LEGISLATION
APPROPRIATIONS
## Proposed FY 2025 Funding Levels for Federal Education Programs
(School Year 2025-26, in thousands)

<table>
<thead>
<tr>
<th>Federal Education Program</th>
<th>FY 2023 Omnibus Final</th>
<th>FY 2024 Final</th>
<th>FY 2025 President’s Budget</th>
<th>FY 2025 House Subcommittee</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PROPOSED: K-12 Acceleration</strong> *</td>
<td>--</td>
<td>--</td>
<td><strong>8,000,000</strong></td>
<td>NA</td>
</tr>
<tr>
<td><strong>PROPOSED: School Readiness (pre-K)</strong></td>
<td>--</td>
<td>--</td>
<td><strong>25,000</strong></td>
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<td><strong>PROPOSED: Fostering Diverse Schools</strong></td>
<td>--</td>
<td>--</td>
<td><strong>10,000</strong></td>
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<tr>
<td>Title I - Grants to LEAs</td>
<td>18,386,802</td>
<td>18,406,802</td>
<td><strong>18,586,802</strong></td>
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<td>Migrant Education</td>
<td>375,626</td>
<td>375,626</td>
<td>375,626</td>
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<tr>
<td>Neglected and delinquent</td>
<td>49,239</td>
<td>49,239</td>
<td>49,239</td>
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<tr>
<td>Homeless children and youth</td>
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<td>129,000</td>
<td>129,000</td>
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<td>Impact Aid</td>
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<td>1,625,151</td>
<td><strong>1,618,112</strong></td>
<td><strong>1,630,000</strong></td>
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<td>Comprehensive Literacy Dev. Grant</td>
<td>194,000</td>
<td>194,000</td>
<td>194,000</td>
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<td>Title IV - Support &amp; Academic Grant</td>
<td>1,380,000</td>
<td>1,380,000</td>
<td><strong>1,380,000</strong></td>
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<tr>
<td>State assessments</td>
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<td>Rural education</td>
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<td><strong>220,000</strong></td>
<td><strong>215,000</strong></td>
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<td>Education for Native Hawaiians</td>
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<td>Alaska Native Education Equity</td>
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<td>Promise Neighborhoods</td>
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<td>21st century learning centers</td>
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<td>Full-Service Community Schools</td>
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<td><strong>200,000</strong></td>
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<td>Indian Education</td>
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<td>Education Innovation and Research</td>
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<td><strong>259,000</strong></td>
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<td>Title II - Effective Instruction</td>
<td>2,190,080</td>
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<td>Teacher quality partnership (HEA)</td>
<td>70,000</td>
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<td><strong>95,000</strong></td>
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<td>Teacher and Leader Incentive Fund</td>
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<td>Charter schools grants</td>
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<td><strong>400,000</strong></td>
<td><strong>450,000</strong></td>
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<td>Magnet schools assistance</td>
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<td>School Safety National Activities</td>
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<td>216,000</td>
<td>216,000</td>
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<tr>
<td>Federal Education Program</td>
<td>FY 2023 Omnibus Final</td>
<td>FY 2024 Final</td>
<td>FY 2025 President’s Budget</td>
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<tr>
<td>Title III - English Language Acquisition</td>
<td>890,000</td>
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<td>IDEA - Part B</td>
<td>14,193,704</td>
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<td>IDEA Preschool</td>
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<td>IDEA Infants and Families</td>
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<td>Perkins CTE</td>
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<td>GEAR UP</td>
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<td>Research, dev., and dissemination</td>
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<tr>
<td>Statistics</td>
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<td>Regional educational laboratories</td>
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<td>National assessment (NAEP)</td>
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<td>National Assessment Governing Board</td>
<td>7,799</td>
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<td>Statewide data systems</td>
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<td>38,500</td>
<td>NA</td>
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<tr>
<td><strong>U.S. Department of Education Discretionary Appropriations total</strong></td>
<td><strong>79,233,262</strong></td>
<td><strong>79,052,000</strong></td>
<td><strong>82,363,612</strong></td>
<td><strong>68,100,000</strong></td>
</tr>
</tbody>
</table>

* Mandatory Funding Proposal

**GREEN** indicates increase over previous year; **RED** indicates decrease over previous year

NA: Specific funding level not available as of July 8, 2024
June 25, 2024

The Honorable Charles Schumer  The Honorable Mike Johnson
Majority Leader  Speaker
United States Senate  U.S. House of Representatives
Washington, DC  20510  Washington, DC  20515

The Honorable Mitch McConnell  The Honorable Hakeem Jeffries
Minority Leader  Minority Leader
United States Senate  U.S. House of Representatives
Washington, DC  20510  Washington, DC  20515

Dear Speaker Johnson, Majority Leader Schumer, Minority Leader McConnell, and Minority Leader Jeffries:

The 1,050 undersigned organizations—which represent the full breadth of investments that support all of America, every day—call on Congress to reject arbitrary and damaging funding levels for Fiscal Year 2025 and, at the very least, to fully appropriate the necessary non-defense discretionary (NDD) funds to keep pace with rising costs and demand and keep poison pill policy riders that undercut the priorities of the American people out of the package. Cutting funding from the FY 2024 levels appropriated just three months ago will do little to reduce the national debt and federal deficit but will greatly jeopardize American competitiveness, security, economic strength, and services on which families and individuals rely.

Vital domestic and international appropriations are a small part of the federal budget—less than one-sixth—yet they fund a wide range of important services and investments that keep America strong now and in the future. Examples include: scientific and medical research; health care for veterans; federal law enforcement; environmental conservation; home energy assistance; housing and child care assistance for low-income families; mental health and substance use disorder treatment; rural development; K-12 education and skills training; nutrition assistance for young children, families, and older people; financial aid for higher and technical education; infrastructure investments in roads and bridges, sewage treatment, safe drinking water, flood control and navigation improvements; diplomacy, humanitarian aid and development; services for victims of gender-based violence; courts and reentry programs; assistance for small businesses; public safety and other programs for older people; life-saving services for people with disabilities; public health; and much more.

Every state and congressional district benefits from NDD investments. Denying NDD programs the increases needed to keep pace with rising costs and provide effective services is a penny-wise, pound-foolish way to address the larger fiscal challenges facing our country.

As seen with enactment of FY24 appropriations law, there is a strong governing majority for more robust investments. Rather than constraining NDD appropriations to an arbitrary and insufficient funding target, our organizations urge you to avoid poison pill policy riders and invest the amounts needed to meet the needs of our country and protect American competitiveness, economic strength, security, and services critical to families and individuals.
The Council of the Great City Schools, the coalition of the nation’s largest central-city school districts, is pleased to submit the following comments on the Notice of Proposed Rulemaking (NPRM) for CIRCIA Reporting Requirements. The Council appreciates the passage of the Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA) in 2022, which represented the first federal statute requiring a comprehensive and coordinated approach to understanding cyber incidents across critical infrastructure sectors, including K-12 Education. We also appreciate the work of the federal Cybersecurity and Infrastructure Security Agency (CISA) to develop the draft regulatory framework and reporting structure for cyber incidents. Three of our technology leaders – Shahryar Khazei (Los Angeles Unified School District, retired), Mark Racine (Boston Public Schools), and Don Wolff (Portland Public Schools) – represent urban school districts on the Government Coordinating Council on Cybersecurity and can provide further comments in upcoming meetings.

In recent years, cyberattacks on school districts have increased in frequency and targeted many of the nation’s large urban school systems. These attacks disrupt classroom instruction, stall district operations, and expose sensitive personally identifiable student and staff data vulnerable to malicious actors often seeking payment in exchange for the data. With the escalating rise in frequency and variety of security incidents and attacks school districts have been working to establish a holistic approach to security. This strategy helps to focus efforts on different and critical components of the K-12 education technology infrastructure that must be secured and involves several security “layers” to consider that range from physical security to cloud security.

The Council has worked with the Federal Communications Commission to provide feedback on strengthening the E-Rate program’s role in safeguarding the critical investments school districts have made to connect classrooms to reliable, high-speed internet. Our below comments on a few of the major definitions and requirements are intended to assist CISA in finalizing a strong regulatory framework for cyber incident reporting.

July 3, 2024

Docket Number: CISA-2022-0010

Todd Klessman
CIRCIA Rulemaking Team Lead
Cybersecurity and Infrastructure Security Agency
Department of Homeland Security
245 Murray Lane, SW
Washington, DC 20528-0380
Covered Entity
For K-12 schools, CISA proposes to include in the definition of “covered entity” any entity that qualifies as either a local educational agency, educational service agency, or state educational agency, as defined under 20 U.S.C. 7801, with a student population of 1,000 or more students. Urban school districts in our organization must be located in cities with populations over 250,000 and student enrollments over 35,000. School districts located in the largest city of any state are also eligible for membership, regardless of population or enrollment size.

The Council supports the definition of school districts (i.e. local educational agencies or LEAs) with a student population of 1,000 or more in the CISA proposal for a “covered entity.” Our organization’s school district members would likely be included as covered entities even if the definition’s enrollment threshold was increased ten-fold. As the largest school district and often the largest employer in the nation’s cities, urban school systems are eager to share information on the cyber incidents we are experiencing.

Substantial Cyber Incident
CISA proposes the term substantial cyber incident to mean a cyber incident that leads to any of the following: (a) a substantial loss of confidentiality, integrity, or availability of a covered entity's information system or network; (b) a serious impact on the safety and resiliency of a covered entity's operational systems and processes; (c) a disruption of a covered entity's ability to engage in business or industrial operations, or deliver goods or services; or (d) unauthorized access to a covered entity's information system or network, or any nonpublic information contained therein, that is facilitated through or caused by either a compromise of a cloud service provider, managed service provider, other third-party data hosting provider, or a supply chain compromise.

The Council believes the definition is sufficient with the exception of "integrity" in (a). We understand that integrity is a standard part of the CIA model used in information security, but further clarity for this term is needed in defining a substantial cyber incident. The term is currently open to interpretation and there will likely be entities who correctly or incorrectly determine that a specific incident meets their understanding of the term. While a perfect definition of "substantial cyber incident" may not be possible to meet all party’s interpretation, further clarity would be helpful.

Cyber Incident Reporting and Timeline
The NPRM proposes that cyber incident reports under CIRCIA include information on the Covered Entity, covered cyber incident reports and ransom payment reports, information related to the identity of the perpetrator, and mitigation and response activities. The NPRM also outlines that use of third-party reporting on the Covered Entity’s behalf is allowed and the basis/purpose for entities to file supplemental reports.

The Council supports the required information proposed for entities to include in the initial report. Since a web-based, single form will be required and CISA described this as an initial report, we also feel that 72 hours is a sufficient timeframe for submitting the initial report. We do not support putting a timeframe on the supplemental report submission, since an arbitrary
deadline does not reflect the evolving nature of the incident or subsequent investigation. In the aftermath of a cyber incident, requiring a strict timeline for the subsequent report could see school districts accused of withholding information while the event or investigation is still unfolding. An open-ended response for supplemental reports will work best after the initial information is provided within 72 hours.

The Council appreciates the opportunity to provide feedback on the CIRCIA proposal and the inclusion of urban school district technology leaders in the Government Coordinating Council on Cybersecurity meetings. CISA leadership and directive in CIRCIA in developing a coordinated, informed response to the malicious actors performing these cyber attacks is vital in protecting our nation’s important institutions and citizens.

Please do not hesitate to contact me if you need any additional information.

Sincerely,

Raymond Hart, Executive Director
Council of the Great City Schools
Proposed Regulations for Cyber Security Incidents

Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCIA)
Notice of Proposed Rulemaking (NPRM) for CIRCIA Reporting Requirements

NPRM located at:

The proposed regulations in the NPRM include a proposed definition for a “substantial cyber incident” or ransomware payment from a covered entity that would require a timely report to CISA. All CGCS members meet the proposed definition of “covered entity” as school districts with enrollment greater than 1,000 students. Summary of the Reporting Requirements and proposed definition for a “substantial cyber incident” are below.

REPORTING REQUIREMENTS

Manner and Form of CIRCIA Reports
- Entities must submit CIRCIA Reports through the web-based CIRCIA Incident Reporting Form or any other method approved by the Director
- Single form would be used for all types of CIRCIA reports

Third-Party Reporting
- A Covered Entity may use a third party to report on the Covered Entity’s behalf
- No limitations on type of entity who can be a third party
- Third party must provide an attestation that it has been authorization by the Covered Entity to submit on the Covered Entity’s behalf
- Responsibility for compliance stays with Covered Entity

Content of CIRCIA Reports
- Information on the Covered Entity (e.g., name; entity type; physical address; CI sector(s); other identifiers)
- Contact information
- Covered Cyber Incident Reports and Ransom Payment Reports
- A description of the incident, including impacts; vulnerabilities exploited; tactics, techniques, and procedures (TTPs) used; indicators of compromise; etc.
- For Ransom Payment Reports only: ransom demand; payment details (e.g., instructions; amount)
- Information related to the identity of the perpetrator
- Mitigation and response activities
- Supplemental Reports: The basis for/purpose of the supplemental report; any substantial new or different information; notice of a ransom payment made following submission of a Covered Cyber Incident Report (if applicable); optional information to provide notification that a Covered Cyber Incident has concluded (if applicable)
CISA proposes the term substantial cyber incident to mean:

A cyber incident that leads to any of the following:
   a) a substantial loss of confidentiality, integrity, or availability of a covered entity’s information system or network;
   b) a serious impact on the safety and resiliency of a covered entity’s operational systems and processes;
   c) a disruption of a covered entity’s ability to engage in business or industrial operations, or deliver goods or services; or
   d) unauthorized access to a covered entity’s information system or network, or any nonpublic information contained therein, that is facilitated through or caused by either a compromise of a cloud service provider, managed service provider, other third-party data hosting provider, or a supply chain compromise.

CISA is further proposing that a substantial cyber incident resulting in one of the listed impacts include any cyber incident regardless of cause, including, but not limited to:
   • a compromise of a cloud service provider, managed service provider, or other third-party data hosting provider;
   • a supply chain compromise;
   • a denial-of-service attack; a ransomware attack; or
   • exploitation of a zero-day vulnerability.

Finally, CISA is proposing the term substantial cyber incident does not include:
   a) any lawfully authorized activity of a United States Government entity or SLTT Government entity, including activities undertaken pursuant to a warrant or other judicial process;
   b) any event where the cyber incident is perpetrated in good faith by an entity in response to a specific request by the owner or operator of the information system; or
   c) the threat of disruption as extortion, as described in 6 U.S.C. 650(22).
E-RATE
Summary of FCC Order Authorizing E-Rate Funding for Hotspots and Services

Permitting E-Rate Program Support for
Off-Premises Use of Wi-Fi Hotspots and Services
Report and Order

WC Docket No. 21-31

Date of Consideration: July 18, 2024

Background:
The E-Rate program provides support to ensure that schools and libraries can obtain affordable, high-speed broadband services and equipment needed to connect today’s students and library patrons with next-generation learning opportunities and services. Many students, school staff, and library patrons around the country are on the wrong side of the digital divide and are unable to fully participate in educational opportunities.

This Order would modernize the E-Rate program rules to permit eligible schools and libraries to request E-Rate support for Wi-Fi hotspots and wireless Internet services that can be used off-premises so that students, school staff, or library patrons with the greatest need can be connected and learn without limits.

FCC Order:

- Updates the Commission’s E-Rate rules to permit support for schools and libraries to purchase Wi-Fi hotspots and wireless Internet services to be loaned to and used by students, school staff, and library patrons off-premises.
- Adopts a three-year budget mechanism to limit funding and allow for the equitable distribution of Wi-Fi hotspots and services to students, school staff, and library patrons.
- Prioritizes requests for eligible on-premises equipment and services before requests for eligible off-premises equipment and services if overall demand for E-Rate support exceeds available funding.
- Adopts numerous safeguards to promote the integrity of the E-Rate program, including measures to ensure the supported Wi-Fi hotspots and services are in use, are used for educational purposes, are not funded through other sources, and are properly documented for auditing purposes.
- Clarifies that the off-premises use of Wi-Fi hotspots and associated wireless Internet services serve an educational purpose and enhance access to advanced telecommunications and information services for school classrooms and libraries.
- Applies the Children’s Internet Protection Act (CIPA) requirements to a school or library that receives E-Rate support for Wi-Fi hotspots.
SCHOOL CHOICE
July 8, 2024

Chairman Jason Smith
Committee on Ways & Means
U.S. House of Representatives
Washington, DC 20515

Ranking Member Richard Neal
Committee on Ways & Means
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Neal:

The undersigned organizations of the National Coalition for Public Education write to express our opposition to any legislation, including H.R. 6795 and H.R. 531, that uses the tax code to further privatize K-12 education. We oppose using tax expenditures, which at bottom are public funds, to create vouchers in any form, whether a tuition tax credit or expanding the use of 529 accounts to fund homeschooling and education expenses related to private K-12 schools.

Although promoted as “educational freedom,” private school vouchers in any form do not provide real freedom of choice to students and parents. The “choice” in voucher programs actually lies with the private schools, which may turn students away for a variety of reasons often including disability, sexual orientation and gender identity, religion, academic achievement, and economic status. In contrast, public schools are open to all and required to abide by federal civil rights laws — including Title VI, Title IX, the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, and school accountability standards of the Elementary and Secondary Education Act (ESEA). They educate nearly 90% of our country’s students and are a cornerstone of our communities.

Open and nondiscriminatory in their acceptance of all students, public education serves many vital purposes in our country: it improves communities, reduces inequalities, forges common experiences, and strengthens our democracy. Public education brings our communities together by forging common experiences among a wide range of students. Creating a federal tuition tax credit or expanding the use of 529 accounts, however, undermine our nation’s public schools by diverting desperately needed resources away from the public school system to fund the education of a few select students. We should not promote policies that would forgo tax dollars that could be used to fund public schools, and instead direct federal dollars toward children already engaged in private education and homeschooling. Parents are free to educate their child in private, religious schools and home schools, but lawmakers should not subsidize these programs with public dollars, particularly when parents already fund them themselves. Congress should prioritize funding and support for public schools, which must serve all students, rather than siphoning funds to unaccountable private schools and homeschools.
Expanding 529 Accounts Would Benefit High-Wealth Families in High-Tax States

Public dollars should fund public schools. Yet because of policy shifts included in the Tax Cuts and Jobs Act of 2017, currently $1 billion is being directed to private K-12 tuition through 529 accounts each year. The Tax Cuts and Jobs Act of 2017 expanded 529 college-savings accounts to allow coverage of elementary and high school expenses of up to $10,000 a year for private and religious schools. The Committee should reject efforts to expand these tax breaks even further to allow 529 plans to be used to cover expenses associated with homeschooling or additional private school expenses such as curriculum, textbooks, online classes, and educational therapies. Congress should be taking steps to end this tax break for private education, not enlarging it.

Importantly, we know that 529 savings plans are inaccessible to low- and middle-income families. Voucher and education savings accounts recipients are typically families who are already paying tuition at a private school prior to receiving the voucher. For example, in Arkansas, 95% of the participants in the state’s universal voucher program had never attended public schools before receiving a voucher. 80% of voucher recipients in Arizona never attended public schools; 89% of voucher recipients in New Hampshire never attended public schools and 75% of voucher recipients in Wisconsin never attended public schools. Families who already homeschool their children are doing so without the federal government’s intervention and tax breaks. These accounts merely provide a discount to families who already have the ability to save money on a short-term basis.

Expanding 529 accounts even further for private school and homeschooling would disproportionately benefit families with high incomes because of the nature of which they depend on families’ abilities to save rather than spend on basic needs. Tax breaks delivered in the form of a reduction in taxable income are more valuable for those in higher tax brackets and with higher tax burdens. This means that high-wealth families in states such as New York, Connecticut, and New Jersey stand to gain the most from the expansion of 529 accounts while families with low incomes in states without state income taxes such as Florida, Wyoming, and Texas will gain the least. The likely outcome of the expansions, therefore, is that they will provide a new tax break for high-wealth families who already enroll their children in private schools or homeschools. Rather than forcing the public to take on a brand-new expense that results in giving up hundreds of millions of dollars in revenue at the federal and state levels to provide tax breaks to the wealthy, Congress should be allocating more funding for our public schools, police forces, park services, and the post office.

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1. According to ISS Market Intelligence, in 2022-2023 $1 billion of 529 accounts were estimated to be directed for K-12 private school tuition.

Tuition Tax Credit Vouchers Are Wasteful Spending and Ineffective

Although tuition tax credit voucher schemes may have a different name and structure, they are simply a private school voucher: they divert tax dollars away from public education and into private schools. Individuals and corporations get a dollar-for-dollar tax credit for donating money to a “scholarship granting organization,” which pays the tuition for students who attend private schools. This scheme not only privileges “donations” to these nonprofits over all other forms of charitable giving because of the tax credit, but also operates less like a tax incentive and more like a direct transfer of public funds away from public education and into private schools.

Private school vouchers fail to improve students’ academic achievement. Indeed, they often result in students performing worse than their peers who have not participated in the voucher program: large-scale studies of the Louisiana, Indiana, Ohio, and Washington, DC, programs show that voucher students experienced significant declines in their academic performance. The impact of accepting a voucher on academic achievement in these programs is on par with or worse than the learning loss experienced by catastrophic events like Hurricane Katrina and the COVID-19 pandemic.

In addition, voucher programs often lack even the most basic accountability standards and oversight requirements to ensure that public money is not being wasted. They frequently do not require participating schools to meet any baseline standard for teacher qualification, student testing, financial accountability, or even safe facilities. There is a long list of instances where this lack of oversight has resulted in waste, fraud, and abuse.

The government should not redirect billions of dollars per year of tax dollars to pay for ineffective, discriminatory, and unaccountable vouchers. We urge you to oppose any effort to expand 529 accounts for contributions covering expenses associated with private elementary and secondary education or homeschooling, and to oppose any other tax expenditures that promote the privatization of our K-12 schools.
May 14, 2024

The Honorable Maria Cantwell  
Chair  
Committee on Commerce, Science, and Transportation  
United States Senate  
Washington, DC 20510  

The Honorable Ted Cruz  
Ranking Member  
Committee on Commerce, Science, and Transportation  
United States Senate  
Washington, DC 20510

Chair Cantwell and Ranking Member Cruz:

The Council of the Great City Schools, the coalition of the nation’s largest central city school districts, would like to share our significant issues with the Eyes on the Board proposal that is included in the Kids Off Social Media Act (S. 4213) scheduled for markup this week. Urban districts are extremely concerned that student and family access to social media sites, particularly on district owned or managed devices, are prohibited under the proposal. At a time when districts are working extremely hard to increase student engagement, reduce student absenteeism, and improve student mental health, cutting off a major means of communications with student’s and family’s peers, school, district, and community while they are outside of school would have a negative effect on these efforts. We urge the committee to remove the Eyes on the Board provisions from the underlying bill.

Urban school districts share the committee’s urgency regarding online safety and the detrimental impact that harmful content can have on youth in America. Social media companies have been unresponsive to our repeated and ongoing attempts to get destructive material removed from their sites. Urban districts around the country have initiated and joined lawsuits against social media companies to change how these companies operate and force them to take responsibility. The goal of these lawsuits is not to eliminate social media, which is how the current generation of students choose to communicate with their friends and classmates, but to force companies to prioritize the safety of students.

Most of the underlying bill shares this same priority, yet the Eyes on the Board proposal that is also included would remove access entirely on district devices. As we learned during COVID, for many students in urban schools the district device that they bring home is their only means of connecting with their peers outside of school, and often the only computer in the household. We appreciate the changes that were made to the original Eyes on the Board Act to address concerns about the legitimate use of social media in school buildings, but the outright ban for devices that remains in the proposal would restrict both student and family access and limit connections to their local community and school.

The Eyes on the Board Act also includes a problematic screen time policy requirement that will create major problems for schools. Requiring districts to publish recommended guidelines for screen time – even if unenforced – will lead to public demands that schools take action and make changes to classroom instruction, homework assignments, and student behavior when individual usage deviates from the recommendation. The committee should remove the Eyes on the Board proposal and keep the underlying legislation focused on how social media companies can improve the safety of our children. This will allow school districts to focus on serving our students and families and improving academic achievement in our classrooms.

Sincerely

Ray Hart  
Executive Director
Email Alert on Kids Off Social Media Act

From: Manish Naik
Sent: Tuesday, May 14, 2024 3:10 PM
To: CGCS Districts (with Senators on the Commerce Committee)
Subject: Senate Commerce Committee markup this Thursday

Legislative Liaisons –

I wanted to follow up with information on Senate Commerce Committee action this week regarding the Eyes on the Board proposal in my earlier emails. After the markup was canceled a couple of weeks ago, Senators Cruz and Schatz officially introduced their bill, Kids Off Social Media Act, which includes the Eyes on the Board proposal. The Senate Commerce Committee has now re-scheduled a markup for a number of bills, including the Kids Off Social Media Act (S. 4213), for this Thursday May 16th.

As shared below, the bill would not allow social media companies to open accounts for children under age 13 or operate algorithms targeted towards children and youth. But it also includes troublesome provisions that would condition E-Rate funding on school districts: (1) banning social media on all school networks and devices and (2) publishing guidelines with specific screen time recommendations by grade level. Some exemptions have been included in the bill for certain platforms, adult use in schools, and educational purposes. But we remain concerned about:

- Any threats to E-Rate funding, which urban schools rely on to connect our schools and classrooms.
- The requirement to ban social media on all district owned or managed devices, especially because the district device that many students take home is the only computer that a student or family has access to outside of school. A social media block on take-home devices could limit student and family connections to their peers, school, and community at a time when districts are working to increase engagement, reduce absenteeism, and improve student mental health.
- The screen time policy requirement, even though the bill includes no requirement that districts enforce or monitor screen time usage. The mandate that we publish guidelines by grade is setting our districts up for failure, as any deviation from these published guidelines may lead to parents’ demands that schools take action and make changes to classroom instruction, homework assignments, and student behavior involving technology. We also remain concerned that parents’ complaints in this area could imperil E-Rate funding for the district.

We recognize that some states and districts already ban social media and the proposal might have limited impact, but the possibility of losing or suspending E-Rate funding if you do not meet the requirements as laid out in the bill could still cause problems.
ACTIONS REQUESTED:
We ask that you once again contact the staff (that handles education or Commerce Committee work) in the office of your Senator on the Commerce Committee before Thursday and:

(1) Share your concerns with the inclusion of the Eyes on the Board Act provisions in S. 4213, the Kids Off Social Media Act; and
(2) Ask they support amendments that remove Eyes on the Board provisions from the legislation. (Note that we are not asking Senators to oppose the entire legislation, just remove the troublesome Eyes on the Board provisions.)

Feel free to let me know if you have any questions or wish to share anything you hear back from your Senator’s office. Thanks, as always.

--Manish

Manish Naik | Legislative Director
Council of the Great City Schools
SUPREME COURT
AND OTHER RECENT DECISIONS
Recent U.S. Supreme Court Decisions Affecting Education

Local School Boards: First Amendment and Social Media Accounts of Public Officials

Michelle O’Connor-Ratcliff v. Christopher Garnier

|------------|--------------------|------------------------|-----------------------|-----------------------|----------------------------------|

Related Case: Lindke v. Freed, No. 22-611

Decision: A public official who is using a social media page for both personal and official posts risks violating federal law if they block commenters. However, a violation occurs only if the official possessed actual authority to speak on behalf of the public entity and claimed to exercise that authority when making the post. Public officials have their own First Amendment rights to speak about public affairs in their personal capacities. To determine whether an official was acting in an official capacity or as a private citizen on social media, courts must look at factors like whether the account was designated as personal or official, whether individual posts clearly invoked official authority, and the immediate legal effect of the posts. Posts may be viewed as made with “official authority” if a written law empowered the public official to make official announcements or, in the absence of written law, if prior public officials in the same position claimed to speak with such authority and have been recognized to have such authority. It would be more difficult for a public official to deny that government business is being conducted on social media if they used government staff to make a post. A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.

Holding: A public official who prevents someone from commenting on the official’s social-media page engages in state action under §1983 only if the official both (1) possessed actual authority to speak on the State’s behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts.

Judgment: Ninth Circuit judgment was reversed and remanded for instructions in accordance with Lindke v. Freed.
Employment Discrimination: Transfer Decisions

*Muldrow v. St. Louis*

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<td>22-193</td>
<td>8th Cir.</td>
<td>Dec. 6, 2023</td>
<td>Apr. 17, 2024</td>
<td>9-0</td>
<td>Kagan</td>
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**Decision:** The involuntary transfer of a female police sergeant within the St. Louis Police Department from the Intelligence Division to a patrol job in favor of a male officer constituted sex discrimination in violation of Title VII’s anti-discrimination. The police department’s reasoning that her transfer had not resulted in a significant disadvantage to Sergeant Muldrow was not persuasive to the Court. Title VII’s anti-discrimination provision flatly prevents injury to individuals based on protected status without distinguishing between significant and less significant harms.

**Holding:** An employee challenging a job transfer under Title VII must show that the transfer brought about some harm with respect to an identifiable term or condition of employment, but that harm need not be significant.

**Judgment:** Judgment of the Eighth Circuit was vacated, and the case was remanded for further proceedings consistent with the opinion. Justices Thomas, Alito and Kavanaugh filed concurring opinions.

Agency Deference: Rules Interpreting Statutes

*Loper Bright Enterprises v. Raimondo*

|------------|-----------|----------|---------|------|--------|---------|

Related Case: *Relentless v. Department of Commerce*, No. 22-1219

**Decision:** *Chevron U.S.A Inc. v. NRDC* established the legal framework for courts to determine the interpretation of an ambiguous statute by deferring to the relevant agency experts. The Supreme Court has now ruled that *Chevron* deference to agency rules cannot be squared with the Administrative Procedure Act (APA), which commands that the reviewing court—not the agency whose action it reviews—is to decide all relevant questions of law and interpret statutory provisions. *Chevron* required a court to ignore, not follow, the reading the court would have reached had it exercised its independent judgment as required by the APA, and it demanded that courts mechanically afford binding deference to agency interpretations, including those that have been inconsistent over time. *Chevron* cannot be reconciled with the APA by presuming that statutory ambiguities are implicit Congressional delegations to agencies. The majority of the
Court believed that the only way to ensure that the law would not merely change erratically, but will develop in a principled and intelligible fashion, was for the Court to leave *Chevron* behind.

