



Association of
Title IX Administrators

The New Regulations and (hopefully) Final Rule on Title IX and the OCR

Mississippi State University Legal Issues Conference 2023

Presented by:

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REGISTRATION LINK



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Lobby Link
(access to slides)



Strategic Risk
Management Solutions



Any advice or opinion provided during this webinar, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.



CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

AGENDA

1

2022 NPRM

2

Scope & Applicability

3

Reporting & Response

4

Intake & Evaluation

5

Grievance Procedures

6

Pregnancy & Related
Conditions

7

What's Next?

8

Questions?



2022 NPRM

NPRM OVERVIEW

- The Department of Education (ED) released a 701-page Notice of Proposed Rulemaking (NPRM) on June 23, 2022 – the 50th Anniversary of Title IX
- Published in the Federal Register on July 12
 - 60-day comment period ran until September 12
 - ED received over 210,000 comments
 - ED must now respond to all comments as part of the rulemaking process
- Final version likely will differ from NPRM
 - Less deviation expected than in the 2018 NPRM versus 2020 Regulations

NPRM, GENERALLY

- Broader than the 2020 Regulations
 - Includes the behavior covered by the 2020 Regulations
 - Expands to provide procedures to respond to other forms of sex discrimination
- Elements of both Obama-era and Trump-era guidance/regulations
- Adds in greater flexibility
- Return to Stop, Prevent, Remedy,

THE FINAL RULE

- ED expects to release a Final Rule in 2023
 - 2020 Regulations took approximately 18 months from NPRM to release
 - Anticipated implementation by August 2023
 - 2020 Regulations had approximately 100-day implementation period



SCOPE & APPLICABILITY

SCOPE (§ 106.10)

- NPRM is broader than the 2020 Regulations
- Discrimination on the basis of sex includes
 - Sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
- Sex discrimination includes sex-based harassment
 - Replaces “sexual harassment” and includes
 - Quid pro quo, Hostile Environment, Sexual Assault, Dating Violence, Domestic Violence, and Stalking
- ED has announced the proposed rule regarding athletic eligibility as well – it will likely be released soon after as a final rule!

HOSTILE ENVIRONMENT

- Hostile Environment Harassment (pg. 657-58)
 - Unwelcome sex-based conduct that is
 - Sufficiently severe OR pervasive, that, based on the totality of the circumstances AND
 - Evaluated subjectively and objectively
 - Denies or limits a person's ability to participate in or benefit from the recipient's education program or activity

HOSTILE ENVIRONMENT (CONT.)

- OCR's proposed definition also provides factors for evaluating whether a hostile environment exists including:
 - Complainant's ability to access the education program or activity
 - The type, frequency, and duration of the conduct
 - The parties' ages, roles, and previous interaction(s)
 - The location and context of the conduct
 - The control the Recipient has over the Respondent
- Potential intersection with First Amendment

APPLICABILITY

- Education program or activity
 - Broadly interpreted to include:
 - Academic, extracurricular, and athletic programs
 - Activities on school network, bus, class, or facilities
- De Minimis Harm
 - Policy or practice preventing participation in a program or activity consistent with gender identity “subjects a person to more than de minimis harm on the basis of sex”

§ 106.31; NPRM pg. 668

APPLICABILITY (CONT.)

- Jurisdiction includes:
 - Conduct subject to Recipient's disciplinary authority,
 - Conduct in a building owned or controlled by a student organization officially recognized by a postsecondary institution
- Removes geographical restrictions
 - Conduct outside the United States may need to be addressed under Title IX
 - Downstream (in-program) effects
 - Charging decisions may become more complicated

§ 106.11; NPRM pg. 666
§ 106.31; NPRM pg. 668

IF THE CONDUCT...

Occurred in your program
or activity

AND/OR

Is subject to your
disciplinary authority

AND/OR

Has led to a hostile
environment within your
program or activity

AND would meet Title IX, if proven...

YOU LIKELY HAVE JURISDICTION

OTHER POLICIES & LAWS

- The proposed regulations will likely overlap with existing policies and laws
 - Title VII
 - Fair Housing Act
 - Violence Against Women Act Amendments to the Clery Act
 - State statutory definitions of sexual harassment applicable to students and/or employees
 - State or jurisdiction requirements for sexual harassment investigations and/or reporting requirements
- Work with your legal counsel to figure out the best way to ensure all institutional policies co-exist cohesively



Decision Point:
What other laws and policies does your institution need to consider?



