Jr.
Chief Legal Officer
National School Boards Association