**Holding:** The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled.

**Judgment:** Judgments of the D.C. and First Circuits relied on *Chevron* were vacated and the cases were remanded for further proceedings consistent with the opinion. Justices Thomas and Alito filed concurring opinions, while Justice Kagan dissented joined by Justices Sotomayor, and Jackson.

**Recent Supreme Court Decisions Denying Certiorari**

**K-12 Education: IEP Meetings**

*Pitta v. Medeiros*

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<td>23-1090</td>
<td>1st Cir.</td>
<td>Jun. 10, 2024</td>
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**Implications of the Decision:** The decision to deny review means that the Court upheld a Massachusetts school district's right to prohibit video recordings of an IEP meeting. In the underlying case, the father notified the school that he would be video recording his son's IEP meeting, but the school responded that he was not permitted to do so. The school offered to audio record the meeting, but the father declined because it would be difficult to identify the speakers. In ruling for the school district in January 2024, the First Circuit Court of Appeals relied on the principle that recording of government officials has limitations and may be done only when they are performing their duties in indisputably public places in full view of the public, and even then, only when the act of filming would not hinder officials in the performance of their public duties and would serve public interests. A student's IEP Team Meeting, whether virtual or in person, is ordinarily not conducted in a public space. Further, the meeting could not be public because only members of a student's IEP Team may attend an IEP Team Meeting, and because IEP Team Meetings involve the discussion of sensitive information about the student. Nor are the school district employees attending IEP meetings akin to the “public officials” in the cases cited by the father. Therefore, the father possessed no First Amendment right to video record IEP Team Meetings. The First Circuit considered that the school district's prohibition on video recording is content neutral and narrowly tailored to its significant governmental interest in promoting candid conversations in the discussion or development of IEPs in order to provide students with a free appropriate public education, and that the policy also left open several alternative channels for collecting and recording information from IEP Team Meetings.
Recent Federal Circuit Court Decisions

K-12 Education: Discipline for Racist Speech

*Plaintiffs A,B, C, D, v. Park Hill School District*

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<th>Docket No.</th>
<th>Circuit</th>
<th>Lower Court</th>
<th>Opinion</th>
<th>Vote</th>
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<td>23-1119</td>
<td>8th</td>
<td>W.D. MO</td>
<td>Apr. 2, 2024</td>
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**Decision:** The Eighth Circuit Court of Appeals affirmed the judgment of the District Court upholding the school district’s decision to expel or suspend four students who took part in an “ill-advised joke” during a school event (traveling to an away football game) to create an online (Snapchat) petition calling for the return of slavery with a picture of a Black student. The Court found that all of the plaintiffs had fair notice and meaningful opportunity to present their case in the school disciplinary proceedings. The undisputed evidence showed there was a rational basis for the school district’s disciplinary decisions. The petition and its fallout drew national news-media attention and caused disruptions in the school environment. The school district decided additional punishment, beyond a short suspension, was needed to address the magnitude of the plaintiffs’ disruption. There was no indication the disciplinary decisions were motivated by bad faith or ill will. The plaintiffs also sought to compare their situations to the Black student whose picture was posted with the petition. According to the plaintiffs, he also participated in the creation, approval, and posting of the petition and yet faced no discipline. However, the District Court denied the plaintiffs’ Equal Protection claim, finding that, even if their version of the story was true, the Black student was not similarly situated to the plaintiffs, as his involvement was limited. He did not create the petition or comment on the posts as the others did. The plaintiffs’ claim the school district implemented a policy of treating Black students more leniently than White students to even out the statistical disparities in suspensions also failed. Nothing in the evidence suggested such a practice happened in this case, as the Black student’s participation in the incident was materially different from the plaintiffs’ participation.

**Holding:** The plaintiffs were provided with procedural due process, there was no substantive due process violation because the school district’s actions had a rational basis, and the plaintiffs were not denied equal protection of law.

**Judgment:** Affirmed by a 3-judge panel.
**K-12 Education: Dress Codes and Material Disruption**

*L.M. v. Town of Middleborough*

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<td>23-1535</td>
<td>1st</td>
<td>Dist. Mass.</td>
<td>Jun. 9, 2024</td>
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<td>23-1645</td>
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**Decision:** The First Circuit Court of Appeals upheld a Massachusetts school district’s dress code provision that prohibited a middle school student from wearing two versions of a shirt that read, “There Are Only Two Genders.” According to the school policy: “Clothing must not state, imply, or depict hate speech or imagery that target[s] groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification,” and “Any other apparel that the administration determines to be unacceptable to our community standards will not be allowed.” The complaint alleged that the dress code provision violated the student’s rights under the First and Fourteenth Amendments, and that its prohibitions on hate speech that targets groups and on clothing unacceptable to community standards are facially unconstitutional because they are impermissible prior restraints, void for vagueness, and overbroad. The school district countered that the shirt would make LGBTQ+ students feel unsafe and excluded in the educational environment, thereby making it inconsistent with the school’s basic educational mission of inclusivity and creating a safe welcoming environment for all students to learn. The Court instructed that *Tinker v. Des Moines*’ material disruption limitation can be applied to passive, silent speech, so long as two conditions are met: (1) that the speech can be reasonably interpreted to demean someone’s personal identity, and (2) that the message could be reasonably assumed to have a serious negative psychological impact on students with the demeaned characteristic, thereby causing substantial disruption of their learning. The First Circuit also emphasized previous rulings that established the special characteristics of the school environment. School administrators need to maintain security and order, warranting a certain degree of flexibility in school disciplinary procedures.

**Holding:** The school district’s interpretation of the message on the student’s t-shirt met the conditions of *Tinker*’s material disruption limitation on student speech, and the school district properly applied the dress code prohibition to the student plaintiff.

**Judgment:** Affirmed by a 3-judge panel.
**Business: Diversity, Equity & Inclusion Programs**


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**Decision:** The Fearless Foundation holds the Fearless Strivers Grant Contest, which awards $20,000 grants to small businesses that are at least 51% owned by Black women. The American Alliance for Equal Rights sought a preliminary injunction preventing the Fearless Strivers Grant Contest from continuing because it constituted race-based discrimination. The Alliance is likely to succeed on the merits of its argument.

**Holding:** The Fearless Fund contest is indeed a contract under § 1981 and substantially likely to violate § 1981 and cause injury. Fearless Fund was not protected by the First Amendment’s protection for expressive conduct.

**Judgment:** The District Court’s decision denying the Alliance’s request for preliminary injunctive relief was reversed and remanded with instructions to enter a preliminary injunction preventing Fearless Fund from closing its contest to all but Black women.

**K-12 Education: Government Speech v. Private Speech**

*Cajune v. Independent School District 194*

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<td>23-3115</td>
<td>8th</td>
<td>Dist. Minn.</td>
<td>Jun. 26, 2024</td>
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**Decision:** The Eighth Circuit Court of Appeals reversed the dismissal of a complaint by citizens advocating for “All Lives Matter” and “Blue Lives Matter” posters hung in school hallways where “Black Lives Matter” posters were permitted.

**Holding:** The school district was not shielded by the government speech doctrine when rejecting the requested posters. The “Black Lives Matter” posters were designed by private citizens, and the district engaged only in a passive role in the design and adoption of the posters. Once the district opened its hallways to the “Black Lives Matter” posters, it created a limited public forum and could not engage in viewpoint discrimination by denying the other posters.

**Judgment:** Reversed by a 3-judge panel.
Recent Federal District Court Decisions

**K-12 Education: Employees and Personal Pronouns**

*Wood v. Florida Dept. of Education*

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<th>Docket No.</th>
<th>District Court</th>
<th>Order</th>
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<td>4:23cv526</td>
<td>N.D. FL</td>
<td>Apr. 9, 2024</td>
<td>Walker</td>
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**Decision:** The District Court issued an Order on Motions for Preliminary Injunction by two teacher plaintiffs challenging Fla. Stat. 1000.071(3), which mandates that “[a]n employee or contractor of a public K-12 educational institution may not provide to a student his or her preferred personal title or pronouns if such preferred personal title or pronouns do not correspond to his or her sex.” The Court granted a preliminary injunction prohibiting the State of Florida and Hillsborough County School District from enforcing Fla. Stat. 1000.071(3) against Plaintiff, Ms. Wood.

**Holding:** The Court held that Ms. Wood was speaking as a private citizen, on a matter of public concern, when she provided her preferred title and pronouns to students in contravention of state law, and that her interests outweigh the State’s interest in enforcing a viewpoint-based restriction on her speech. However, the issuance of the injunction was not statewide, as Ms. Wood did not argue that the statute is facially unconstitutional. The Court denied the motion by Plaintiff, Mx. Schwandes, holding that they lacked standing because even though they were fired from Florida Virtual School for refusing to change their title, they pled prior restraint on speech and are not currently employed by a public employer.

**Judgment:** Plaintiff Wood’s motion was granted. Plaintiff Schwandes’ motion was denied.

**K-12 Education: Title IX Regulations**

a. *Tennessee v. Cardona*
b. *Louisiana v. U.S. Dept. of Education*
c. *Kansas v. U.S. Dept. of Education*
d. *Texas v. Cardona*

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<td>d. 23-cv-00604</td>
<td>d. N.D. TX</td>
<td>d. Jun. 11, 2024</td>
<td>d. O’Connor</td>
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Decisions:

a. The Court preliminarily enjoined implementation and enforcement of the new Title IX rules in Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia, and as applied in those states to intervening plaintiffs Christian Educators Association International and one 15-year-old girl. The Court found that the Department of Education’s interpretation conflicts with the plain language of Title IX and therefore exceeds its authority to promulgate regulations under that statute. Additionally, the Department’s actions were arbitrary and capricious where it failed to provide a reasoned explanation for departing from its longstanding interpretations regarding the meaning of sex and providing virtually no answers to many of the difficult questions that arose during the public comment phase of rulemaking. According to the Court, the Department did not provide a sufficient explanation for leaving regulations in place that conflict with the new gender-identity mandate, nor did it meaningfully respond to commentors’ concerns regarding risks posed to student and faculty safety. The Court was not persuaded by the Defendants’ application of the Supreme Court’s ruling in Bostock v. Clayton County, which it believes applies only in the employment context.

b. The Court preliminarily enjoined the implementation and enforcement of the new Title IX rules in Louisiana, Mississippi, Montana, and Idaho on many of the same grounds as above. The Court found that the rules violate the APA, Title IX, and the First Amendment and that “the abuse of power by administrative agencies is a threat to democracy.”

c. The Court preliminarily enjoined implementation and enforcement of the new Title IX rules in Kansas, Alaska, Utah, Wyoming, and as applied to plaintiff K.R.’s school, the schools attended by the members of Young America’s Foundation or Female Athletes United, as well as the schools attended by the children of the members of Moms for Liberty. The Court found that the Final Rule’s interpretation of sex and discrimination are therefore contrary to the statute and historical context of Title IX.

d. The Court permanently enjoined enforcement of 2021 Guidance Documents issued by the U.S. Department of Education interpreting Title IX’s prohibition on discrimination on the basis of sex to encompass discrimination on the basis of sexual orientation and gender identity, as in excess of the Department’s authority.

Implications of the Decisions: Pending final resolution of the cases, the newly promulgated Title IX regulations cannot be implemented by school districts in the States that are prohibited by the injunctions from implementing or enforcing the new rules. In the Texas case, school districts permanently may not enforce the 2021 Department of Education Guidance Documents.
Recent State Supreme Court & Courts of Appeals Decisions Affecting Education

Recent Oklahoma Supreme Court Decision

*Drummond v. Oklahoma Statewide Virtual Charter School Board and St. Isidore of Seville Catholic Virtual Charter School*

**Docket No.** 121694  
**Opinion** Jun. 25, 2024  
**Vote** 6-2  
**Author** Winchester  
**Dissents** Rowe, Kuehn

**Decision:** The court issued a writ of mandamus and declaratory relief requiring the state’s charter school board to rescind its contract with St. Isidore of Seville Catholic Virtual School because the contract violates state and federal law and is unconstitutional. Under Oklahoma law, a charter school is a public school. As such, a charter school must be nonsectarian. However, St. Isidore will evangelize the Catholic faith as part of its school curriculum while sponsored by the State. This State’s establishment of a religious charter school violates Oklahoma statutes, the Oklahoma Constitution, and the Establishment Clause. St. Isidore cannot justify its creation by invoking Free Exercise rights as a religious entity.

**Implications of the Decision:** The Oklahoma Supreme Court struck down the first known publicly funded religious charter school.

Recent Missouri Court of Appeals Decision

*R.M.A. v. Blue Springs R-IV School District*

**Docket No.** WD85778  
**Opinion** Jun. 4, 2024  
**Lower Court** Circuit Court of Jackson County, MO  
**Vote** 3-0  
**Author** Gabbert

**Decision:** The Missouri Court of Appeals (Western District) reversed the trial court’s decision to set aside a jury verdict issued in favor of a transgender male student who was denied access to the boys’ restroom and locker room at school. The jury awarded the student $175,000 in compensatory damages, plus $4 million in punitive damages, and about a half million dollars in attorney’s fees. The school district argued that the decision to deny access to the male restroom was not because of the student’s sex (determined to be male on his amended birth certificate) but because of his female genitalia. The Missouri Court of Appeals quoted Justice Neil Gorsuch’s U.S. Supreme Court Opinion in *Bostock v. Clayton County* that sex is inextricably related to transgender status.

**Judgment:** Reversed and remanded with instructions for the trial court to enter judgment in accordance with its prior judgment reflecting the jury awards and attorneys’ fees and costs on appeal.
TITLE II
Email Alert on Title II of the ADA Accessibility Requirements

From: Mary Lawson, General Counsel
Sent: May 8, 2024
To: General Counsels
Subject: Title II Accessibility Requirements

General Counsels,

On April 24, 2024, the Department of Justice issued its final rule revising the regulation implementing title II of the ADA establishing specific requirements, including the adoption of specific technical standards, for making accessible the services, programs, and activities offered by State and local government entities to the public through the web and mobile applications. The electronic version of the rule can be found at https://www.federalregister.gov/d/2024-07758.

As expected, the Department added a new subpart H that sets forth technical requirements for ensuring that web content that State and local government entities provide or make available, directly or through contractual, licensing, or other arrangements, is readily accessible to and usable by individuals with disabilities.

The Department adopted an internationally recognized accessibility standard for web access, the Web Content Accessibility Guidelines (“WCAG”) 2.1, as the technical standard for web content and mobile app accessibility under title II of the ADA. See Web Content Accessibility Guidelines (WCAG) 2.1 (w3.org). Public entities must comply with the WCAG 2.1 Level AA success criteria and conformance requirements.

The rule is effective as of June 24, 2024, however, compliance is delayed for two or three years, as set forth in the rule:

Compliance dates: A public entity, other than a special district government, with a total population of 50,000 or more shall begin complying with this rule April 24, 2026. A public entity with a total population of less than 50,000 or any public entity that is a special district government shall begin complying with this rule April 26, 2027.

Please feel free to pass this information along to your CIOs if they are not aware of the new rule.

Best regards,

Mary C. Lawson

Mary C. Lawson  |  General Counsel
Council of the Great City Schools
TITLE IX
Email Alert on Title IX Rule Changes

From: Mary Lawson, General Counsel
Sent: May 3, 2024
To: General Counsels
Subject: Title IX Rule Changes - Comparison Table

General Counsels,

Attached please find a Comparison Table for 2024 Changes to Title IX Regulations for Elementary & Secondary Public Schools created for your convenience. Please note that any rule language that was not significantly revised and other language, including but not limited to certain definitions, commentary explanations, and language contained in post-secondary provisions, may not be contained in the table. It is recommended that each district conducts a thorough review of all changes to the final rule, as well as the rule’s commentary, as this table is meant only as a quick reference tool.

Key takeaways from the rule changes include:

➢ The scope of Title IX protection now explicitly extends to discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

➢ References to a recipient’s “actual knowledge” and deliberate indifference are removed. A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively.

➢ 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.

➢ Definitions are streamlined and several new definitions are added. Examples of revisions include:

   o A Complaint can be an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX.

   o Hostile environment harassment is 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).

   o Confidential employee is added as a definition.
Several notice requirements and duties of the Title IX Coordinator are revised. The Title IX Coordinator must now monitor for barriers to reporting information about conduct that reasonably may constitute sex discrimination and take steps reasonably calculated to address such barriers.

A single-investigator model is again permitted, meaning that the decision maker may be the same person as the Title IX Coordinator or investigator. However, the facilitator of an informal resolution process must not be the same person as the investigator or decision maker.

Clarification is made that discrimination is prohibited on the basis of current, potential, or past pregnancy or related conditions, and the manner in which accommodations must be made for such conditions is detailed.

In the limited circumstances in which Title IX permits different treatment or separation on the basis of sex (e.g. restrooms, locker rooms, single-sex classes), 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, notwithstanding circumstances permitted by Title IX (housing, athletic teams).

Clarification is made that supportive measures may vary depending on what the recipient deems to be reasonably available and permits the parties to seek modification or reversal of supportive measures.

The Title IX Coordinator must consult with one or more members, as appropriate, of the student’s IEP team, if any, or one or more members, as appropriate, of the group of persons responsible for the student’s placement decision to determine how to comply with the IEP or Section 504 plan in the implementation of supportive measures.

Several changes are made to the requirements for responding to complaints and implementing grievance procedures. Some of the more burdensome procedural requirements (e.g. written questions and responses) have been eliminated.

Once the final version of the rule is officially posted to eCFR :: 34 CFR Part 106 -- Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, you can also enable the comparison function in the electronic CFR. In the meantime, the table should help you get a head start on planning revisions to your policies and procedures. Please feel free to reach out to me if you have any questions or concerns about the material.

Best regards,

Mary C. Lawson

Mary C. Lawson  |  General Counsel
Council of the Great City Schools
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<td><strong>SUBPART A – INTRODUCTION</strong>&lt;sup&gt;1&lt;/sup&gt;</td>
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<td><strong>106.1 Purpose</strong></td>
<td><strong>Pre-2020:</strong> The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.</td>
<td><strong>New:</strong> The purpose of this part is to effectuate Title IX, which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Public Law 93-380, 88 Stat. 484.</td>
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<td><strong>106.2 Definitions</strong></td>
<td><strong>Consolidates</strong> definitions in 106.2 and 106.30; <strong>Revises</strong> some definitions; <strong>Adds</strong> definitions</td>
<td><strong>Revised:</strong> <strong>Complainant</strong> is a student or employee alleged to be a victim of conduct that could constitute sex discrimination</td>
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<td><strong>Complainant</strong> means anyone alleged to be the victim of conduct that could constitute sexual harassment.</td>
<td><strong>Revised:</strong> <strong>Complainant</strong> is a student or employee alleged to be a victim of conduct that could constitute sex discrimination.</td>
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<td>(This language was included under formal complaint)</td>
<td>...Or anyone who was participating in or attempting to participate in the recipient’s programs at the time of the alleged discrimination.</td>
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<sup>1</sup> Rule language that was not significantly revised and other language, including but not limited to certain definitions, commentary explanations, and language contained in post-secondary provisions, may not be contained herein. It is recommended that each district conduct a thorough review of all changes to the final rule, as well as the rule’s commentary, as this table is meant only as a quick reference tool.
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| **Formal complaint** – includes several procedural requirements to constitute a formal complaint | **Revised:**  
*Complaint* means an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part | **Added:**  
*Confidential employee* – (1) anyone whose communications are confidential under state or federal law, or (2) anyone designated by the recipient to be confidential for purposes of providing services to persons related to sex discrimination ((3) postsecondary only) |
| **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment | **Revised:**  
*Respondent* means a person who is alleged to have violated the recipient’s prohibition on sex discrimination. | **Defines**  
*Retaliation* |
| **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following: | **Revised:**  
*Sex-based harassment* prohibited by this part is a form of sex discrimination and means |
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<td>(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).</td>
<td>sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is: (1) Quid pro quo harassment. 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, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of 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</td>
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2 Commentary, p. 84: “...in the section below on Hostile Environment Sex-Based Harassment—Subjectively and Objectively Offensive (§ 106.2), the Department added the word ‘offensive,’ which also appears in the Davis standard, to the final definition. The Department’s final definition is not identical to Davis, however, because the Department also believes a broader standard is appropriate to enforce Title IX’s prohibition on sex discrimination in the administrative context, in which educational access is the goal and private damages are not at issue. To that end, the final regulations require that harassing conduct be ‘subjectively and objectively offensive’ and ‘severe or pervasive,’ rather than the Davis standard’s ‘severe, pervasive, and objectively offensive.’”
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<td>about each party that may be relevant to evaluating the effects of the conduct; (iv) The location of the conduct and the context in which the conduct occurred; and (v) Other sex-based harassment in the recipient’s education program or activity; or (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: (A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) Where the existence of such a relationship shall be determined based on a consideration of the following factors: (1) The length of the relationship; (2) The type of relationship; and (3) The frequency of interaction between the persons involved in the relationship; (iii) Domestic violence meaning felony or misdemeanor crimes committed by a person who: (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim; (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;</td>
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<td>(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. Note 1 to the definition of sex-based harassment: The Assistant Secretary will not require a recipient to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment.</td>
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<td>Supportive measures ... “before or after the filing of a formal complaint or where no formal complaint has been filed.” (language removed)</td>
<td>Revised: Supportive measures definition is changed to apply “during the recipient’s grievance procedures under 106.45, and if applicable, 106.46, or during the informal resolution process under 106.44.” Examples moved to 106.44(g)(1) Moves requirement that supportive measures must remain confidential to 106.44(g)(5)</td>
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<td>106.3 Remedial and affirmative action and self-evaluation</td>
<td>Removes sections (c) and (d), requiring self-evaluation of policies within one (1) year to remain on file for 3 years</td>
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<td><strong>106.6 Effect of other requirements and preservation of rights</strong></td>
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<td>Pre-2020: (b) Effect of State or local law or other requirements. The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.</td>
<td>Revised: (b) Effect of State or local law or other requirements. The obligation to comply with Title IX and this part is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or this part.</td>
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<td><strong>2020 Amendment:</strong></td>
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<td>(d) Constitutional protections. Added that recipients may not restrict any rights protected by First, Fourth, and Fifth Amendments or any rights guaranteed against government action under the Constitution (left intact in 2024)</td>
<td>(g) Exercise of rights by parents or guardians. Adds “or other authorized legal representative” to act on behalf of a complainant, respondent, or other person... Changes “including but not limited to filing a formal complaint,” to “making a complaint ... of sex discrimination.”</td>
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<p>| <strong>106.8 Designation of coordinator; nondiscrimination policy; grievance procedures; notice of nondiscrimination; training; students with disabilities; and recordkeeping</strong> |
| (a) Required notification to all stakeholders of the name, address, email address and phone number of the Title IX Coordinator | Removes requirement to notify stakeholders of Title IX Coordinator information from this subsection |
| Permitted anyone to report sex discrimination to the Title IX Coordinator (verbally or written), including during non-business hours | Adds numbered subsections: |
| (b) (1) required notification of Title IX policy; (2) required prominent display of the Title IX Coordinator’s information on the website and in each handbook or catalog | (a)(1) If a recipient has more than one Title IX Coordinator, it must designate one of its Title IX Coordinators to retain ultimate oversight over those responsibilities and ensure the recipient’s consistent compliance; (2) allows delegation “as appropriate” |
| (b)(1) simplifies the language requiring the adoption of a policy prohibiting sex discrimination and revises the requirement to notify stakeholders of the policy (see (c)(2) below); (2) moves here the requirement to adopt grievance procedures for the prompt and equitable resolution for complaints |</p>
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<td>(c) required adoption and publication of grievance procedures, including notice of how to report of file a complaint</td>
<td>(c) <strong>Notice of nondiscrimination.</strong> A recipient must provide a notice of nondiscrimination to students; parents, guardians, or other authorized legal representatives of elementary school and secondary school students; employees; applicants for admission and employment; and all unions and professional organizations holding collective bargaining or professional agreements with the recipient. Requires: <strong>(1) contents of the notice of nondiscrimination</strong> to include (A) a statement of nondiscrimination on the basis of sex and prohibition against sex discrimination in any program or activity; (B) a statement that inquiries may be referred to the Title IX Coordinator, Office for Civil Rights, or both; (C) name or title, office address, email address, and telephone number of the Title IX Coordinator; (D) how to locate the nondiscrimination policy; and the grievance procedures; and (E) how to report information about conduct that may constitute sex discrimination under Title IX; and how to make a complaint of sex discrimination. Permits inclusion of information about any exceptions or exemptions applicable to Title IX. <strong>(2) publication of the notice</strong> of nondiscrimination – Adds in addition to website, handbooks and catalogs, all announcements, bulletins and application forms; allows for a <strong>shortened notice statement</strong> (instead of all elements A-D) “a statement that the recipient prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator,” and provide the location of the notice on the recipient’s website, <em>if necessary due to formatting.</em></td>
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(d) Application outside the United States. The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

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(d) Deletes language. (See 106.11 which requires application to conduct contributing to a hostile environment outside of the program or activity or outside the U.S.)

Requires prompt training related to Title IX duties for (1) all employees on the obligation to address sex discrimination the scope of conduct that constitutes sex discrimination, and all applicable notification requirements in 106.40(b)(2) and 106.44; (2) Investigators, decisionmakers, and others responsible for grievance procedures or authority to modify or terminate supportive measures on the above plus obligations under 106.44 and grievance procedures under 106.45 and 106.46; how to serve impartially; the meaning of “relevant” questions and evidence and permissible evidence regardless of relevance; (3) Facilitators of informal resolution on the above plus the informal resolution process; (4) Title IX Coordinator and designees on all of the above, plus specific responsibilities for compliance, delegation, supportive measures, recordkeeping and training.

Added:

(e) Students with disabilities. If a complainant or respondent is an elementary or secondary student with a disability, the recipient must require the Title IX Coordinator to consult with one or more members, as appropriate, of the student’s IEP team, or one or more members, as appropriate, of the group of persons responsible for the student’s placement decision under 34 CFR 104.35(c), if any, to determine how to

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3 Commentary, p. 1385: As explained in the discussion of § 106.8(d) related to frequency of training, the Department modified § 106.8(d) to require training promptly upon hiring or a change in position that alters the employee’s duties under Title IX, and annually thereafter.

4 Commentary, p. 1403: [T]he Department has revised § 106.8(d) to clarify that training must occur promptly when an employee changes positions that alters their duties under Title IX or the final regulations and annually thereafter so any changes in their notification responsibilities would be covered by this training.
**Recordkeeping** addressed in 106.45(10):

(i) A recipient must maintain for a period of **seven years** records of -

(A) **Each sexual harassment investigation** including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

(B) **Any appeal** and the result therefrom;

(C) **Any informal resolution** and the result therefrom; and

(D) **All materials used to train** Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(1) For each complaint of sex discrimination, **records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome.**

(2) For each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX or this part, including notifications under § 106.44(c)(1) or (2), **records documenting the actions the recipient took to meet its obligations under § 106.44 (in response to knowledge of sex discrimination or complaint).**

(3) **All materials used to provide training** under paragraph (d) of this section. A recipient must make these training materials available upon request for inspection by members of the public.
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<td>(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.</td>
<td>Deletes the requirement to document the basis for its conclusion that its response was not deliberately indifferent and why it was not clearly unreasonable not to provide supportive measures. (However, all records of supportive measures, informal resolution, grievance procedures and the outcome are required, as referenced above.)</td>
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<td>106.10 Scope</td>
<td>Not included in 2020 or pre-2020</td>
<td>Section added: 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.</td>
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<td>Subpart B – Coverage</td>
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<td>106.11 Application</td>
<td>Pre-2020: Except as provided in this subpart, this part 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.</td>
<td>Revised: Except as provided in this subpart, this part applies to every recipient and to all sex discrimination occurring under a recipient’s education program or activity in the United States. For purposes of this section, conduct that occurs under a recipient’s education program or activity includes but is not</td>
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<td>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.⁵ ⁶</td>
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<td>106.16</td>
<td>Requiring transition plans for any administratively separate units that admit only one sex</td>
<td>Removes these sections and renumbers</td>
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<td>106.17</td>
<td>106.18 Severability</td>
<td>Renumbered as 106.16</td>
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⁵ Commentary, p. 159: As explained in the discussion of § 106.11, Title IX applies to sex discrimination, including sex-based harassment, occurring under a recipient’s education program or activity in the United States. When sex-based harassment, including the specific offenses, occurs outside of a recipient’s education program or activity, Title IX would not apply. However, as § 106.11 makes clear, Title IX requires that a recipient address a hostile environment that exists under its education program or activity even when some conduct, including in the form of any specific offense, alleged to be contributing to the hostile environment occurred outside of the recipient’s education program or activity.

