



**Winter 2023 Virtual CLE Workshop**  
January 25 – 27, 2023

**07** **In the Meantime:  
What to Do While  
You're Waiting for  
the Final Title IX  
Regs**

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**IN THE MEANTIME: WHAT TO DO WHILE YOU'RE WAITING FOR THE FINAL  
TITLE IX REGS**

January 25 – 27, 2023

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**I. Title IX NPRM Update**

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**II. Summary of Major Provisions of the Department of Education's Title IX Notice of Proposed Rulemaking**

U.S. Department of Education

# IN THE MEANTIME: WHAT TO DO WHILE YOU'RE WAITING FOR THE FINAL TITLE IX REGS

## TITLE IX NPRM UPDATE

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### **I. Introduction**

The current Title IX regulations ushered in yet another chapter in the ongoing Title IX story. Since 2011, institutions of higher education, and others, have had to create, review, and revise their policies and procedures, and educate their community members, due to ever-changing requirements in the Title IX regulatory landscape. With the release of a new Title IX Notice of Proposed Rulemaking (“NPRM”), institutions must again prepare to begin this now familiar, “review, revise and educate” cycle. This memorandum will briefly review information regarding the publication of the NPRM, the steps leading up to the NPRM’s publication, and significant changes to the current regulations proposed in the NPRM.

### **II. When Was the Title IX NPRM Published?**

On June 23, 2022, the 50<sup>th</sup> anniversary of the Title IX Education Amendments of 1972, the United States Department of Education (“Department”) released an unofficial version of the Title IX NPRM for public comment.<sup>1</sup> Simultaneous with the release of the proposed regulations, the Department also released a summary<sup>2</sup> and a fact sheet<sup>3</sup> which provided additional information regarding the proposed regulations.

The official version of the NPRM was subsequently published in the *Federal Register* on July 12, 2022.<sup>4</sup> Public comments to the NPRM were accepted by the Department for sixty days, through September 12, 2022. The Department noted in the NPRM that,

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<sup>1</sup> *The US Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comments*, <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment> (last visited December 16, 2022).

<sup>2</sup> *Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking*, <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf> (last visited December 19, 2022).

<sup>3</sup> *FACT SHEET: U.S. Department of Education’s 2022 Proposed Amendments to its Title IX Regulations*, <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf> (last visited December 19, 2022).

<sup>4</sup> *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 FR 41390 (July 12, 2022), <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal> (last visited December 20, 2022).

[T]he purpose of the proposed regulations is to better align the Title IX regulatory requirements with Title IX’s non-discrimination mandate, and to clarify the scope and application of Title IX and the obligation of all schools, including elementary schools, secondary schools, postsecondary institutions, and other recipients that receive Federal financial assistance from the Department....to provide an educational environment free from discrimination on the basis of sex, including responding to incidents of sex discrimination.<sup>5</sup>

During the public comment period, the Department received 240,182 comments.<sup>6</sup> For context, 124,162 public comments were submitted in response to the NPRM for the 2020 amendments.<sup>7</sup> Prior to publishing the Final Rule, the Department must review each comment received and respond to significant, relevant issues raised to the proposed regulations.

### III. How Did We Get Here?

Prior to issuing the NPRM, the Department conducted a review of the current Title IX regulations in response to President Joseph R. Biden’s *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*.<sup>8</sup> In its April 6, 2021 announcement, the Department noted that, as required by the Executive Order, “OCR is undertaking a comprehensive review of the Department’s existing regulations, orders, guidance, policies and any other similar agency actions, including amendments to the Department’s Title IX regulations that took effect on August 14, 2020.”<sup>9</sup> The Department sought feedback from stakeholders and indicated that the feedback would help it to determine whether or not changes to the current regulations, or any related agency actions, would be necessary in order to fulfill the Executive Order.<sup>10</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, ED-2021-OCR-0166, <https://www.regulations.gov/document/ED-2021-OCR-0166-0001/comment> (last visited December 15, 2022).

<sup>7</sup> *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 FR 61462 (November 29, 2018), <https://www.regulations.gov/document/ED-2018-OCR-0064-0001> (last visited December 20, 2022).

<sup>8</sup> *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, Exec. Order No. 14021, 86 FR 13803 (March 11, 2021), <https://www.federalregister.gov/documents/2021/03/11/2021-05200/guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including> (last visited December 20, 2022).

<sup>9</sup> *Letter to Students, Educators and other Stakeholders re Executive Order 14021* (April 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf> (last visited December 20, 2021).

