



Association of  
Title IX Administrators

June 28, 2022

# NPRiMer: What You Need to Know About the New Title IX Notice of Proposed Rulemaking (NPRM)

An Overview of the 2022 Title IX NPRM



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.

# AGENDA

**1** Scope & Applicability

**2** Definitions

**3** Reporting & Response to Disclosures Requirements

**4** Intake & Preliminary Inquiry

**5** Investigations

**6** Decision-making

**7** K-12 Observations

**8** Pregnancy

# SCOPE

- Discrimination on the basis of sex
  - Sex stereotypes
  - Sex characteristics
  - Pregnancy or related conditions
  - Sexual orientation
  - Gender identity
- Sex-based harassment
- Gender identity and athletics coming later

§ 106.10; NPRM pg. 666

# APPLICABILITY

- Education program or activity
  - Now includes conduct subject to recipient’s disciplinary authority and conduct in a building owned or controlled by a student organization official recognized by a postsecondary institution
  - Sex-based hostile environment occurring outside program, activity, or the United States
    - Downstream effect
  - 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.”

§ 106.11; NPRM pg. 666

§ 106.31; NPRM pg. 668

# DEFINITIONS (§ 106.2)

- Sex Discrimination broader than Sexual Harassment (no definition)
- Pregnancy or Related Condition (pg. 654-55)
- Program or Activity (pg. 655)
- Relevant (pg. 656)
- Supportive Measures (pg. 659)
- No required consent definition

# DEFINITIONS (CONT.)

- Sex-Based Harassment (pg. 657)
- Quid Pro Quo (pg. 657)
- Hostile Environment Harassment (pg. 657-58)
  - SPOO vs. Severe **or** Pervasive (“SORP” 657-58)
- Sexual Assault, Dating Violence, Domestic Violence (pg. 658)
- Stalking (p. 659)
- No Sodomy, Sexual Assault with an Object

# REPORTING & RESPONSE TO DISCLOSURES REQUIREMENTS (NON-K-12)

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

# REPORTING & RESPONSE TO DISCLOSURES REQUIREMENTS (NON-K-12) (CONT.)

- No self-reporting requirement
- Confidential employees
  - Institution notifies all participants of confidential employees
  - Confidential employees must explain confidential status and provide Title IX Coordinator (TIXC) information
- Postsecondary public awareness events – institution not obligated to respond to information provided during public event, including on online platforms.
- Note slightly expanded administrative requirements
- Training requirements

§ 106.44; NPRM pg. 675

# INTAKE & PRELIMINARY INQUIRY

- Upon notification of sex discrimination allegations, TIXC must:
  - Treat parties equitably
  - Notify Complainant of procedures and, in the event of a complaint, the Respondent
  - Supportive measures
  - Initiate grievance procedures or informal resolution as requested
- Notice (and complaints) can be verbal or written
- TIXC may still determine to initiate grievance procedures when circumstances call for it
- TIXC should also “take other prompt and effective steps”

§ 106.44; NPRM pg. 675-76

# INTAKE & PRELIMINARY INQUIRY (CONT.)

- Supportive Measures
  - Restore or preserve party access to program or activity
  - May burden a Respondent, only during grievance procedure, but may not be more restrictive than is necessary to restore or preserve the Complainant's access to the program or activity
    - May not impose such measures for punitive or disciplinary reasons
  - 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

§ 106.44; NPRM pg. 676-77

# OTHER PRELIMINARY INQUIRY ELEMENTS

- Emergency Removal/Administrative Leave
- Permissive Dismissal
  - Cannot identify the Respondent
  - Respondent is not participating in the education program or activity/not employed
  - Complainant voluntarily withdraws allegations
  - Conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX (so long as allegations are clarified first)
- Notification of dismissal required; type of notification can vary
  - § 106.44; NPRM pg. 679
- Appeals
  - § 106.45; NPRM pg. 685-87
  - § 106.46; NPRM pg. 692

# INFORMAL RESOLUTION

- Informal Resolution (IR) still permitted
  - No complaint required to initiate IR
  - Voluntary by parties
  - TIXC must agree
  - Provide notice to parties in advance (detailed requirements)
  - Facilitator may not be Investigator or Decision-maker
  - Consider policy regarding statements made in IR related to subsequent investigation