⁶ Commentary, p. 196: Title IX also applies to sex-based hostile environments occurring under a recipient’s 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. Commentary, p. 199: [A] recipient has an obligation to address a sex-based hostile environment under its education program or activity in the United States, 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.
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<td><strong>SUBPART C - DISCRIMINATION ON THE BASIS OF SEX IN ADMISSION AND RECRUITMENT PROHIBITED</strong></td>
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<td><strong>106.21 Admissions</strong></td>
<td><strong>Pre-2020:</strong> General (c) Prohibitions relating to marital or parental status. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies: (1) Shall not apply any rule concerning the <strong>actual or potential</strong> parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex; (2) Shall not discriminate against or exclude any person <strong>on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom</strong>, or establish or follow any rule or practice which so discriminates or excludes; (3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and (4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss” or “Mrs.” A recipient <strong>may make pre-admission inquiry as to the sex of an applicant for admission</strong>, but only if such inquiry is made <strong>equally of such applicants of both sexes</strong> and if the <strong>results</strong> of such inquiry are not used in connection with discrimination prohibited by this part.</td>
<td><strong>Status generally</strong> (c) Parental, family, or marital status; pregnancy or related conditions. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies: (1) Must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions; and (2) Must not: (i) Adopt or implement any policy, practice, or procedure concerning the <strong>current, potential, or past</strong> parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex; (ii) Discriminate against any person <strong>on the basis of current, potential, or past pregnancy or related conditions</strong>, or adopt or implement any policy, practice, or procedure that so discriminates; and (iii) Make a pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss or Mrs.” A recipient <strong>may ask an applicant to self-identity their sex</strong>, but only if this question is <strong>asked of all applicants</strong> and if the <strong>response</strong> is not used as a basis for discrimination prohibited by this part.</td>
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<td><strong>106.30 Definitions</strong></td>
<td><strong>Removed</strong> (definitions consolidated in 106.2)</td>
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<td><strong>Subpart D - Discrimination on the Basis of Sex in Education Programs or Activities Prohibited</strong></td>
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<td>106.31 Education programs or activities</td>
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(a)(2) In the limited circumstances in which Title IX or this part permits **different treatment or separation on the basis of sex**, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by **subjecting a person to more than de minimis harm**, except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b). **Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.**

7 Commentary, p. 1270-71: [T]he text of § 106.31(a)(2) makes clear that it does not apply to sex-separate athletic teams permitted under 34 CFR 106.41(b). As noted above, Congress made clear that the Title IX regulations should reflect the fact that athletic competition raises unique considerations and the Department’s regulations have always permitted more than de minimis harm to individual students in the context of sex-separate athletic teams. On the other hand, § 106.31(a)(2) applies in contexts for which there is no statutory exception, such as sex-separate restrooms and locker rooms under § 106.33, and single-sex classes or portions of classes under § 106.34(a) and (b). The Department has always treated access to facilities and classes differently than athletics. Classes, for example, focus on learning skills and competencies and do not raise the unique issues that are present in sex-separate interscholastic or intercollegiate athletic competition. As explained in more detail below, a recipient can address any concerns about the application of § 106.31(a)(2) to contexts like classes and facilities without preventing students from participating consistent with their gender identity. **Commentary, p. 1279:** As explained in the July 2022 NPRM, 20 U.S.C. 1686 specifically carves out from Title IX’s general statutory prohibition on sex discrimination an allowance for recipients to maintain sex-separate living facilities.

8 Commentary, p. 1272: With respect to commenters’ questions about how a recipient should determine a person’s gender identity for purposes of § 106.31(a)(2), the Department is aware that many recipients rely on a student’s consistent assertion to determine their gender identity, or on written confirmation of the student’s gender identity by the student or student’s parent, counselor, coach, or teacher. However, requiring a student to submit to invasive medical inquiries or burdensome documentation requirements to participate in a recipient’s education program or activity consistent with their gender identity imposes more than de minimis harm. In particular, a recipient may not require a person to provide documentation (such as an amended birth certificate or evidence of medical treatment) to validate their gender identity for purposes of compliance with § 106.31(a)(2) if access to such documentation is prohibited by law in that jurisdiction.
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| 106.40 Parental, family, or marital status; pregnancy or related conditions | (a) A recipient shall not apply any rule concerning a student’s **actual or potential parental, family, or marital status** which treats students differently on the basis of sex. | Revised:  
(a) A recipient must not adopt or implement any policy, practice, or procedure concerning a student’s **current, potential, or past parental, family, or marital status** that treats students differently on the basis of sex. |
|         | (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student’s pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient. | Revised:  
(1) A recipient does not engage in prohibited discrimination when it allows a student, based on pregnancy or related conditions, to voluntarily participate in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions. |
|         | (2) A recipient may require such a student to obtain the **certification of a physician** that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician. | Deleted and replaced with:  
(2) Responsibility to provide Title IX Coordinator contact and other information. A recipient must ensure that when a student, or a person who has a legal right to act on behalf of the student, informs any employee of the student’s pregnancy or related conditions, unless the employee reasonably believes that the Title IX Coordinator has been notified, the employee promptly provides that person with the Title IX Coordinator’s contact information and informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student’s equal access to the recipient’s education program or activity. |
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|         | (3) Recipients must ensure that separate voluntary programs or activities for pregnant students are comparable to that offered to non-pregnant students. | Replaced with: (3) Recipients must take **specific actions** to prevent pregnancy discrimination:  
  (i) provide **notice** of the recipient’s obligations;  
  (ii) (A) **make reasonable modifications** to policies, practices, and procedures based on individualized needs after consultation with the student (**does not require fundamental alterations** to the nature of the program or activity; (B) the student **may accept or decline** the reasonable modifications, but if accepted, the recipient must implement it; (C) **Reasonable modifications may include, but are not limited to**, breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom; intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time for coursework and rescheduling of tests and examinations; allowing a student to sit or stand, or carry or keep water nearby; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other changes to policies, practices, or procedures.  
  (iii) allow **voluntary access to separate and comparable** portion of the program or activity;  
  (iv) allow the student to take a **voluntary leave of absence** as deemed medically necessary or under a policy that allows for a greater period of time. When the student returns, they must be **reinstated with academic status, and as practicable, extracurricular status.** |
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<td>(v)</td>
<td>ensure that the student can access a lactation space, which must be other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding. (vi) must not require supporting documentation for reasonable modifications, leaves, lactation unless necessary to determine the modifications or take specific actions. Supporting documentation is not necessary when needs are obvious (e.g. needs a bigger uniform); documentation has previously been provided; when the modifications are to have water, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom; for lactation needs; or when actions are otherwise available without the need for supporting documentation.</td>
<td>(v) ensure that the student can access a lactation space, which must be other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding. (vi) must not require supporting documentation for reasonable modifications, leaves, lactation unless necessary to determine the modifications or take specific actions. Supporting documentation is not necessary when needs are obvious (e.g. needs a bigger uniform); documentation has previously been provided; when the modifications are to have water, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom; for lactation needs; or when actions are otherwise available without the need for supporting documentation.</td>
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<td>(4)</td>
<td>A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.</td>
<td>Revised: (4) Comparable treatment to other temporary medical conditions. To the extent consistent with paragraph (b)(3) of this section, a recipient must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions with respect to any medical or hospital benefit, service, plan, or policy the recipient administers, operates, offers, or participates in with respect to students admitted to the recipient’s education program or activity.</td>
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<td>(5)</td>
<td>In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a</td>
<td>Replaced with: (5) Certification to participate. A recipient must not require a student who is pregnant or has related conditions to provide certification from a healthcare provider or any other person that the student is physically able to participate in the recipient’s class, program, or extracurricular activity unless:</td>
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<td>justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.</td>
<td>(i) The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity; (ii) The recipient requires such certification of all students participating in the class, program, or extracurricular activity; and (iii) The information obtained is not used as a basis for discrimination prohibited by this part. (Leave of absence language moved to (3)(iv) and revised)</td>
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| 106.41 Athletics | (b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact. (d) Adjustment period. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. | Section (b) remains (final regulation on athletics expected soon) |

|         | Removed this section (d) |
A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

106.44 Recipient’s response to sex discrimination

(Added in 2020 - Previously entitled Recipient’s response to sexual harassment)

(a) A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

For the purposes of this section, §§ 106.30, and 106.45, “education program or activity” includes locations, events, or circumstances over which the recipient exercised disciplinary authority.

Revised:

(a) General. (1) A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively;

Revises: “actual knowledge” and deliberate indifference language.

9 Commentary, p. 198 (Discussing sex-based harassment application in 106.11): The Department therefore reiterates that a recipient should not focus its analysis on whether alleged conduct happened “on” or “off” campus but rather on whether the recipient has disciplinary authority over the respondent's conduct in the context in which it occurred. *** As discussed in the July 2022 NPRM, conduct occurring under a recipient’s education program or activity would include, but is not limited to, conduct in off-campus settings that are operated or overseen by the recipient, including, for example, field trips, online classes, and athletic programs; conduct subject to a recipient’s disciplinary authority that occurs off campus; conduct that takes place via school-sponsored electronic devices, computer and internet networks and digital platforms operated by, or used in the operations of, the recipient, including AI technologies; and conduct that occurs during training programs sponsored by a recipient at another location. See 87 FR 41401.

10 Commentary, p. 314: Under the 2020 amendments, a recipient is required to respond to sexual harassment when the recipient has “actual knowledge.” 34 CFR 106.30(a), 106.44(a). The 2020 amendments defined actual knowledge to mean 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 school or secondary school recipient. 34 CFR 106.30(a). The 2020 amendments also stated that imputation of knowledge based solely on “vicarious liability” or “constructive notice” would be insufficient to constitute actual knowledge, and that the standard would not be met when the only official of the recipient with actual knowledge is the respondent. 85 FR 30574. Further, the 2020 amendments announced that a recipient with actual knowledge must respond promptly in a manner that is not “deliberately indifferent,” and that a recipient is deliberately indifferent only if its response is clearly unreasonable in light of the known circumstances. Id. Throughout this discussion, we refer to the “actual knowledge standard” and the “deliberate indifference standard” as referenced in the 2020 amendments. *** After the 2020 amendments went into effect stakeholders and commenters representing recipients of all educational
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<td>substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.</td>
<td>Added: (b) requires Title IX Coordinator to monitor for barriers to reporting information about conduct that reasonably may constitute sex discrimination and take steps reasonably calculated to address such barriers.</td>
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**Compare with:**

106.30 Definitions. (section now deleted)

(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.

(c) Notification requirements. (1) An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part.

levels, Title IX Coordinators, State Attorneys General, and advocacy organizations informed the Department of serious problems associated with the actual knowledge and deliberate indifference standards in the 2020 amendments. *** The Department has concluded that Title IX does not permit a recipient to act merely without deliberate indifference and otherwise allow sex discrimination to occur. Rather, in the administrative enforcement context, in which the Department is responsible for ensuring that its own Federal funds are not used to further discrimination, the Department expects recipients to fully effectuate Title IX.
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<td>Added:</td>
<td>(d) <strong>Confidential employee requirements.</strong></td>
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<td>(1)</td>
<td>A recipient must notify all participants in the recipient’s education program or activity of <strong>how to contact its confidential employees, if any</strong>, ....</td>
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<td>(2)</td>
<td>A recipient must require a confidential employee to <strong>explain to any person</strong> who informs the confidential employee of conduct that reasonably may constitute sex discrimination under Title IX or this part:</td>
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<td>(i)</td>
<td><strong>The employee’s status</strong> as confidential for purposes of this part, including the circumstances in which the employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination;</td>
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<td>(ii)</td>
<td><strong>How to contact the recipient’s Title IX Coordinator</strong> and how to make a complaint of sex discrimination; and</td>
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<td>(iii)</td>
<td>That the <strong>Title IX Coordinator may be able to offer and coordinate supportive measures</strong>, as well as <strong>initiate an informal resolution process or an investigation</strong> under the grievance procedures.</td>
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<td>(a) (cont’d)</td>
<td>A recipient's response must treat complainants and respondents <strong>equitably</strong> by offering <strong>supportive measures</strong> as defined in § 106.30 to a complainant, and by <strong>following a grievance process</strong> that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must <strong>promptly contact the complainant to discuss the availability of supportive measures</strong> as defined in § 106.30, <strong>consider the complainant's wishes</strong> with respect to supportive measures, inform the complainant of the availability of supportive measures with or <strong>without the filing of a formal complaint</strong>, and <strong>explain to the complainant the process</strong> for filing a formal complaint.</td>
<td>Clarifies Title IX Coordinator duties:</td>
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<td>(b) Response to a formal complaint.</td>
<td>(1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).</td>
<td>(f) Title IX Coordinator requirements.</td>
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<td>(iv) In response to a complaint, <em>initiate the grievance procedures</em> under § 106.45, and if applicable § 106.46, or the informal resolution process under paragraph (k) of this section, if available and appropriate and requested by all parties;</td>
<td>(1) ...when notified of conduct that reasonably may constitute sex discrimination under Title IX or this part, to take the following actions to <strong>promptly and effectively end any sex discrimination</strong> in its education program or activity, prevent its recurrence, and remedy its effects:</td>
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<td>(i) provide <strong>equitable treatment</strong> to complainant and respondent;</td>
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<td>(ii) offer and coordinate <strong>supportive measures, as appropriate</strong>, for the complainant, and to the respondent if grievance procedures have been initiated or informal resolution has been offered;</td>
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<td>(iii)(A) notify the complainant (or reporter) of grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process under paragraph (k) of this section; and</td>
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<td>(B) If a complaint is made, notify the respondent of the grievance procedures under § 106.45, and if applicable § 106.46, and the informal resolution process under paragraph (k) of this section, if available and appropriate;</td>
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<td>(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.</td>
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<td><strong>Compare with:</strong> 106.30  Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.</td>
<td>(v) In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures under § 106.45, and if applicable § 106.46.  (A) <strong>To make this fact-specific determination, the Title IX Coordinator must consider,</strong> at a minimum, the following factors:  (1) The complainant’s request not to proceed with initiation of a complaint;  (2) The complainant’s reasonable safety concerns regarding initiation of a complaint;  (3) The risk that additional acts of sex discrimination would occur if a complaint is not initiated;  (4) The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;  (5) The age and relationship of the parties, including whether the respondent is an employee of the recipient;  (6) The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination,</td>
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or sex discrimination alleged to have impacted multiple individuals;
(7) The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
(8) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46.

(B) If, after considering these and other relevant factors, the Title IX Coordinator determines that the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the recipient from ensuring equal access on the basis of sex to its education program or activity, the Title IX Coordinator may initiate a complaint.

(vi) If initiating a complaint under paragraph (f)(1)(v) of this section, notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant’s safety or the safety of others, including by providing supportive measures consistent with paragraph (g) of this section; and

(vii) Regardless of whether a complaint is initiated, take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to ensure that sex discrimination does not continue or recur within the recipient’s education program or activity.
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<td>106.30 (now deleted):</td>
<td><strong>Supportive measures</strong> means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The</td>
<td><strong>Revised:</strong></td>
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<td>(2) A Title IX Coordinator is <strong>not required to comply</strong> with paragraphs (f)(1)(i) through (vii) of this section upon being notified of conduct that may constitute sex discrimination if the Title IX Coordinator reasonably determines that the conduct as alleged could not constitute sex discrimination under Title IX or this part.</td>
<td>(g) <strong>Supportive measures.</strong> Offer and coordinate supportive measures, as appropriate. For allegations of <strong>sex discrimination other than sex-based harassment or retaliation</strong>, a recipient’s provision of supportive measures <strong>does not require the recipient</strong>, its employee, or any other person authorized to provide aid, benefit, or service on the recipient’s behalf to <strong>alter the alleged discriminatory conduct for the purpose of providing a supportive measure</strong>.</td>
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<td>(1) may vary depending on <strong>what the recipient deems to be reasonably available</strong>. May include but are not limited to: counseling; extensions of deadlines and other course-related adjustments; campus escort services; increased security and monitoring of certain areas of the campus; restrictions on contact applied to one or more parties; leaves of absence; changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative; and training and education programs related to sex-based harassment.</td>
<td>(2) may <strong>not unreasonably burden either party and must not be imposed for punitive or disciplinary reasons</strong></td>
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<td>Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.</td>
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<td>(3) may modify or terminate at the conclusion of the grievance procedures or informal resolution or may continue</td>
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<td>(4) must provide the parties with an opportunity to seek modification or reversal of the supportive measures from an impartial employee who is not the employee who made the initial decision; if they are inconsistent with the definition of supportive measures under 106.2 or if circumstances change materially.</td>
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<td>(5) must keep supportive measures confidential (with exceptions)</td>
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<td>(6)(i) If the complainant or respondent is an elementary or secondary student with a disability, the recipient must require the Title IX Coordinator to consult with one or more members, as appropriate, of the student’s Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or one or more members, as appropriate, of the group of persons responsible for the student’s placement decision under 34 CFR 104.35(c), if any, to determine how to comply with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the implementation of supportive measures.</td>
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<td>(c) Emergency removal.</td>
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<td>Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis,</td>
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<td>(h) Emergency removal.</td>
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<td>Language remains similar but removes the requirement that “physical” safety is threatened and expands to allegations arising from sexual discrimination (instead of just sexual harassment).</td>
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d) Administrative leave. Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

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<td>determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.</td>
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<td>d)</td>
<td>Administrative leave. Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.</td>
<td>i) Administrative leave. Nothing in this part precludes a recipient from placing an employee respondent on administrative leave from employment responsibilities during the pendency of the recipient’s grievance procedures. This provision must not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, or the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq.</td>
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<td><strong>Compare with 106.71:</strong> (a) Retaliation prohibited.</td>
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<td>...The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation,</td>
<td>(j) Prohibited disclosures of personally identifiable information. A recipient must not disclose personally identifiable information obtained in the course of complying with this part, except in the following circumstances: (1) When the recipient has obtained prior written consent from a person with the legal right to consent to the disclosure; (2) When the information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue; (3) To carry out the purposes of this part, including action taken to address conduct that reasonably may constitute sex</td>
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<td>hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).</td>
<td>discrimination under Title IX in the recipient’s education program or activity; (4) As required by Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement; or (5) To the extent such disclosures are not otherwise in conflict with Title IX or this part, when required by State or local law or when permitted under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.</td>
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<td>106.45(9) Informal resolution.</td>
<td>A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and <strong>may not offer an informal resolution process unless a formal complaint is filed.</strong> However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient -</td>
<td>Revised: (k) <strong>Discretion to offer informal resolution in some circumstances.</strong> (1) At any time prior to determining whether sex discrimination occurred under § 106.45, and if applicable § 106.46, a recipient may offer to a complainant and respondent an informal resolution process, <strong>unless the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student</strong> or such a process would conflict with Federal, State or local law. <strong>A recipient that provides the parties an informal resolution process must, to the extent necessary, also require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient’s education program or activity.</strong></td>
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|         |                 | (i) Subject to the limitations in paragraph (k)(1) of this section, a recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that reasonably may constitute sex discrimination under Title IX or this part or when a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of the parties’ wishes.  
(ii) In addition to the limitations in paragraph (k)(1) of this section, circumstances when a recipient may decline to allow informal resolution include but are not limited to when the recipient determines that the alleged conduct would present a future risk of harm to others.  
(2) A recipient must not require or pressure the parties to participate in an informal resolution process. The recipient must **obtain the parties’ voluntary consent to the informal resolution process** and must not require waiver of the right to an investigation and determination of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise of any other right.  

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11 Commentary, p. 566-67: The Department agrees with commenters that, in order to provide voluntary consent, a party must have notice and information about the informal resolution process. ... We also believe it unnecessary to specify how a recipient obtains the voluntary consent required by § 106.44(k)(2). We instead believe it appropriate to entrust such decisions to a recipient’s discretion and judgment. The Department notes that nothing in § 106.44(k) prohibits a recipient from obtaining a party’s voluntary consent in writing or obviates a recipient’s recordkeeping requirements under § 106.8(f).
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<td>(i) Provides to the parties a <strong>written notice disclosing</strong>: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; (ii) Obtains the parties' <strong>voluntary, written consent</strong> to the informal resolution process; and (iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.</td>
<td>(3) Before initiation of an informal resolution process, the recipient must provide to the parties <strong>notice that explains</strong>: (i) The allegations; (ii) The requirements of the informal resolution process; (iii) That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient’s grievance procedures; (iv) That the parties’ agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations; (v) The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and (vi) What information the recipient will maintain and whether and how the recipient could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed. (4) The facilitator for the informal resolution process must <strong>not be the same person as the investigator or the decisionmaker</strong> in the recipient’s grievance procedures. Any person designated by a recipient to facilitate an informal resolution process must <strong>not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent</strong>. Any person facilitating informal resolution must <strong>receive training</strong> under § 106.8(d)(3). (5) <strong>Potential terms that may be included in an informal resolution agreement</strong> include but are not limited to: (i) Restrictions on contact; and</td>
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<td>206.45 Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination</td>
<td>(a) Applies only in response to a formal complaint of sexual harassment that may constitute discrimination on the basis of sex under title IX</td>
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<td>Training requirements moved to 106.8(d) and expanded to include conduct that constitutes sex discrimination (as opposed to sex-based harassment)</td>
<td>(a)(1) General. Applies to the prompt and equitable resolution of complaints of sex discrimination</td>
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<td>Added: Grievance procedures must be in writing. Applies only to complaints that an individual respondent violated the policy - When a sex discrimination complaint alleges that a recipient’s policy or practice discriminates on the basis of sex, the recipient is not considered a respondent.</td>
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<td>(2) Complaint. Specifies/adds: Persons with the right to make a complaint of sex discrimination, including sexual harassment:</td>
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<td>• Complainant (different than a Reporter);</td>
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<td>• Parent, guardian, or other authorized legal representative;</td>
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<td>• Title IX Coordinator after making a determination as set forth in 106.44(f)(1)(v) (see above);</td>
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|         |                | For sex discrimination **other than sex-based harassment:**  
|         |                | - Student  
|         |                | - Employee  
|         |                | - Anyone participating or attempting to participate in a program or activity at the time of the alleged discrimination  
| (b)(1)  | Basic requirements for grievance process. | (b) **Basic requirements** for grievance procedures.  
|         |                | **Several of the same provisions remain** – i.e., no conflicts of interest; treat parties equitably; presumption that the respondent is not responsible; require an objective evaluation of all evidence...inculpatory and exculpatory; describe the range of supportive measures and disciplinary sanctions.  
|         |                | **Revised:**  
|         |                | (2) ... The **decisionmaker may be the same person as the Title IX Coordinator or investigator**;  
|         |                | **Revised:**  
|         |                | (4) Establish reasonably prompt timeframes for the **major stages** of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay. Major stages include, for example, evaluation (i.e., the recipient’s decision whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any  
|         |                | **Added:**  
|         |                | (5) Require the recipient to take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient’s grievance procedures, provided that the steps  
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<td>do not restrict the ability of the parties to: obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures;</td>
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<td><strong>Compare with:</strong></td>
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<td>(5) Investigation of a formal complaint.</td>
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<td>(7) Exclude the following types of evidence, and questions seeking that evidence, as impermissible ... regardless of whether they are relevant:</td>
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<td>(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties <strong>provided that the recipient cannot access, consider, disclose, or otherwise use a party's records</strong> that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section</td>
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<td>(6) Live hearings. ... Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.</td>
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<td>• Protected by privilege (including if provided to a confidential employee) unless waived (added);</td>
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<td>• Party or witness records maintained by a physician, psychologist, or other professional or paraprofessional in connection with treatment, unless voluntary, written consent for use;</td>
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<td>• Related to a complainant's prior sexual interests or conduct, unless offered to prove that someone other than the respondent committed the alleged conduct or is about specific incidents of prior sexual conduct between the complainant and respondent offered to prove consent ¹² (revised under impermissible rather than not relevant).</td>
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¹² The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant’s consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred. 106.45(b)(7)(iii).
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<td>(8) If a recipient adopts grievance procedures that apply to the resolution of some, but not all, complaints articulate consistent principles for how the recipient will determine which procedures apply.</td>
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<td>(2) Notice of allegations. (i) Upon receipt of a formal complaint, a recipient must provide the following <strong>written</strong> notice to the parties who are known:</td>
<td>(c) Notice of allegations. Upon initiation of the recipient’s grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known. <strong>Removes</strong> the word “written” (however, it may be impractical to provide the required elements of notice without the elements being in writing)</td>
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<td>(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct alleged to constitute sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a <strong>statement that the respondent is presumed not responsible for the alleged</strong></td>
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<td>(1) The notice must include: (i) The recipient’s grievance procedures under this section, and if applicable § 106.46, and any informal resolution process under § 106.44(k); (ii) Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination under Title IX or this part, and the date(s) and location(s) of the alleged incident(s), to the extent that information is available to the recipient;</td>
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13 Commentary, p. 755: ...[A] recipient must provide information regarding what factors, if any, the recipient will consider when determining under what circumstances or to which types of sex discrimination complaints certain procedures apply (e.g., complaints involving certain forms of sex-based harassment, student-to-student sex-based harassment complaints, complaints with certain types of evidence, complaints involving students of certain ages or education levels).
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<td>conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must <strong>inform the parties that they may have an advisor of their choice</strong>, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.</td>
<td>(iii) A statement that retaliation is prohibited; and (iv) A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence as set out in paragraph (f)(4) of this section; and if the recipient provides a description of the evidence, the parties are entitled to an equal opportunity to access to the relevant and not otherwise impermissible evidence upon the request of any party.</td>
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<td>(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.</td>
<td>Revised: (2) If, in the course of an investigation, the recipient decides to investigate additional allegations of sex discrimination by the respondent toward the complainant that are not included in the notice provided under paragraph (c) of this section or that are included in a complaint that is consolidated under paragraph (e) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.</td>
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<td>(3) <strong>Dismissal of a formal complaint</strong> - (i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint</td>
<td>Revised/added: (d) <strong>Dismissal of a complaint.</strong></td>
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14 These provisions (presumption and advisor) are moved in the 2024 Rule to § 106.46 Grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions.
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<td>would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct. (ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. (iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.</td>
<td>(1) A recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable § 106.46, for any of the following reasons: (i) The recipient is unable to identify the respondent after taking reasonable steps to do so; (ii) The respondent is not participating in the recipient’s education program or activity and is not employed by the recipient; (iii) The complainant voluntarily withdraws any or all of the allegations in the complaint, the Title IX Coordinator declines to initiate a complaint under § 106.44(f)(1)(v), and the recipient determines that, without the complainant’s withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX or this part even if proven; or (iv) The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX or this part. Prior to dismissing the complaint under this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant. (2) Upon dismissal, a recipient must promptly notify the complainant of the basis for the dismissal. If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent of the dismissal and the basis for the dismissal promptly following notification to the complainant, or simultaneously if notification is in writing.</td>
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15 See footnotes 5 & 6 above.

16 Commentary, p. 764-65: [I]f alleged conduct did not occur under the recipient’s education program or activity, neither Title IX nor this part apply. See id.; see also discussion of § 106.11. Accordingly, a complaint that alleges such conduct would not constitute sex discrimination “under Title IX or this part” and may be dismissed. See § 106.45(d)(1)(iii), (iv).
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| (3) A recipient must notify the complainant that a dismissal **may be appealed** and provide the complainant with an opportunity to appeal the dismissal of a complaint on the bases set out in § 106.46(i)(1). If the dismissal occurs after the respondent has been notified of the allegations, then the recipient must also notify the respondent that the dismissal may be appealed on the bases set out in § 106.46(i)(1). If the dismissal is appealed, the recipient must:  
(i) **Notify the parties of any appeal, including notice of the allegations consistent with paragraph (c) of this section if notice was not previously provided to the respondent**;  
(ii) **Implement appeal procedures equally for the parties**;  
(iii) **Ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint**;  
(iv) **Ensure that the decisionmaker for the appeal has been trained** as set out in § 106.8(d)(2);  
(v) Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and  
(vi) **Notify the parties of the result of the appeal and the rationale** for the result.  
(4) A recipient that dismisses a complaint must, at a minimum:  
(i) **Offer supportive measures to the complainant as appropriate** under § 106.44(g);  
(ii) For dismissals under paragraph (d)(1)(iii) or (iv) of this section in which the respondent has been notified of the allegations, **offer supportive measures to the respondent as appropriate** under § 106.44(g); and  
(iii) Require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination
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<td>does not continue or recur within the recipient’s education program or activity under § 106.44(f)(1)(vii).</td>
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<td>(5) <strong>Investigation of a formal complaint.</strong> When investigating a formal complaint and throughout the grievance process, a recipient must (i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3); (ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence; (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;</td>
<td>Revised: (f) <strong>Complaint investigation.</strong> A recipient must provide for adequate, reliable, and impartial investigation of complaints. To do so, the recipient must: (1) Ensure that the burden is on the recipient—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred; (2) Provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible; Deleted: (iii) requirement to permit either party to discuss the allegations</td>
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(vi) Provide both parties an equal opportunity to **inspect and review** any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

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<td>(3) Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance, consistent with § 106.2 and with paragraph (b)(7) of this section; and</td>
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<td>(4) Provide each party with an equal opportunity to <strong>access the evidence</strong> that is relevant to the allegations of sex discrimination and not otherwise impermissible, consistent with § 106.2 and with paragraph (b)(7) of this section, in the following manner:</td>
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<td>(i) A recipient must provide an equal opportunity to access <strong>either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence</strong>. If the recipient provides a description of the evidence, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party;</td>
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<td>(ii) A recipient must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence described in paragraph (f)(4)(i) of this section; and</td>
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|         | (iii) A recipient must take reasonable steps to **prevent and address** the parties’ unauthorized disclosure of information and evidence obtained solely through the grievance procedures. For purposes of this paragraph, disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized.
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<td>Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and (vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.</td>
<td>Deleted pre-investigative report requirements and investigative report requirements (moved investigative report to 106.46 for postsecondary institutions)</td>
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<td>(6) Hearings.</td>
<td>(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up.</td>
<td>(g) Questioning parties and witnesses to aid in evaluating allegations and assessing credibility. A recipient must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party’s or witness’s credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination. Deletes option for live hearings and submission of questions by parties at elementary and secondary level.</td>
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<td><strong>questions from each party.</strong> With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. <strong>The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.</strong></td>
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<td><strong>(7) Determination regarding responsibility.</strong></td>
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<td>(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.</td>
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<td>Revised/Added:</td>
<td>(h) <strong>Determination whether sex discrimination occurred.</strong></td>
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<td>Following an investigation and evaluation of all relevant and not otherwise impermissible evidence under paragraphs (f) and (g) of this section, the recipient must:</td>
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<td>(1) Use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred. <strong>Both standards of proof require the decisionmaker to evaluate relevant and not otherwise impermissible evidence for its persuasiveness; if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the</strong></td>
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<td>(ii) The written determination must include - (deleted/condensed)</td>
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<td>evidence is, the decisionmaker must not determine that sex discrimination occurred.</td>
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<td>(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;</td>
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<td>(2) Notify the parties in writing of the determination whether sex discrimination occurred under Title IX or this part including the rationale for such determination, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable;</td>
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<td>(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;</td>
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<td>(C) Findings of fact supporting the determination;</td>
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<td>(D) Conclusions regarding the application of the recipient's code of conduct to the facts;</td>
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<td>(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and</td>
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<td>(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.</td>
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(iii) The recipient must **provide the written determination to the parties simultaneously.** The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for **effective implementation of any remedies.**

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<td>(iii) The recipient must <strong>provide the written determination to the parties simultaneously.</strong> The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.</td>
<td>(3) If there is a determination that sex discrimination occurred, as appropriate, require the <strong>Title IX Coordinator to coordinate the provision and implementation of remedies to a complainant and other persons the recipient identifies as having had equal access to the recipient’s education program or activity limited or denied by sex discrimination, coordinate the imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any such disciplinary sanctions, and require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient’s education program or activity</strong> under § 106.44(f)(1)(vii). A recipient may not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the recipient’s grievance procedures that the respondent engaged in prohibited sex discrimination;</td>
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<td>(iv) The Title IX Coordinator is responsible for <strong>effective implementation of any remedies.</strong></td>
<td>(4) Comply with § 106.45, and if applicable § 106.46, before the imposition of any disciplinary sanctions against a respondent; and</td>
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<td>(5) <strong>Not discipline a party, witness, or others participating in a recipient’s grievance procedures for making a false statement</strong></td>
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<td>or for engaging in consensual sexual conduct based solely on the recipient’s determination whether sex discrimination occurred.</td>
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(8) Appeals.
(i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
(A) Procedural irregularity that affected the outcome of the matter;
(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
(ii) A recipient may offer an appeal equally to both parties on additional bases.
(iii) As to all appeals, the recipient must:
(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

Revised:
(i) Appeals.
In addition to an appeal of a dismissal consistent with paragraph (d)(3) of this section, a recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints. For a complaint of sex-based harassment involving a student complainant or student respondent, a postsecondary institution must also offer an appeal on the bases set out in §106.46(i)(1).