<sup>10</sup> *Id.*

The Department held virtual public hearings in June 2021 for the purpose of improving enforcement of Title IX<sup>11</sup> and thereafter issued new guidance<sup>12</sup> on July 20, 2021, in which it clarified questions that had arisen regarding the current regulations and to identify areas of flexibility for institutions of higher education.

The Department's review, which began in March 2021, culminated in the issuance of the NPRM on June 23, 2022. In its announcement regarding the proposed regulations, the Department stated the following:

Over the last year, the Department has heard from a wide variety of stakeholders, including students, parents, and educators in elementary, secondary, and postsecondary schools, state government representatives, advocates, lawyers, researchers, and other stakeholders through the Title IX nationwide virtual public hearing in June 2021 convened by the Office for Civil Rights (OCR) and in numerous listening sessions and meetings. This input, together with careful review of federal case law and OCR's enforcement work under Title IX, highlighted the need to revise the current regulations to protect more fully against sex discrimination in all education programs and activities receiving federal financial assistance.<sup>13</sup>

According to the Biden Administration's Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions, the Department plans to publish the Final Title IX regulations in May 2023.<sup>14</sup> Institutions will have at least sixty days from the date the Final Rule is published to revise their existing policies and procedures to align with the Final Rule. Until that time, the 2020 Title IX regulations remain in effect and institutions should continue using their current policies and procedures.

#### **IV. What Are Some of the Most Significant Proposed Changes in the NPRM in Comparison to the Current Regulations?**

If approved, the proposed Title IX regulations would significantly alter the current regulations, thereby requiring institutions to change institutional policies and procedures that were modified or developed only a little over two years ago, when the current regulations went into effect. A list of ten key changes in the NPRM is set forth below:

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<sup>11</sup> *Federal Register* Notice Announcing Title IX Public Hearing, 86 FR 27429 (May 20, 2021), <https://www.federalregister.gov/documents/2021/05/20/2021-10629/announcement-of-public-hearing-title-ix-of-the-education-amendments-of-1972> (last visited December 20, 2021).

<sup>12</sup> *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf> (last visited December 20, 2022).

<sup>13</sup> *Id.* at *The US Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comments*.

<sup>14</sup> Office of Information and Regulatory Affairs, Office of Management and Budget, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, RIN 1870-AA16 (last visited January 9, 2023, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1870-AA16>).

<u>ISSUE</u>	<u>CURRENT REGULATIONS</u>	<u>NPRM<sup>15</sup></u>	
<b>Conduct triggering an institutional response</b>	Sexual harassment (34 CFR §106.30(a))	Sex-based harassment <b>AND</b> all forms of sex discrimination (includes sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity) (NPRM 34 CFR §106.10)	
<b>Conduct constituting a hostile environment</b>	Conduct determined by a reasonable person to be so severe, pervasive, <b>AND</b> objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity (34 CFR §106.30(a))	Unwelcome sex-based conduct that is sufficiently severe <b>OR</b> pervasive that based on the totality of circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity (NPRM 34 CFR §106.2)	
<b>Conduct that occurred outside of the United States/institution’s program or activity</b>	Institution not required to address the conduct (34 CFR §106.44(a))	Institution required to address the conduct (NPRM 34 CFR §106.11)	
<b>Required notice or disclosure</b>	Institutional official with authority to institute corrective measures, i.e., actual knowledge, must notify the Title IX coordinator of sexual harassment/allegations of sexual harassment (34 CFR §106.44)	Non-confidential employee with authority to implement corrective measures learns of sex discrimination	Notice to Title IX coordinator required (NPRM 34 CFR §106.44(c)(2)(i))
		Non-confidential employee in an administrative leadership, teaching or advising role learns of sex discrimination about student complainant	Notice to Title IX coordinator required (NPRM 34 CFR §106.44(c)(2)(ii))
		Non-confidential employee in an administrative leadership, teaching or advising role learns of sex discrimination involving employee complainant	Notify Title IX coordinator <b>OR</b> provide the Title IX coordinator’s contact information and an explanation re how to report conduct (NPRM 34 CFR §106.44(c)(2)(iii))
		All other non-confidential employees	Notify Title IX coordinator <b>OR</b> provide the Title IX coordinator’s contact

<sup>15</sup> The information included in this section has been proposed by the Department and is not currently required. Institutions should continue to follow the current regulations until the Final Rule is published.

