

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

Issue	The Title IX NPRM
<p><i>Prohibiting All Forms of Sex Discrimination (Proposed § 106.10)</i></p>	<p>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)</p>
<p><i>Defining Sex-Based Harassment (Proposed § 106.2)</i></p>	<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[†] 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>
<p><i>Addressing Off-Campus Conduct that Creates or Contributes to a Hostile Environment in a</i></p>	<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"> • Conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. (Proposed § 106.11)

* 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](#).

[†] Recipients are elementary schools and secondary schools, postsecondary institutions, and other recipients of Federal funds.

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<p>Recipient’s Education Program or Activity (Proposed § 106.11)</p>	<ul style="list-style-type: none"> • Conduct that occurs off-campus when the respondent[‡] is a representative of the recipient or otherwise engaged in conduct under the recipient’s disciplinary authority. (Proposed § 106.11) <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>Responding to Sex Discrimination (Proposed § 106.44(a))</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>Ensuring recipients learn of possible sex discrimination (Proposed § 106.44(c))</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"> • 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

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

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	<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"> • 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"> • 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))
<p><i>Respecting Complainant Autonomy</i> <i>(Proposed §§ 106.2, 106.8(d), 106.44(a) –(e))</i></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"> • Employees and students have information about the identity and role of a recipient’s confidential employees. • Employees and students at elementary schools and secondary schools know that all employees must notify the Title IX Coordinator of possible sex discrimination.

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	<ul style="list-style-type: none"> • 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. • 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. • 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. <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><i>Title IX Coordinator Response to Sex Discrimination (Proposed § 106.44(f)-(g))</i></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"> • Treat the complainant and respondent equitably at every stage of the recipient’s response. (Proposed § 106.44(f)(1)) • 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)) • Offer and coordinate supportive measures, as appropriate, to the complainant and respondent. (Proposed § 106.44(f)(3)) • In response to a complaint, initiate the recipient’s grievance procedures or informal resolution process. (Proposed § 106.44(f)(4)) • 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)) • 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))

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	<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><i>Grievance Procedures for All Sex Discrimination Complaints under Title IX (Proposed § 106.45)</i></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"> • General requirements: <ul style="list-style-type: none"> ○ Equitable treatment of complainants and respondents. (Proposed § 106.45(b)(1)) ○ Title IX Coordinator, investigators, and decisionmakers must not have conflicts of interest or bias. (Proposed § 106.45(b)(2)) ○ Decisionmaker may be the same person as the Title IX Coordinator or investigator. (Proposed § 106.45(b)(2)) ○ 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)) ○ Reasonably prompt timeframes for all major stages. (Proposed § 106.45(b)(4)) ○ Reasonable steps to protect privacy of parties and witnesses. (Proposed § 106.45(b)(5))

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	<ul style="list-style-type: none"> ○ Objective evaluation of relevant and not otherwise impermissible evidence. (Proposed § 106.45(b)(6)-(7)) ● Notice of the allegations to the parties. (Proposed § 106.45(c)) ● Dismissals permitted in certain circumstances, but not required. (Proposed § 106.45(d)) ● Consolidation permitted for complaints arising out of the same facts or circumstances. (Proposed § 106.45(e)) ● Investigation requirements: (Proposed § 106.45(f)) <ul style="list-style-type: none"> ○ Burden is on the recipient to gather sufficient evidence. (Proposed § 106.45(f)(1)) ○ Equal opportunity for all parties to present relevant fact witnesses and other evidence. (Proposed § 106.45(f)(2)) ○ Determination by the decisionmaker of what evidence is relevant and what evidence is impermissible. (Proposed § 106.45(f)(3)) ○ 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)) ● 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)) ● Clear processes for the determination of whether sex discrimination occurred, including (proposed § 106.45(h)): <ul style="list-style-type: none"> ○ 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)) ○ Notifying parties of the outcome of the complaint and any opportunity to appeal. (Proposed § 106.45(h)(2)) ○ 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)) ○ The grievance procedures are completed before imposing any sanctions. (Proposed § 106.45(h)(4)) ○ 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)) ● Parties are permitted to choose to participate in an informal resolution process if one is provided by the recipient. (Proposed § 106.45(j))

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	<ul style="list-style-type: none"> 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)) <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><i>Additional Requirements for Grievance Procedures for Sex-Based Harassment Complaints Involving a Postsecondary Student</i></p> <p><i>(Proposed § 106.46)</i></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"> 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)) Opportunity to have an advisor of the party's choice at any meeting or proceeding. (Proposed § 106.46(e)(2)-(3)) Equitable access to relevant and not otherwise impermissible evidence or to a written report summarizing the evidence. (Proposed § 106.46(e)(6)) A process to assess credibility of parties and witnesses, when necessary, that includes either: <ul style="list-style-type: none"> 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)). 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)) 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)) Not permitting questions that are unclear or harassing of the party being questioned. (Proposed § 106.46(f)(3)) 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

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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"> • 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)) • 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)) <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>Informal Resolution (Proposed § 106.44(k))</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"> • Participation in informal resolution must be voluntary. • Informal resolution is not permitted in situations in which an employee is accused of sex discrimination against a student. (Proposed § 106.44(k)) <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>Retaliation (Proposed §§ 106.2, 106.71)</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"> • 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) • 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)) • Peer retaliation, which would be defined as retaliation by one student against another student, would also be prohibited. (Proposed §§ 106.2, 106.71(b)) <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><i>Discrimination Based on Pregnancy or Related Conditions</i></p> <p><i>(Proposed § 106.2, 106.21(c), 106.40, 106.57)</i></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"> • 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)) • Allow the student a voluntary leave of absence for medical reasons and reinstatement upon return. (Proposed § 106.40(b)(3)(iii)) • Provide the student a clean, private space for lactation. (Proposed § 106.40(b)(3)(iv)) <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><i>Discrimination Based on Sexual Orientation, Gender Identity, and Sex Characteristics</i></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"> • 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)) <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>