REPORTING & RESPONSE REQUIREMENTS

- Reporting & Response Requirements
- Reporting Categories
- Exceptions
- Additional Requirements

REPORTING & RESPONSE TO DISCLOSURES REQUIREMENTS (§ 106.44)

EMPLOYEE ROLE	DISCLOSURE FROM	NOTIFY TITLE IX COORDINATOR	PROVIDE TIXC INFO
Confidential Employees	<ul style="list-style-type: none"> • Student • Employee 	NO	YES
Employees with the authority to institute corrective measures	<ul style="list-style-type: none"> • Student • Employee 	YES	YES
Employees with responsibility for administrative leadership, teaching, and advising	• Student	YES	YES
	• Employee	CHOOSE ONE OR THE OTHER	
All other employees who are not confidential employees	<ul style="list-style-type: none"> • Student • Employee 	CHOOSE ONE OR THE OTHER	

REPORTING EXCEPTIONS

- No self-reporting requirement for employee Complainants
- Postsecondary public awareness events (§ 106.44(e))
 - Institution not obligated to respond to information provided during public event, including on online platforms
 - Unless information reveals an immediate and serious threat to the health or safety of students or other persons in the postsecondary institution's community, institution must respond
 - Must incorporate information/trends revealed at public awareness events into prevention education

§ 106.44; NPRM pg. 674-675

TRAINING REQUIREMENTS (§ 106.8)

- Various training requirements for:
 - All employees
 - Investigators, Decision-makers, and others responsible for implementing grievance procedures or modifying/terminating supportive measures
 - Informal Resolution Facilitators
 - Title IX Coordinator
 - No training requirement for students under NPRM
- All training materials must be made available on institution's website



Decision Point:
Training frequency and
modalities

NPRM pg. 662-665

ADDITIONAL REQUIREMENTS (§ 106.44)

- Monitoring
 - TIXC must monitor education program or activity for barriers to reporting information and take reasonable steps to address such barriers
 - Identity-based barriers
 - Perceived delays in responding to reports
 - Infrequent communication/updates
 - Fears of retaliation
 - Collateral conduct charges/lack of amnesty policies
 - Limited supportive measures offered
 - Lack of awareness of Title IX Office/TIXC
 - Perceived inadequate response



INTAKE & EVALUATION

- Notice & Complaints
- Intake & Initial Evaluation
- Dismissals
- Supportive Measures
- Removals
- Informal Resolution

NOTICE & COMPLAINTS

- “Complaint” replaces “Formal Complaint”
- Notice (and complaints) can be verbal or written
 - Complaints do not have to be submitted to Title IX Coordinator/Title IX Team Member
- Complaints can be made by a Complainant or the TIXC
 - If a parent, guardian, or other authorized legal representation has the authority to act on behalf of a person, then that person can also file a complaint
- For allegations of sex discrimination, other than sex-based harassment, any student, employee, or third party may make a complaint

§ 106.2; NPRM pg. 651

§ 106.6; NPRM pg. 665

§ 106.45; NPRM pg. 682

INTAKE & INITIAL EVALUATION

- Upon notification of sex discrimination allegations, TIXC must:
 - Treat parties equitably
 - Notify Complainant of procedures and, in the event of a complaint, prepare to notify the Respondent
 - Offer and coordinate supportive measures
 - Initiate grievance procedures or informal resolution as requested
- Initial Evaluation
 - Provides TIXC with greater latitude to collect information before formal grievance process begins

§ 106.44(f); NPRM pg. 675-76

DISMISSALS (§ 106.45)

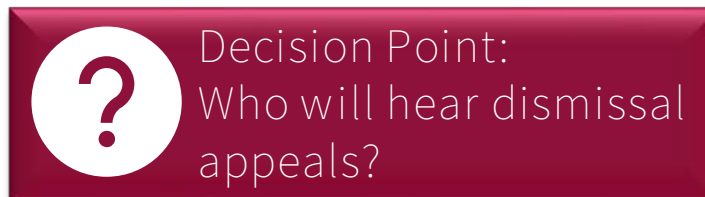
All dismissals are discretionary, but can occur when:

- The Respondent is unable to be identified *after reasonable steps to do so*
- The Respondent is no longer participating in the educational program or employed by the Recipient
- The Complainant withdraws all or a portion of the complaint and any remaining conduct ≠ discrimination under Title IX
- It is determined that the conduct, even if proven, would ≠ discrimination under Title IX
 - *Prior to dismissing the complaint, the Recipient must take reasonable efforts to clarify the allegations with Complainant*

DISMISSALS (§ 106.45) (CONT.)