<u>ISSUE</u>	<u>CURRENT REGULATIONS</u>	<u>NPRM<sup>15</sup></u>	
			information and an explanation re how to report conduct ( <i>NPRM 34 CFR §106.44(c)(2)(iv)</i> )
		Confidential employee	Provide person with the Title IX coordinator’s contact information and an explanation re how to report conduct ( <i>NPRM 34 CFR §106.44(d)</i> )
<b>Complaint</b>	Written, formal complaint required to initiate grievance process ( <i>34 CFR §106.30</i> )	Written complaint is no longer required; oral complaint is permissible ( <i>NPRM 34 CFR §106.2</i> )	
<b>Single investigator model</b>	Prohibited ( <i>34 CFR §106.45(b)(7)</i> )	Permissible, provided that the individual does not also serve as the decision-maker on appeal ( <i>NPRM 34 CFR §106.45(b)(2)</i> )	
<b>Training</b>	Specific training required for Title IX coordinator, investigators, decision-makers and anyone who facilitates an informal resolution ( <i>34 CFR §106.45(b)(iii)</i> )	Training regarding institution’s obligation to address sex discrimination, and what it includes, required for <b>all</b> employees; additional training required for investigators, decision-makers, and others responsible for implementing grievance procedures or who have authority to modify or terminate supportive measures ( <i>NPRM 34 CFR §106.8(d)</i> )	
<b>Grievance procedures</b>	Must be followed upon receipt of a formal complaint of sexual harassment ( <i>34 CFR §106.45(b)</i> )	Complaint alleging sex discrimination by an employee, student or third party and complaint alleging sex-based harassment by an employee or third party not involving a student must follow the procedures set forth in 106.45; complaint alleging sex-based harassment either by or against a student must follow procedures set forth in 106.45 <b>AND</b> 106.46 ( <i>NPRM 34 CFR §106.45 and 34 CFR §106.46</i> )	
<b>Live hearings</b>	Grievance process requirement for post-secondary schools ( <i>34 CFR §106.45(b)(6)</i> )	Permissive, but not required per NPRM, for post-secondary schools as part of the grievance process ( <i>NPRM 34 CFR §106.46(f)(1)(ii)</i> )	
<b>Informal resolution<sup>16</sup></b>	Permissible only after filing of a formal complaint ( <i>34 CFR §106.45(9)</i> )	Permissible any time after institution learns of conduct that may constitute sex discrimination and prior to determining whether sex discrimination occurred ( <i>NPRM 34 CFR §106.44(k)(1)</i> )	

<sup>16</sup> Both the current regulations and the NPRM prohibit an institution from resolving a matter using informal resolution that involves sexual harassment (current regulations) or sex discrimination (NPRM) between an employee and a student.

In addition to the issues identified above, the NPRM would create increased responsibilities for Title IX coordinators<sup>17</sup>, including obligations to pregnant students and those experiencing a pregnancy-related condition<sup>18</sup>, as well as the continued requirement to offer supportive measures to both parties<sup>19</sup> (although the NPRM would permit institutions to offer temporary supportive measures that burden a respondent,<sup>20</sup> which is prohibited by the current regulations<sup>21</sup>).

## V. Conclusion

In conclusion, the unofficial version of the NPRM spans over six-hundred pages and contains a host of proposed requirements, which, if approved, will require higher education institutions to modify their existing policies and procedures to align with the Final Rule upon its publication. While it's helpful for institutions to be familiar with the proposed rules included in the NPRM, due to the number of comments received by the Department, it is unlikely that the NPRM will be adopted, as published, in the Final Rule. Thus, during this waiting period between the issuance of the NPRM and the Final Rule, institutions are encouraged to:

- (1) identify all of their institutional policies that will be impacted by the NPRM;
- (2) constitute a working group that can quickly begin meeting upon publication of the Final Rule to begin the labor-intensive task of identifying and making any necessary changes to existing policies and procedures (which will likely need to occur during the summer 2023 months);
- (3) develop strategies for presenting to stakeholders and obtaining approval of any revised policies and procedures; and
- (4) begin to develop a strategy for educating members of the campus community, and other impacted individuals, regarding the institution's revised policies and procedures that will be based on the Final Rule.

Hopefully, since this is not the first time that they have been called upon to engage in these efforts, institutions will be able to rely upon some of the tools that were recently put into place in 2020 to assist with implementing any new changes that will be required upon publication of the Final Rule.

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<sup>17</sup> See NPRM 34 CFR §106.44(f).

<sup>18</sup> See NPRM 34 CFR §106.40(b)(3).

<sup>19</sup> See NPRM 34 CFR §106.44(g).

<sup>20</sup> See NPRM 34 CFR §106.44(g)(2).

<sup>21</sup> See 34 CFR §106.30.



## Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking\*

Issue	The Title IX NPRM
<b><i>Prohibiting All Forms of Sex Discrimination</i></b> <b><i>(Proposed § 106.10)</i></b>	The proposed regulations would prohibit all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. (Proposed § 106.10)
<b><i>Defining Sex-Based Harassment</i></b> <b><i>(Proposed § 106.2)</i></b>	<p>The proposed regulations would define sex-based harassment as including sexual harassment; harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity; and other sex-based conduct that meets requirements described immediately below. (Proposed § 106.2)</p> <p>The proposed regulations would continue to cover quid pro quo harassment—when an employee or other person authorized by a recipient<sup>†</sup> to provide an aid, benefit, or service explicitly or impliedly conditions that aid, benefit or service on a person’s participation in unwelcome sexual conduct, and incidents of sexual assault, dating violence, domestic violence, and stalking. (Proposed § 106.2)</p> <p>The proposed regulations would also cover harassment that creates a hostile environment—unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity. (Proposed § 106.2)</p> <p><i>The current regulations prohibit unwelcome sex-based conduct only if it is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”</i></p> <p><i>The current regulations cover sexual harassment but do not address other forms of sex-based harassment. (Current § 106.30)</i></p>
<b><i>Addressing Off-Campus Conduct that Creates or Contributes to a Hostile Environment in a</i></b>	<p>Title IX requires recipients to address all sex discrimination in their education programs or activities. Under the proposed regulations, conduct that occurs in a recipient’s education program or activity includes:</p> <ul style="list-style-type: none"> <li>• Conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. (Proposed § 106.11)</li> </ul>

\* For the complete set of proposed regulations, please see the Department’s Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, which is available [here](#).

<sup>†</sup> Recipients are elementary schools and secondary schools, postsecondary institutions, and other recipients of Federal funds.

Issue	The Title IX NPRM
<p><b><i>Recipient’s Education Program or Activity (Proposed § 106.11)</i></b></p>	<ul style="list-style-type: none"> <li>• Conduct that occurs off-campus when the respondent<sup>‡</sup> is a representative of the recipient or otherwise engaged in conduct under the recipient’s disciplinary authority. (Proposed § 106.11)</li> </ul> <p>Under the proposed regulations, a recipient would be required to address a sex-based hostile environment in its education program or activity, including when sex-based harassment contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States. (Proposed § 106.11) This coverage follows from Title IX’s text, which provides that no person shall be subjected to discrimination under an education program or activity receiving Federal financial assistance.</p> <p><i>The current regulations do not require a recipient to address a sex-based hostile environment in its education program or activity in the United States if the hostile environment results from sex-based harassment that happened outside of the recipient’s education program or activity, or outside of the United States. (Current § 106.44(a))</i></p>
<p><b><i>Responding to Sex Discrimination (Proposed § 106.44(a))</i></b></p>	<p>Title IX requires all recipients to operate their education programs or activities free from prohibited sex discrimination at all times. To fulfill this requirement, the proposed regulations would require a recipient to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. (Proposed § 106.44(a))</p> <p><i>The current regulations only require a recipient to respond to possible sexual harassment when it has “actual knowledge” of the harassment (i.e. notice of sexual harassment or alleged sexual harassment). At postsecondary institutions, only employees with authority to institute corrective measures can have actual knowledge; in elementary schools and secondary schools, the actual knowledge requirement applies to all employees.</i></p> <p><i>A recipient that has actual knowledge of sexual harassment must respond only in a manner that is not deliberately indifferent. (Current §§ 106.30 and 106.44(a))</i></p>
<p><b><i>Ensuring recipients learn of possible sex discrimination (Proposed § 106.44(c))</i></b></p>	<p>The proposed regulations require that recipients require certain employees to notify the recipient’s Title IX Coordinator of conduct that may constitute sex discrimination under Title IX. This would ensure that recipients learn of possible sex discrimination so they can operate their education programs or activities free from prohibited sex discrimination as Title IX requires. (Proposed § 106.44(c))</p> <ul style="list-style-type: none"> <li>• Any employee at an elementary school or secondary school who is not a confidential employee would be obligated to notify the Title IX Coordinator. (Proposed § 106.44(c)(1)) (Please note that elementary school</li> </ul>

<sup>‡</sup> A respondent is a person who is alleged to have violated the recipient’s prohibition on sex discrimination. (Proposed § 106.2).