§ 106.44; NPRM pg. 680-82

# WHICH GRIEVANCE PROCEDURES TO USE?

	§ 106.45	§ 106.46
K-12	Everything	N/A
Higher Education	<ul style="list-style-type: none"> <li>All sex-based harassments complaints involving:                             <ul style="list-style-type: none"> <li>Employee-on-employee</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>All sex-based harassment complaints involving:                             <ul style="list-style-type: none"> <li>Student-on-student</li> <li>Student-on-employee</li> <li>Employee-on-student</li> </ul> </li> </ul>

# INVESTIGATIONS - § 106.45

- Equitable, reasonably prompt
- Reasonable steps to protect privacy
- Retains presumption that Respondent is not responsible
- Retains focus on preventing conflicts of interest or bias
- Notice of Allegations
  - Grievance procedures
  - Any Informal Resolution options
  - Sufficient information to allow parties to respond (party identities, alleged conduct, date and location, etc.)
  - Statement prohibiting retaliation

§ 106.45; NPRM pg. 685

# INVESTIGATIONS - § 106.45 (CONT.)

- Adequate, reliable, and impartial investigation of complaints
- Burden of proof on recipient
- Equal opportunity for parties to present inculpatory and exculpatory evidence
- Collect evidence and determine relevance
  - Evidence is relevant, impermissible, or not relevant
    - No “directly related” evidence
    - Impermissible: privilege applies, medical evidence, or rape shield provision
  - Provide parties with description of relevant evidence, and reasonable opportunity to respond – no 10-day rule

§ 106.45; NPRM pg. 688

# INVESTIGATIONS - § 106.46

- Notice of Allegations
  - All information under § 106.45
  - Provided with sufficient time for the parties to prepare responses before interview
  - Respondent presumed not responsible, will have opportunity to present relevant evidence to trained, impartial Decision-maker
  - May have Advisor of their choice
  - Entitled to receive relevant evidence OR investigation report
  - Prohibition against false statements

§ 106.46; NPRM pg. 690-91

# INVESTIGATIONS - § 106.46 (CONT.)

- Written notice of meetings, interviews, or hearings with sufficient time for preparation
- Expert witnesses permitted
- Reasonable extensions permitted; written notice to parties
- Provide equitable access to relevant and “not otherwise impermissible” evidence, or to an investigation report that summarizes the evidence
  - Reasonable opportunity to review and respond
  - If conducting a hearing, parties must be able to **review** prior to the hearing, and **respond** before the hearing or at the hearing

§ 106.46; NPRM pg. 693

# DECISION-MAKING - § 106.45

- Must provide a process enabling the Decision-maker to assess credibility of parties and witnesses
- Use Preponderance of the Evidence standard, unless recipient uses Clear and Convincing Evidence standard in **all comparable proceedings**
- Notify parties of outcomes of complaint, including determination and appeal procedures
- Title IX Coordinator provides and implements remedies

§ 106.45; NPRM pg. 689-90

# DECISION-MAKING - § 106.46

- Incorporate elements of § 106.45
- A TIXC or Investigator may serve as Decision-maker
- Must give Decision-maker opportunity to assess credibility through questioning
  - If a party does not respond to questions related to credibility, the Decision-maker must not rely on any statement of that party that supports that party's position

§ 106.46; NPRM pg. 690-95

# DECISION-MAKING - § 106.46 (CONT.)

- If providing a live hearing, no questioning by a party themselves
  - Decision-maker or Advisor may ask questions; Decision-maker makes relevance determination
- Flexibility to have hearing in one location or separate locations using appropriate technology

# DECISION-MAKING - § 106.46 (CONT.)

- Written Determination
  - 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
  - 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

§ 106.46; NPRM pg. 696

# K-12 OBSERVATIONS

- May now have designated confidential employees
- Reduced burden regarding written notifications in process
  - Notification/reports can be verbal or written
  - Notice of Allegations can be verbal or written
  - No written investigation report requirement
  - Notice of outcome does not have to be written
- More flexibility regarding procedures
  - Less staffing burden; TIXC or single administrator can serve as Investigator and Decision-maker
- Coordination with IEP/504 teams where applicable

# 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 access to separate and comparable program
    - Voluntary leave of absence
    - Availability of lactation space
    - Grievance procedures for sex discrimination complaints

§ 106.40; NPRM pg. 669-72

# PREGNANCY (CONT.)

- Comparable treatment to temporary disabilities or conditions
- Pregnancy leave
- Lactation time and space for employees too

§ 106.40; NPRM pg. 669-72

§ 106.57; NPRM pg. 699



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# Questions?

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