



Webinar

The U.S. Department of Education's Notice of Proposed Rulemaking on Title IX and Sexual Misconduct (2022)

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Associate

Context

November 29, 2018
ED publishes NPRM on Title IX

May 19, 2020
Final Rule published in Federal Register



What Triggers A Response



What Triggers A Response Obligation?

“The Department’s current view is that these decisions are correct in . . . requir[ing] a recipient to address a hostile environment based on sex that exists within its education program or activity, whether or not the initial sex



What Triggers A Response Obligation?

- Actual knowledge no longer triggers recipient's response obligations.
- Instead, various categories of employees who receive notification of possible sex discrimination will trigger response obligations.
- Much broader than officials with authority to institute corrective measures under the current regulations.

Notification Requirements

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- Any employee with authority to institute corrective measures on behalf of recipient
- Any employee with responsibility for administrative leadership, teaching, or advising when complainant is a student

- Any employee with responsibility for administrative leadership, teaching, or advising when complainant is an employee
- All other employees

Response Obligations

Title IX Coordinator Responsibilities

- Once a recipient is on notice, the Title IX Coordinator must:
 - Treat both parties equitably;
 - Notify complainant of grievance procedures;
 - If complaint is made, notify respondent of applicable grievance procedures and both parties of informal resolution;
 - Offer and coordinate supportivemeasures;
 - Initiate grievance procedures or informal resolution;
 - If no complaint, determine whether to initiate grievance procedures and
 - Take other steps to ensure that sex discrimination does not continue or recur.

NPRM § 106.44(f)

Initiating The Grievance Process (Unwilling Complainant)

- A complaint generally should be initiated when there is:
 - An immediate and serious threat to the health and safety of any community member; or
 - Corroborating evidence available.

Initiating Grievance Process (Unwilling Complainant)

- Factors to consider:
 - Risk of additional sex discrimination;
 - Seriousness of alleged sex discrimination;
 - Age and relationship of parties;
 - Scope of alleged sex discrimination;
 - Availability of evidence; and
 - Disciplinary sanction

NPRM Preamble at 204 (2016)

Title IX Coordinator Responsibilities

- Upon receiving notice that a student is pregnant, a Title IX Coordinator must:
 - Inform student of the recipient's obligations re: pregnancy and related conditions;
 - Provide student with option of reasonable modification to policies/practices/procedures;
 - Allow voluntary access to a separate portion of program or activity;
 - Allow leave of absence;
 - Ensure availability of lactation space; and
 - Maintain grievance procedures under §106.45 and §106.46.



Supportive Measures

- Factors to Consider When Offering Supportive Measures:
 - Need expressed by the complainant or respondent;
 - Ages of the parties involved, the nature of the allegations and their continued effects on the complainant or respondent;
 - Whether the parties continue to interact directly in the recipient's education program or activity; and
 - Whether steps have already been taken to mitigate the harm from the parties' interactions, such as implementation of a civil protective order.

NPRM Preamble at 216

Supportive Measures

- Supportive measures can now include temporary measures that burden a respondent:
 - May be imposed only during pendency of the grievance procedures and
 - Must be no more restrictive than is necessary to restore or preserve the complainant's access to the recipient's education program or activity
- Recipient must provide the parties with the opportunity to appeal the supportive measures
 - Decision maker cannot be the same person who implemented the measures and
 - Recipient must conduct fact specific inquiry to determine what is a timely appeal

Informal Resolution

“A recipient has the authority to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that may constitute sex





Questions?



The Grievance Process

The Grievance Process: §106.45

~~§~~ ~~10~~ ~~6~~ ~~4~~ ~~5~~ “The
decisionmaker *may* be the same person as
the Title IX Coordinator or

The Grievance Process: §106.45

Notice of allegations: “Upon initiation of the recipient's grievance procedures, a recipient must provide notice of the allegation to the parties whose identities are known.” NPRM §106.45(c).

Dismissals

2020 Regulations

If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if



The Grievance Process: §106.45

6 6
NPRM §106.45(h)(1)



The Grievance Process: §106.45

6 6 “Notify the parties of the outcome of the complaint, including the determination of whether sex discrimination occurred under Title IX, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable.”