Issue	The Title IX NPRM
	<p>and secondary school employees may have additional obligations under Federal, State or local law to report sex-based misconduct.)</p> <ul style="list-style-type: none"> <li>• An employee at a postsecondary institution or other recipient who has authority to take corrective action or, for incidents involving students, has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity, would be obligated to notify the Title IX Coordinator. (Proposed § 106.44(c)(2)(i)-(ii)) <ul style="list-style-type: none"> <li>• All other employees at a postsecondary institution or other recipient would be obligated to notify the Title IX Coordinator or provide an individual with the Title IX Coordinator’s contact information and information about reporting, except that confidential employees would not be obligated to notify the Title IX Coordinator about possible sex discrimination. Confidential employees would be obligated only to provide an individual with the Title IX Coordinator’s contact information and information about reporting. (Proposed § 106.44(c)(2)(i)-(ii); § 106.44(d)(2))</li> </ul> </li> </ul>
<p><b><i>Respecting Complainant Autonomy</i></b>  <b><i>(Proposed §§ 106.2, 106.8(d), 106.44(a) –(e))</i></b></p>	<p>To ensure that a recipient’s education program or activity is free from sex discrimination while also respecting complainant autonomy, the proposed regulations would require recipients to provide clear information and training (proposed § 106.8(d)) on (1) when their employees must notify the Title IX Coordinator about possible sex discrimination (proposed § 106.44(c)) and (2) how students can report sex discrimination for the purpose of seeking confidential assistance only (proposed § 106.44(d)) or for the purpose of asking a recipient to initiate its grievance procedures. (Proposed § 106.45(a)(2))</p> <p>A complainant would also be protected in their right to file a complaint about sex discrimination they experienced even if they have chosen to leave the recipient’s education program or activity as a result of that discrimination or for other reasons. (Proposed §§ 106.2 and 106.45(a)(2))</p> <p>Under the proposed regulations, a recipient also would require its Title IX Coordinator to monitor for barriers to reporting information about conduct that may constitute sex discrimination under Title IX. The recipient would then need to take steps reasonably calculated to address barriers the Title IX Coordinator identifies. (Proposed § 106.44(b))</p> <p>Together, these requirements in the proposed regulations would ensure that:</p> <ul style="list-style-type: none"> <li>• Employees and students have information about the identity and role of a recipient’s confidential employees.</li> <li>• Employees and students at elementary schools and secondary schools know that all employees must notify the Title IX Coordinator of possible sex discrimination.</li> </ul>

Issue	The Title IX NPRM
	<ul style="list-style-type: none"> <li>• Employees and students at postsecondary institutions know that certain employees have a duty to notify the Title IX Coordinator of possible sex discrimination and other employees must instead provide them information about how to contact the recipient’s Title IX Coordinator and report sex discrimination.</li> <li>• Students (and parents, guardians and other authorized legal representatives of elementary and secondary school students) know how to make a complaint to initiate a recipient’s grievance procedures and also how to seek information about supportive measures and other resources without making a complaint.</li> <li>• Recipients know to honor a complainant’s request not to proceed with a complaint investigation whenever possible, as long as doing so does not prevent the recipient from ensuring equal access to its education program or activity.</li> </ul> <p><i>The current regulations provide that the decision to file a complaint of sexual harassment is for the complainant or Title IX Coordinator to make, depending on the circumstances, but they do not permit complaints under Title IX by former students or employees who are not participating or attempting to participate in the recipient’s education program or activity. (Current § 106.30(a))</i></p>
<p><b><i>Title IX Coordinator Response to Sex Discrimination (Proposed § 106.44(f)-(g))</i></b></p>	<p>Under the proposed regulations, a recipient would be required to take prompt and effective action to end any sex discrimination in its education program or activity. The proposed regulations would require a recipient to ensure that its Title IX Coordinator takes the following steps upon being notified about possible sex discrimination:</p> <ul style="list-style-type: none"> <li>• Treat the complainant and respondent equitably at every stage of the recipient’s response. (Proposed § 106.44(f)(1))</li> <li>• Notify the complainant of the recipient’s grievance procedures and, if a complaint is made, notify the respondent of the grievance procedures and notify the parties of the informal resolution process, if any. (Proposed § 106.44(f)(2))</li> <li>• Offer and coordinate supportive measures, as appropriate, to the complainant and respondent. (Proposed § 106.44(f)(3))</li> <li>• In response to a complaint, initiate the recipient’s grievance procedures or informal resolution process. (Proposed § 106.44(f)(4))</li> <li>• In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient’s education program or activity. (Proposed § 106.44(f)(6))</li> <li>• Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur in the recipient’s education program or activity, in addition to providing remedies to an individual complainant. (Proposed § 106.44(f)(7))</li> </ul>

