

TECHNICAL SUMMARY OF TITLE IX NOTICE OF PROPOSED RULEMAKING

JULY 2022

The Department of Education released a [notice of proposed rulemaking](#) (NPRM) on sex discrimination under Title IX on June 23, 2022. Below is a technical summary of the requirements contained in the NPRM. NAICU has also produced an [executive summary](#) of the regulations. In addition, the Department has provided a [fact sheet](#) and [summary](#) of the major regulatory provisions.

In general, the proposed regulations expand the scope of Title IX while streamlining procedural requirements and providing additional protections for victims of sex discrimination. The proposed rules, which differ in numerous ways from the Obama-era guidance, would remove some requirements that apply to colleges and universities while adding new ones in their place.

The NPRM is subject to a 60-day public comment period that began on July 12, 2022 when the proposed rules were [published](#) in the *Federal Register*. Comments must be submitted via the Federal eRulemaking Portal at <http://www.regulations.gov> on or before September 12, 2022. After the comment period closes, the Department will review the comments and draft final regulations, a process that is expected to take at least a year.

Background

In 2017, the Department rescinded Obama-era campus sexual assault guidance and announced its intent to develop Title IX regulations governing sexual harassment. [Final regulations](#) went into effect in 2020. Shortly after taking office in 2021, President Biden ordered the Department to [review](#) the agency's Title IX policies, a move that prompted the Department to begin the process of rewriting the rules governing Title IX.

This technical summary includes Title IX regulatory details on the following:

- I. Coverage
- II. Obligation to Address Sex Discrimination
- III. Nondiscrimination Policy
- IV. Training
- V. Informal Resolution
- VI. Grievance Procedures for Sex Discrimination Claims
- VII. Grievance Procedures for Sexual Harassment Claims Involving Students at Postsecondary Institutions
- VIII. Enforcement
- IX. Other Provisions

I. COVERAGE

The NPRM would expand the scope of the Title IX rules.

- The NPRM would cover students, employees, and third parties who participated or attempted to participate in the school’s educational program or activity at the time the alleged sex discrimination occurred.
- The NPRM would prohibit not just sexual harassment, but all forms of sex discrimination within an institution’s educational program or activity, including:
 - Sexual harassment, including quid pro quo harassment and hostile environment harassment;
 - Sexual violence, including sexual assault, dating violence, domestic violence, and stalking; and
 - Discrimination based on sex stereotypes or characteristics, pregnancy or related conditions, sexual orientation, gender identity, and parental, family, or marital status.
- The NPRM would expand the definition of hostile environment harassment to cover a broader scope of conduct. “Hostile environment harassment” would be defined as “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.”
 - To determine whether a hostile environment has been created, institutions would be required to conduct a fact-specific inquiry that considers:
 - The degree to which the conduct affected the complainant’s ability to access the recipient’s education program or activity;
 - The type, frequency, and duration of the conduct;
 - The parties’ ages, roles within the recipient’s education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;
 - The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
 - Other sex-based harassment in the recipient’s education program or activity.
- The NPRM would clarify the current regulatory prohibitions against parental, family, or marital status and pregnancy or related conditions.
 - Discrimination on the basis of pregnancy or related conditions would be defined to include discrimination based on childbirth, termination of pregnancy, or lactation.
 - Institutions would be required to treat pregnancy or related conditions in the same manner as other temporary disabilities or physical conditions.