*Although the 2024 rule deletes the bases for appeal listed in 106.45(8)(i)(A)-(C) of the 2020 rule for elementary and secondary schools, section 106.45(h)(2) requires written notification of the determination whether sex discrimination occurred, the rationale for the determination, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable. 17

17 Commentary, p. 679. The Department has determined that recipients should have discretion in determining the bases for appeal of dismissals, other than those that fall under §106.46(i). Commentary, p. 784, “...requiring a recipient to offer an appeal from the final determination in all sex discrimination complaints regardless of whether a recipient offers an appeal in comparable proceedings is unnecessary to ensure an equitable and reliable process; and doing so may impair a recipient’s ability to resolve sex discrimination complaints in a prompt and equitable manner. However, in the case of a complaint that has been dismissed, it is the Department’s view that an appeal is necessary because dismissal occurs before a determination is reached and before an investigation may have been initiated or completed. Moreover, the procedural requirements that precede dismissal are necessarily more limited than those required at the completion of grievance procedures.”
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| (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;  
(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;  
(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;  
(E) Issue a written decision describing the result of the appeal and the rationale for the result; and  
(F) Provide the written decision simultaneously to both parties. | (j) **Additional provisions.**  
If a recipient adopts additional provisions as part of its grievance procedures for handling complaints of sex discrimination, including sex-based harassment, such additional provisions must apply equally to the parties. |
| Comparison above (see 2024 106.44(k)) | (k) **Informal resolution.**  
In lieu of resolving a complaint through the recipient’s grievance procedures, the parties may instead elect to participate in an informal resolution process under § 106.44(k) if provided by the recipient consistent with that paragraph. |
| Similar language in 106.45(b)(1)(vi) and (ix) | (l) Provisions limited to sex-based harassment complaints. For complaints alleging sex-based harassment, the grievance procedures must:  
(1) Describe the range of supportive measures available to complainants and respondents under § 106.44(g); and |
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| (2) List, or describe the range of, the possible disciplinary sanctions that the recipient may impose and remedies that the recipient may provide following a determination that sex-based harassment occurred.
| (10) Recordkeeping. | Addressed in 106.8 above |
| 106.46 | 106.46 Severability. (moved to 106.48 in subpart D) | Redesignated: 106.46 Grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions. |
| 106.71 Retaliation. | (a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint |
| | A recipient must prohibit retaliation, including peer retaliation, in its education program or activity. When a recipient has information about conduct that reasonably may constitute retaliation under Title IX or this part, the recipient is obligated to comply with § 106.44. Upon receiving a complaint alleging retaliation, a recipient must initiate its grievance procedures under § 106.45, or, as appropriate, an informal resolution process under § 106.44(k). As set out in § 106.45(e), if the complaint is consolidated with a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures initiated by the consolidated complaint must comply with the requirements of both §§ 106.45 and 106.46. |
of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) Specific circumstances.
(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.
(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.
United States Court of Appeals
For the First Circuit

Nos. 23-1535, 23-1645

L.M., a minor by and through his father and stepmother and natural guardians, Christopher and Susan Morrison,

Plaintiff, Appellant,

v.

TOWN OF MIDDLEBOROUGH, MASSACHUSETTS; MIDDLEBOROUGH SCHOOL COMMITTEE; CAROLYN J. LYONS, Superintendent, Middleborough Public Schools, in her official capacity; HEATHER TUCKER, Acting Principal, Nichols Middle School, in her official capacity,

Defendants, Appellees.

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Indira Talwani, U.S. District Judge]

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Before

Barron, Chief Judge,
Thompson and Montecalvo, Circuit Judges.

________________________

David A. Cortman, with whom Rory T. Gray, Tyson C. Langhofer, P. Logan Spena, John J. Bursch, Andrew D. Beckwith, Samuel J. Whiting, Alliance Defending Freedom, and Massachusetts Family Institute were on brief, for appellant.


Joseph D. Spate, Assistant Deputy Solicitor General of South Carolina, Alan Wilson, Attorney General, Robert Cook, Solicitor General, J. Emory Smith, Jr., Deputy Solicitor General, Thomas T. Hydrick, Assistant Deputy Solicitor General, Steve Marshall, Attorney General of Alabama, Tim Griffin, Attorney General of Arkansas, Christopher M. Carr, Attorney General of Georgia, Raúl...

Robert Corn-Revere and Abigail E. Smith on brief for Foundation for Individual Rights and Expression, amici curiae.

Gary M. Lawkowski and Dhillon Law Group, Inc. on brief for Center for American Liberty, amici curiae.

James L. Kerwin, William E. Trachman, and Ilya Shapiro on brief for Mountain States Legal Foundation and Manhattan Institute, amici curiae.

Catherine W. Short and Sheila A. Green on brief for Life Legal Defense Foundation and Young America's Foundation, amici curiae.

Gene C. Shaerr, Jennifer C. Braceras, and Schaerr Jaffe LLP on brief for Independent Women's Law Center, amici curiae.

Deborah J. Dewart on brief for the Institute for Faith and Family, amici curiae.

Deborah I. Ecker, with whom Gregg J. Corbo and KP Law, P.C. were on brief, for appellees.

Ruth A. Bourquin, Kirsten V. Mayer, and Rachel E. Davidson on brief for the American Civil Liberties Union of Massachusetts, Inc., amici curiae.


June 9, 2024
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), famously upheld the First Amendment right of public-school students to wear black armbands at school in protest of the country's involvement in the Vietnam War. The Supreme Court was sensitive, however, to the "special characteristics of the school environment" and so took care to explain that there was "no evidence whatever of . . . interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." Id. at 506, 508. It also affirmed more generally that "of course" school authorities may restrict student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" or, otherwise put, "'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school' [or] . . . collid[es] with the rights of others." Id. at 513 (citation omitted).

In the more-than-half century since Tinker, the Court has addressed variations of the First Amendment question presented in that landmark case. But it has not addressed the vexing question of when (if ever) public-school students' First Amendment rights must give way to school administrators' authority to regulate speech that (though expressed passively, silently, and without mentioning any specific students) assertedly demeans
characteristics of personal identity, such as race, sex, religion, or sexual orientation.

In these consolidated appeals, we confront a dispute that raises that question for the first time in our Circuit, although other federal courts have confronted it before. The underlying suit, filed in the District of Massachusetts, concerns the "hate speech" provision of a public middle school dress code, which the defendants applied to prohibit a twelve-year-old student first from wearing a t-shirt that read "There Are Only Two Genders" and then from wearing that same t-shirt with the words "Only Two" covered by a piece of tape on which was written "CENSORED."

Relying solely on Tinker's "invasion of the rights of others" limitation, and thus not Tinker's "material disruption" limitation, the District Court denied the student's motion for a preliminary injunction. On that same basis, the District Court granted the defendants final judgment on all the student's claims, which challenged both the dress code's specific applications and two portions of the dress code on their face. We affirm the District Court's rulings, albeit on somewhat different grounds.

I.

A.

1. John T. Nichols Middle School ("NMS") is a public middle school in Middleborough, Massachusetts. NMS's students are in the
sixth through eighth grades and are between ten and fourteen years old.

NMS and the Middleborough Public School System ("MPSS") administrators knew that several NMS students identified as part of the "LGBTQ+ community." In addition, Heather Tucker, the then-interim principal of NMS, who had just started at the school, was aware that several NMS students identified as "transgender or gender nonconforming."

Prior to coming to NMS, Tucker had educated young students for two decades. During that time, she met with students who had been bullied based on their gender identities and worked closely with students who had self-harmed, contemplated suicide, or attempted to commit suicide "because of their gender identity." Tucker also worked on teams that had recommended out-of-district placements for students "because of [those students'] gender identity and suicidal ideation."

Carolyn Lyons, the superintendent of the MPSS, also knew that several NMS students had "attempted to commit suicide or have had suicidal ideations in the past few years, including members of the LGBTQ+ community." Lyons further stated in an affidavit that "[t]hese situations have frequently cited LGBTQ+ status and treatment as a major factor." Lyons attested that ",[s]tudent survey data collected in June 2022, through NMS's platform Panorama, show over 20 individual student[s'] comments about
perceived bullying at school, feeling unwelcome at school, and expressing specific concerns about how the LGBTQ+ population is treated at school."

NMS had a student-run organization called the Gay Straight Alliance Club ("GSA"), which was "intended as a space for students who fit under the LGBTQ+ umbrella or are their allies" (cleaned up). The GSA was open to all NMS students, and at any given time "approximately ten to twenty students . . . attend[ed] the GSA['s] [monthly] meetings."

2.

NMS's code of conduct included a dress code ("Dress Code") that was set forth in the "Student & Family Handbook," which was provided to NMS's students and their families. The Dress Code's preface states that the Dress Code is "governed by health, safety[,] and appropriateness" and that, because "an environment conducive to learning is necessary," clothing that "causes distractions and inhibits learning is not allowed." The preface further states that students are "encourage[d] . . . to dress in a neat and presentable manner that reflects pride in themselves and their school."

The Dress Code provides:

- Clothing must be neat and clean.
- Clothing that is excessively revealing . . . will not be allowed.
- Tank tops or basketball shirts must have a t-shirt underneath.
Chains, chain belts, spikes, studs, and gang related attire is not allowed.

Clothing with alcohol, tobacco, vulgar writing, sexual references or controlled substance reference[s] will not be allowed.

Outer coats, hats, caps, bandanas, sweatshirt hoods, and sunglasses will not be worn in the building without permission of an administrator.

Wheeled shoes and platform shoes are dangerous on our floors and not allowed. Blankets or other clothing that drapes down or is considered a tripping hazard will not be allowed.

Clothing must not state, imply, or depict hate speech or imagery that target[s] groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification.

Any other apparel that the administration determines to be unacceptable to our community standards will not be allowed.

(Emphases added). The Dress Code concludes by stating that should a student "wear something inappropriate to school, [the student] will be asked to call their parent/guardian to request that more appropriate attire be brought to school" and that "[r]epeated violations of the dress code will result in disciplinary action."

3.

In the Spring of 2023, L.M. was a seventh grader at NMS. He held the belief that there are only two biological sexes (male and female), that the word "gender" is synonymous with "sex[,]" and that because there are only two biological sexes there are only two genders.
On March 21, 2023, L.M. wore a black t-shirt to school that displayed, in black capitalized letters with thick white outlines, the words "There Are Only Two Genders" (the "Shirt"). L.M. wore the Shirt both to express his own views, which he understood to be contrary to those NMS espouses on the subject, and to convey his belief that his views are not "inherently hateful."

After L.M. arrived at his first-period class, a teacher contacted Jason Carroll, the assistant principal of NMS, about the Shirt. The teacher expressed concerns about the "physical safety" of L.M. "as well as other students' safety, citing to multiple members of the LGBTQ+ population at NMS as current students in the building who would be impacted by the t-shirt['s] message and potentially disrupt classes." Carroll then contacted Tucker, who went to L.M.’s class and asked him to meet with her.

Tucker explained that L.M. could not wear the Shirt at school and could either remove it while at school or discuss the matter further. L.M. requested to discuss the matter further, so Tucker asked him to come with her to another room to continue the discussion.

In the separate room, with the school counselor also present, Tucker explained that some students had "complained" and that L.M. could not return to class if he did not remove the Shirt.
When L.M. declined to do so, Tucker called L.M.'s father to explain that L.M. would need to remove the Shirt to return to class.

L.M.'s father stood by L.M.'s decision not to remove the Shirt and thereafter picked L.M. up from school and took him home. School administrators took no other action at that point.

L.M. did not personally witness any noticeable disruption on March 21 or thereafter that resulted from his wearing of the Shirt. L.M. has since worn shirts expressing his views on a range of other topics, which included messages like "Don't Tread on Me" and "First Amendment Rights," none of which he was asked to remove. L.M. has not been disciplined by NMS administrators for wearing the Shirt or any of those shirts or for any views he has expressed while off school grounds.

4.

On April 1, 2023, L.M.'s father sent Lyons an email in which he asked for an explanation of the problem with the Shirt, given that "nothing about [the] shirt . . . was directed to any particular person" and that "[i]t simply stated [L.M.'s] view on a subject that has become a political hot topic . . . that is being discussed . . . all across our country." Lyons responded in an email on April 4, 2023, that stated that L.M. had not been, nor would be, disciplined for having worn the Shirt. Lyons explained that Tucker had been enforcing the Dress Code because the Shirt's
contents had been understood to "target[] students of a protected class; namely in the area of gender identity."

On April 27, 2023, L.M.'s counsel sent Lyons a letter that asserted NMS had violated L.M.'s free-speech rights under Tinker by prohibiting him from wearing the Shirt and that "the 'hate speech' provision" of the Dress Code was facially unconstitutional. The letter further stated that L.M. intended to wear the Shirt on May 5 and that, if NMS "interfere[d] with [L.M.] doing so again," it "may be necessary" for L.M. to initiate legal action.

MPSS's counsel responded on May 4 with a letter that stated NMS's actions had been justified under applicable legal authorities. The letter stated that state law "provides [students] protection against discrimination, harassment and bullying on the basis of . . . gender identity" and that those protections were against "communications, whether oral, written, . . . or through the wearing of apparel, that may reasonably be considered intimidating, hostile, offensive or unwelcome based on . . . gender identity . . . and/or may otherwise be reasonably likely to lead to a disruption of [school] operations." The letter further stated that MPSS administrators would prohibit the wearing of t-shirts "likely to be considered discriminatory, harassing and/or bullying . . . by suggesting that [others'] sexual orientation, gender identity or expression does not exist or is invalid."
NMS's actions attracted local and national media coverage. L.M. participated in several interviews with news media about the March 21 incident and became the subject of local and national news coverage.

On April 13, two individuals stood near NMS's bus drop-off area, but off school property, and held signs that read, "there are only two genders" and "keep woke politics out our schools." The next day, counter-protesters standing off school property held signs that read, "trans people belong," "everyone is welcome here," and "we support trans rights." Lyons received complaints from community members about both groups of individuals.

In late April and early May, Lyons, Tucker, NMS, and Middleborough High School received a slew of messages, emails, and phone calls related to the controversy involving the Shirt. Lyons described some of the calls as being "threatening in nature," and Tucker attested that she and other NMS staff received "hateful messages" in emails from individuals both within and without Massachusetts.

On May 1, 2023, NMS received over fifty telephone messages Tucker described as "hateful and lewd." The calls continued for about two weeks, tapered off, and started up again around May 31.

Lyons found out about a post on the social-media platform "X," formerly known as "Twitter," that listed the NMS staff
directory and stated, "if you see these people in public, you know what to do." In response to some of these messages, the Middleborough Police Department provided a police detail to NMS between April 24 and April 28.

5.

L.M. wore the Shirt to school again on May 5. This time he covered the words "Only Two" with a piece of tape on which was written in marker "CENSORED" (the "Taped Shirt"). L.M. wore the Taped Shirt to "speak up about" and protest NMS barring him from wearing the Shirt even though other students, according to L.M., were permitted to express other views on gender.

Soon after arriving at school on May 5, L.M. was brought to Tucker's office. While L.M. was alone in the office, Lyons, Tucker, and school counsel conferred and decided not to allow L.M. to wear the Taped Shirt. L.M. ultimately took the Taped Shirt off and returned to class. He was not disciplined for having worn the Taped Shirt.

On May 9, two other NMS students wore t-shirts to school that read "There Are Only Two Genders." Tucker met with those students and told them they could not wear those shirts. One of the students removed the shirt and returned to class. The other student declined to comply, and their parents were called. Neither student faced discipline.
B.

L.M., by and through his natural guardians, filed suit in the United States District Court for the District of Massachusetts pursuant to 42 U.S.C. § 1983. The complaint alleged violations of L.M.'s rights under the First and Fourteenth Amendments to the U.S. Constitution. The complaint named as defendants the Town of Middleborough, the Middleborough School Committee, superintendent Lyons, and then-interim now-acting principal Tucker (collectively "Middleborough").

L.M.'s complaint alleged that, by barring him from wearing the Shirt and Taped Shirt, Middleborough violated the First Amendment as incorporated against the states through the Due Process Clause of the Fourteenth Amendment. The complaint further alleged that the Dress Code's prohibitions on "hate speech" that "target[s]" groups and on clothing "unacceptable to . . . community standards" are facially unconstitutional because they are impermissible prior restraints, void for vagueness, and overbroad. The complaint sought an injunction prohibiting Middleborough from barring L.M.'s wearing of the Shirt, Taped Shirt, and similar t-shirts; a declaratory judgment that the challenged portions of the Dress Code are unconstitutional, both facially and as applied to L.M.'s t-shirts; and actual and nominal damages.
Soon thereafter, L.M. moved for a temporary restraining order and a preliminary injunction. Middleborough opposed both motions.

Middleborough first noted that Massachusetts law required schools to "develop anti-bullying plans that recognize the vulnerability of certain students" and prevent bullying or harassment based on gender identity and that Middleborough's actions must be understood in the context of guidance provided by the Massachusetts Board of Elementary and Secondary Education directing schools to "create a culture in which transgender and gender nonconforming students feel safe, supported, and fully included." Middleborough also reviewed the evidence of the school administrators' "specific knowledge of the vulnerability of students who are members of the LGBTQ+ community." Middleborough then invoked out-of-circuit decisions applying Tinker's rights-of-others and material-disruption limitations in assertedly similar contexts. See Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171-72, 1177-83 (9th Cir. 2006) (addressing a t-shirt in the high-school context that displayed "Be ashamed, our school embraced what God has condemned" on the front and "Homosexuality is shameful" on the back), vacated as moot by Harper ex rel. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007); Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1247-49 (11th Cir. 2003) (addressing high-school students' display of a confederate flag on

Based on the record and the rulings, Middleborough argued that "it is clear that [its] decision that [L.M.'s] message on the [Shirt] would invade the rights of others, the rights of particularly vulnerable students who are members of the [LGBTQ+] community (a protected class) to feel safe in school and to be free from harassment and bullying while in school, was reasonable." Middleborough also argued that "[i]t was, likewise, reasonable for [it] to conclude that [L.M.'s] shirt would materially disrupt classwork or involve substantial disorder in the school." Noting the young age of NMS's students and the school's "active LGBTQ+ community," Middleborough further argued that "[t]he level of self-advocacy expressed by this group of students strongly suggests that they would not sit idly by and allow someone to deny their very existence" and that "[i]t was . . . reasonable for the [NMS administrators] to take proactive measure to ensure the integrity of the learning environment in NMS."

Middleborough separately argued that L.M. was not likely to succeed on the merits of his as-applied claim concerning the Taped Shirt. Middleborough contended that, "[a]s with the message on [the Shirt], [administrators] reasonably forecasted that the
message on [the Taped Shirt], that merely replaced the [words 'only two'] with the word 'censored,' would not only make the LGBTQ+ students feel unsafe and excluded in the educational environment but would also cause a substantial disruption in the school and was inconsistent with NMS [sic] basic educational mission of inclusivity and creating a safe welcoming environment for all students to learn."

Middleburgh emphasized that its decision to bar L.M. from wearing the Taped Shirt on May 5 did not occur "in a vacuum" and followed "the history of disruption caused by [L.M.] wearing the [Shirt]" as well as L.M.'s attorney having "linked the two shirts by making [Middleborough] aware that [L.M.] was going to wear the same shirt to school on May 5." Middleborough thus argued that it "could reasonably forecast that [the Taped Shirt] would cause disruption and would interfere in the rights of other students under the circumstances."

As to L.M.'s First Amendment-based facial claims, Middleborough first contended that he did not have Article III standing to challenge the Dress Code. Middleborough also contended, in the alternative, that the prohibition on clothing depicting "hate speech that target[s] groups based [on,] among other protected categories, sexual orientation or gender identity," was not overbroad because it "comport[ed] with the laws and regulations that protect[] students from discrimination,"
harassment and bullying." Middleborough separately contended that L.M. was unlikely to succeed on his Due Process-based facial claims because L.M. was never disciplined and did not "articulate . . . what process he claims he is or was due" given that the handbook containing the Dress Code "provides disciplinary guidelines and procedures."

The District Court denied the temporary-restraining-order motion on June 1 and the preliminary-injunction motion on June 16. In denying the latter motion, the District Court reviewed the evidence of what Middleborough knew about students at NMS and those students' vulnerability before turning to the merits.

With respect to the March 21 incident involving the Shirt, the District Court concluded that the "school administrators were well within their discretion to conclude" that the message displayed on the Shirt "may communicate that only two gender identities -- male and female -- are valid, and any others are invalid or nonexistent." The District Court reasoned Tinker's rights-of-others limitation applied, because "students who identify differently . . . have a right to attend school without being confronted by messages attacking their identities." The District Court thus concluded that L.M. had failed to establish a likelihood of success on the merits because he could not "counter [Middleborough's] showing" that it had enforced the Dress Code on
March 21 "to protect [against] the invasion of the rights of other students to a safe and secure educational environment."

With respect to the May 5 incident involving the Taped Shirt, the District Court concluded that the analysis was no different. The District Court concluded that L.M. could not show a likelihood of success, because Middleborough could "reasonably conclude that the Taped Shirt did not merely protest censorship but conveyed the 'censored' message and thus invaded the rights of other students." In a footnote, the District Court explained that, in light of its rulings, it did not need to determine if Tinker's material-disruption limitation would also be applicable to any of L.M.'s claims. The District Court thus did not address the possible relevance of any of the evidence concerning what had occurred at NMS between March 21 and May 5 or thereafter.

Finally, the District Court ruled L.M. had no likelihood of success with respect to his facial challenges. It reasoned that was so because the Dress Code both "does not threaten discipline for a violation . . . that has not been specifically identified by the school as improper" and "provides that if students wear something inappropriate to school, they will be asked to call their parent/guardian to request that more appropriate attire be brought to school" (cleaned up).

L.M. filed a notice of interlocutory appeal of the District Court's ruling on June 23, 2023. On July 17, the parties
filed a joint motion for final judgment pursuant to Federal Rules of Civil Procedure 54(a), 56, and 65(a)(2). The parties "agreed that, based on the factual record as established through the preliminary injunction proceedings, judgment as a matter of law [was] appropriate" and asked the District Court to convert its ruling into a final judgment because the "interests of the Parties . . . will be better served by an appeal from a final judgment." The parties clearly expressed that they "continue to dispute the proper legal outcome of [L.M.'s] constitutional claims."

Two days later, the District Court entered final judgment for Middleborough as to all L.M.'s claims, incorporating the reasoning from the preliminary-injunction ruling. L.M. timely appealed, and on August 15, 2023, this Court granted the parties' joint motion to consolidate the appeals.

II.

The parties agree that the factual record needs no further development, and neither party contends that any material facts are in dispute. Our review is de novo. See Garcia-Rubiera v. Calderón, 570 F.3d 443, 455-56 (1st Cir. 2009).

We recognize that "where First Amendment interests are implicated, our review must be more searching," Mullin v. Town of Fairhaven, 284 F.3d 31, 37 (1st Cir. 2002), as we have an obligation "to independently review the factual record to ensure that the [lower] court's judgment does not unlawfully intrude on
free expression," *Boy Scouts of America v. Dale*, 530 U.S. 640, 648-49 (2000). We note, too, that the parties agree *Tinker* governs this dispute and "places the burden on the school to justify student speech restrictions." *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25 (1st Cir. 2020). The parties do not dispute that school administrators "may rely only on the justification originally provided to" L.M. for restricting his speech. *Id.* at 28.

**III.**

L.M. contends that the District Court's First Amendment-related rulings on his claims -- both facial and as-applied -- for monetary, declaratory, and injunctive relief conflict with *Tinker*. But, as we will explain, regardless of whether *Tinker*'s rights-of-others limitation applies here, we conclude that *Tinker*'s material-disruption limitation does.\(^1\) We thus affirm the District Court's *Tinker*-based rulings on that ground -- save for one of the First Amendment-related facial claims, for which we conclude that L.M. lacks Article III standing. *See United States v. George*, 886 F.3d 31, 39 (1st Cir. 2018) ("We

\(^1\) One of the amici argues that Middleborough could not rely on *Tinker*'s rights-of-others limitation as a matter of state law, but "we need not address" that contention "[b]ecause the parties did not raise the issue," *Norris*, 969 F.3d at 33 n.22, and because we affirm under *Tinker*'s material-disruption limitation.
are at liberty to affirm a district court's judgment on any ground made manifest by the record.").

We dive into the details of L.M.'s challenges to the District Court's Tinker-based rulings in Parts IV and V. First, however, we need to set forth the legal framework that, under Tinker, we understand to apply in this context. We thus now explain what that framework is and our reasons for embracing it.2

A.

As we noted above, the District Court relied solely on Tinker's rights-of-others limitation in upholding Middleborough's actions. Specifically, the District Court held that "students who identify differently . . . have a right to attend school without being confronted by messages attacking their identities" and that L.M. could not "counter [Middleborough's] showing" that Middleborough had enforced the Dress Code on both days "to protect [against] the invasion of the rights of other students to a safe and secure educational environment."

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2 Our analysis does not address Tinker's application in a post-secondary school setting. Cf. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 267 (3d Cir. 2002) ("[T]he public school setting is fundamentally different from other contexts, including the university setting."); Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426, 443 (4th Cir. 2013) ("Elementary and secondary schools are undoubtedly different than colleges . . . and this distinction results in different legal standards in some instances.").
There is some uncertainty, however, as to when, if ever, the rights-of-others limitation applies to passive and silent expression that does not target any specific student or students but assertedly demeans a personal characteristic like race, sex, religion, or sexual orientation that other students at the school share. Tinker itself had no reason to address how, or whether, such speech implicates that limitation, as the armbands at issue there were not asserted to espouse any message other than opposition to the Vietnam War and did not -- unlike the t-shirts here -- refer to any such personal characteristic. See 393 U.S. at 510-11.

Tinker also did not elaborate on the contents of "the rights of other students to be secure and to be let alone." Id. at 508. The Court did cite approvingly, id. at 513, to a Fifth Circuit decision that upheld school officials' authority to forbid the wearing of "freedom buttons" at school based on evidence that "actions by the students in distributing [the] buttons, pinning [the buttons] on others, and throwing [the buttons] through windows constituted a complete breakdown in school discipline." Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966). But no physically coercive conduct by the speaker is involved here. And while the rights-of-others limitation appears to encompass tortious speech more generally, see Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1375-77 (8th Cir. 1986), rev'd on other
grounds by Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), there is no developed contention that speech of that sort is involved here either.

The Supreme Court has recently affirmed schools' authority to regulate "severe bullying and harassment," but the Court did so without specifying whether schools may do so pursuant to the rights-of-others limitation. See Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy, 594 U.S. 180, 188 (2021). The Court merely emphasized that the "special characteristics" of the public-school context afford schools "special leeway when [they] regulate speech that occurs under [their] supervision." Id.

There has been discussion in post-Tinker caselaw about whether the rights-of-others limitation applies only to circumstances in which the speech in question would be independently unlawful and there is no developed contention that the speech involved here is. But the Court has made clear that it has not decided whether the limitation is so limited. See Kuhlmeier, 484 U.S. at 273 n.5.

For our part, we have held that the rights-of-others limitation applies in the case of bullying, even when there is no physical invasion of any kind -- seemingly without regard to whether the state separately makes such bullying a source of tort liability. See Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 507-09 (2021); cf. Norris, 969 F.3d at 29. Beyond that, though, we have
not addressed the scope of that limitation. We note that the bullying speech in Doe and Norris was asserted to target a specific student. But there is no contention that L.M.'s speech similarly was, notwithstanding that it addressed in general terms a characteristic of personal identity that other students at the school shared.

At the same time, it is not obvious how passive, silently expressed student speech that targets no specific students but demeans characteristics like those described above relates to the material-disruption limitation. Given the nature of the expression involved in Tinker, the Court there had no occasion to address such a question directly. The evidence of disruption the Court concluded was missing appeared to relate to "aggressive, disruptive action," "group demonstrations," or "threats or acts of violence on school premises" that would impede a school from carrying out its educational mission and not to the possible negative psychological effects of the speech in question on a subset of students. 393 U.S. at 508.

More recently the Court addressed a school's attempt to regulate off-campus speech under the material-disruption limitation. See Mahanoy, 594 U.S. at 193. In doing so, the Court made clear that the standard for showing the limitation applied was "demanding." Id.
We also have not had occasion to address how or whether the material-disruption limitation is implicated by expression that assertedly demeans a characteristic of personal identity like race, sex, religion, or sexual orientation. So, our precedent, too, does not offer any direct guidance on that score.

There is, however, an extensive body of federal court caselaw that applies *Tinker* in circumstances -- akin to those present in this case -- involving passive and silently expressed messages by students that do not target specific students but that assertedly demean other students' personal characteristics, like race, sex, religion, or sexual orientation. As we will explain, those rulings address when school authorities may regulate such expression and whether they may do so to prevent a "material[] disrupt[ion]" of the classroom, a "collision with the rights of other students to be secure and to be let alone," or both. *Tinker*, 393 U.S. at 508, 513. We thus now review those rulings for the guidance that they may offer here.

B.

Two circuit-level rulings in this line have relied on the rights-of-others limitation. The first is the now-vacated-as-moot Ninth Circuit decision in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), vacated as moot by *Harper ex rel. Harper v. Poway Unified School District*, 549 U.S. 1262 (2007), which affirmed the denial of a preliminary injunction to
prevent public high-school officials from barring a student from wearing a t-shirt that read "Homosexuality is Shameful." Id. at 1178.