Issue	The Title IX NPRM
	<p>The proposed regulations require recipients to offer supportive measures as appropriate to the complainant and/or respondent to the extent necessary to restore or preserve that person’s access to the recipient’s education program or activity. Supportive measures may include, for example, counseling, extension of deadlines, restrictions on contact between the parties, and voluntary or involuntary changes in class, work, or housing. (Proposed § 106.44(g))</p> <p><i>The current regulations require only that a recipient treat a complainant and respondent equitably by providing remedies to a complainant when it has determined that sexual harassment has occurred and by following a grievance process before imposing disciplinary sanctions or other actions on a respondent. (Current § 106.45(b)(1))</i></p> <p><i>The current regulations do not permit a recipient to offer an informal resolution process unless a formal complaint has been filed. (Current § 106.45(b)(9))</i></p>
<p><b><i>Grievance Procedures for All Sex Discrimination Complaints under Title IX</i></b> <b><i>(Proposed § 106.45)</i></b></p>	<p>Since 1975, the Title IX regulations have required a recipient to adopt and publish grievance procedures that provide for the prompt and equitable resolution of sex discrimination complaints. The current regulations include detailed requirements for grievance procedures only for complaints of sexual harassment. The proposed regulations adapt the current regulations to apply to all complaints of sex discrimination with specific changes that would take into account the age, maturity, and level of independence of students in various educational settings, the particular contexts of employees and third parties, and the need to ensure that recipients adopt grievance procedures that include basic and essential requirements for fairness and reliability for all parties that are well suited to implementing Title IX’s nondiscrimination guarantee in their respective settings.</p> <p>Under the proposed regulations, all recipients would be required to adopt grievance procedures in writing (proposed § 106.45(a)(1)) that incorporate the requirements of proposed § 106.45, including the following:</p> <ul style="list-style-type: none"> <li>• General requirements: <ul style="list-style-type: none"> <li>○ Equitable treatment of complainants and respondents. (Proposed § 106.45(b)(1))</li> <li>○ Title IX Coordinator, investigators, and decisionmakers must not have conflicts of interest or bias. (Proposed § 106.45(b)(2))</li> <li>○ Decisionmaker may be the same person as the Title IX Coordinator or investigator. (Proposed § 106.45(b)(2))</li> <li>○ A presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance procedures. (Proposed § 106.45(b)(3))</li> <li>○ Reasonably prompt timeframes for all major stages. (Proposed § 106.45(b)(4))</li> <li>○ Reasonable steps to protect privacy of parties and witnesses. (Proposed § 106.45(b)(5))</li> </ul> </li> </ul>

Issue	The Title IX NPRM
	<ul style="list-style-type: none"> <li>○ Objective evaluation of relevant and not otherwise impermissible evidence. (Proposed § 106.45(b)(6)-(7))</li> <li>● Notice of the allegations to the parties. (Proposed § 106.45(c))</li> <li>● Dismissals permitted in certain circumstances, but not required. (Proposed § 106.45(d))</li> <li>● Consolidation permitted for complaints arising out of the same facts or circumstances. (Proposed § 106.45(e))</li> <li>● Investigation requirements: (Proposed § 106.45(f)) <ul style="list-style-type: none"> <li>○ Burden is on the recipient to gather sufficient evidence. (Proposed § 106.45(f)(1))</li> <li>○ Equal opportunity for all parties to present relevant fact witnesses and other evidence. (Proposed § 106.45(f)(2))</li> <li>○ Determination by the decisionmaker of what evidence is relevant and what evidence is impermissible. (Proposed § 106.45(f)(3))</li> <li>○ A description provided to the parties by the recipient of the relevant and not otherwise impermissible evidence, as well as a reasonable opportunity to respond. (Proposed § 106.45(f)(4))</li> </ul> </li> <li>● A process that enables the decisionmaker to assess the credibility of the parties and witnesses when credibility is in dispute and relevant. (Proposed § 106.45(g))</li> <li>● Clear processes for the determination of whether sex discrimination occurred, including (proposed § 106.45(h)): <ul style="list-style-type: none"> <li>○ Determining whether sex discrimination occurred using the preponderance of the evidence standard of proof, unless the clear and convincing evidence standard is used in all other comparable proceedings, including other discrimination complaints, in which case that standard may be used in determining whether sex discrimination occurred. (Proposed § 106.45(h)(1))</li> <li>○ Notifying parties of the outcome of the complaint and any opportunity to appeal. (Proposed § 106.45(h)(2))</li> <li>○ When there is a determination that sex discrimination occurred, the Title IX Coordinator provides and implements remedies for the complainant or others whose access to the recipient’s education program or activity has been limited or denied by sex discrimination, and takes other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur. (Proposed § 106.45(h)(3))</li> <li>○ The grievance procedures are completed before imposing any sanctions. (Proposed § 106.45(h)(4))</li> <li>○ A recipient is prohibited from disciplining a party, witness, or other participant for making a false statement or for engaging in consensual sexual conduct based solely on the determination of whether sex discrimination occurred. (Proposed § 106.45(h)(5))</li> </ul> </li> <li>● Parties are permitted to choose to participate in an informal resolution process if one is provided by the recipient. (Proposed § 106.45(j))</li> </ul>