NPRM §106.45(h)(2).

The Grievance Process: §106.45

- **§ 106.45(d)(3)** : “The recipient must . . . [i]f there is a determination that sex discrimination occurred, as appropriate, require the Title IX Coordinator to provide and implement remedies to a complainant or other person the recipient identifies as having had equal access to the recipient’s education program or activity limited or denied by sex discrimination, 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.” NPRM §106.45(h)(3).

The Grievance Process: §106.45

- **§ 106.45(e)** : “The recipient must . . . [n]ot discipline a party, witness, or others participating in a recipient’s grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient’s determination of whether sex discrimination occurred.” NPRM §106.45(h)(5).

The Grievance Process: §106.45

- **§ 106.45** : "If a recipient adopts additional provisions as part of its grievance procedure for handling complaints of sex discrimination, including sex based harassment, such additional provisions

The Grievance Process: §106.46

- Additional Procedures Under NPRM §106.46:
 - Student employees
 - Written notice required, NPRM §106.46(c)
 - Oral AND written complaint can initiate grievance procedures
 - Complaint withdrawal in writing
 - 6 additional



The Grievance Process: §106.46

“The postsecondary institution must provide the determination whether sex based harassment occurred in writing to the parties simultaneously.”
NPRM §106.46(h)

The Grievance Process: §106.46

- Mandatory
- Grounds for Appeals
 - procedural irregularity,
 - new evidence,
 - conflict of interest or bias,
 - investigator or decisionmaker that would change the outcome;
 - additional grounds for appeal discretionary
- Comply with requirements of NPRM §106.45(d)(3)(i), (iv), (v)

Miscellaneous

Retaliation (§106.71)

Training

- A recipient must be trained on:
 - the recipient's obligation to address sex discrimination in its education program or activity,
 - the scope of conduct that constitutes sex discrimination (including the proposed definition of "sex based harassment") and
 - all applicable notification and information requirements under proposed §§ 106.40(b)(2) and 106.44(p. 143)
 - Issues related to pregnancy and parenting

Training

- A recipient must be trained on:

Training

- **6.1.1** **6.1.2** **6.1.3** **6.1.4** **6.1.5** **6.1.6** **6.1.7** **6.1.8** **6.1.9** **6.1.10** **6.1.11** **6.1.12** **6.1.13** **6.1.14** **6.1.15** **6.1.16** **6.1.17** **6.1.18** **6.1.19** **6.1.20** **6.1.21** **6.1.22** **6.1.23** **6.1.24** **6.1.25** **6.1.26** **6.1.27** **6.1.28** **6.1.29** **6.1.30** **6.1.31** **6.1.32** **6.1.33** **6.1.34** **6.1.35** **6.1.36** **6.1.37** **6.1.38** **6.1.39** **6.1.40** **6.1.41** **6.1.42** **6.1.43** **6.1.44** **6.1.45** **6.1.46** **6.1.47** **6.1.48** **6.1.49** **6.1.50** **6.1.51** **6.1.52** **6.1.53** **6.1.54** **6.1.55** **6.1.56** **6.1.57** **6.1.58** **6.1.59** **6.1.60** **6.1.61** **6.1.62** **6.1.63** **6.1.64** **6.1.65** **6.1.66** **6.1.67** **6.1.68** **6.1.69** **6.1.70** **6.1.71** **6.1.72** **6.1.73** **6.1.74** **6.1.75** **6.1.76** **6.1.77** **6.1.78** **6.1.79** **6.1.80** **6.1.81** **6.1.82** **6.1.83** **6.1.84** **6.1.85** **6.1.86** **6.1.87** **6.1.88** **6.1.89** **6.1.90** **6.1.91** **6.1.92** **6.1.93** **6.1.94** **6.1.95** **6.1.96** **6.1.97** **6.1.98** **6.1.99** **6.1.100** must be trained on:
 - the topics listed two slides ago;
 - the rules and practices associated with them.



Questions?

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