

The Department of Education's Notice of Proposed Rulemaking on Title IX

*Presented by the National Association of College and University Attorneys
in Cooperation with:*

American Council on Education (ACE)

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Our Roadmap For Today

- Key definitions and overall approach of the proposed regulations
- What Gives Rise to Institutional Obligations
- Title IX Grievance Process Requirements
- Hearing Requirements and Standard of Evidence
- Post-Hearing and Other Requirements
- Participant Questions Throughout

1. Overall Requirement

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

§ 106.44(a)

Key Definitions

- **Actual Knowledge:** notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient § 106.30

Key Definitions

Sexual Harassment means:

- (i) an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (ii) unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (iii) sexual assault as defined in 34 CFR 668.46(a). § 106.30

Key Definitions

- **Education Program or Activity:** no definition in the regulation; refers to the statute.
- The preamble to the proposed regulation suggests factors to consider in determining whether conduct occurred as part of recipient's education program or activity.

Key Definitions

- **Person in the United States:** would exclude sexual harassment against a person outside the U.S. (e.g. in a study abroad program).

Key Definitions

- **Not deliberately indifferent:** A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. § 106.44(a)

Questions & Answers-Part 1



2. Triggering Recipient Obligations

A recipient must follow procedures prescribed in the proposed regulations in response to a formal complaint

- **Formal Complaint:** a document signed by the complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the recipient's grievance procedures. § 106.30

Recipient Obligations (cont.)

Actual Notice but No Formal Complaint:

- When a recipient has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint.

Recipient Obligations (cont.)

Actual Notice but No Formal Complaint:

- For institutions of higher education, a recipient is not deliberately indifferent when in the absence of a formal complaint the recipient offers and implements **supportive measures** designed to effectively restore or preserve the complainant's access to the recipient's education program or activity. § 106.44(b)(3)

Supportive Measures

Supportive Measures: non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge, to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. § 106.30

Emergency Measures

- May remove respondent from education program on emergency basis. § 106.44(c)
- May place non-student employee respondent on administrative leave during pendency of investigation. § 106.44(d)

Informal Resolution

Departure from prior guidance: At any time prior to reaching a determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication. § 106.45(b)(6)

Informal Resolution (cont.)

Informal Resolution:

- Written notice requirements
- Parties must voluntarily consent in writing to informal resolution
- Recipient and the parties will determine whether the matter is appropriate for informal resolution

Termination of Grievance Procedure

- If the conduct alleged by the complainant would not constitute sexual harassment even if proved or did not occur within the recipient's program or activity, the recipient must terminate its grievance process with regard to that conduct. § 106.45(b)(3)
- What if the conduct violates a student conduct code?

Questions & Answers-Part 2



3. Grievance Procedures

Regulation section § 106.45

- Equitable treatment of the parties
- Objective evaluation of all relevant evidence
- Be free from personal conflicts of interest or bias
- Trained coordinators, investigators, and decision-makers

Grievance Procedures (cont.)

- Presumption that the respondent is not responsible until a final determination of responsibility is made
- Prompt timeframes (but no 60-day rule as under prior guidance)
- Grievance Procedures Must Describe:
 - Range of Sanctions and Remedies
 - Standard of Evidence
 - Appeal Process (if applicable)
 - Range of supportive measures

Grievance Procedures (cont.)

- Detailed notice requirements
 - Timing
 - Content, including identities of parties if known
 - Statement of presumption that respondent not responsible for alleged conduct
- Right to an advisor of choice during investigation
 - Recipient can restrict participation of advisors

Grievance Procedures (cont.)

- Parties have right to inspect and review evidence, including evidence on which recipient does not intend to rely
- Parties have a right to submit a written response to the gathered evidence prior to the finalization of the investigation report
- Institution must provide final investigative report to parties at least 10 days prior to a hearing

Questions & Answers-Part 3



4. Hearing

- Recipient's grievance procedure must provide for a live hearing. § 106.45(b)(3)(vii)
- Single investigator model not permitted.

Hearing Procedures

- Notice and right to inspect and review evidence directly related to the allegations
- Right to present witnesses and evidence
- Right to an advisor of choice at the hearing

Hearing Procedures-Cross Examination

Live cross examination must be permitted

§ 106.45(b)(3)(vii)

- Must be conducted by party's advisor of choice
- If party doesn't have advisor, recipient must provide the party an advisor "aligned with that party" to conduct cross examination

Hearing Procedures-Cross Examination

- Cross examination must exclude evidence of the complainant's sexual behavior or predisposition, unless
 - Offered to prove someone other than respondent committed the conduct, or
 - It concerns specific incidents of sexual behavior and is offered to prove consent.

Hearing Procedures-Cross Examination

- Decision-maker must explain decisions to exclude questions
- At request of a party, recipient must provide for cross examination in separate rooms with technology used to permit simultaneous viewing
- If a party or witness does not submit to cross examination, decision-maker may not rely on any statement of that party or witness in making determination

Standard of Evidence

- Must apply either the preponderance of the evidence or clear and convincing evidence standard.
§ 106.45(b)(4)(i)
- May use preponderance of the evidence standard only if that standard is used for other conduct code violations that carry the same maximum disciplinary sanction
- Must apply the same standard for complaints against students as it does for complaints against employees

Determination of Responsibility

- Decision-maker(s) cannot be same person as TIX coordinator or investigator(s)
- Must issue a written determination of responsibility
- Must issue simultaneously to the parties

Questions & Answers-Part 4



5. Post Hearing and Other Requirements

- Remedies and Sanctions
- Appeals
- Restrictions on discussing allegations
- Retaliation
- Training

Remedies and Sanctions

- An equitable resolution must include remedies for the complainant where a finding against the respondent has been made.
- Such remedies must be designed to restore or preserve access to the recipient's education program or activity. § 106.45(b)(1)(i)

Remedies and Sanctions

- A complainant is not entitled to a particular sanction against the respondent.
§106.45(b)(5)

Appeals

- Discretionary
- If the recipient allows appeals, it must allow both parties to appeal
- Complainant may appeal that the remedies are not designed to restore or preserve access to education program or activity
- Prescribed requirements for appeals

Restrictions on Discussing Allegations

- A recipient must not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. § 106.45(b)(3)(iii)

Retaliation

- The regulations are silent on retaliatory conduct

Training

- A recipient must ensure that coordinators, investigators, and decision-makers receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process, including hearings, if applicable, that protect the safety of students, ensure due process protections for all parties, and promote accountability. § 106.45(b)(1)(iii)
- Must promote impartial investigations and adjudications
- Must maintain all materials used to train coordinators, investigators, and decision-makers

Questions & Answers-Part 5



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