

Major Changes under the Proposed Title IX Regulations

Issue	Proposed Regulations & Practice Tips
<p>Expanded definition of what is considered discrimination on the basis of sex.</p>	<p>The proposed regulations would prohibit all forms of sex discrimination, expanding the definition of discrimination to include discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.</p> <p>Best Practice Tip: Ensure that you are training your faculty and staff on the explicit inclusion of gender identity and sexual orientation, as well as pregnancy. Provide specific guidance on supporting students through identity changes by enabling pronoun changes, and registration changes with ease. Training will be crucial as to this specific change.</p>
<p>Expanded definition of what is considered sexual harassment.</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.</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. <i>The current regulations cover sexual harassment but do not address other forms of sex-based harassment.</i></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. <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>Best Practice Tip: Under the new regulations, a person can be effectively denied access based on the totality of the circumstances based on subjective details as well as objective ones. This means that it is more important than ever to train staff to have boundary setting discussions with students on an ongoing basis, as the student’s subjective history and understanding can and will be taken into account.</p>
<p>Off Campus Conduct</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 any conduct that occurs in any building <u>owned or controlled</u> by a student organization that is officially recognized by a postsecondary institution. It also includes any alleged conduct that occurs off-campus when the respondent is a representative of the institution or otherwise engaged in conduct under the <i>recipient’s disciplinary authority</i>.</p>

	<p>Best Practice Tip: Ensure that your institution has very specific guidelines about the process to “officially” recognize a student organization or activity. This may require additional oversight of student activities. Additionally, create specific guidelines on what ownership and control may mean for a student organization. We suggest that you create form documents that define an official student organization and establish a procedure for property oversight, requiring compliance for all organizations. Moreover, it will be important to have institutional discussions about whether you have disciplinary authority for subsets of institutional members, volunteers, activities, programs, and other activities.</p>
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<p>Off Campus Conduct [Continued.]</p>	<p>Under the proposed regulations, Institutions must 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.</p> <p><i>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, <u>or outside of the United States.</u></i></p> <p>Best Practice Tip: Your institution needs to be requiring all students who study abroad, and staff who accompany them, on healthy relationships, consent, and reporting obligations. Your institution may need to consider what remote supportive resources may be necessary in the unlikely event that a student abroad requires support.</p>
<p>Responding to Reports</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. This seemingly renews the requirement that all employees report discrimination immediately or risk imputed actual or constructive knowledge. That is to say, if the University has reason to know of an incident of sexual harassment or discrimination it must now act.</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. Moreover, the current regulations require that an Institution with actual knowledge of sexual harassment must respond only in a manner that is not deliberately indifferent.</i></p> <p>Best Practice Tip: Your Institution will have to be prepared to respond quickly and efficiently to reports in order to address the report and to prevent future, similar reports. That means that your Institution should work to create more specific programming that can be utilized in</p>

	<p>specific scenarios to “prevent recurrence.” Your Institution should also ensure that the methodology for reporting, and first response is fine tuned and capable of producing timely responses.</p>
<p><i>Ensuring recipients learn of possible sex discrimination</i></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. Any employee at an elementary school or secondary school who is not a confidential employee would be obligated to notify the Title IX Coordinator.</p> <p>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.</p> <p>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. This proposed rule change revives the mandatory reporting rule of the “Dear Colleague” era.</p> <p>Best Practice Tip: Ensure that your institution has very specific guidelines about the process to “officially” recognize a student organization or activity. This may require additional oversight of student activities. Additionally, create specific guidelines on what ownership and control may mean for a student organization. We suggest that you create form documents that define an official student organization and establish a procedure for property oversight, requiring compliance for all organizations. Moreover, it will be important to have institutional discussions about whether you have disciplinary authority for subsets of institutional members, volunteers, activities, programs, and other activities.</p>

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<p><i>Respecting Complainant Autonomy</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 on (1) when their employees must notify the Title IX Coordinator about possible sex discrimination and (2) how students can report sex discrimination for the purpose of seeking confidential assistance only, or for the purpose of asking a recipient to initiate its grievance procedures.</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.</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.</p> <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.</i></p> <p>Best Practice Tip: Consider developing a more inclusive, thorough intake/reporting form for your Institutional website. This form would categorize reports by those intended to remain confidential and those who would like to seek resolution through a grievance procedure. In addition, because it is now necessary to evaluate barriers to reporting, student polling and data collection will be more important than ever.</p>

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<p><i>Title IX Coordinator Response to Sex Discrimination</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. • 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. • Offer and coordinate supportive measures, as appropriate, to the complainant and respondent. • In response to a complaint, initiate the recipient’s grievance procedures or informal resolution process. • 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. • 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. <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.</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.</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.</i></p> <p>Best Practice Tip: Reviving the guidance from the Dear Colleague era means that Institutions should have more in-depth checklists, and internal processes to ensure that all of the above steps are completed in every respective scenario. Moreover, Institutions should develop internal checklists regarding supportive measures and ensure ease and accessibility of each supportive measure—including academic accommodations, extensions, and course changes.</p>

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<p><i>Grievance Procedures for All Sex Discrimination Complaints under Title IX</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 that incorporate general requirements:</p> <ul style="list-style-type: none"> ○ Equitable treatment of complainants and respondents. ○ Title IX Coordinator, investigators, and decisionmakers must not have conflicts of interest or bias. ○ Decisionmaker may be the same person as the Title IX Coordinator or investigator. ○ A presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance procedures. ○ Reasonably prompt timeframes for all major stages. ○ Reasonable steps to protect privacy of parties and witnesses.
	<ul style="list-style-type: none"> ○ Objective evaluation of relevant and not otherwise impermissible evidence. · Notice of the allegations to the parties. · Dismissals permitted in certain circumstances, but not required. · Consolidation permitted for complaints arising out of the same facts or circumstances.

- Investigation requirements: (Proposed § 106.45(f))
 - 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)):
 - 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>
<i>Informal Resolution</i>	<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>Best Practice Tip: Amend your Policy to reflect that informal resolution may be offered even where Title IX does not cover the scenario. Make sure you add this language to the email templates and checklists.</p>

<p><i>Retaliation</i></p> <p><i>(Proposed §§ 106.2, 106.71)</i></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 to 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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***(Proposed §§ 106.10,
106.31(a)(2), 106.41(b)(2))***

The proposed regulations would address discrimination based on sexual orientation, gender identity, and sex characteristics by prohibiting Institutions 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.

Best Practice Tip: This suggests that Institutions likely need to avoid placing students in situations wherein they may feel marginalized based on their identity as a trans or non binary person. Consider developing a system to review syllabi for faculty and staff. Ensure that your policy does not utilize pronouns or binary language.