Upon dismissing a complaint:

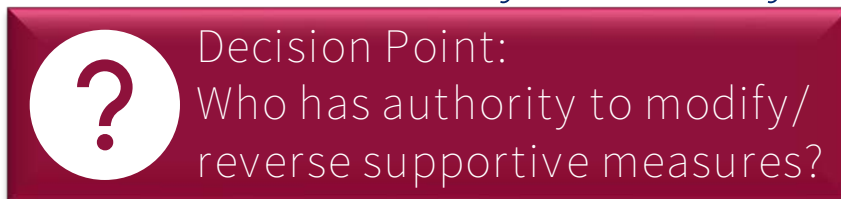
- A Recipient must notify the Complainant of the basis for the dismissal
- Supportive measures should still be offered to the Complainant
- Must notify the Respondent of the dismissal and offer supportive measures if the Respondent has already been notified of the complaint
- All parties have a right to appeal the dismissal
 - What's Unclear?
 - Whether an unaware Respondent has this right



NPRM pg. 686-87

SUPPORTIVE MEASURES (§ 106.44)

- Should restore or preserve the party's access
 - May not impose burdensome measures for punitive or disciplinary reasons, but permits burdening Respondent for other reasons during the grievance process
- Supportive measures may be continued, modified, or terminated at the end of the grievance process or IR
- Must provide an opportunity to seek modification or reversal of supportive measure (or lack thereof)
 - An impartial employee, not involved with the initial decision, must have authority to modify or reverse



NPRM pg. 676-77

REMOVALS (§ 106.44)

- Administrative Leave
 - Institutions may place employee Respondents on administrative leave during grievance process
- Emergency Removal
 - Institutions may remove student Respondents, on an emergency basis, if an individualized safety and risk analysis determines:
 - An immediate and serious threat exists and arises from the allegations
 - Removes the “physical” threat requirement from the 2020 Regulations



Decision Point:
Who will conduct the safety
and risk analysis?

INFORMAL RESOLUTION (§ 106.44)

- Informal Resolution Requirements:
 - Voluntary by parties
 - TIXC must agree
 - Provide notice to parties in advance (detailed requirements)
 - Facilitator may not be Investigator or Decision-maker
 - Not permitted in complaints with a student Complainant and an employee Respondent
- Informal Resolution can occur without a formal complaint
 - Can look like a supportive measures only response
- Information and records from the Informal Resolution cannot be used in the grievance process if the Informal Resolution is unsuccessful



Decision Point:
Who will facilitate
Informal Resolutions?



GRIEVANCE PROCEDURES

- Investigating
- Decision-making
- Appeals
- Advisors
- Evidence

§ 106.45 VS. § 106.46

- Section 106.45 is a bare-bones civil rights process
 - Section 106.46 is a more robust process that incorporates all of the elements of § 106.45 and retains many features from the 2020 regulations
- Two separate policies are permitted, but not required



GRIEVANCE PROCEDURES

- Section 106.45 outlines a list of requirements for written grievance procedures that generally apply to both § 106.45 and § 106.46.
- Prohibits conflicts of interest or bias
- Allows for single-investigator model
 - No requirement for a separate Decision-maker
 - Permissible for the Investigator to serve as the Decision-maker
 - Permissible for the TIXC to serve as the Investigator (and/or DM)



Decision Point:
Who will serve as an
investigator? As Decision-
maker?

NPRM pg. 682-90

GRIEVANCE PROCEDURES (CONT.)

- Reasonably prompt timeframe for major process stages
 - Evaluation, Investigation, Determination, Appeal
- Reasonable steps to protect privacy without restricting a party's ability to obtain and present evidence
 - Section 106.46 specifies that expert witnesses may be allowed if the right is offered to all parties
- Objective evaluation of permissible relevant evidence
- Allows for additional provisions, so long as they are applied equally to the parties



Decision Point:
Will expert witnesses be permitted?
Will you add other provisions?

NPRM pg. 682-690

GRIEVANCE PROCEDURES (CONT.)

- Notice must be provided to parties at the beginning of an investigation

§ 106.45

- Notice does not have to be written
- No waiting period between notice and interview

§ 106.46

- Written notice required
- Sufficient time to prepare before an interview required
- May be accompanied by an Advisor of choice
- Presumption of non-responsibility
- Prohibition against false statements, if any



Decision Point:
Do you have policies prohibiting false statements? If not, will you add them?

GRIEVANCE PROCEDURES (CONT.)

- Complaints can be consolidated in some situations
- The burden to conduct an investigation and gather sufficient information to make a determination is on the Recipient
- For sex-based harassment complaints only, the grievance procedures must:
 - Describe the range of supportive measures available
 - Describe the range of possible disciplinary sanctions and remedies that could be imposed



Decision Point:
What are the range of sanctions and remedies for students? For Employees?