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	<ul style="list-style-type: none"> <li>• Grievance procedures must describe the range of possible supportive measures and a range or list of disciplinary sanctions and remedies for sex-based harassment complaints. (Proposed § 106.45(k))</li> </ul> <p>A recipient may add provisions to its grievance procedures as long as the provisions apply equally to the parties. (Proposed § 106.45(i))</p> <p><i>The current regulations include specific requirements for grievance procedures for complaints of sexual harassment that apply to all recipients (except that hearings and cross-examination by a party's representative are required only in postsecondary institutions). (Current § 106.45) Many of those requirements are also in proposed § 106.45. Some are in proposed § 106.46, discussed below, which would apply only to postsecondary institutions in response to complaints of sex-based harassment involving a student complainant or student respondent.</i></p>
<p><b><i>Additional Requirements for Grievance Procedures for Sex-Based Harassment Complaints Involving a Postsecondary Student</i></b></p> <p><b><i>(Proposed § 106.46)</i></b></p>	<p>A postsecondary institution's prompt and equitable written grievance procedures for complaints of sex-based harassment involving a student-complainant or student-respondent would include all of the requirements of proposed § 106.45, described above, and the following additional requirements under proposed § 106.46:</p> <ul style="list-style-type: none"> <li>• Written notice to the parties of allegations, dismissal, delays, meetings, interviews, and hearings. (Proposed § 106.46(c), 106.46(d), 106.46(e)(1) and 106.46(e)(5))</li> <li>• Opportunity to have an advisor of the party's choice at any meeting or proceeding. (Proposed § 106.46(e)(2)-(3))</li> <li>• Equitable access to relevant and not otherwise impermissible evidence or to a written report summarizing the evidence. (Proposed § 106.46(e)(6))</li> <li>• A process to assess credibility of parties and witnesses, when necessary, that includes either: <ul style="list-style-type: none"> <li>○ Allowing the decisionmaker to ask relevant and not otherwise impermissible questions in a meeting or at a live hearing, and allowing the parties to propose relevant and not otherwise impermissible questions for the decisionmaker or investigator to ask during a meeting or live hearing. (Proposed § 106.46(f)(1)(i)).</li> <li>○ Allowing an advisor for each party to ask relevant and not otherwise impermissible questions to other parties and any witnesses during a live hearing. (Proposed § 106.46(f)(1)(ii))</li> </ul> </li> <li>• Permitting, but not requiring, a live hearing. When a live hearing is permitted, a recipient must allow the parties, on request, to participate from separate locations using technology. (Proposed § 106.46(g))</li> <li>• Not permitting questions that are unclear or harassing of the party being questioned. (Proposed § 106.46(f)(3))</li> <li>• Not relying on a statement of a party that supports that party's position if the party does not respond to questions related to their credibility, and not drawing an inference about whether sex-based harassment</li> </ul>

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	<p>occurred based solely on a party's or witness's refusal to respond to questions related to their credibility. (Proposed § 106.46(f)(4))</p> <ul style="list-style-type: none"> <li>• Providing written notice of the determination that includes a description of the allegations, information about the policies and procedures used to evaluate the allegations, the decisionmaker's evaluation of the relevant evidence and determination of whether sex-based harassment occurred, disciplinary sanctions and remedies if relevant, and information about appeal procedures. (Proposed § 106.46(h))</li> <li>• Providing an opportunity to appeal based on procedural irregularity, new evidence, and conflict of interest or bias, as well as any other bases offered equally to the parties by the recipient. (Proposed § 106.46(i))</li> </ul> <p><i>The current regulations include many of these requirements for all recipients (except that hearings are optional at non-postsecondary recipients) but only for complaints of sexual harassment. (Current § 106.45)</i></p>
<p><b><i>Informal Resolution</i></b> <b><i>(Proposed § 106.44(k))</i></b></p>	<p>The proposed regulations would permit a recipient to offer an informal resolution process if appropriate whenever it receives a complaint of sex discrimination or has information about conduct that may constitute sex discrimination under Title IX in its education program or activity.</p> <ul style="list-style-type: none"> <li>• Participation in informal resolution must be voluntary.</li> <li>• Informal resolution is not permitted in situations in which an employee is accused of sex discrimination against a student. (Proposed § 106.44(k))</li> </ul> <p><i>The current regulations permit informal resolution only if a formal complaint alleging sexual harassment has been filed. (Current § 106.45(b)(9))</i></p>
<p><b><i>Retaliation</i></b> <b><i>(Proposed §§ 106.2, 106.71)</i></b></p>	<p>The proposed regulations would clarify that Title IX protects a person from retaliation, including peer retaliation, and that protection against retaliation is necessary to fulfill Title IX's requirement that recipients operate their education programs or activities free from sex discrimination. (Proposed § 106.71)</p> <ul style="list-style-type: none"> <li>• Retaliation would be defined as intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in a recipient's Title IX process. (Proposed § 106.2)</li> <li>• A recipient would be prohibited from taking action against a student or employee under its code of conduct for the purpose of intimidating, threatening, coercing, or discriminating against someone because they provided information or made a complaint regarding sex discrimination. (Proposed § 106.71(a))</li> <li>• Peer retaliation, which would be defined as retaliation by one student against another student, would also be prohibited. (Proposed §§ 106.2, 106.71(b))</li> </ul> <p><i>The current regulations prohibit retaliation; they do not include definitions of either "retaliation" or "peer retaliation." (Current § 106.71)</i></p>