- Institutions would be prohibited from requiring a student who is pregnant or has related conditions to provide medical certification of ability to participate in a program or activity unless such certification is necessary, is required of all participating students, and is not used as a basis for discrimination.
 - Institutions would be required to ensure that employees who are informed of a student's pregnancy or related condition notify the student of the Title IX Coordinator's contact information.
 - The Title IX Coordinator would be required to inform such a student about the institution's nondiscrimination obligations, provide reasonable modifications to policies or practices, allow voluntary access to any separate and comparable program or activity, permit a voluntary leave of absence, and ensure the availability of lactation space.
 - The lactation space would be required to be clean, private, and a space other than a bathroom.
 - Institutions would be required to provide reasonable break time for employees to express breast milk or breastfeed.
 - Institutions would be required to provide reasonable modifications for pregnancy and related conditions unless they can demonstrate that such modifications would fundamentally alter their educational program or activity.
 - Institutions would be prohibited from making pre-employment inquiries regarding a job applicant's marital status.
 - Institutions would be permitted to ask job applicants to self-identify their sex if such a question is asked of all applicants.
- The NPRM would apply to all sex discrimination occurring within an institution's educational program or activity, including:
 - Conduct that occurs in a building owned or controlled by an officially recognized student organization;
 - Conduct that is subject to the institution's disciplinary authority; and
 - Conduct that occurs outside the institution's educational program or activity or outside the United States if such conduct contributed to a hostile environment within the institution's program or activity.
 - The NPRM would retain the current prohibition against retaliation.
 - Retaliation would include peer retaliation and disciplining individuals for code of conduct violations that do not involve sex discrimination but that arise out of the same circumstances or reports of such discrimination.
 - Institutions would be required to take action to end such retaliation, prevent its recurrence, and remedy its effects, as well as to initiate grievance procedures upon receiving an eligible complaint.

- In the limited instances in which Title IX permits sex-segregated programs or activities, the NPRM would prohibit differential treatment that cause more than de minimis harm, including policies or practices that limit individuals from participating in programs or activities consistent with their gender identity.
 - This requirement would not apply in contexts in which particular practices are otherwise permitted by Title IX, such as admissions to single-sex colleges or as permitted by a religious exemption.
- The NPRM would not amend the current regulations governing athletics.
 - The Department has stated that it will engage in a separate rulemaking to address the Title IX athletics regulations, particularly with respect to criteria that institutions should use to determine transgender students' eligibility to participate on sex-segregated athletic teams.
- The current regulations governing exemptions for religious institutions would remain in place under the NPRM.

II. OBLIGATION TO ADDRESS SEX DISCRIMINATION

- The NPRM would require institutions to take prompt and effective action to end any sex discrimination that has occurred, prevent its recurrence, and remedy its effects.
- Institutions would be required to designate at least one employee to serve as the Title IX Coordinator.
 - Title IX Coordinators would have a duty to monitor for barriers to reporting sex discrimination and take steps to address such barriers.
 - The Title IX Coordinator could delegate responsibilities as necessary.
- Title IX Coordinators would be required to:
 - Treat the complainant and respondent equitably;
 - Notify the complainant of grievance procedures;
 - If a complaint is made, notify the respondent of grievance procedures and both parties of the informal resolution process, if available;
 - Coordinate supportive measures;
 - Respond to complaints by initiating either the grievance procedures or informal resolution process;
 - In the absence of a complaint or informal resolution, determine whether it is necessary to initiate a complaint of sex discrimination; and
 - Take steps to prevent the recurrence of sex discrimination.

- The Title IX Coordinator would not be obligated to act in response to allegations of sexual harassment disclosed during live or online public awareness events unless the information reveals an immediate and serious threat to the health or safety of the campus community.
 - Institutions would be required to use such information to inform its efforts to prevent sexual harassment.

- The Title IX Coordinator would be required to provide appropriate supportive measures in response to allegations of sex discrimination.
 - Reasonable supportive measures would be available to both parties to the extent necessary to restore or preserve the parties' access to the educational program or activity.
 - Supportive measures could include counseling, deadline extensions, other course-related adjustments, campus escort services, increased security and monitoring, restrictions on contact, leaves of absence, training and education, and voluntary or involuntary changes in class, work, housing, and extracurricular or other activities.
 - Supportive measures that burden a respondent would be limited to those that are necessary to restore or preserve the complainant's access to the educational program or activity, are terminated at the conclusion of the grievance procedures, and are not imposed for punitive or disciplinary reasons.
 - Institutions would be required to offer the parties affected by the provision of supportive measures with an opportunity to seek changes to those measures via a decision by an impartial employee.
 - For supportive measures that burden a respondent, institutions would be required to provide this opportunity before the measure is imposed or, if necessary, as soon as possible after the measures have taken effect.
 - Institutions would be required not to disclose information about supportive measures to non-parties unless necessary to provide the measures.