Decision Point:
What supportive measures are available?

NPRM pg. 682-90

INVESTIGATING

- Adequate, reliable, and impartial investigations of complaints
- Equal opportunity for parties to present inculpatory and exculpatory evidence
- Investigators must collect evidence and determine relevance

§ 106.45

- Written or verbal description of relevant evidence
- Reasonable opportunity for parties to respond

§ 106.46

- Equitable access to all relevant evidence or to an investigation report that summarizes the evidence
- Reasonable opportunity to review and respond
- Review must take place before the hearing, if any

DECISION-MAKING

	§ 106.45	§ 106.46
Second 10-day period	<ul style="list-style-type: none"> • Not required 	<ul style="list-style-type: none"> • Not required
Credibility Assessment	<ul style="list-style-type: none"> • Decision-maker is required to assess credibility • Does not have to occur during a hearing or live questioning 	<ul style="list-style-type: none"> • Decision-maker(s) required to assess credibility through live questioning during a live hearing or through individual meetings
Live Hearing	<ul style="list-style-type: none"> • Not required 	<ul style="list-style-type: none"> • Permissible • Required in some jurisdictions

NPRM pg. 682-90

DECISION-MAKING (CONT.)

	§ 106.45	§ 106.46
Cross-examination	<ul style="list-style-type: none">• Not required	<ul style="list-style-type: none">• Required• Can occur through the Decision-maker or through party Advisors (during a live hearing)
Written Outcome	<ul style="list-style-type: none">• Permitted but not required	<ul style="list-style-type: none">• Required
Appeal	<ul style="list-style-type: none">• Permitted but not required• May be otherwise required	<ul style="list-style-type: none">• Required

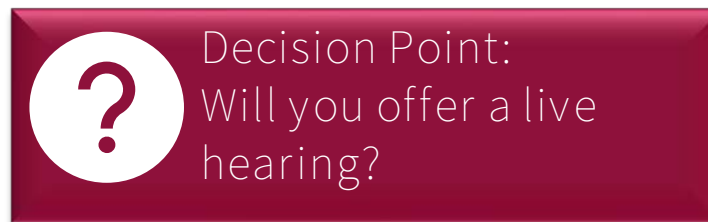
INDIVIDUAL MEETINGS

- Under § 106.46 if a Recipient chooses to conduct individual meetings, Decision-makers must be permitted to pose their own relevant questions and relevant questions from the parties
 - Parties may provide questions directly to Decision-maker or, if separate, to the Investigator
- What's Unclear?
 - If an institution utilizes the same administrator for investigating and decision-making, can cross-examination take place during the investigation?
 - Does cross-examination have to occur after the investigation has concluded?

§ 106.46(f); NPRM pg. 694

LIVE HEARINGS

- Under § 106.46 if a Recipient conducts live hearings:
 - Decision-makers must be allowed to pose their own relevant questions and relevant questions from the parties, OR
 - Each party's Advisor must be allowed to ask any party and any witnesses all relevant questions
- Can include questions going to credibility
- Parties can never ask questions directly



§ 106.46(f); NPRM pg. 694

OUTCOME DETERMINATION

- After making a determination as to whether the sex-based harassment occurred, the Recipient must provide that determination to the parties
 - Under § 106.45
 - Does not have to be in writing
 - Under § 106.46
 - Written determination must include:
 - Description of alleged sex-based harassment
 - Information about policies and procedures
 - Decision-maker's evaluation of credible evidence and determination
 - Disciplinary sanctions and/or remedies, as appropriate
 - Appeal procedures

NPRM pg. 696

APPEALS

- Under § 106.46 institutions are required to offer an opportunity to request an appeal after a final determination
 - Outcome becomes final on the date the Recipient provides a written determination of an appeal, or if an appeal is not filed, the date on which appeal would no longer be timely
- Appeal Decision-maker(s) cannot be the Investigator or Decision-Maker



STANDARD OF PROOF

- Standard of Proof
 - Language shift from “burden of proof” or “standard of evidence”
- Must use preponderance of the evidence *unless*
 - Clear and convincing is used in all other comparable proceedings, including other discrimination complaints (Title VII, Title VI)
 - Employee Respondent vs. Student Respondent complaints are not comparable



Decision Point:
Which standard of proof will be used for employees? Students?