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<p><b><i>Discrimination Based on Pregnancy or Related Conditions</i></b></p> <p><b><i>(Proposed § 106.2, 106.21(c), 106.40, 106.57)</i></b></p>	<p>The proposed regulations would clarify that recipients must protect students and employees from discrimination based on pregnancy or related conditions (defined in proposed § 106.2), including by providing reasonable modifications for students, (proposed § 106.40(b)(3)(ii) and (b)(4)), reasonable break time for employees for lactation (proposed § 106.57(e)(1)), and lactation space for both students and employees (proposed §§ 106.40(b)(3)(iv) and 106.57(e)(2)).</p> <p>The proposed regulations would also modernize and clarify Title IX’s longstanding prohibition against treating parents differently on the basis of sex, including by defining “parental status” to include, e.g., adoptive or stepparents, or legal guardians). (Proposed § 106.2)</p> <p>Under the proposed regulations, a recipient would be required ensure that when a student (or a student’s parent, guardian, or authorized legal representative) tells a recipient’s employee of the student’s pregnancy or related conditions, the employee must provide information on how to contact the Title IX Coordinator for further assistance. (Proposed § 106.40(b)(2)). Once a student or the student’s representative notifies the Title IX Coordinator, the Title IX Coordinator must:</p> <ul style="list-style-type: none"> <li>• Provide the student with the option of individualized, reasonable modifications as needed to prevent discrimination and ensure equal access to the recipient’s education program or activity. (Proposed § 106.40(b)(3)(ii) and (b)(4))</li> <li>• Allow the student a voluntary leave of absence for medical reasons and reinstatement upon return. (Proposed § 106.40(b)(3)(iii))</li> <li>• Provide the student a clean, private space for lactation. (Proposed § 106.40(b)(3)(iv))</li> </ul> <p>A recipient would be required to provide its employees with reasonable break time for lactation, as well as a clean and private lactation space. (Proposed § 106.57(e)(1)-(2))</p> <p><i>The current regulations prohibit discrimination against students, employees, and applicants based on pregnancy, childbirth, and recovery. The current regulations also prohibit recipients from adopting rules that treat parents differently on the basis of sex. (Current §§ 106.21(c)(2), 106.40(a)-(b), and 106.57(a)-(b))</i></p>
<p><b><i>Discrimination Based on Sexual Orientation, Gender Identity, and Sex Characteristics</i></b></p>	<p>The proposed regulations would make clear that Title IX prohibits all forms of sex discrimination, including discrimination based on sexual orientation, gender identity, and sex characteristics. (This proposed provision also addresses discrimination based on sex stereotypes and pregnancy or related conditions.) (Proposed § 106.10)</p>

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<p><i>(Proposed §§ 106.10, 106.31(a)(2), 106.41(b)(2))</i></p>	<p>The proposed regulations would address discrimination based on sexual orientation, gender identity, and sex characteristics by:</p> <ul style="list-style-type: none"> <li>• Prohibiting recipients from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm (unless otherwise permitted by Title IX). This includes policies and practices that prevent a student from participating in a recipient’s education program or activity consistent with their gender identity. This rule would not apply in contexts in which a particular practice is otherwise permitted by Title IX, such as admissions practices of traditionally single-sex postsecondary institutions or when permitted by a religious exemption. (Proposed § 106.31(a)(2))</li> </ul> <p>The Department will engage in a separate rulemaking to address Title IX’s application to the context of athletics and, in particular, what criteria recipients may be permitted to use to establish students’ eligibility to participate on a particular male or female athletic team. (See discussion of § 106.41.)</p>