Harper reasoned that "[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth" and that "[t]he 'right to be let alone'" is a "'recognizable privacy interest . . . ' [that is] perhaps most important 'when persons are powerless to avoid it.'" Id. (quoting Hill v. Colorado, 530 U.S. 703, 714-16 (2000)). The court explained that speech that strikes at a "core characteristic" of a minority group's identity has a "detrimental" effect on "[the students'] psychological health . . . [and] educational development" and, in so explaining, relied on social-science literature, of which it took judicial notice, that concluded such denigration is "harmful . . . to [those students'] educational performance." Id. at 1178-79.

Harper concluded that the school "had a valid and lawful basis" for barring the t-shirt under the rights-of-others limitation, because the shirt's message "was injurious to gay and lesbian students and interfered with their right to learn." Id. at 1180. In so holding, Harper appeared to presume that t-shirts could be restricted in a high school pursuant to the rights-of-others limitation whenever their denigrating message was "directed
at students' minority status such as race, religion, and sexual orientation." Id. at 1183.

The second rights-of-others ruling is West v. Derby Unified School District No. 260, 206 F.3d 1358, 1362, 1365-68 (10th Cir. 2000), in which the Tenth Circuit rejected a First Amendment challenge to the suspension of a middle-school student for his violating the school district's racial-harassment policy by drawing a confederate flag in class. Notably, however, Derby concluded that the school district "had reason to believe that a student's display of the Confederate flag" would not only "interfere with the rights of other students to be secure and let alone" but also "cause disruption." Id. at 1366. The court did so, moreover, without suggesting that different showings were necessary to trigger each limitation. Id. at 1366.

Unlike Harper, however, Derby neither explained why the rights of other students "to be secure and to be let alone" were implicated nor relied on a presumption about the negative psychological impact on minority students of the expression. The court instead relied on the factual predicate of racial tensions in the school district, which included students spray painting racist and threatening graffiti in school bathrooms, a fight breaking out because a student wore a confederate-flag headband, and students responding to displays of the flag with t-shirts bearing the letter "'X,'" denoting support for the teachings of
Malcolm X."  Id. at 1362, 1366-67.  Derby made clear, though, that administrators had acted reasonably even with respect to the middle schooler's drawing of the flag, notwithstanding that the more extreme incidents occurred at the high school and "the [racial] tensions were not widespread and involved relatively few students at the middle school."  Id. at 1362.

Several rulings in this line have relied on similar logic in invoking the material-disruption limitation to approve of a school's authority to regulate seemingly similar expression. But, in doing so, those rulings have either expressly eschewed reliance on, or simply not mentioned, the rights-of-others limitation.

Nuxoll ex rel. Nuxoll v. Indian Prairie School District #204 is an example. There, the Seventh Circuit addressed a school rule barring "'derogatory comments,' oral or written, 'that refer to race, ethnicity, religion, gender, sexual orientation, or disability'" as applied to a t-shirt bearing the message "Be Happy, Not Gay."  523 F.3d 668, 670 (7th Cir. 2008).

The court acknowledged as "prudent" the student's concession that the message "homosexuals go to Hell" could be barred as "fighting words."  Id. at 671. But the court made clear that, the "fighting words" category aside, Tinker also permitted school officials to restrict some passive, silent expression of derogatory comments that, by demeaning characteristics of "personal identity" such as those listed in the rule, "strike a
person at the core of his being" because of how "unalterable" or "otherwise deeply rooted" those characteristics are. Id. at 671. And that was so, Nuxoll made clear, even if the speech did not expressly target specific students. Id. at 672, 674.

Like Harper, Nuxoll noted evidence suggesting "that adolescent students subjected to derogatory comments about such characteristics may find it even harder than usual to concentrate on their studies and perform up to the school's expectations." Id. at 671 (collecting social-science literature). The court also observed that it could "foresee" that other students might respond with "negative comments on the Bible" or the religious characteristic of the speaker and thereby "poison the school atmosphere" and "deterior[ate] the school's ability to educate its students." Id. at 671. As the court put it, "[m]utual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning." Id.

Nuxoll rejected the school's assertion, however, that the school rule could be upheld against a facial attack under Tinker because "all" it does is "protect the 'rights' of the students against whom derogatory comments are directed." Id. at 672. Nuxoll instead stated the school was "on stronger ground" in contending that, because the rule "strikes a reasonable balance
between . . . free speech and ordered learning," the material-
disruption limitation justified the rule. Id. at 672-73.

Nuxoll pointed to the "psychological effects" of such
eexpression and reasoned that a "material disruption" under Tinker
need not involve violence and could involve "a decline in students'
test scores, an upsurge in truancy, or other symptoms of a sick
school -- symptoms therefore of substantial disruption." Id. at
671, 674. Nuxoll then indicated that speech demeaning the
characteristics of personal identity that the school's rule
covered could be prohibited under Tinker's material-disruption
limitation if school authorities could reasonably forecast that
the speech would have "psychological effects" on students with
those characteristics that would yield such "symptoms." Id. at
674.3

The court held that, on its face, "Be Happy, Not Gay"
was only "tepidly negative" and so would not have "even a slight
tendency . . . to poison the educational atmosphere," thereby
clarifying that it might matter how "negative" the message was.
Id. at 676.4 Indeed, Nuxoll suggested that a case involving a t-

3 In context, we understand Nuxoll to have been referring to
absenteeism and declining academic performance among the students
with the demeaned characteristic suffering the "psychological
effects" of being exposed to, and demeaned by, the expression. See id. at 674.

4 In reasoning that "Be Happy, Not Gay" was only "tepidly
negative" -- and not "derogatory" or "demeaning" -- the Seventh
shirt "on which was written 'blacks have lower IQs than whites' or 'a woman's place is in the home'" would be different because of the "psychological effects" on students with the demeaned characteristic of that expression. Id. at 674. And, in reversing with instructions to enter a preliminary injunction and remanding for further proceedings, Nuxoll observed that "[t]he district judge will be required to strike a careful balance between the limited constitutional right of a high-school student to campaign inside the school against the sexual orientation of other students and the school's interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity." Id. at 676.

The Seventh Circuit revisited the same expression and school in Zamecnik v. Indian Prairie School District No. 204, 636 F.3d 874 (7th Cir. 2011). Zamecnik acknowledged that "[s]chool authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission" but still concluded that the high school had failed to adduce sufficient evidence to ground a forecast of future material disruption. Id. at 877-78.

Circuit noted that "'gay' used to be an approximate synonym for 'happy'" and, thus, the message's negative import would not be clear on its face without cultural context. Id. at 675-76.
Importantly, Zamecnik held, "the fact that homosexual students and their sympathizers harassed [the plaintiff] because of their disapproval of her message [was] not a permissible ground for banning it" because otherwise protected speech "met by . . . unprivileged retaliatory conduct" cannot be suppressed because of that conduct. Id. at 879. But Zamecnik did not question Nuxoll's observation that schools had a legitimate interest in regulating expression that is especially demeaning out of a concern that, if students "attack[ed] each other with wounding words" about one another's personal characteristics, such a "First Amendment free-for-all[]" could "poison the school atmosphere," Nuxoll, 523 F.3d at 671-72, 675, or "cause serious disruption of the decorum and peaceable atmosphere of an institution dedicated to the education of the youth," Zamecnik, 636 F.3d at 877. "A school has legitimate responsibilities, albeit paternalistic in character, toward the immature captive audience that consists of its students," the court explained, "including the responsibility of protecting them from being seriously distracted from their studies by offensive speech during school hours." Id. at 879-80. Thus, in holding that "Be Happy, Not Gay" would not "have even a slight tendency to . . . poison the educational atmosphere," the court did not suggest that
the outcome would be the same for a more overtly demeaning message and, if anything, indicated the opposite. See id. at 876-78.⁵

The Third Circuit in *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir. 2002), similarly relied on the material-disruption limitation to assess the facial validity of a school district's racial-harassment policy and its application to bar a student from wearing a t-shirt displaying the term "redneck."⁶ *Sypniewski* observed that "'[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected'" and that the

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⁵ This reasoning in *Nuxoll* and *Zamecnik* mirrored the Seventh Circuit's earlier analysis in *Muller ex rel. Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996), overruled on other grounds by N.J. by *Jacob v. Sonnabend*, 37 F.4th 412, 424-25 (7th Cir. 2022), with respect to younger students. "[An adult] Christian can tell the Jew he is going to hell, or the [adult] Jew can tell the Christian he is not one of God's chosen," *Muller* opined without reference to either *Tinker* limitation, but "it makes no sense to say that the overly zealous Christian or Jewish child in an elementary school can say the same thing to his classmate." *Id.* at 1540. *Muller* also explained that elementary-school officials could restrict "[r]acist and . . . hateful views" that "could crush a child's sense of self-worth." *Id.* (emphasis added).

⁶ *Sypniewski* followed the Third Circuit's decision in *Saxe v. State College Area School District*, which held that a school district's anti-harassment policy could not pass constitutional muster under the material-disruption limitation insofar as the policy barred speech "intended to [cause disruption]" and speech that creates a "hostile environment" without "any threshold showing of severity or pervasiveness[,]" 240 F.3d 200, 216-17 (3d Cir. 2001) (emphasis added). In so holding, *Saxe* noted that the "precise scope of *Tinker*'s [rights-of-others limitation] is unclear" but that "it is certainly not enough that the speech is merely offensive to some listener." *Id.* at 217.
prohibition on written materials that create "ill will" was overbroad under Tinker because it could not be reasonably interpreted to refer to "something more than mere offense." Id. at 264-65 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 414 (1992) (White, J., concurring)).

At the same time, Sypniewski upheld the portion of the policy prohibiting materials that "create[] . . . hatred," because the term "hatred" "implie[d] such strong feelings that a serious possibility of disruption might be inferred." Id. (emphases added). Moreover, Sypniewski upheld the prohibition on "name calling" in part because "[a]lthough mere offense is not a justification for suppression of speech, schools are generally permitted to step in and protect students from abuse." Id. at 264. And, with respect to the as-applied claim, the court seemingly approved the school's authority to bar the confederate flag, given its connection to a student gang known as "the Hicks" and past incidents of racial tension involving its members, but not the "redneck" t-shirt, because of the lack of evidence indicating that students would react to that word in light of the district's past racial disturbances. See id. at 254-57.

Thereafter, the Eleventh Circuit also relied on Tinker's material-disruption limitation in holding that high-school students could be disciplined for displaying confederate flags on school grounds. See Scott, 324 F.3d at 1247-48. "Public school
students' First Amendment rights . . . should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve." Id. at 1247. And, in accord with Nuxoll, Scott indicated a school would not need evidence of past violence at the school to deem the expression materially disruptive: "[O]ne only needs to consult the evening news to understand the concern school administrators had regarding the disruption . . . emotional trauma and outright violence which the display of the symbols involved in this case could provoke." Id. (emphasis added). Indeed, the court noted that "[w]ords like 'symbol', 'heritage', 'racism', 'power', 'slavery', and 'white supremacy' are highly emotionally charged" and that it is "constitutionally allowable for school officials to closely contour the range of expression children are permitted regarding such volatile issues." Id. at 1249. Scott reasoned both that "[p]art of a public school's essential mission" is "teach[ing] students of differing races, creeds and colors to engage each other in civil terms rather than in 'terms of debate highly offensive or highly threatening to others'" and that the school had not "attempted to suppress civil debate on racial matters" but only those symbols "[s]o associated with racial prejudice [and] so likely to provoke feelings of hatred and ill will in others that they are inappropriate in the school context."
Id. (quoting Denno v. Sch. Bd. of Volusia Cnty., Fla., 218 F.3d 1267, 1273 (11th Cir. 2000)).

The Sixth Circuit reached a similar conclusion in Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008), which also upheld a school district's ban on displays of the confederate flag. The court first rejected the students' argument that the school board's forecast of future disruption was unreasonable because there was no evidence that the confederate flag itself had caused past disruption on the ground that "Tinker . . . does not require that the banned form of expression itself actually have been the source of past disruptions." Id. at 565. Barr then concluded that the record "belie[d]" the students' arguments that racial tensions at the school were not as high as the board claimed, there was "minimal evidence of prior disruption," and thus there was little basis for anticipating future disruption. Id. at 556-66. To those points, the court observed that "[t]here is no requirement that disruption under Tinker be violent" and that "an increase in absenteeism" is "the epitome of disruption in the educational process." Id. at 566.

More recently, in Sapp v. School Board of Alachua County, Florida, No. 09-cv-242, 2011 WL 5084647 (N.D. Fla. Sept. 30, 2011), a district court in the Eleventh Circuit drew on Scott to uphold a school district's ban on wearing t-shirts at school that read "Islam is of the Devil." The court first pointed to past incidents
of disturbance, such as a high-school football game where attendees wearing the t-shirts had been asked to leave after a student became deeply upset and the principal of the elementary school "received disturbing and threatening emails." Id. at *4-5. Sapp then upheld the administrators' actions under Tinker's material-disruption limitation because administrators had forecasted that, based on their years of experience as educators, the t-shirts' demeaning message would "lead to an unnecessary distraction and a hostile environment." Id. at *5. The court credited determinations by administrators that "the message was offensive and demeaning to [the school's twenty-five] Muslim students . . . and could cause an unsafe environment due to the polarizing effect of the anti-Islamic message," id. at *5 & n.3; that t-shirts that "single[] out a group of people and call[] them evil" would lead to unnecessary distraction, id. at *5; and that such a message being displayed on a t-shirt would "foster a hostile and intimidating atmosphere for students" and "compromise[] the school's ability to provide [an] . . . effective educational setting," id.

C.

The reasoning of these rulings suggests that distinctions between the two Tinker limitations in the context of student speech that assertedly demeans personal characteristics -- like race, sex, religion, or sexual orientation -- may be more semantic than real. Doctrinal labels
aside, these courts appear to have converged on the shared understanding -- most fully articulated in Nuxoll -- that school officials may bar passive and silently expressed messages by students at school that target no specific student if: (1) the expression is reasonably interpreted to demean one of those characteristics of personal identity, given the common understanding that such characteristics are "unalterable or otherwise deeply rooted" and that demeaning them "strike[s] a person at the core of his being," Nuxoll, 523 F.3d at 671; cf. Saxe, 240 F.3d at 206 (noting the especially incendiary nature of "disparaging comment[s] directed at an individual's sex, race, or some other personal characteristic" (emphasis added)); and (2) the demeaning message is reasonably forecasted to "poison the educational atmosphere" due to its serious negative psychological impact on students with the demeaned characteristic and thereby lead to "symptoms of a sick school -- symptoms therefore of substantial disruption," Nuxoll, 523 F.3d at 674, 676.7

7 Harper is no exception despite holding that the rights-of-others limitation permitted the restriction of such demeaning speech only if it was "directed at students' minority status." 445 F.3d at 1183. Harper left little doubt that Tinker permits the restriction of expression in such circumstances as described above, as it explained that expression demeaning a characteristic of a majority rather than minority group "is more likely to fall under the 'substantial disruption' prong of Tinker" and that its ruling left open "the possibility that some verbal assaults on core characteristics of majority high school students would merit application of [the rights-of-others limitation]." Id. at 1183 n.28.
Our review of these rulings persuades us that Tinker permits public-school authorities to regulate such expression when they can make the two showings described above. We agree that those showings suffice to ensure that speech is being barred only for reasons Tinker permits and not merely because it is "offensive" in the way that a controversial opinion always may be. See 393 U.S. at 509.

Importantly, although the standard for showing a material disruption is "demanding," Mahanoy, 594 U.S. at 193, a school need not be certain of its forecast. "[T]aking the case law as a whole we don't think a school is required to prove that unless the speech at issue is forbidden serious consequences will in fact ensue. That could rarely be proved. . . . It is enough for the school to present 'facts which might reasonably lead school officials to forecast substantial disruption.'" Nuxoll, 523 F.3d at 673 (quoting Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827-28 (7th Cir. 1998)) (collecting cases). As the Sixth Circuit explained, "Tinker does not require school officials to wait until the horse has left the barn before closing the door." Lowery v. Euvard, 497 F.3d 584, 591-92 (6th Cir. 2007).

There is also the question whether public schools may regulate student expression based on these two showings pursuant to only one of Tinker's two limitations and, if so, which one. As we earlier explained, there is no clear answer in controlling
precedent to that question. Our review of the rulings discussed above also reveals no obvious rationale for concluding that one limitation applies to the exclusion of the other.

Nonetheless, most federal courts in this line of authority have identified the material-disruption limitation as the better fit. And while it may be that -- as Derby appears to have concluded -- the rights-of-others limitation applies, we see no reason to break with that consensus view. The material-disruption limitation has served as a workable doctrinal means of accounting for the concerns that arise in this context and that Tinker requires us to assess. It usefully permits the depth of the expression’s disruptive impact on the learning environment to be evaluated in relation to myriad school contexts and the myriad forms that assertedly demeaning speech may take.

D.

All that said, L.M. does argue that Tinker bars schools from regulating student speech based on the its "subjective psychological intrusion[]" on listeners. For that reason, he contends, we may not uphold Middleborough’s actions here under Tinker based on a forecast of disruption that is rooted in the psychological effects on other students of expression that is passive, silent, and targets no specific students. But his reasons do not convince us to reject the framework drawn from the long line of authority described above.
L.M. is right that we must be sensitive to **Tinker**'s overarching concern about "punish[ing]" students for "silent, passive expressions of opinion, unaccompanied by any disorder or disturbance on the part of" the speakers themselves. 393 U.S. at 508. **Tinker** stressed that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression" because the reality is that "[a]ny departure from absolute regimentation may cause trouble." **Id.** **Tinker** observed that "[a]ny variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance." **Id.** But, because "our Constitution says that we must take this risk," the Court explained that, for a school "to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." **Id.** at 508-09 (emphases added).

In short, L.M. is right that **Tinker** establishes that public schools cannot "confine[]" students "to the expression of those sentiments that are officially approved," as "school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'" **Id.** at 511 (quoting **Burnside v. Byars**, 363 F.2d 744, 749 (5th Cir. 1966)). Thus, it does not permit a
"hurt feelings" exception that any opinion that could cause "offense" may trigger. Zamecnik, 636 F.3d at 877. Otherwise, school authorities could do what Tinker clearly forbids: protect other students "from the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509 (emphasis added).

None of the decisions in the line of authority just reviewed, Harper included, however, purported to permit reliance on an "undifferentiated fear or apprehension of disturbance" or a desire to avoid the "trouble" that accompanies "[a]ny departure from absolute regimentation." Id. at 508 (emphases added). Each found that there was "something more" than the "mere desire to avoid . . . discomfort and unpleasantness" involved. Id. at 509 (emphasis added).

We recognize that L.M. contrasts regulable speech that causes a negative psychological impact on others, such as bullying or harassing speech, see Doe, 19 F.4th at 508-09; Chen ex rel. Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 718 (9th Cir. 2022); C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1146-47, 1152 (9th Cir. 2016), with passive, silent expression that is not similarly targeted at specific students. L.M. does so on the ground that the former species of speech is "coercive" because it pervasively and repeatedly targets specific students, while the latter species results in what he contends is merely a "subjective
psychological intrusion[,]" such that, in his view, the speech may not be regulated under Tinker.

But L.M. himself acknowledged at oral argument that schools could bar silent, passive expression that described persons who identify as transgender in obviously highly demeaning terms but targeted no specific individual.\footnote{Specifically, L.M. conceded that a school could bar a shirt displaying the message "All Trans Kids Are Retarded." We do not use that language lightly, but the example clarifies that all parties agree that there are messages so overtly and highly demeaning of a personal characteristic that, if displayed on a shirt, can be restricted by a school based solely on its words, even if no specific students are targeted. From this example it would appear the parties also would agree that known religious, racial, and sex- and sexual-orientation-related slurs also fall within this category of overtly and highly demeaning speech.} And while L.M. concedes only that such expression would constitute "fighting words," see R.A.V., 505 U.S. at 383-84, 386, much as the plaintiff argued in Nuxoll about a similarly highly demeaning message ("homosexuals go to hell"), 523 F.3d at 670-71, we do not see how the fighting-words rubric is more illuminating than, and thus preferable to, the material-disruption rubric.

To that point, by invoking the "fighting words" doctrine, L.M. is embracing, necessarily, the notion that words that otherwise would not constitute "fighting words" may be so deemed in the public-school setting because of the heightened psychological sensitivities of school children. After all, even such highly demeaning expression as L.M. thinks regulable would...
not constitute "fighting words" outside a school. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[Fighting words are] words . . . which by their very utterance . . . tend to incite an immediate breach of the peace."); United States v. Bartow, 997 F.3d 203, 207-09 (4th Cir. 2021) (recognizing that speaking "even the most egregious racial slur," without more, "is not a fighting word per se" and that "fighting words" are limited to "direct personal insults" that are "directed to the person of the hearer" (internal citations omitted)). Yet, we find it strange that school authorities could respond to demeaning speech when its "psychological effects," Nuxoll, 523 F.3d at 674, are strong enough to provoke "violent resentment" by other students, cf. Gooding v. Wilson, 405 U.S. 518, 528 (1972) (describing fighting words as language that "when used to or of another person, and in his presence, naturally tend to provoke violent resentment"), but not when those effects are strong enough to "crush a child's sense of self-worth," Muller, 98 F.3d at 1540, and so impede that child's ability to learn, see Trachtman v. Anker, 563 F.2d 512, 520 (2d Cir. 1977) (Gurfein, J., concurring) (observing in applying Tinker in a high-school setting that "a blow to the psyche may do more permanent damage than a blow to the chin"), or otherwise "poison the educational atmosphere," Nuxoll, 523 F.3d at 676, and so lead to "symptoms of a sick school," id. at 674.
Relatedly, L.M. does not suggest that *Derby* (on which the District Court here relied) was wrong to uphold the restriction on the passive, silent display of the confederate flag. He argues only that the confederate flag is distinguishable from his speech because, on his account, his "messages about gender . . . aren't remotely comparable to the Confederate flag, which flew over a breakaway polity dedicated to the slavery of African Americans." Thus, in this way, too, L.M.'s real challenge appears to turn on a question of degree and not kind about the nature of the message -- a question to which we will turn our attention shortly. Cf. *Morse v. Frederick*, 551 U.S. 393, 409-10 (2007) ("Stripped of rhetorical flourishes, then, the debate [with the dissent] . . . is less about constitutional first principles than about whether [the student's] banner constitutes promotion of illegal drug use . . . . [A] contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.").

We should add that, consistent with the line of authority that we find persuasive, the Supreme Court post-*Tinker* has itself credited school authorities' concerns about the serious negative psychological impact of student expression on other students. It did so in holding that a student could be disciplined for a lewd speech at a school assembly in part because the speech "was acutely insulting to teenage girl students" and "could well be seriously

To be sure, L.M. does point to three circuit rulings that he contends support his position: Saxe, 240 F.3d 200 (3d Cir. 2001); Sypniewski, 307 F.3d 243 (3d Cir. 2002); and Zamecnik, 636 F.3d 874 (7th Cir. 2011). But none undermines the Tinker framework that we distill from the large body of federal court rulings in this area, and indeed, all three are in that line.

L.M. is right that Saxe held that a school district's anti-harassment policy was overbroad under Tinker. But Saxe did not set forth a categorical rule protecting such derogatory expression when passively and silently expressed. It instead drew a distinction between "speech about some enumerated personal characteristic[]" that is "merely offensive to some listener" and speech of that kind where there is some "threshold showing of severity" in the educational environment caused by the speech. Id. at 216-17 (emphasis added). Thus, Saxe concluded that, while the school district had a "compelling interest in promoting an educational environment that is safe and conducive to learning," the school district could not prohibit "derogatory" speech about "such contentious issues as 'racial customs,' 'religious tradition' . . . [or] 'sexual orientation'" without a "particularized reason as to why it anticipates substantial disruption." Id. at 217.
Sypniewski, which followed Saxe, is no different. As we have seen, it, too, deemed a school policy restricting speech -- there, one barring racial harassment -- overbroad in barring "written material . . . [that] creates ill will." 307 F.3d at 264-65. But it also upheld the portion of the policy prohibiting materials that "create[] . . . hatred" because that term "implie[d] such strong feelings that a serious possibility of disruption might be inferred." Id. at 265 (emphasis added); but see Derby, 206 F.3d at 1367-68 (upholding policy that, as construed by the school district, prohibited written material "that is racially divisive or creates ill will or hatred"). And Sypniewski held that the school administrators there were without authority to bar the t-shirt bearing the word "redneck" because the evidence did not support the conclusion that students at the school would react to that word similar to how they reacted to terms like "hick" or displays of the confederate flag. See 307 F.3d at 255-57.

Finally, Zamecnik did affirm the injunction against the high school barring the "Be Happy, Not Gay" message because the evidence for forecasting a material disruption was speculative, unpersuasive given the heckler's veto doctrine, and unreliable in explaining why the phrase in question was "particularly insidious." 636 F.3d at 877-81. But Zamecnik reasoned that "Be Happy, Not Gay" was "only tepidly negative" and would not "have even a slight tendency to . . . poison the educational atmosphere."
Thus, the court did not suggest that the outcome would be the same for a more overtly demeaning message and, if anything, indicated the opposite. See id. at 876-78.

E.

In following the lead of other courts that have grappled with similar cases, we emphasize that in many realms of public life one must bear the risk of being subjected to messages that are demeaning of race, sex, religion, or sexual orientation, even when those messages are highly disparaging of those characteristics. But, like these other courts, we do not understand Tinker, in holding that schools must allow for robust discussion and debate over even the most contentious and controversial topics, to have held that our public schools must be a similarly unregulated place.

The Supreme Court has recognized, post-Tinker, that "[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school." Fraser, 478 U.S. at 682; see Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in the judgment) ("[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."). Indeed, the Court has observed that "[even in]
our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate" and that "the role and purpose of the American public school system is to inculcate the habits and manners of civility as values in themselves indispensable to the practice of self-government." Fraser, 478 U.S. at 681 (cleaned up).

Across the decades, the federal courts in the line of authority we find persuasive have recognized that the "special characteristics of the school environment," Tinker, 393 U.S. at 506, warrant affording school officials the ability to respond to the way speech demeaning other students' "unalterable or otherwise deeply rooted personal characteristics" can "poison the school atmosphere," Nuxoll, 523 F.3d at 671-72. That flexibility to "teach . . . [and] demonstrate the appropriate form of civil discourse and political expression," Fraser, 478 U.S. at 683, however, has not been understood by these same courts to entitle school authorities to regulate debate on any topic just because it may be highly upsetting to some students. As Judge Brown has explained, "[p]art of a public school's mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in 'terms of debate highly offensive or highly threatening to others.'" West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1233-34 (D. Kan. 1998) (emphasis
added) (quoting Fraser, 478 U.S. at 683), aff'd by Derby, 206 F.3d 1358; see also Harper, 445 F.3d at 1182 (distinguishing demeaning comments about political topics, like the war in Iraq, with such comments "relating to a core characteristic of particularly vulnerable students" based on the degree of "damag[e] to the individual or the educational process"). And so, with our framework for applying Tinker to this sensitive context in place, we now turn to L.M.'s specific challenges to the rulings below.

IV.

We begin with L.M.'s challenges to the rulings rejecting his as-applied claims, which turn on what this record shows about the reasonableness of both Middleborough's (1) interpretation of the messages at issue in each claim as being demeaning of the kind of characteristic of personal identity described above and (2) forecast that each of those messages, due to its negative psychological impact on students with the demeaned characteristic, would "poison the educational atmosphere" and thereby materially disrupt the learning environment, Nuxoll, 523 F.3d at 676. Because we conclude that the record reveals that Middleborough has made each showing, we conclude its actions must be upheld under Tinker's
material-disruption limitation even if not also, based on those same showings, under Tinker's rights-of-others limitation.

A. As to the as-applied claim that concerns Middleborough's actions on March 21, L.M. asserts that the Shirt was "on all fours" with Tinker's armbands or, at least, was like the "Be Happy, Not Gay" t-shirt Nuxoll found "tepidly negative" on its face and having not "even a slight tendency to . . . poison the educational atmosphere." 523 F.3d at 676. L.M. separately contends that, in any event, the record evidence is too sparse to support Middleborough's forecast of the expression's disruptive impact on student learning due to the "vague" nature of the supporting affidavits from school administrators. We are not convinced on either score.

1. Insofar as the Shirt does demean the gender identities of students who are transgender or gender nonconforming, we agree with Middleborough it is no less likely to "strike a person at the core of his being" than it would if it demeaned the religion, race, sex, or sexual orientation of other students. Nuxoll, 523 F.3d at 671; see Bostock v. Clayton Cnty., Ga., 590 U.S. 644 (2020); Mass. G.L. ch. 71, § 370; Mass. G.L. ch. 76, § 5. Notably, on this specific point, L.M. contends only that the message -- though concerning gender identity -- is not demeaning of anyone's gender
identity. So, the threshold question is whether the message is demeaning of gender identity at all.

We see little sense in federal courts taking charge of defining the precise words that do or do not convey a message demeaning of such personal characteristics, so long as the words in question reasonably may be understood to do so by school administrators. See Morse, 551 U.S. at 401 ("The message on [the student's] banner is cryptic. . . . But [the principal] thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one."); Norris, 969 F.3d at 29 (explaining that the Supreme Court "has repeatedly emphasized the necessary discretion school officials must exercise and the attendant deference owed to many of their decisions"); see also Scott, 324 F.3d at 1249; Nuxoll, 523 F.3d at 671. Indeed, there are good reasons for federal courts to be wary of making such an assessment for those whose job it is to deliver public education. Cf. Nuxoll, 523 F.3d at 675 ("[W]e are concerned that if the rule is invalidated the school will be placed on a razor's edge, where if it bans offensive comments it is sued for violating free speech and if it fails to protect students . . . it is sued for violating laws against harassment.").

In some cases, the assessment may be easy -- the words involved may not address such a characteristic at all, do so in terms not plausibly thought negative, or, alternatively, be the
kind of denigrating speech that even L.M. acknowledges schools may restrict. But there is a spectrum of negativity, see Nuxoll, 523 F.3d at 676 (holding that "'demeaning' [was] too strong a characterization" of the message, which on its face was "only tepidly negative"); but see id. at 678-79 (Rovner, J., concurring in the judgment), and because we must decide questions of degree and not just kind, deference here cannot amount to rote acceptance, see Norris, 969 F.3d at 30.