§ 106.6(g); NPRM pg. 688

ADVISORS

- Under § 106.45, Recipients are not required to provide Advisors
 - Recipients are not prohibited from doing so, as long as all parties are treated equitably
 - Advisors may otherwise be required
 - VAWA
 - Union/CBA Agreements
- Under § 106.46, all parties have the right to be accompanied by an Advisor of choice
 - An Advisor is not required unless an institution has chosen to implement live hearings with Advisor-led cross-examination
 - If a party does not have an Advisor, the Recipient must provide an Advisor at no cost

§ 106.46(e)(2); NPRM pg. 692

TYPES OF EVIDENCE

Relevant

Impermissible
(regardless of
relevance)

Not Relevant



PREGNANCY & RELATED CONDITIONS

- Pregnancy Discrimination
- Reasonable Modifications
- Pregnancy Leave
- Lactation Space

PREGNANCY DISCRIMINATION

- Pregnancy or related conditions:
 - 1) Pregnancy, childbirth, termination of pregnancy, or lactation
 - 2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
 - 3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions
- Nondiscrimination
 - Cannot adopt policies, practices, or procedures
 - To treat a student OR employee differently based on current, potential, or past pregnancy related conditions

§ 106.2; NPRM pg. 655
§ 106.21; NPRM pg. 667

PREGNANCY DISCRIMINATION (CONT.)

- Admissions/Enrollment
 - No pre-admission or enrollment inquiries regarding marital status
 - Including asking “Miss or Mrs.”
 - Self-identification of sex is permissible if required from all applicants
- What’s Unclear?
 - Non-birthing parents
 - Scope of parental protections

§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 698-99

RESPONSE TO PREGNANCY

- Providing Information
 - When an employee acquires knowledge of a student's pregnancy or related conditions by the student...the employee must inform that person of Title IX support
- TIXC required response:
 - Prohibit sex discrimination
 - Reasonable modifications (document it!)
 - Allow voluntary access to separate and comparable program, if desired
 - Voluntary leave of absence
 - Availability of lactation space
 - Grievance procedures for sex discrimination complaints

§ 106.40; NPRM pg. 669-72

REASONABLE MODIFICATIONS

- Reasonable modifications may include:
 - Breaks to attend health needs
 - Breaks for breastfeeding or expressing breast milk
 - Absences for medical appointments
 - Access to online or homebound education
 - Changes in sequence or schedule of courses
 - Extensions or rescheduling examinations
 - Counseling
 - Elevator access

§ 106.40; NPRM pg. 669-72

PREGNANCY-RELATED LEAVE

- Pregnancy or related conditions serve as a justification for a reasonable, voluntary leave of absence
 - Can be unpaid
 - Applies to employees and students
 - Even if there is no policy or the person does not qualify under the policy
- Upon return, the person should be reinstated to their prior or a comparable status
 - For employees, there should be no decrease in compensation
 - For students, this includes academic and extracurricular status

§ 106.40; NPRM pg. 670
§ 106.57; NPRM pg. 699

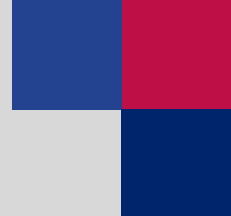
LACTATION TIME & SPACE

- Employees and students must be provided reasonable break times for breastfeeding or expressing breast milk
- Lactation Space
 - Not a bathroom
 - Clean, shielded from intrusion
 - Can be used by a student or employee, as needed



Decision Point:
How many lactation spaces
are needed to reasonably
accommodate both student
and employee populations?

§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 699



WHAT'S NEXT?

POSSIBLE LEGAL CHALLENGES

- 2020 Regulations saw several legal challenges
 - *Cardona* decision ultimately struck the suppression clause
 - No challenges delayed or halted implementation
- The Final Rule will likely face many legal challenges
 - Tennessee + 19 other states have a current injunction
 - *State of Tenn., et al. v. U.S. Dep’t of Educ.*, No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022)
 - Regulatory overreach
 - *West Virginia v. EPA*, 597 U.S. ____ (2022)
 - Additional challenges likely

SPECIFIC CONSIDERATIONS

- State Laws & Case Law
 - Does your jurisdiction have requirements related to hearings or cross-examination?
 - Specific requirements for investigations or determinations?
 - Many states are continuing to introduce state laws related to Title IX
- Post-*Dobbs*
 - High potential for impact in school settings

THINGS TO DO BEFORE IMPLEMENTATION

- Review today's decision points
- Prepare to expedite policy revisions at your institution
- Educate community about future changes
 - The final changes may be different from the NPRM
- Review current policies, practices, publications, and websites
 - Create a checklist of changes that will need to be made to each
- Work with your legal counsel to determine how the proposed regulations intersect with other policies and governing laws
- KEEP FOLLOWING THE 2020 REGULATIONS!



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Questions?

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