L.M. does assert that the Shirt's message is "purely ideological" and "summarized [his] beliefs at a high level of generality without criticizing opposing views." Thus, L.M. contends, the Shirt's message is not "hateful or bigoted" and neither targets anyone nor "criticiz[es] opposing views," as it "doesn't deny any person's existence of inherent value." L.M. does not dispute, however, that the message expresses the view that students with different "beliefs about the nature of [their] existence" are wrong.

Consistent with that acknowledgement, the District Court determined the message is reasonably understood to be an assertion, however sincerely believed, that individuals who do not identify as either male or female have no gender with which they may identify, as male and female are their only options. As the District Court put it, the message "may communicate that only two
gender identities -- male and female -- are valid, and any others are invalid or nonexistent."

We agree with the District Court and so cannot say the message, on its face, shows Middleborough acted unreasonably in concluding that the Shirt would be understood -- in this middle-school setting in which the children range from ten-to-fourteen years old -- to demean the identity of transgender and gender-nonconforming NMS students. *Cf. Nuxoll*, 523 F.3d at 671 ([F]or most people these are major components of their personal identity -- none more so than a sexual orientation that deviates from the norm. Such comments can strike a person at the core of his being.""); *Trachtman*, 563 F.2d at 518 ("The defendants have consistently treated the topic of sexuality as an important part of students' lives, which requires special treatment because of its sensitive nature."). We also note that Middleborough interpreted the message in applying a dress code and thus in the context of assessing a particular means of expression that is neither fleeting nor admits of nuance. As a result, Middleborough's assessment of the message's demeaning character does not necessarily reflect a categorical judgment that, whenever uttered, the message has such a character. So understood, we see no basis for substituting our judgment for Middleborough's as to whether the Shirt demeaned the gender identities of other students at NMS.
We turn, then, to the reasonableness of Middleborough's forecast that, by demeaning those identities, the Shirt would be materially disruptive to the learning environment because of its negative psychological impact on transgender and gender nonconforming students at NMS. In that regard, Middleborough argues that, based off its specific knowledge of the students at NMS, it "reasonably forecast[ed]" that the Shirt's message "alone" would "materially disrupt transgender and gender non-conforming students' ability to focus on learning while in a classroom where the message is being displayed." Middleborough further contends that, given its knowledge of "past incidents in which [students in the LGBTQ+ community] expressed concern about not being sufficiently protected," it reasonably concluded that "if [L.M. was] permitted to wear the same shirt, others would follow suit . . . . [and] that disruption would . . . have ensued with a standoff between a group of students wearing the message [of the Shirt] . . . and those students who are members of the LGBTQ+ community and their allies."

L.M. responds that Middleborough's concerns on this score are supported only by "vague affidavits referencing [those] concerns without addressing their cause." He thus contends that the evidence does not demonstrate a "link between students' troubles and passive t-shirt messages," as nothing in the record
shows that a message like this one had been used in any prior bullying or caused any of the struggles by transgender and gender nonconforming NMS students of which school officials were keenly aware.

School officials, however, must have some margin to make high-stakes assessments in conditions of inevitable uncertainty. See Mahanoy, 594 U.S. at 201 (Alito, J., concurring) ("[T]he school has a duty to protect students while in school because their parents are unable to do that during those hours."); id. at 189 (Maj. Op.); Zamecnik, 636 F.3d at 880 ("A school . . . [has] the responsibility of protecting . . . its students from being seriously distracted from their studies by offensive speech during school hours."). In consequence of what the record here shows about what Middleborough reasonably understood the message to convey and what it knew about the NMS student population, we do not understand Tinker, our own precedents, or any other circuits' decisions to support our second-guessing Middleborough's assessment that there was the requisite basis for the forecast of material disruption here.

First, there is the demeaning nature of the message. To be sure, there is a spectrum of messages that are demeaning of characteristics such as race, sex, religion, sexual orientation, and so gender identity as well. It is hard to see how it would be unreasonable to forecast the disruptive impact of messages at the
most demeaning end of that spectrum, given their tendency to poison the educational atmosphere. See Nuxoll, 523 F.3d at 674 ("Imagine the psychological effects if the plaintiff wore a T-shirt on which was written 'blacks have lower IQs than whites' or 'a woman's place is in the home.'"); Saxe, 240 F.3d at 206, 217 (reasoning that "disparaging comment[s]" about other students' personal characteristics may "create an 'hostile environment'" and thus be restricted if there is a "threshold showing of severity or pervasiveness").

But, while oral argument indicated the Shirt's message is not at the farthest end of demeaning, see n.8 supra, neither is it, on its face, only "tepidly negative." L.M. himself agrees that the message directly denies the self-conceptions of certain middle-school students, and those denied self-conceptions are no less deeply rooted than those based on religion, race, sex, or sexual orientation. This is also a middle-school setting, with some kids as young as ten. See, e.g., Walker-Serrano ex rel. Walker v. Leonard, 325 F.3d 412, 416-17 (3d Cir. 2003) (recognizing that the age of students is a relevant consideration in administrators' decisions to regulate student speech); Sonnabend, 37 F.4th at 426 (same); K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist., 710 F.3d 99, 108 (3d Cir. 2013) (same). In addition, Middleborough was enforcing a dress code, so it was making a forecast regarding the disruptive impact of a particular means of
expression and not of, say, a stray remark on a playground, a point made during discussion or debate, or a classroom inquiry. The forecast concerned the predicted impact of a message that would confront any student proximate to it throughout the school day. See Tinker, 393 U.S. at 515 (Stewart, J., concurring) (stating that "in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." (emphasis added) (quoting Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in the judgment))); Morse, 551 U.S. at 404 ("[S]chool boards have the authority to determine 'what manner of speech in the classroom or in school assembly is inappropriate.'" (emphasis added) (first quoting Fraser, 478 U.S. at 683, then citing Fraser, 478 U.S. at 689 (Brennan, J., concurring in the judgment))).

Second, in making its assessment of how disruptive the Shirt would be on the educational atmosphere, Middleborough was not acting on abstract concerns about the potential impact of speech demeaning the gender identities of some students at NMS. Middleborough was not aware of any prior incidents or problems caused by this specific message. But it knew the serious nature of the struggles, including suicidal ideation, that some of those students had experienced related to their treatment based on their gender identities by other students, and the effect those struggles
could have on those students' ability to learn. Indeed, Tucker had previously worked on recommending out-of-district placements for such students prior to her coming to NMS. In such circumstances, we think it was reasonable for Middleborough to forecast that a message displayed throughout the school day denying the existence of the gender identities of transgender and gender non-conforming students would have a serious negative impact on those students' ability to concentrate on their classroom work. See Zamecnik, 636 F.3d at 880 ("[Schools have] the responsibility of protecting [students] from being seriously distracted from their studies by offensive speech during school hours."); Sapp, 2011 WL 5084647, at *5.

Finally, precisely because the message was reasonably understood to be so demeaning of some other students' gender identities, there was the potential for the back-and-forth of negative comments and slogans between factions of students that Nuxoll could "foresee [leading to] a deterioration in the school's ability to educate its students." 523 F.3d at 672. And that potentiality, too, was not rooted solely in abstract concerns. In addition to Tucker having been told by Carroll that L.M.'s teacher "was concerned" that "members of the LGBTQ+ population at NMS as current students . . . would be impacted by the t-shirt['s] message and potentially disrupt classes," administrators were aware from student survey data that a number of students had "specific
concerns about how the LGBTQ+ population [was] treated" at NMS. Given its specific knowledge of those facts and the "vulnerability of gender non-conforming and transgender youth . . . attending NMS," Middleborough had legitimate reason to be worried about "uninhibited . . . hallway debate over [gender identity] -- whether carried out in the form of dueling T-shirts, dueling banners, dueling pamphlets, annotated Bibles, or soapbox oratory" that would "lead to . . . symptoms of a sick school." Nuxoll, 523 F.3d at 671, 674.

Against this backdrop, we see no reason to substitute our judgment for Middleborough's with respect to its application of its Dress Code here. We conclude the record supports as reasonable an assessment that the message in this school context would so negatively affect the psychology of young students with the demeaned gender identities that it would "poison the educational atmosphere" and so result in declines in those students' academic performance and increases in their absences from school -- in other words, what Nuxoll described as "symptoms of a sick school . . . [and] therefore of substantial disruption." Id. at 674, 676.

We recognize that L.M. claims Middleborough was motivated by "a few subjective complaints" and "simply dislikes" his views. But we have explained why we do not accept that characterization of the predicate on which Middleborough acted,
and nothing indicates Middleborough permitted comparably demeaning speech, cf. Tinker, 393 U.S. at 510 (emphasizing that the school "did not purport to prohibit the wearing of all symbols of political or controversial significance," including the Iron Cross), barred L.M.'s oral expression of disagreement with pro-LGBTQ+ views in school, or prohibited the mere utterance of the particular message in question, cf. id. at 513 (reasoning that, if a rule were adopted "forbidding discussion of the Vietnam conflict, or expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise," that rule would be unconstitutional absent a showing of material disruption); see also Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd., 246 F.3d 536, 541-42, 544 (6th Cir. 2001) (reversing grant of summary judgment where evidence suggested viewpoint discrimination because "only certain racial viewpoints [were banned] without any showing of disruption"); Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1281 (11th Cir. 2004) (reversing a grant of summary judgment after concluding that there was a dispute of material fact as to whether the student was "punished for the substance of his unpatriotic views rather than an alleged disruption of class").

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9 We see no reason to take up L.M.'s invitation to be, as far as we can tell, the first court to import recent decisions that clearly did not contemplate the special characteristics of the
L.M. contends that he wore the Shirt to respond to Middleborough's asserted views on gender. But Tinker does not require a school to tolerate t-shirts that denigrate a race or ethnicity, for instance, just because the school celebrates Black History Month, Asian and Pacific American Heritage Month, and Hispanic Heritage Month. See Harper, 445 F.3d at 1185-86. For this reason, too, we reject L.M.'s contention that Middleborough was not entitled to act as it did in barring the Shirt pursuant to Tinker's material-disruption limitation, even if not also pursuant to the rights-of-others limitation based on the same two showings.

B.

Turning to the as-applied claim concerning the incident involving the Taped Shirt on May 5, our analysis is largely the same. L.M. contends he wore that shirt to protest Middleborough's March 21 actions. But "[w]e conduct the Tinker inquiry objectively" and focus on "the reasonableness of the school administration's response, not on the intent of the student." Norris, 969 F.3d at 25 (quoting Cuff ex rel. B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109, 113 (2d Cir. 2012)).

The Taped Shirt did cover "Only Two" with the word "CENSORED," which raises a question as to whether it conveyed a less negative message than the Shirt. But the Taped Shirt was the

same shirt and thus, aside from the taping, looked the same. And while L.M. left his first-period class with Tucker and did not return to classes on March 21, L.M. spoke at the School Committee meeting about the precise contents of the Shirt on April 13, had significant local and national press coverage between March 21 and May 5, and had photos of himself wearing the Shirt go viral online in that period. Middleborough thus reasonably concluded that, given the attention L.M.'s wearing of the Shirt on March 21 garnered, other students would know the words written on the Taped Shirt, even if two words were covered up. See Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426, 430-433 (4th Cir. 2013) (upholding bar on a student wearing certain shirts protesting her school's prohibition on displays of the confederate flag because administrators "reasonably predicted that the protest shirt was likely to cause a substantial disruption" because it "explicitly broadcast" the same racially inflammatory messages as the Confederate flag and thus "could just as easily" cause the same disruptions).

V.

We turn, then, to L.M.'s challenges to the District Court's rulings granting judgment as a matter of law to Middleborough on his claims facially attacking the Dress Code. Those claims concern the Dress Code's (1) prohibition on clothing that "state[s], impl[ies], or depict[s] hate speech or imagery
that target[s] groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification" and (2) rule that clothing "[school] administration determines to be unacceptable to our community standards will not be allowed [at NMS]." We see no merit to this set of challenges either.

A.

As to L.M.'s community-standards-provision claim, our jurisdiction is limited to "Cases" and "Controversies." U.S. Const. art. III § 2 cl. 1; see Doyle v. Huntress, Inc., 419 F.3d 3, 6 (1st Cir. 2005) (explaining our "obligation to inquire sua sponte into our jurisdiction over the matter" in every case). L.M. thus must show he has standing to bring this claim. See Wilkins v. Genzyme Corp., 93 F.4th 33, 40 (1st Cir. 2024). He cannot.

In the email exchange with L.M.'s father, Lyons explained that L.M. had been asked to remove the Shirt because "[t]he content of [his] shirt targeted students of a protected class; namely in the area of gender identity" before pasting the entirety of the Dress Code. That statement most naturally refers to the hate-speech provision, and L.M. makes no argument otherwise. L.M.'s counsel's letter to Middleborough also identified the hate-speech provision as the sole relevant and unconstitutional provision, and no other evidence indicates that the community-
standards provision was even a partial basis for Middleborough's actions on either March 21 or May 5.

Because L.M. "advances no affirmative argument that [the community-standards provision] is not severable from different parts of the [Dress Code]" he asserts are invalid and were applied to him, L.M. has no standing to challenge the community-standards provision based on past prohibitions. See Signs for Jesus v. Town of Pembroke, NH, 977 F.3d 93, 100 (1st Cir. 2020). There is also no non-speculative basis for concluding that future prohibitions would be fairly traceable to the community-standards provision.


B.

As to the hate-speech-provision claim, L.M. advances various reasons it is facially unconstitutional. But we do not find those reasons persuasive.¹⁰

1.

L.M. contends that the provision is unconstitutionally vague under the Fourteenth Amendment's Due Process Clause, because the provision affords Middleborough unbridled discretion to enforce it in a discriminatory and viewpoint-discriminatory manner

¹⁰ Middleborough's cursory contention that L.M. does not have standing to challenge the hate-speech provision because his speech was unprotected conflates the question of whether speech is protected with whether that protected speech may nonetheless be constitutionally regulated under Tinker.
in that "hate speech" has "no standard definition and is largely in the eye of the beholder" and the "any other classification" language is "completely vacuous." School disciplinary rules, however, "need not be as detailed as a criminal code" because "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures" and schools have a legitimate "need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct." Fraser, 478 U.S. at 686; see Sypniewski, 307 F.3d at 266 (explaining that "courts have been less demanding of specificity" when confronted with vagueness challenges to student dress and disciplinary codes); J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 935-36 (3d Cir. 2011) (en banc). The Dress Code also permits a student to be disciplined only for "[r]epeated violations," thereby ensuring notice will be given in advance of such action. See A.M. ex rel. McAllum v. Cash, 585 F.3d 214, 225 (5th Cir. 2009); Hardwick, 711 F.3d at 442. Thus, this challenge claim fails as to his Due Process-based claims for monetary, declaratory, and injunctive relief.

2.

L.M.'s claim that the provision is overbroad under the First Amendment relies in part on its use of the term "hate speech," which he contends has "no standard definition," and in part on its bar against clothing that "state[s]," "depict[s]," or
"impl[ies]" such speech. He also argues that the bar on messages that "target groups" based on "any other classification" permits Middleborough to invent any "group" it wants and sweep in any speech that refers to anyone, especially if "target[ing]" turns on "the reaction of listeners." In pressing these points, L.M. emphasizes that the hate-speech provision does not refer to substantial disruption or interference with other students' rights and therefore "most . . . applications [of the provision] are to protected, not unprotected, speech."

The Supreme Court has emphasized post-Tinker, however, that public schools require flexibility in the drafting and administration of disciplinary codes. See Fraser, 478 U.S. at 686. And because there is "a much broader 'plainly legitimate' area of speech [that] can be regulated at school than outside school," Sypniewski, 307 F.3d at 259, "the overbreadth doctrine warrants a more hesitant application in [the public-school] setting than in other contexts," Hardwick, 711 F.3d at 441 (alteration in original) (quoting Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 258 (4th Cir. 2003)).

It is significant, therefore, that the hate-speech provision applies only to apparel and then only when worn "to school" (emphasis added). Cf. Saxe, 240 F.3d at 216 n.11 (expressing concern that anti-harassment policy could be "read to cover conduct occurring outside of school premises"). The word
"hate" in "hate speech" also indicates that the provision refers only to speech that provokes "such strong feelings that a serious possibility of disruption might be inferred." Sypniewski, 307 F.3d at 265. Thus, we do not understand the provision to bar "any unwelcome [message] which offends an individual because of some enumerated personal characteristics." Saxe, 240 F.3d at 215 (cleaned up). As a result, the provision's failure to mention "material disruption" or "invasion of the rights of others" is not fatal. Cf. id. at 217 (finding "hostile environment" portion of anti-harassment policy overbroad because it "[did] not, on its face, require any threshold showing of severity or pervasiveness"); Sypniewski, 307 F.3d at 265.

In contending that the provision could "sweep[] in speech that only a diversity, equity, and inclusion expert would find 'hateful,' and even depictions of famous art," L.M. points in part to the provision's use of the words "impl[ies]" and "depi[t]s." But the prohibited messages still must constitute "hate speech," as the words L.M. highlights here merely describe means (including subtle ones) of expressing the prohibited "hate speech." Nor does the residual clause support L.M.'s concern

11 L.M. argues that the provision unconstitutionally discriminates in viewpoint between "negative" and "positive" messages, but we do not read Tinker or any other Supreme Court or federal court student-speech decision to require "positive messages" be prohibited if a "negative" message is regulable
that the provision could sweep in any classification one could imagine. The word "other" ensures that it encompasses only classifications akin to those listed, all of which pertain to classes of persons commonly protected in anti-discrimination measures. See, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001) (explaining the ejusdem generis canon); cf. Fraser, 478 U.S. at 681 (explaining that the "role and purpose" of public schools is to "inculcate the habits and manners of civility as values" (citation omitted)).

Finally, the word "target" causes no concern, as we see no reason to construe it (as L.M. contends we must) to have a meaning dependent entirely on the subjective understanding of any student rather than the objectively reasonable understanding of school administrators. Nor does L.M. argue that the word "target" renders the provision overbroad once it is construed in that narrower way.\(^{12}\)

\(^{12}\) L.M. also contends that the provision is an impermissible prior restraint because it "forbids certain messages before they occur." But, as he offers no support for equating the provision with restrictions that have been deemed prior restraints, see Alexander v. United States, 509 U.S. 544, 553 n.2 (1993), the contention is waived for lack of development, see United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).
VI.

We close by emphasizing a point that may be obvious but should not be overlooked. The question here is not whether the t-shirts should have been barred. The question is who should decide whether to bar them -- educators or federal judges. Based on Tinker, the cases applying it, and the specific record here, we cannot say that in this instance the Constitution assigns the sensitive (and potentially consequential) judgment about what would make "an environment conducive to learning" at NMS to us rather than to the educators closest to the scene.

The judgment of the District Court is affirmed.
United States Court of Appeals
For the First Circuit

No. 23-1513

SCOTT D. PITTA,

Plaintiff, Appellant,

v.

DINA MEDEIROS, individually and in her official capacity as Administrator of Special Education for the Bridgewater Raynham Regional School District; BRIDGEWATER RAYNHAM REGIONAL SCHOOL DISTRICT,

Defendants, Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. F. Dennis Saylor, IV, U.S. District Judge]

__________

Before

Gelpi, Selya, and Lynch,

Circuit Judges.

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Scott D. Pitta, pro se, for appellant.
Peter L. Mello, with whom Murphy, Hesse, Toomey & Lehane, LLP, was on brief, for appellees.

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January 4, 2024
LYNCH, Circuit Judge. Scott D. Pitta, the attorney father of a public school student, appeals from the decision of the Massachusetts U.S. District Court granting the motion to dismiss his First Amendment claim against Bridgewater-Raynham Regional School District ("the District") and Dina Medeiros, the District's Administrator for Special Education. Pitta v. Medeiros, No. 22-11641, 2023 WL 3572391 (D. Mass. May 19, 2023).

After the District denied his request to video record a private meeting with school district employees to discuss the Individualized Educational Program ("IEP") of his child, Pitta brought suit under 42 U.S.C. § 1983, alleging that he had a constitutional First Amendment right, which the appellees had denied, to video record what was said by each individual at his child's IEP Meeting. The district court held that Pitta, on the facts alleged, did not possess such a First Amendment right, id. at *8, and that is the only issue on appeal. To be clear, Pitta does not allege that he had a right to record an IEP Team Meeting under any federal or state statute or regulation. We affirm the district court's dismissal of Pitta's First Amendment claim.

I.

We first detail the allegations in Pitta's complaint and events in his further filings, on which he relies. Pitta is a resident of Bridgewater, Massachusetts. His child attends public school in the District and, at the time of the events pled,
received IEP services. Appellees are the District, a Massachusetts school district organized under Massachusetts General Laws ch. 71, § 14B, and Medeiros in her official capacity as the District's Administrator of Special Education. Pitta originally sued Medeiros in her individual capacity as well, but this claim was dropped on appeal.

On February 15, 2022, and March 8, 2022, during the COVID-19 pandemic, Pitta and pertinent District employees engaged in two meetings ("IEP Team Meetings") virtually to "discuss and develop a new IEP for [Pitta's] child." During these meetings, although the appellees had previously "argu[ed] to remove [Pitta's] child from IEP based special education services," "several school district employees" admitted "that the [District and Medeiros] had no data upon which to base their opinion" that his child should be removed from these services, and "that teachers who performed evaluations on the child that resulted in findings contrary to the [appellees'] position were later asked by the [appellees] to 'double check' their evaluation, but teachers whose evaluation results supported the [appellees'] position were not asked to do the same." The complaint alleges that "[d]espite lengthy discussions" of these statements, these statements "were not included in the [appellees'] official meeting minutes that were emailed to [him] on March 10[, 2022]." When Pitta alerted appellees to these "omissions and inaccuracies," he "objected to
the [appellees'] minutes as an official record of the meetings and requested that the minutes be amended to include the omitted portions," but appellees "refused to amend the meeting minutes."

Months later, on September 20, 2022, Pitta attended another IEP Team Meeting, conducted virtually through "Google Meet," to discuss his child's IEP. Pitta requested that the appellees video record the meeting using the Google Meet record function.¹ He did so, he alleges, because of appellees' previous "failure to produce accurate minutes of prior meetings and refusal to correct those errors despite obligations to maintain accurate records under 603 CMR 23.03." Appellees refused his request to make such a video recording, stating that such a recording would be "invasive" and was not permitted by District policy. Appellees did offer to audio record the meeting instead. Pitta then told Medeiros, the IEP Team Meeting chair, that since the District's policy prohibited them from video recording the meeting, he would make his own recording. Once the meeting began, the appellees announced that they were audio recording the meeting, and Pitta stated that he was video recording it. At that point, Medeiros stated that if Pitta did not stop his video recording, she would

¹ Both Pitta's complaint and the appellees' brief state that Pitta "requested that the Defendants[] video record the meeting using the Google Meet record function." As the district court noted, Pitta did not specify which District employees, other than Medeiros, attended the IEP Team Meeting. Pitta, 2023 WL 3572391, at *7.
end the meeting. When Pitta refused to stop the video recording, Medeiros terminated this meeting. Pitta filed this suit on September 28, 2022, within days of the failed meeting, seeking declaratory and injunctive relief.

On October 3, 2022, after Pitta had filed this suit, Medeiros emailed Pitta that the District had "figured out a way to accommodate [his] request to know who is speaking while the meeting is being audio recorded" and was attempting to find a mutually agreeable time "for the educational Team to reconvene from the attempted [IEP] Team [M]eeting scheduled on 9/20/22." She proposed that "[t]eam members will all be audio recorded and participate with the camera off. When speaking, their identity box will be indic[a]ted as the person speaking by lighting around/within the box." She wrote that this would allow Pitta to "be able to tell who is speaking" while "looking at the screen." Pitta agreed to a virtual IEP Team Meeting under these conditions to take place on October 21, 2022.²

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² On a motion to dismiss, we may consider documents which are of undisputed authenticity, official public records, central to the plaintiff's claim, or sufficiently referred to in the complaint. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). We will consider the e-mails attached to appellees' memorandum to the district court as documents of undisputed authenticity.

³ The record does not reflect whether this meeting took place. At oral argument, Pitta stated that after the district court granted the appellees' motion to dismiss in this case, the District rescinded its offer to allow this kind of recording and
After filing this suit, Pitta sent a public records request on July 10, 2023, seeking from the District "[a]ll special education policies, procedures, etc[.] regarding the IEP process in effect from January 1, 2022[,] to the date of th[at] request"; "[a]ll emails to or from Paul Tsovolos or Dina Medeiros regarding the same information"; and "[a]ll changes or proposed changes to policies, procedures, etc[.] requested." On July 24, 2023, the District provided Pitta with a copy of the Bridgewater-Raynham Regional School District Special Education Policy and Procedure Manual ("Manual").

The Manual explains in detail the District's requirements and policies regarding IEPs, the composition of IEP Teams, and the conduct of IEP Team Meetings. It lists the specific individuals who comprise an IEP Team as: "the student's parent(s); at least one regular education teacher familiar with the student; at least one special education teacher familiar with the student; a representative of the district who has the authority to commit

has since restricted both audio and video recording of IEP Team Meetings.

Pitta filed a Supplemental Appendix with his reply brief containing the Manual, as well as a June 4, 2003, letter written by Stephanie S. Lee, then-Director of the Office of Special Education Programs at the Department of Education ("DOE"). We take judicial notice of the official documents contained in the Supplemental Appendix, the appellees not having contested their authenticity.
resources; an individual who can interpret evaluation results; other individual(s) who have knowledge or expertise regarding the student; [and] if appropriate, the child."

The Manual states that "[t]he IEP Team is charged with managing three important activities: Eligibility Determination/ Initial and Reevaluation[,] Development of the IEP[,] and Placement Decision." (Emphasis omitted.) "After finding a student eligible for special education services, the Team develops the IEP." "The IEP must be tailored to the individual student['s] needs as determined through the evaluation process." It explains that "[d]uring an IEP Meeting, Team members share information and discuss the needs of the student in order to gain a comprehensive understanding of the student." IEP development is a "student driven, individualized process," and "[a] well-managed Team meeting" solicits and considers highly personalized information about the student for whom the IEP is being developed, including "parent/student input," "the student's future dreams and goals," "how the student's disability affects the student's learning," and "how the student performs today," as well as "the areas that are affected by the disability" and the "supports and services the student needs for success." Team members must also review "the

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5 The Manual instructs that "[t]he Director of Student Services, Administrator of Special Education, Special Education Coordinator, Principals and Chairpersons/Department Head have the authority to commit District resources."
student's strengths, interests, personal attributes, and personal accomplishments as well as key evaluation results," among other behaviors and personal characteristics of the student.

The Manual states that "[Massachusetts] regulations and [the District] require[] attendance at the Team Meeting of the following staff members: (1) Regular Education Teacher[;] (2) Special Education Teacher[;] (3) A representative of the district who is able to commit the resources of the district[; and] (4) An individual who can interpret the instructional implications of [the] evaluation results, who may be a member described above."

In addition, "[t]he Administrator or Coordinator of Special Education is available to attend any meeting where the Team feels it will be discussing resources beyond those which are readily available in their school building." The Manual permits "[a]lternatives to 'physical meetings'" for IEP Team Meetings, "including video conferencing, telephone conferencing, or virtual meetings."

The Manual does not address the topic of video recording these meetings. It does specify, however, how IEP Team Meetings should be documented. The Manual describes the use of an "N1 letter" as "a tool used to formally document the proposed action and justification for that action that a school district will take following a Team meeting." "The N1 letter is the district account and perspective on the proceedings and should outline all perceived
viewpoints and responses resulting from the Team discussion," including "a clear student-centered recommendation that allows for the student to receive a Free and Appropriate Public Education," "documentation of the consideration of any rejected factors by the Team," "all district based information (staff input, observation, evaluation)" and "all information obtained from parents or non-district members of the Team (parent observation, outside evaluations, outside service provider input, discharge summary)."

The Manual also requires that the IEP Team Members "[u]se the Team Meeting Notes Form to document pertinent information summarizing the [IEP Team] meeting and action plan." It states that "[a]ny formal meeting among Team members, including parents, should result in either: a completed IEP or the Team Meeting Notes/Summary form in lieu of the completed IEP (if changes are made to the IEP)."

II.

On October 20, 2022, Medeiros and the District moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. After briefing and argument, the district court issued its Memorandum and Order granting the defendants' motion to dismiss on May 19, 2023. See Pitta, 2023 WL 3572391, at *8. It held that the complaint failed to state a claim under the First Amendment because First Amendment protections for "filming government
officials engaged in their duties in a public place," as recognized by the First Circuit in Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011), did not extend to video recording an IEP Team Meeting. Id. at *6 (quoting Glik, 655 F.3d at 82). It reasoned that the meeting did not occur in a "public space," its attendees were not included under the definition of "public officials" as the term was used in Glik and a related case, Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999), and it was unclear whether a right to record public officials existed without a corresponding intent to disseminate the recording, which it found Pitta did not allege. See Pitta, 2023 WL 3572391, at *7-8.6

6 The district court's other rulings are not at issue in this appeal. In addition to their motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), appellees also moved to dismiss it under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction due to mootness and failure to exhaust administrative remedies under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482. Pitta, 2023 WL 3572391, at *3-6. In addition, Medeiros moved to dismiss the complaint against her in her individual capacity for insufficient service of process under Fed. R. Civ. P. 12(b)(4)(e). Id. at *8. The district court declined to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1), holding first that the complaint presented a live case or controversy and second that Pitta's claim was not subject to the exhaustion requirement under the IDEA. Id. at *3-6. The court also dismissed Pitta's Fourteenth Amendment claim for failure to state a claim under Rule 12(b)(6) because the complaint did not provide detail beyond mere allegations that his due process rights had been infringed or that he had been denied equal protection of the laws. Id. at *8. Finally, the court dismissed the individual-capacity claim against Medeiros under Rule 12(b)(4)(e) for failure to effect proper service. Id.
Pitta timely appealed.

III.

We review de novo a district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). Lyman v. Baker, 954 F.3d 351, 359 (1st Cir. 2020). "[I]n First Amendment cases, appellate courts have 'an obligation to make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Cheng v. Neumann, 51 F.4th 438, 443 (1st Cir. 2022) (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)).

We accept the complaint's well-pleaded factual allegations as true and draw all reasonable inferences in favor of the non-movant. Id. (citing McKee v. Cosby, 874 F.3d 54, 59 (1st Cir. 2017)). "We do not credit legal labels or conclusory statements, but rather focus on the complaint's non-conclusory, non-speculative factual allegations and ask whether they plausibly narrate a claim for relief." Id.

To survive a motion to dismiss, the complaint must "state a claim to relief that is plausible on its face," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), that is, its "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)," id. at 555.
While the plausibility standard is not a "'probability requirement,' . . . it does require 'more than a sheer possibility that a defendant has acted unlawfully.'" Air Sunshine, Inc. v. Carl, 663 F.3d 27, 33 (1st Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "Determining whether a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679. If the complaint fails to include "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory," it should be dismissed. Gagliardi v. Sullivan, 513 F.3d 301, 305 (1st Cir. 2008) (quoting Centro Médico del Turabo, Inc. v. Feliciano de Melecio, 406 F.3d 1, 6 (1st Cir. 2005)).

IV.

"The First Amendment, which applies to the States through the Fourteenth," Mills v. Alabama, 384 U.S. 214, 218 (1966), provides that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I. In order to determine whether Pitta's First Amendment rights were violated, we first address whether video recording one's child's IEP Team Meeting is protected by this amendment. See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985); see also
Project Veritas Action Fund v. Rollins, 982 F.3d 813, 830-31 (1st Cir. 2020). We conclude it is not.

In Glik v. Cunniffe, this court held that an onlooker possessed a constitutionally protected right under the First Amendment to video tape police officers as they performed an arrest in the Boston Common. 655 F.3d at 82-84. As the appellant in that case was walking through the Common, he caught sight of three police officers arresting a young man. Id. at 79. "Concerned that the officers were employing excessive force to effect the arrest, Glik stopped roughly ten feet away and began recording video footage of the arrest on his cell phone." Id. at 79-80. This court found that First Amendment protections "encompass[] a range of conduct related to the gathering and dissemination of information," and that "[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within" this range.7 Id. at 82.

7 In making its determination, the Glik court commented that "we have previously recognized that the videotaping of public officials is an exercise of First Amendment liberties," citing Iacobucci, 193 F.3d. But Iacobucci did not raise a First Amendment claim. Rather, the case involved a 42 U.S.C. § 1983 claim for false arrest brought by a local journalist who was arrested while attempting to film commissioners of the Town of Pembroke's Historic District Commission in the Pembroke Town Hall after a public meeting of the Commission. Iacobucci, 193 F.3d at 17-18. Iacobucci attended the Commission meeting to videotape it for "a weekly news program that he produced and broadcast via a cable television outlet." Id. at 17. He refused to stop recording

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This court also recognized on the facts therein a First Amendment right to video and audio record police officers in Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014), and in Project Veritas, 982 F.3d. Gericke held that an individual has a right to record police officers "carrying out their duties in public" while conducting a traffic stop on the side of the road. 753 F.3d at 3-4, 7 (quoting Glik, 655 F.3d at 82). Gericke was driving on the highway in Weare, New Hampshire, at approximately 11:30 pm when a police officer stopped her friend's car, which she had been following. Id. at 3. Gericke pointed a video camera at the police officer and announced that she was going to audio-video record the officer while he interacted with her friend, who had exited his vehicle. Id. When the police officer ordered Gericke to return the meeting despite repeated requests by the commissioners and by police officers eventually called to the scene. Id. at 17-18. After the meeting ended, Iacobucci noticed that the commissioners were speaking with a man in the Town Hall corridor and began filming their conversation "on the assumption that he was witnessing a de facto resumption of the adjourned meeting." Id. at 18. Although the commissioners again asked him to stop filming, Iacobucci persisted. Id. Eventually a police sergeant stepped in front of his camera lens and demanded he cease and desist, but Iacobucci continued video recording, even after he was given the ultimatum of "sit down or be arrested," until the sergeant took his camera and placed him under arrest. Id. The criminal charges were eventually dismissed, but Iacobucci filed a pro se civil action which included the false arrest claim against the sergeant. Id. The opinion stated in dicta that because Iacobucci's "activities were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights, [the defendant police sergeant] lacked the authority to stop them." Id. at 25 (emphasis added).
to her car, she immediately complied, though she continued to point her camera at the officer despite knowing it was not recording.\textsuperscript{8} \textsuperscript{8} Gericke eventually put away the camera in her car's central console on her own accord. Id. When Gericke refused to tell another police officer who had arrived on the scene where she had put the camera and to produce her license and registration upon his request, the officer arrested her for disobeying a police order. Id. at 3-4. The Weare police then filed criminal complaints against Gericke, including unlawful interception of oral communications. See id. at 4; N.H. Rev. Stat. Ann. § 570-A:2. Although town and county prosecutors declined to proceed on the charges against her, Gericke brought an action under 42 U.S.C. § 1983 against the defendant police officers, the Weare Police Department, and the Town of Weare, alleging that "the officers violated her First Amendment rights when they charged her with illegal wiretapping in retaliation for her videotaping of the traffic stop." Gericke, 753 F.3d at 4.

\textsuperscript{8} This court held that the "constitutionally protected right to film police . . . discussed in Glik" applied to Gericke's case as well, because "[i]n both instances, the subject of filming is 'police carrying out their duties in public,'" \textsuperscript{id} at 7 (quoting Glik, 655 F.3d at 82), though the court acknowledged that the circumstances of filming a traffic stop were "substantially different" than filming an arrest in a public park, \textsuperscript{id} at 5. In doing so, this court emphasized that this holding did not mean "an individual's exercise of the right to film a traffic stop cannot be limited." \textsuperscript{id} at 7. "The circumstances of some traffic stops . . . might justify a safety measure -- for example, a command that bystanders disperse -- that would incidentally impact an
individual's exercise of the First Amendment right to film." \textit{Id.} at 8.

In \textit{Project Veritas}, this court held that this First Amendment right to record "police officers discharging their official duties in public space" included the right to make "secret, nonconsensual audio recording[s]." 982 F.3d at 817. Project Veritas involved challenges made by two sets of plaintiffs -- two Boston civil rights activists, K. Eric Martin and René Pérez and a national undercover investigative journalism organization, Project Veritas Action Fund -- to Massachusetts General Laws ch. 272, § 99 ("Section 99"), which criminalized secret audio recordings made without prior permission by the recorded party. \textit{Id.} Martin and Pérez "allege[d] that Section 99 violate[d] the First Amendment insofar as it criminalizes the secret, nonconsensual audio recording of police officers discharging their official duties in public spaces." \textit{Id.} Project Veritas, in contrast, challenged Section 99 "insofar as it bans the secret, nonconsensual audio recording of any government official discharging official duties in public spaces, as well as insofar as it bans such recording of any person who does not have a reasonable expectation of privacy in what is recorded." \textit{Id.} (emphasis added in part). Project Veritas also argued that Section 99 should be "struck down in its entirety" due to overbreadth. \textit{Id.}
This court upheld judgment for Martin and Pérez, finding that Section 99's prohibition on "secret, nonconsensual audio recording of police officers discharging their official duties in public spaces" violated the First Amendment. Id. More significantly for present purposes, the court vacated on ripeness grounds the district court's grant of summary judgment to Project Veritas's challenge that Section 99 "violate[d] the First Amendment insofar as that statute bars the secret, nonconsensual audio recording of government officials discharging their duties in public." Id. at 817-18. Project Veritas sought to challenge Section 99's prohibition on recording "government officials" in general, which it defined as "officials and civil servants," including persons "employed in a department responsible for conducting the affairs of a national or local government," also known as "public employee[s]." Id. at 843, 843 n.5 (citing Official, Black's Law Dictionary (10th ed. 2014); Civil Servant, Black's Law Dictionary (10th ed. 2014)). But its plans to record government officials and police officers were too "narrow[]" to raise the much broader issue of whether Section 99's prohibition on recording all "government officials discharging their duties in public spaces" violated the First Amendment. Id. at 843. Importantly, this was because "government officials," as defined by Project Veritas, "cover[ed] everyone from an elected official to a public school teacher to a city park maintenance worker."
Id. (emphasis added). This court rejected that definition. Id. Indeed, the court held that the "First Amendment analysis might be appreciably affected by the type of government official who would be recorded;" for example, "a restriction on the recording of a mayor's speech in a public park" would differ from "a restriction on the recording of a grammar school teacher interacting with her students in that same locale." Id. (emphasis added).

Pitta's First Amendment claim rests, as the district court recognized, on a misreading of this Circuit's precedents in Glik, Iacobucci, Gericke, and Project Veritas. These cases do not support his argument that a First Amendment right to record exists whenever "public officials" are operating in "public spaces." Among other things, his argument ignores limitations imposed both explicitly and implicitly by these cases. A student's IEP Team Meeting, whether virtual or in person, is ordinarily not conducted in a "public space." Further, this meeting could not be public because only members of a student's IEP Team may attend an IEP Team Meeting, and because IEP Team Meetings involve the discussion of sensitive information about the student. Nor are school district employees attending these meetings akin to the "public officials" in the cases cited by Pitta. In most of these cases, those "public officials" were law enforcement officers performing their duties in obviously public places. We hold, as did the
district court, that Pitta possesses no First Amendment right to video record IEP Team Meetings and do so for a variety of reasons.

To start, an IEP Team Meeting does not ordinarily occur in a space open to the public. Pitta argues that whether the recording occurred in a public space or non-public space "[i]s irrelevant [f]or [t]he [p]urpose [o]f [a] [m]otion [t]o [d]ismiss" because "[t]he specific forum merely identifies the level of scrutiny applied to the government officials['] restriction of First Amendment activity." He argues from this that "[a] finding that the specific forum is a non-public forum" does not foreclose a finding that he had a First Amendment right to video record.

This Circuit's cases have found a First Amendment right to record government officials performing their duties only when those duties have been performed in public spaces. See Glik, 655 F.3d at 84 (protecting under the First Amendment a recording made "in the Boston Common, the oldest city park in the United States and the apotheosis of a public forum"); Gericke, 753 F.3d at 7; Project Veritas, 982 F.3d. at 844. In Project Veritas, we noted that "[o]ur cases have fleshed out the contours of [the public space] category":

"traditional public fora, such as public parks like the Boston Common (which was the site of the recording in Glik, 655 F.3d at 84); the sites of traffic stops, including those that occur on the sides of roads, see Gericke, 753
F.3d at 8 . . .; and other "inescapably" public spaces, id. at 7, such as the location of the recording that occurred in Iacobucci v. Boulter, 193 F.3d 14 (1st Cir. 1999), which concerned a journalist's arrest for openly recording members "of the Pembroke Historic District Commission" that were having a conversation in "the hallway" of the town hall immediately following an open public meeting, id. at 17-18.

Id. at 827. The setting of an IEP Team Meeting could hardly be more different from these public spaces identified in Project Veritas.

The IEP Team Meeting occurred in a password-protected virtual meeting room under the control of a public school official. Even if the IEP Team Meeting were not virtual, but in person, the general public is not free to walk into a school and enter a meeting of educators. Even parents, apart from the general public, have no constitutional right to attend a meeting to which they were not invited. See Carey v. Brown, 447 U.S. 455, 470-71 (1980) (finding that the Constitution does not leave state officials "powerless to pass laws to protect the public from . . . conduct that disturbs the tranquility of spots selected by the people . . . [for] buildings that require peace and quiet to carry out their functions, such as . . . schools"); see also Hannemann v. S. Door Cnty. Sch. Dist., 673 F.3d 746, 755 (7th Cir. 2012) (holding "members of the public do not have a constitutional right to access school property"); Lovern v. Edwards, 190 F.3d 648, 655 (4th Cir.
1999) ("School officials have the authority to control students and school personnel on school property, and also have the authority and responsibility for assuring that parents and third parties conduct themselves appropriately while on school property."); Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 724 (2d Cir. 1994) (finding appellant, a Board of Education member, "did not have an unrestricted right to enter the school classrooms or hallways during school hours"); Worthley v. Sch. Comm. of Gloucester, No. 22-12060, 2023 WL 2918981, at *5 (D. Mass. Apr. 12, 2023) (holding plaintiff, "as a member of the public, does not have a constitutional interest to access the school during school hours").

We quickly dispatch Pitta's argument that this court should utilize what he calls a "Lawfully Present" standard to define what is a "public space." He argues that if a "member of the public was lawfully present while recording government officials," that space should be deemed public. None of the cases to which Pitta cites support his argument for a "Lawfully Present" standard. There is good reason for this. To give an example, a member of the public called for jury duty, and thus lawfully present in a jury room, does not have a First Amendment right to video record their fellow jurors during deliberations, nor the proceedings of the courtroom from the jury box. See 18 U.S.C. § 1508(a) (banning "record[ing], or attempt[ing] to record, the proceedings of any grand or petit jury in any court of the United States while such jury is deliberating or voting"); Fed. R. Crim. P. 53 ("Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."); Liviz v. Sup. Ct. of U.S., No. 18-12532, 2018 WL 6592093, at *2 (D. Mass. Dec. 14, 2018), aff'd, No. 18-2252, 2019 WL 2537955 (1st Cir. Mar. 19, 2019) ("To the extent [the plaintiff] contends that there is a First
The public did not, and could not by law or District policy, have access to an IEP Team Meeting. Attendance is limited to members of a student's IEP Team. See 20 U.S.C. §§ 1414(d)(1)(B), 1414(d)(1)(C) (defining the members of the IEP team and policies for IEP Team attendance); 34 C.F.R. 300.321 (outlining policies for IEP Team composition and attendance).

In addition, the IEP Team Meetings not only take place in non-public spaces and are closed to the public, but by their nature involve discussions of personal, highly sensitive information about a student. According to the Manual, these topics include "the student's future dreams and goals," "how the student's disability affects the student's learning," and "how the student performs today," as well as "the areas that are affected by the disability" and the "supports and services the student needs for success," so that all attendees at the meetings can "gain a comprehensive understanding of the student" and discuss or develop an IEP "tailored to the individual student." See also 20 U.S.C. § 1414; 603 C.M.R. 28.05 (outlining the requirements for the IEP development process under Massachusetts law).

Next, unlike the public officials in Glik, Gericke, and Project Veritas, the IEP Team Members were not performing their duties in public, but rather at a virtual meeting with no public Amendment right of camera access to the Supreme Court and other federal courts, such a right has not been recognized.

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access. The District has effectively argued that video recording IEP Team Members would hinder their performance of their duties, as it carries a high risk of suppressing the sensitive, confidential, and honest conversations necessary when discussing or developing a child's IEP. Public school teachers and administrators carrying out their IEP obligations also do not wield the same "power of suppression" as police officers, see Glik, 655 F.3d at 82 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 n.11 (1978)), nor have they been "granted substantial discretion that may be misused to deprive individuals of their liberty," as law enforcement officials have, id. Unlike police officers, IEP Team Members are not "expected to endure significant burdens caused by citizens' exercise of their First Amendment rights." Id. at 84.

We thus also reject Pitta's overbroad argument that the references to "public officials" or "government officials" in Glik, Project Veritas, and Gericke, where these terms were used to refer to police officers, extends to anyone employed by a government. This court has never held that the test is whether an individual sought to be video recorded in the course of his or her job is a government official. Pitta's argument ignores established limitations in First Circuit law, which permit recording of government officials performing their duties only in indisputably public places in full view of the public, and even then, only when
the act of filming would not hinder officials in the performance of their public duties and would serve public interests.

For example, in Glik, the court considered what it called the "fairly narrow" First Amendment issue of whether "there [is] a constitutionally protected right to videotape police carrying out their duties in public." Id. at 82 (emphasis added). "The same restraint demanded of law enforcement officers in the face of 'provocative and challenging' speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." Id. (emphasis added) (quoting City of Houston v. Hill, 482 U.S. 451, 461 (1987)).

In Gericke, the "government officials" at issue were also police officers "carrying out their duties in public" while conducting a traffic stop on the side of the road. 753 F.3d at 3-4, 7 (quoting Glik, 655 F.3d at 82). This court held that the officer, however, could prevent the recording if he "c[ould] reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties." Id. at 8.

Project Veritas also does not support Pitta's argument. This court held that individuals have a First Amendment right to make "secret, nonconsensual audio recording[s]" only of "police officers discharging their official duties in public spaces." See 982 F.3d at 817. It also reaffirmed that "[t]he government is under no obligation to permit a type of newsgathering that would
interfere with police officers' ability to do their jobs." Id. at 836. There, the record showed no evidence that secretly recording police "would appreciably alter their ability to protect the public either in gross or at the retail level of more individualized interactions." Id.

There is yet another reason Pitta's claim fails. Our cases have repeatedly framed the right to record public information as linked to the right of the public to receive this information. Glik held that recording government officials in public spaces was a protected First Amendment right because "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" 655 F.3d at 82 (quoting Mills, 384 U.S. at 218). Because "'the First Amendment . . . prohibit[s] government from limiting the stock of information from which members of the public may draw,' . . . [a]n important corollary to this interest in protecting the stock of public information is . . . [the] 'right to gather news from any source by means within the law.'" Id. (emphasis added) (first quoting First Nat'l Bank, 435 U.S. at 783, then quoting Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (internal citations omitted)). Similarly, Project Veritas recognized First Amendment protection for secretly recording police officers (extending from prior precedent that protected the
open recording of police, see Glik, 655 F.3d at 84; Gericke, 753 F.3d at 7), because these recordings promote the "cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs," among other grounds, 982 F.3d at 832 (emphasis added) (internal citations omitted). No such interest is served by video recording an IEP Team Meeting because such a recording is not intended to be disseminated to the public.

Finally, we add that even if Pitta had a First Amendment right to video record his child's IEP Team Meeting, which he does not, his claim would fail. "Even protected speech is not equally permissible in all places and at all times." Cornelius, 473 U.S. at 799; accord Glik, 655 F.3d. at 84 (holding a First Amendment right to video record "may be subject to reasonable time, place, and manner restrictions"); Gericke, 753 F.3d at 7 (holding ":[r]easonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them"). Here, the District's prohibition on video recording these meetings is content neutral and narrowly tailored to its significant governmental interest in promoting candid conversations in the discussion or development of IEPs in order to provide students with a "free appropriate public education" ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482. The policy also leaves open several alternative
channels for collecting and recording information from IEP Team Meetings.

On the record before us, the District's policy is content neutral. The policy does not "'draw[] distinctions based on the message a speaker conveys.'" [Rideout v. Gardner, 838 F.3d 65, 71 (1st Cir. 2016)] (quoting Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015)). The policy also does not "discriminat[e] among viewpoints" or "regulat[e] speech based on 'the specific motivating ideology or the opinion or perspective of the speaker.'" Reed, 576 U.S. at 168 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)). "The government's purpose is the controlling consideration" for whether a restriction is content neutral, and here, the policy "serves purposes unrelated to the content of expression." [Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)]. It thus "require[s] a

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10 Pitta argues to us that the District's prohibition on video recording was a viewpoint-based restriction because in his view it was "in direct response to [his] revealing the highly unethical and potentially unlawful actions of the school district['s] administrator" and because there was no written policy on video recording at the time. Policies need not be written and Pitta has not argued that other parents were not subjected to the same policy. Further, as Gericke held, a "[r]easonable restriction[] on the exercise of the right to" record may take a variety of forms, including not only a "preexisting statute, ordinance, regulation, or other published restriction with a legitimate public purpose," but also "a reasonable, contemporaneous order[]." [753 F.3d at 7-8].
lesser level of justification" than a content-based restriction. 
Rideout, 838 F.3d at 71.

Content-neutral regulations "are subject to intermediate scrutiny, which demands that the law be 'narrowly tailored to serve a significant governmental interest.'" Id. at 71-72 (quoting Ward, 491 U.S. at 791). "A speech restriction is sufficiently narrowly tailored so long as the 'regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 106 (1st Cir. 2020) (quoting Ward, 491 U.S. at 799). "The application of intermediate scrutiny also accords with the approach that we took in Glik and Gericke, even though neither case explicitly named the level of scrutiny deployed." Project Veritas, 982 F.3d at 835.

The purpose of the District's video recording prohibition is to serve its "significant governmental interest," see Rideout, 838 F.3d at 72, in meeting its responsibilities under the IDEA. The IDEA provides federal funding to states to assist them with educating children with disabilities and imposes requirements, including that schools must provide all children with disabilities with a FAPE "'in conformity with the [child's] individualized education program,' or IEP." Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13, 19 (1st Cir. 2019) (alteration in original) (quoting 20 U.S.C. § 1401(9)(D)).
The IDEA requires that IEP Team Members create a written IEP tailored to the "unique needs" of the student that expressly addresses a number of sensitive and personal issues and questions. 20 U.S.C. §§ 1400, 1414. These include "a statement" regarding "how the child's disability affects the child's involvement and progress in the general education curriculum," "a statement of measurable annual goals, including academic and functional goals," "a description of how the child's progress toward meeting the annual goals . . . will be measured," and "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child . . . to advance appropriately toward attaining the annual goals."

20 U.S.C. § 1414. As the appellees argue, "as an integral component to their ability to facilitate the sort of earnest discussion necessary to yield an appropriate IEP, IEP meeting participants must enjoy wide latitude to engage as comfortably as possible in a candid exchange of observations and ideas."

Promoting candor and protecting sensitive conversations in IEP Team Meetings are "purposes unrelated to the content of
expression." Ward, 491 U.S. at 791." The District's policy prohibiting video recording of these meetings, which could stifle these discussions, also "promotes a substantial government interest that would be achieved less effectively absent the regulation." Id. at 799.

V.

For these reasons, we affirm the judgment of the district court.

11 Pitta, allegedly relying on a DOE guidance document, argues for the first time in his reply brief that he needs to video record his child's IEP Team Meeting to meaningfully assert his parental rights protected by the IDEA. In any event, this is not a First Amendment claim and is waived. His belated claim is an administrative claim subject under the IDEA to exhaustion before it may be brought as a civil action in federal court. See 20 U.S.C. § 1415(l) (holding that "before the filing of a civil action . . . seeking relief that is also available under [the IDEA], the [IDEA's administrative] procedures . . . shall be exhausted"); see also Parent/Pro. Advoc. League, 934 F.3d at 20-21.
This appeal concerns a civil rights action under 42 U.S.C. § 1983. The plaintiffs claim that the defendants discriminated against their political viewpoints in violation of the First Amendment. Certain unnamed plaintiffs also filed a motion to proceed under pseudonyms. The district court dismissed the plaintiffs’ First
Amendment claims and denied the unnamed plaintiffs’ motion. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Background

Following the death of George Floyd in May 2020, teachers at the Independent School District 194 (“District”) requested permission to display Black Lives Matter (“BLM”) posters in classrooms. On September 22, 2020, the District’s superintendent, Michael Baumann, explained in an email that approving the teachers’ request would violate District Policy 535, which prohibits employees from engaging in “conduct that is intended to be or reasonably could be perceived as endorsing or opposing specific political issues or political candidates.” At a school board meeting that same day, members of the community expressed their opposition to the District’s stance. Superintendent Baumann responded that the District’s position in the email was consistent with Policy 535.

At a school board “work session” on October 6, 2020, Superintendent Baumann told attendees once again that BLM posters would not be permitted in the District’s schools. Superintendent Baumann presented a slideshow, which included one slide entitled “Interpretation of Policy 535.” The slide included the statement that “Black Lives Matter posters are not permitted.” Superintendent Baumann stated that BLM posters would not be permitted in the District’s schools due to their “political dimension.”

By December 2020, four school board meetings and work sessions had been substantially devoted to discussions of race. At these meetings, vocal members of the community urged District administrators to ignore Policy 535. Although Superintendent Baumann discussed the need for “policy review,” the District did not alter Policy 535. In addition, neither the school board nor the superintendent expressly authorized the creation of BLM posters at these meetings. Following these
meetings, however, members of the community continued to urge District administrators to ignore Policy 535.

The District first evinced an intent to grant the teachers’ request to display BLM posters in classrooms at a school board work session on March 17, 2021. At the work session, the school board reviewed a draft version of a poster series. The poster series had been designed by private activists, and two of the posters included the phrase “Black Lives Matter.” The Executive Director of Communications and Public Relations, Stephanie Kass, told the school board that the purpose of the poster series was “to meet the requests of several . . . staff members looking to put up posters affirming our students and our classrooms.” Superintendent Baumann acknowledged that there existed “more than one group of stakeholders” involved in the review of the posters, which prompted one of the board members to state that she would tell the public that the posters were “going through our equity group, . . . students, . . . staff, [and] advisory committees.” The Director of Equity Services, Lydia Lindsoe, told the school board that a Native American student and an Asian student were going to be added to one of the posters after such “stakeholders” had expressed concern regarding a lack of diversity in the posters. Nevertheless, Superintendent Baumann told the school board, “I don’t know if I would say our goal is to have them up in the schools. Our goal is to let the teachers have the opportunity and to use [the posters] if they feel it has instructional value or value in their classrooms.” He elaborated that the District was not going to “hang every single one of these up all over the place. . . . [O]ur intentions aren’t necessarily to go around and make sure we hang them up everywhere. It’s really about what the classrooms and the teachers want to do.”

Around April 2021, the District funded the poster series. The final version of the poster series was called the “Inclusive Poster Series” and included eight posters. In one final poster, the District revised a draft version to replace a blonde girl with a blonde boy. Two of the eight posters bore the phrase “Black Lives Matter” and a statement that “[a]t Lakeville Area Schools we believe Black Lives Matter and stand with the social justice movement this statement represents. This poster is aligned to
School Board policy and an unwavering commitment to our Black students, staff and community members.”

Bob Cajune, who resides within the District’s boundaries, asked Director Lindsoe in an email to permit posters and shirts bearing the phrases “All Lives Matter” and “Blue Lives Matter” in the District’s schools. Director Lindsoe responded by email that the District did “not approve of All Lives Matter or Blue Lives Matter posters in the classrooms or other areas of the school, and teachers/school staff are not allowed to wear shirts with these sayings to school.” Director Lindsoe stated that “All Lives Matter and Blue Lives Matter mottos were created specifically in opposition to Black Lives Matter” and that those messages “effectively discount the struggle the Black students have faced in our school buildings and that Black individuals face in our society as a whole.” She told Cajune that the Inclusive Poster Series was “requested by many staff and families in our school communities.”

Several named and unnamed plaintiffs filed a 42 U.S.C. § 1983 lawsuit against the District and its superintendent. They alleged that the District violated the First Amendment’s Free Speech Clause by rejecting the All Lives Matter and Blue Lives Matter posters and shirts while permitting the BLM posters to be posted in the schools. The unnamed plaintiffs also filed a motion to proceed under pseudonyms for fear of reprisal from political activists in the “southern suburban Minneapolis metropolitan community.” The defendants filed a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted.

The district court denied the unnamed plaintiffs’ motion to proceed under pseudonyms and granted the defendants’ motion to dismiss. The district court held that the unnamed plaintiffs had not sufficiently established a threat of a hostile public reaction to their lawsuit that would warrant anonymity. In addition, the district court concluded that the BLM posters constituted government speech that is not subject to scrutiny under the First Amendment’s Free Speech Clause.
II. Discussion

The plaintiffs appeal both orders. With respect to the motion to proceed under pseudonyms, the unnamed plaintiffs contend that the district court failed to properly consider their specific examples of “cancel culture” in southern Minneapolis. As to the motion to dismiss, the plaintiffs assert that the content and meaning of the BLM posters were shaped by private persons and that the District merely stamped its seal of approval on the posters. The plaintiffs further assert that the District created a limited public forum when it allowed private persons to post the BLM posters on the schools’ walls. Having done so, the plaintiffs contend that the District could not discriminate against their speech by rejecting the All Lives Matter and Blue Lives Matter posters and shirts.

A. Motion to Proceed under Pseudonyms

Federal courts disfavor the use of fictitious names in legal proceedings. See, e.g., Doe v. Blue Cross & Blue Shield United, 112 F.3d 869, 872 (7th Cir. 1997); Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992). The use of fictitious names runs afoul of the public’s First Amendment interest in public proceedings and their common law right of access thereto. Proceedings are only truly public when the public knows the identities of the litigants. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 & n.17 (1980); Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1067 (9th Cir. 2000). In addition, there is nothing in the Federal Rules of Civil Procedure that allows plaintiffs to proceed under pseudonyms. Rather, the Federal Rules explicitly provide otherwise. Rule 10(a) provides that “[t]he title of the complaint must name all the parties.” Rule 17(a) requires that “[a]n action . . . be prosecuted in the name of the real party in interest.”

1The appeal of the district court’s denial of the motion to proceed under pseudonyms concerns only the unnamed adult plaintiffs. The district court allowed the minor plaintiffs to proceed using their initials.
Despite this “constitutionally-embedded presumption of openness in judicial proceedings,” federal courts have allowed parties to proceed under pseudonyms in certain limited circumstances. *In re Chiquita Brands Int’l, Inc.*, 965 F.3d 1238, 1247 (11th Cir. 2020). The consensus among our sister circuits is that party anonymity is only warranted when the need for anonymity outweighs countervailing interests in full disclosure. *See, e.g.*, id.; *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008). Thus, courts have allowed plaintiffs to use fictitious names to protect the privacy of vulnerable parties, such as children and rape victims. *See Blue Cross*, 112 F.3d at 872. In contrast, courts have declined to allow plaintiffs to proceed pseudonymously where plaintiffs feared they would face disapproval by many in their community if they prosecuted the case under their real name. *See, e.g.*, *Frank*, 951 F.2d at 324.

This circuit has not directly addressed the standard by which a litigant may proceed under a pseudonym. *See, e.g.*, *Doe v. Poelker*, 497 F.2d 1063 (8th Cir. 1974); *Doe v. Sauer*, 186 F.3d 903, 904 n.2 (8th Cir. 1999). In related cases involving the sealing of judicial records, we have held that “the court must consider the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information.” *IDT Corp. v. eBay*, 709 F.3d 1220, 1223 (8th Cir. 2013). Absent our direct guidance on the applicable standard for litigating under a pseudonym, the district courts of this circuit have for decades applied the standard set forth by our sister circuits. *See, e.g.*, *Heather K. by Anita K. v. City of Mallard, Iowa*, 887 F. Supp. 1249, 1255-56 (N.D. Iowa 1995); *Luckett v. Beaudet*, 21 F. Supp. 2d 1029 (D. Minn. 1998); *Doe v. Washington Univ.*, 652 F. Supp. 3d 1043, 1045-46 (E.D. Mo. 2023). We see no reason to depart from a standard that aligns with our precedent involving the common law right of access to judicial proceedings. Therefore, we join our sister circuits and hold that a party may proceed under a fictitious name only in those limited circumstances where the party’s need for anonymity outweighs countervailing interests in full disclosure.
The factors that are relevant to this balancing inquiry will depend on the facts of the case in question. Our sister circuits have identified several factors that may be relevant in weighing the competing interests. In *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981), the Fifth Circuit identified three factors common to those “exceptional” cases in which party anonymity was held to be justified: (1) the party seeking anonymity was challenging government activity; (2) identification threatened to reveal information of a sensitive and highly personal nature; and (3) a party would be required, absent anonymity, to admit an intention to engage in illegal conduct, thereby risking criminal prosecution. The Seventh Circuit has stated that the danger of retaliation is “often a compelling ground” in favor of anonymity. *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004). Factors that weigh against party anonymity include “whether the party’s requested anonymity poses a unique threat of fundamental unfairness to the defendant,” *Chiquita*, 965 F.3d at 1247, whether the public’s interest in the case is furthered by requiring that the litigants disclose their identities, *see Advanced Textile Corp.*, 214 F.3d at 1068, and whether there exist alternative mechanisms that could protect the confidentiality of the litigants, *see Sealed Plaintiff*, 537 F.3d at 190. We emphasize that the aforementioned factors are non-exhaustive and that other factors, or a combination thereof, may be relevant.

Having decided the standard under which persons may proceed anonymously, we now turn to the standard of review to be applied to the grant or denial of a motion to proceed anonymously. Our sister circuits have applied an abuse of discretion standard of review. *See, e.g., id.; Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 684 (11th Cir. 2001). Because a district court must exercise discretion in the course of weighing competing interests, we agree with our sister circuits that an abuse of discretion standard of review is appropriate. Under this deferential standard of review, we must affirm the district court’s ruling unless the district court failed to

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2This circuit has yet to issue a published decision addressing the standard of review. In an unpublished decision, we reviewed a district court’s pre-service denial of a motion to file suit under a pseudonym for an abuse of discretion. *Doe v. Univ. of Ark.*, 713 F. App’x 525, 526 (8th Cir. 2018).
consider a factor that should have been given significant weight, considered an improper factor, or committed a clear error of judgment in the course of weighing proper factors. *Qwest Commc’ns Corp. v. Free Conferencing Corp.*, 920 F.3d 1203, 1205 (8th Cir. 2019).

The unnamed plaintiffs wish to remain anonymous in this litigation because they fear reprisal from political activists in southern Minneapolis. The unnamed plaintiffs contend that these political activists are part of the greater “cancel culture” movement, which seeks to punish any dissenting political viewpoints. In support of their contention, the unnamed plaintiffs reference three examples of cancel culture: (1) political activists’ intentional interference with Bittersweet Bakery’s business in Eagan, Minnesota; (2) HomeTown Bank’s firing of Tara Mc Neally due to McNeally’s criticism of the Shakopee School District’s superintendent on Facebook; and (3) the plaintiffs in this case allegedly being assaulted and physically blocked from entering school board meetings by political activists.

We conclude that the district court did not abuse its discretion in denying the unnamed plaintiffs’ motion. We acknowledge that the danger of retaliation is “often a compelling ground” in favor of anonymity. *City of Chicago*, 360 F.3d at 669. However, aside from a general reference to cancel culture, the unnamed plaintiffs do not claim any nexus between the incidents involving Bittersweet Bakery or McNeally to their case. A general reference to cancel culture alone is insufficient to establish a compelling fear of retaliation. *Cf. Chiquita*, 965 F.3d at 1247 (holding that the pseudonymous appellants’ general evidence regarding harm suffered by other individuals did “not compel the conclusion that the [appellants] face[d] those risks”).

With respect to the unnamed plaintiffs’ allegations regarding physical assault at school board meetings, the unnamed plaintiffs do not suggest that the political activists involved in these incidents would seek to retaliate against them due to the prosecution of this lawsuit. According to the plaintiffs, the political activists blocked them from attending school board meetings so as to obtain better seats and more
influence over the school board. This behavior ceased after the plaintiffs complained. We cannot say that the district court abused its discretion in finding that this past harm did not precipitate a finding of future harm. In addition, “the district court was free to consider the named plaintiffs as comparators when weighing the pseudonymous appellants’ risk of harm against the presumption of judicial openness.” See id. at 1248. The district court noted that this lawsuit already contains three named plaintiffs who have litigated two federal lawsuits asserting their viewpoints for years without apparent incident. Therefore, we affirm the district court’s denial of the motion to proceed under pseudonyms.

B. Motion to Dismiss

Dismissal under Rule 12(b)(6) is not appropriate when a complaint contains sufficient factual matter, which, when accepted as true and viewed in the light most favorable to the nonmoving party, states “a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is plausible on its face “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. The plausibility standard is not a “probability requirement”; rather, it requires a plaintiff to show that success on the merits is more than a “sheer possibility.” Id. Thus, a complaint “may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007).

To avoid dismissal in this case, the plaintiffs must plead facts allowing a court to draw the reasonable inference that (1) the government-speech doctrine does not bar their claim and (2) the defendants unconstitutionally discriminated against their speech on the basis of its viewpoint. The district court dismissed the complaint after concluding that the government-speech doctrine barred the plaintiffs’ claims. We review de novo the district court’s decision to dismiss the complaint under Rule 12(b)(6). See Sorenson v. Sorenson, 64 F.4th 969, 975 (8th Cir. 2023).
1. Government-Speech Doctrine

The First Amendment’s Free Speech Clause provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. “The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467 (2009). “When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say.” Shurtleff v. City of Boston, Massachusetts, 596 U.S. 243, 251 (2022). The Constitution “relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.” Id. at 252.

In some situations, difficulties can arise in distinguishing between government speech and government regulation of private expression. Id. To determine whether the government intends to speak for itself or to regulate private expression, we conduct a “holistic inquiry,” looking to (1) “the history of the expression at issue,” (2) “the public’s likely perception as to who (the government or a private person) is speaking,” and (3) “the extent to which the government has actively shaped or controlled the expression.” Id.

First, we look to the history of the expression at issue. We consider both the general history of posting messages on school walls as well as the specific history of the District in allowing similar messages to be posted on its walls. See id. at 253-55. As to general history, the parties do not dispute that schools have traditionally controlled and communicated messages on posters placed on their walls. The District’s specific history, however, tells another story. The District had not previously allowed private individuals to display a poster series like the Inclusive Poster Series on school walls. Indeed, Superintendent Baumann attempted on multiple occasions to exclude the BLM posters from the District, but the District acquiesced to the wishes of private persons after facing backlash from members of the community.
The District contends our inquiry into specific history is too “narrow” and that such a narrow inquiry would require courts to find a “mirror image historical analogy” to the conduct at issue. According to the District, we should look only to whether “school districts historically have and will continue to communicate messages of support for [their] students through posters on building walls.” We agree with the District that a mirror image historical analogy is not required. But the analysis the District would have us adopt is indistinguishable from the analysis we have already conducted with respect to general history. Moreover, our inquiry into specific history aligns with that of the Supreme Court in *Shurtleff*. In *Shurtleff*, several plaintiffs raised a First Amendment challenge to the City of Boston’s refusal to raise what the plaintiffs described as a “Christian flag.” *Id.* at 248. In evaluating the first factor, the Court considered the general history of flag flying as well as the specific details of Boston’s flag-flying program. *Id.* at 253-55. The Court concluded that evidence supported the plaintiffs’ characterization of Boston’s flag-flying program as private expression because Boston had strayed from its prior practice regarding flag-flying by rejecting the plaintiffs’ flag. *Id.* Similarly, here, the District strayed from its prior practice by allowing its employees to display the Inclusive Poster Series on school walls.

The district court found that the first factor favored the District’s claim of government speech because the District “reviewed, authorized, and provided the posters to support staff [and students].” In drawing this conclusion, the district court improperly weighed the facts and construed them in the light most favorable to the defendants. The district court did not consider the involvement of private actors in the design and adoption of the posters. For instance, Superintendent Baumann told the school board that the District’s goal was to allow “teachers” to use the BLM posters if those teachers felt that the posters had instructional value. In addition, Director Kass told Cajune that the posters were “requested by many staff and

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3We do not attribute the statements and actions of the individual teachers to the District. *See Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (distinguishing between a “teacher” and the “Los Angeles Unified School District”).
families” in the District. When viewing the facts in the light most favorable to the plaintiffs, these statements (and others) support a finding of private speech. Thus, while general history weighs in the District’s favor, specific history weighs in favor of the plaintiffs.

Second, we consider the public’s likely perception as to who—the government or a private person—is speaking. The District left to the discretion of individual teachers the decision of whether to post the BLM posters in their classrooms. The teachers were not required to display the posters in their classrooms. The location of BLM posters in the teachers’ classrooms, as well as the discretion provided to teachers in choosing whether to display the posters at all, support a finding of private speech. See Summum, 555 U.S. at 467 (noting that the location where a message is displayed can affect the public’s perception of who is speaking).

The District contends that “[a]ny reasonable member of the public would look at the [Inclusive] Poster Series and undoubtedly understand” the District to be communicating a message in support of its students and their academic achievement. To bolster its contention, the District points to several statements the District made during school board meetings indicating it approved of the BLM posters. The District also emphasizes that the posters contain the District’s logo, slogan, website link, and a statement that “[t]his poster is aligned to School Board policy and an unwavering commitment to our Black students, staff[,] and community members.” The District would have us look solely to these indications of its approval as decisive while ignoring statements made by it that are indicative of private speech. On a motion to dismiss, we must view the facts in the light most favorable to the plaintiffs. Furthermore, the District would have us do what the Supreme Court admonished against in Matal v. Tam, 582 U.S. 218, 235 (2017). In Matal, the Court warned courts to be wary of situations where the government has “dangerous[ly] misuse[d]” the government-speech doctrine by attempting to pass off certain speech as government speech by “simply affixing a government seal of approval.” Id. We cannot say that the posters are government speech solely on the basis that the District affixed its seal of approval on them. Thus, with the facts viewed in the light most
favorable to the plaintiffs, we find that the public would perceive private persons, and not the District, as having spoken through the BLM posters.

Third, we look to the extent to which the government has actively shaped or controlled the expression. The District contends it “retained complete control over the [BLM] posters.” However, Superintendent Baumann disclaimed District involvement with the posters when he told the school board, “I don’t know if I would say our goal is to have them up in the schools. Our goal is to let the teachers have the opportunity and to use [the posters] if they feel it has instructional value or value in their classrooms.”

District administrators confirmed on several occasions that the idea of the Inclusive Poster Series originated with private persons, including “staff and families” in the District. Moreover, the District did not prescribe the display of posters on specific walls or on any walls at all. Rather, it allowed individual teachers to make that decision. The District’s statements and actions show that it relinquished control to private actors.

The district court concluded that, given the District’s review process and final approval authority over the BLM posters, the District “could have simply adopted the posters without alteration, and still the posters would be considered the District’s speech.” The district court’s conclusion runs afoul of the Supreme Court’s pronouncement in Matal; private speech cannot be passed off as government speech.

The District claims that only the school board can speak on behalf of the District and that the superintendent’s remarks cannot be imputed to it because District Policy 302 provides that the superintendent can only make “suggestions regarding policies, regulations, rules and procedures deemed necessary for the [District].” According to that same policy, however, the superintendent is the “chief executive officer of the school system,” “an ex-officio member of the [school board],” and is in “charge of the administration of the schools.” Even if we were to assume that only the school board as a collective body could speak on behalf of the District, we find that the school board maintained a passive stance with regard to the Inclusive Poster Series. The idea of the Inclusive Poster Series did not originate with the school board, nor did the school board direct the design and content of the posters.
“by simply affixing a government seal of approval.” *Id.* Without more, the mere existence of a review process with approval authority is insufficient by itself to transform private speech into government speech.

Government speech requires that a government shape and control the expression. In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), the Supreme Court evaluated whether the issuance of specialty license plates by Texas constituted government speech.\(^5\) In issuing specialty license plates, Texas had a review process and final approval authority over the content of the plates. *Id.* at 213. However, the mere existence of these elements did not dissuade the Court from inquiring into whether Texas had “actively exercised” its “sole control over the design, typeface, color, and alphanumeric pattern for all license plates.” *Id.* (emphasis added). Here, by contrast, the District stated that the Inclusive Poster Series was reviewed by an “equity group,” “students,” “staff,” and “other advisory committees.” The District’s sole involvement was to replace a blonde girl in one of the posters with a blonde boy. Thus, the District maintained a passive role in the design of the posters.

Applying the government-speech doctrine holistically, we conclude the plaintiffs have pleaded sufficient facts to allow a court to draw the plausible inference that the BLM posters are expressions of private persons. *See Ashcroft*, 556 U.S. at 678. The district court erred in finding otherwise.

### 2. Viewpoint Discrimination

Having concluded that dismissal is not warranted under the government-speech doctrine, we turn to the question of whether the plaintiffs have alleged a plausible claim of unconstitutional viewpoint discrimination. A government engages in viewpoint discrimination when “the specific motivating ideology or the

\(^5\)The Court has described *Walker* as “likely mark[ing] the outer bounds of the government-speech doctrine.” *Matal*, 582 U.S. at 238.
opinion or perspective of the speaker is the rationale for the restriction.”

The extent to which a government can regulate speech on public property depends on the designation of the forum in which an individual may speak. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). A forum can be public or nonpublic in nature. *Id.* The mere fact that a government owns the property in question does not make the property a public forum. *Id.* at 799-800. Rather, a government has the “power to preserve the property under its control for the use to which it is lawfully dedicated.” *Id.* at 800. To ascertain whether a government intends to designate a place not traditionally open to assembly and debate as a public forum, we consider “the policy and practice of the government” and “the nature of the property and its compatibility with expressive activity.” *Id.* at 802. Specifically, in assessing the nature of various fora, this circuit has considered the physical characteristics of a venue, the typical use of the specific venue, the venue’s function and objective purpose, and the government’s intent for the venue. *Sessler v. City of Davenport*, 102 F.4th 876, 882 (8th Cir. 2024). A public forum is not created “in the face of clear evidence of a contrary intent” or “when the nature of the property is inconsistent with expressive activity.” *Cornelius*, 473 U.S. at 803.

One type of public forum—the limited public forum—exists when a government “reserve[s] a forum for certain groups or for the discussion of certain topics.” *Walker*, 576 U.S. at 215; *see also Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1225 (11th Cir. 2017) (explaining that the term “limited public forum” used to be synonymous with “nonpublic forum” but that recent Supreme Court cases had clarified the distinction). When a government creates a limited public forum, it “must respect the lawful boundaries it has itself set.” *Rosenberger*, 515 U.S. at 829. Thus, in a limited public forum, a government is prohibited from discriminating against speech on the basis of its viewpoint. *Id.* at 829-30.

Here, the plaintiff[s] claim that the District created a limited public forum when it allowed private persons to display BLM posters on school walls. Because the
District permitted such actions, the plaintiffs contend that the District could not discriminate against their speech based on its viewpoint. Having considered the “policy and practice” of the District, we agree with the plaintiffs. *Cornelius*, 473 U.S. at 802. When the District allowed private persons to display the Inclusive Poster Series on school walls, it deviated from its prior practice restricting the display of such posters. In doing so, the District created a limited public forum, thereby opening school walls to the discussion of similar topics.

The District contends it did not create a limited public forum because Policy 535 specifically provides that “[a]ll school district property and facilities are nonpublic fora.” We agree with the Ninth Circuit’s statement in *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001) that “an abstract policy statement purporting to restrict access to a forum is not” conclusive of the nature of the forum. Rather, “[w]hat matters is what the government actually does—specifically, whether it consistently enforces the restrictions on use of the forum that it adopted.” *Id.* Here, the District created a limited public forum by not consistently enforcing the restrictions it had placed on the display of posters on school walls.

Having created a limited public forum, the District could not discriminate against speech on the basis of its viewpoint. According to the District, however, it rejected Cajune’s request because the phrases “All Lives Matter” and “Blue Lives Matter” “were created specifically in opposition to Black Lives Matter.” That was impermissible viewpoint discrimination in that the rationale for the restriction was prompted by what the District viewed as the speaker’s “motivating ideology” or their “opinion or perspective.” *Rosenberger*, 515 U.S. at 829. Therefore, we conclude that the plaintiffs have shown that success on their First Amendment claim is more than a “sheer possibility.” *Ashcroft*, 556 U.S. at 678. We reverse the district court’s dismissal of the complaint under Rule 12(b)(6).
III. Conclusion

For the foregoing reasons, we affirm the district court’s denial of the motion to proceed under pseudonyms, reverse the district court’s dismissal of the complaint, and remand for further proceedings consistent with this opinion.
United States Court of Appeals
For the Eighth Circuit

No. 23-1119

Plaintiff A, by his natural mother and general guardian, Parent A;
Plaintiff B, by his natural father and general guardian, Parent B;
Plaintiff C, by his natural mother and general guardian, Parent C;
Plaintiff D, by his natural father and general guardian, Parent D

Plaintiffs - Appellants

v.

Park Hill School District; Janice Bolin, President and Member, Park Hill School District Board of Education; Bart Klein, Vice President and Member, Park Hill School District Board of Education; Kimberley Ried, Treasurer and Member, Park Hill School District Board of Education; Todd Fane, Member, Park Hill School District Board of Education; Scott Monsees, Member, Park Hill School District Board of Education; Susan Newburger, Member, Park Hill School District Board of Education; Brandy Woodley, Member, Park Hill School District Board of Education; Jeanette Cowherd, Superintendent of Schools, Park Hill School District; Josh Colvin, Director of Student Services, Park Hill School District; Kerrie Herren, Principal, Park Hill South High School

Defendants - Appellees

Appeal from United States District Court
for the Western District of Missouri

Submitted: December 14, 2023
Filed: April 2, 2024
Before SMITH, Chief Judge, GRUENDER and GRASZ, Circuit Judges.

GRASZ, Circuit Judge.

As a part of an ill-advised “joke,” a ninth-grade boy at Park Hill High School created an online petition calling for the return of slavery. Three other students posted online comments favoring the petition. After the Park Hill School District (the School District) expelled or suspended the four students, they sued, claiming the School District violated their rights to equal protection and due process. The district court denied these claims on summary judgment. The four students appeal, and we affirm the district court.

I. Background

Plaintiffs A, B, C, and D (collectively, Plaintiffs) were ninth-grade students on the football team at Park Hill High School (PHS), in Kansas City, Missouri. On September 16, 2021, they were traveling with the team to an away game. While en route, Plaintiff A, a biracial black and Brazilian student, published a petition online titled “Start Slavery Again”; he then circulated the petition to other members of the team through Snapchat. Plaintiff B, a white student, commented “I love slavery.” Plaintiff C, a white student, commented “I hate blacks.” Plaintiff D, a biracial Asian and white student, commented “I want a slave.” The petition included a picture of TRL, a black student.


2 The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri.
The next day, PHS’s Assistant Principal, Melvin Walker, investigated the incident. Walker spoke with Plaintiffs and determined they violated the School District’s policies. The discipline notice stated violations of the following four school policies: Cellphone/Electronic Device, Disorderly Conduct, Disruptive Behavior, and Harassment. Plaintiffs’ written statements noted they were “joking around” and “thought it would be funny.” Plaintiffs B, C, and D explicitly noted they regretted their actions. Walker suspended Plaintiffs for ten days, and recommended extended-term suspensions or expulsions. That evening, PHS’s Principal, Kerrie Herren, emailed PHS families. In that email, he condemned the racist statements and assured families that “we will not tolerate discrimination or harassment.”

On Monday, September 20, Principal Herren sent letters to each of the Plaintiffs’ parents, informing them of the ten-day suspensions and of his recommendations to the School District’s Superintendent for extended-term suspensions or expulsions. The next day, the School District notified Plaintiffs’ parents that it would hold disciplinary conferences on October 1, and gave the parents a procedural outline and a “Notice of Charges.” The Notice of Charges—much like the ones Plaintiffs received—stated the discipline was due to “Harassment, Disruptive Behavior, Disorderly Conduct, Cell Phone/Electronic Device [Use]” in violation of school policies.

The following day, the School District’s Superintendent, Jeanette Cowherd, emailed a letter to the community, condemning the petition, supporting the Principal’s actions, and committing to following school policy. An onslaught of media attention followed, and the School District received calls from parents, students, community members, alumni, and others across the country, expressing concerns about the petition.

On October 1, the School District held disciplinary conferences with Plaintiffs and their parents. Superintendent Cowherd and Student Services Director Josh Colvin agreed that Plaintiff A should be suspended for 170 days, or the remainder
of his freshman year, and further recommended to the School Board that Plaintiff A should be expelled. Cowherd and Colvin agreed that Plaintiffs B, C, and D should be suspended for 170 days. In making their decisions, the administrators compared the situation to other incidents where students were expelled. The first involved a student writing racist and threatening graffiti on school bathroom walls. The second involved a student drawing swastikas on school bathroom walls. Plaintiffs administratively appealed their punishments.

On November 3, the School District held an administrative appeal hearing with Plaintiffs, their parents, and their legal counsel. Plaintiffs were allowed to call and cross-examine witnesses. This hearing lasted from 5:00 p.m. until 3:00 a.m. The School District ultimately expelled Plaintiff A, and required Plaintiffs B, C, and D to undergo ten hours of diversity and inclusion training before they could return to PHS for the 2022–23 school year.

On November 12, Plaintiffs sued the School District, the PHS Principal, and various school board members (collectively, the Defendants) in federal court, asserting various claims under 42 U.S.C. § 1983. After voluntarily dismissing two of those claims, Plaintiffs proceeded to summary judgment on their due process and equal protection claims. Plaintiffs claimed the disciplinary procedures deprived them of substantive and procedural due process. They also claimed the Defendants deprived Plaintiffs of equal protection because they did not punish TRL—the black student whose photo was used on the petition—even though Plaintiffs claimed he was a willing participant in creating the petition. The district court granted summary judgement for the School District, dismissing the Plaintiffs’ procedural due process, substantive due process, and equal protection claims.

II. Analysis

“We review the grant of a summary judgment de novo, viewing the evidence in light most favorable to [the Plaintiffs] as the nonmoving part[ies] and drawing all reasonable inferences in [their] favor.” Onyiah v. St. Cloud State Univ.,
Summary judgment in favor of the Defendants is warranted “if the movant[s] show[] that there is no genuine dispute as to any material fact and the movant[s] are entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

A. Procedural Due Process Claims

“[A] student’s legitimate entitlement to a public education [is] a property interest . . . protected by the Due Process Clause.” Goss v. Lopez, 419 U.S. 565, 574 (1975). A school district must provide students facing a temporary suspension of ten days or less notice and an opportunity to be heard. See id. at 581. Specifically, the student must “be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” Id. But “[l]onger suspensions or expulsions . . . may require more formal procedures.” Id. at 584 (cautioning the notice-and-hearing requirements only pertain to “short suspension[s], not exceeding 10 days”).

Since Goss, the Supreme Court has not addressed whether due process requires additional formal procedures for longer suspensions or expulsions. Instead, courts “have applied the balancing test from Mathews v. Eldridge, 424 U.S. 319 [ ] (1976), to determine what additional process may be due.” Doe ex rel. Doe v. Todd Cnty. Sch. Dist., 625 F.3d 459, 462–63 (8th Cir. 2010).

Under Mathews, courts balance three factors to determine the required procedural protections: (1) the private interest affected by the official action; (2) “the risk of an erroneous deprivation of such interest through the procedures used” and the probable value of additional procedure safeguards; and (3) the government’s interest, “including the fiscal or administrative burdens” of additional procedures. Mathews, 424 U.S. at 321. See also Watson ex rel. Watson v. Beckel, 242 F.3d 1237, 1240 (10th Cir. 2001) (“The three-factor test from the Mathews decision, decided one year after Goss, is appropriate for determining when additional procedure is due
because the test crystallizes the balancing of student interests against school interests suggested in the *Goss* decision.

Applying *Mathews*’ balancing test here suggests a low risk of an erroneous deprivation of Plaintiffs’ interest because Plaintiffs received adequate notice and meaningful opportunities to be heard at every stage of the disciplinary process, and additional procedures unduly burden the School District. *See Mathews*, 424 U.S. at 321.

First of all, Plaintiffs were sufficiently notified of “what [they were] accused of doing and what the basis of the accusation [was].” *Goss*, 419 U.S. at 582. Plaintiffs and their parents were notified about the initial ten-day suspension; they were notified about Principal Herren’s recommendation of extended-term suspension or expulsion; they were notified about the upcoming disciplinary conferences; and they were given a written notice of charges ten days before the disciplinary conferences.

Additionally, Plaintiffs received multiple opportunities “to explain [their] version of the facts.” *See id.* The day after the incident, Plaintiffs had the opportunity to recount their versions of the events at their initial meetings with Assistant Principal Walker. During those meetings, Plaintiffs were provided with explanations of why their behaviors resulted in specific violations. Each plaintiff had an opportunity to tell his version of events—each plaintiff provided a written statement to PHS administration about his admitted involvement in the incident. *See Keefe v. Adams*, 840 F.3d 523, 535 (8th Cir. 2016) (concluding school complied with due process requirements when a school official “met with [the student], informed him that there were concerns regarding his Facebook, read from the posts of greatest concern, explained that his posts implicated the professionalism and professional boundary requirements of the [program], and gave him an opportunity to respond”).
Beyond the initial meetings, Plaintiffs had opportunities to respond to the decision makers during the October 2021 disciplinary conferences and even opportunities to appeal the adverse decisions at the November administrative appeal hearings with legal counsel present. See London v. Dirs. of DeWitt Pub. Schs., 194 F.3d 873, 874, 877 (8th Cir. 1999) (holding middle school student’s expulsion not a due process violation where student’s mother was informed of grounds upon which expulsion recommendation was based and where student was given hearing where he was represented by counsel who had full opportunity to examine and cross-examine witnesses).

In light of the above, Plaintiffs’ procedural due process claim fails. Plaintiffs had fair notice and meaningful opportunity to present their case in the school disciplinary proceedings.

**B. Substantive Due Process**

To prove a violation of substantive due process rights, Plaintiffs must show a government violation of a fundamental constitutional right so egregious that it shocks the contemporary conscience. C.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347, 591 F.3d 624, 634 (8th Cir. 2010). Accord Keefe, 840 F.3d at 533. Because the right to a public education is a property interest, and not a fundamental right, Goss, 419 U.S. at 574, Plaintiffs “must show that there was no rational basis for the [school’s] decision or that the decision was motivated by bad faith or ill will.” Disesa v. St. Louis Cnty. Coll., 79 F.3d 92, 95 (8th Cir. 1996).

Plaintiffs have not met this burden. Long-term suspensions and expulsions are routine disciplinary actions that generally do not “offend . . . notions of fairness or human dignity.” Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916, 921 (8th Cir. 2001); cf. Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1071, 1075–76 (11th Cir. 2000) (Excessive corporal punishment found to shock the conscience where a coach intentionally struck a student with a metal weight lock, knocking the student’s eye out of its socket.).
The undisputed evidence shows there was a rational basis for the School District’s disciplinary decisions. The petition and its fallout drew national news-media attention and caused disruptions in the school environment. Defendants decided additional punishment, beyond a short suspension, was needed to address the magnitude of Plaintiffs’ disruption. There is no indication the disciplinary decisions were motivated by bad faith or ill will.

Defendants’ chosen punishments simply do not make for a substantive due process violation. In light of the disruption and violation of the School District’s policies, all of which occurred during a school event, the disciplinary actions were rationally related to its legitimate purpose of maintaining order. See Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 566 (8th Cir. 1988) (noting school district has “legitimate interest in maintaining order and discipline in its schools”). Thus, we reject Plaintiffs’ substantive due process claim.

C. Equal Protection

Finally, we turn to Plaintiffs’ claim of an equal protection violation. “The Equal Protection Clause generally requires the government to treat similarly situated people alike.” Klinger v. Dep’t of Corrs., 31 F.3d 727, 731 (8th Cir. 1994). “[T]he first step in an equal protection case is determining whether the plaintiff has demonstrated that [he] was treated differently than [comparators] who were similarly situated to [him].” Id. Plaintiffs and their comparators must be similarly situated “in all relevant respects.” Saunders v. Thies, 38 F.4th 701, 714 (8th Cir. 2022) (quoting Gilani v. Matthews, 843 F.3d 342, 348 (8th Cir. 2016)).

Plaintiffs sought to compare their situations to TRL. According to Plaintiffs, TRL also participated in the creation, approval, and posting of the petition and yet faced no discipline. Plaintiffs argue this shows the School District violated the Equal Protection Clause. Even assuming Plaintiffs’ version of TRL’s involvement in the incident is true, TRL was still not similarly situated to Plaintiffs. Whereas each of the Plaintiffs either created the petition or made racist electronic statements when
commenting on the post, TRL’s alleged involvement was limited; he did not create the petition—as Plaintiff A did, nor did he make any posts—as Plaintiffs B, C, and D did.

Plaintiffs also failed to present evidence that the School District’s decision to punish Plaintiffs, but not TRL, was racially motivated. Plaintiffs noted that in 2018, the school administration took steps to address the racial disparity in suspensions and adopted a policy to “support our students in a way that they are not being suspended.” Plaintiffs claim the School District implemented a policy of treating black students more leniently than white students to even out the statistical disparities in suspensions. But nothing in the evidence suggests such a practice happened here, as TRL’s and Plaintiffs’ participation in the incident were materially different. Plaintiffs’ mere suspicion is not sufficient to defeat summary judgment. See Thomas v. Corwin, 483 F.3d 516, 527 (8th Cir. 2007) (“Mere allegations, unsupported by . . . evidence beyond the nonmoving party’s own conclusions, are insufficient to withstand a motion for summary judgment.”).

We reject Plaintiffs’ equal protection claim because we find no evidence supporting the contention that Plaintiffs were similarly situated with TRL, given Plaintiffs’ greater involvement in creating and supporting the petition.

III. Conclusion

For the foregoing reasons, we affirm the district court.