- The NPRM clarifies that nothing in the regulations would prevent an institution from emergency removal of a student or placing an employee on administrative leave.
 - Emergency removal would require an individualized safety and risk analysis, a determination of an immediate and serious threat, and notice and an opportunity to challenge the removal.
 - The NPRM clarifies that both emergency removal and administrative leave could not be construed to modify rights available under federal disability laws.

- The NPRM would prohibit institutions from disclosing the identity of parties, witnesses, or other participants in the Title IX process unless:
 - Such individuals have provided prior written consent;
 - Such disclosures are permitted under the Family Educational Rights and Privacy Act (FERPA) or are required by law; or
 - Such disclosures are needed to carry out the purposes of the regulations.

- The NPRM would establish a category of “confidential employees” and separate requirements for confidential and non-confidential employees.
 - Confidential employees include employees whose communications are privileged and employees designated as confidential employees.
- Confidential employees would not be required to notify the Title IX Coordinator of sex discrimination allegations.
 - Confidential employees would be required to inform individuals reporting potential sex discrimination about how to contact the Title IX Coordinator and report such conduct.
 - Institutions would be required to provide notice regarding the identity of confidential employees and to require such employees to explain their confidential status to anyone who reports potential sex discrimination.
- Non-confidential employees who have information about potential sex discrimination would be required to either notify the Title IX Coordinator or to inform the person reporting such conduct about how to contact the Title IX Coordinator and report sex discrimination.
 - Non-confidential employees who have responsibility for administrative leadership, teaching, advising, or instituting corrective measures would have a duty to report potential sex discrimination involving students to the Title IX Coordinator.

III. NONDISCRIMINATION POLICY

- Institutions would be required to adopt and publish a nondiscrimination policy.
- Institutions would be required to provide to students, employees, and applicants for admission or employment a notice of nondiscrimination that includes:
 - A statement that the institution does not discriminate on the basis of sex;
 - A statement that questions about Title IX may be referred to the Title IX Coordinator, the Department’s Office for Civil Rights, or both;
 - Contact information for the Title IX Coordinator;
 - How to locate the nondiscrimination policy and grievance procedures; and
 - How to report conduct that may violate Title IX, and to file a complaint.
- Institutions would be required to prominently publish its notice of nondiscrimination on its website.
 - Institutions would also be required to publish such notice in each handbook, catalog, announcement, bulletin, and application form that it provides to students, employees, and applicants or recruits for admission or employment.
 - Alternatively, institutions may include in such publications a statement of nondiscrimination, referral to the Title IX Coordinator for questions or concerns, and the location of the nondiscrimination notice on the school’s website.

IV. TRAINING

- Institutions would be required to ensure that the following individuals receive training on their Title IX obligations.
 - Institutions would be required to provide all employees with training regarding the obligation to address sex discrimination, the scope of conduct that constitutes sex discrimination, and applicable notification requirements.
 - Institutions would be required to provide Investigators, decisionmakers, and other individuals who have responsibility for implementing grievance procedures or have authority to modify or terminate supportive measures with additional training on:
 - The institution's obligation to take prompt and effective action to end sex discrimination, prevent its recurrence, and remedy its effects;
 - Grievance procedures;
 - Impartiality; and
 - Relevance of questions and evidence.
 - Institutions would be required to provide facilitators of an institution's informal resolution process with additional training on that process and how to serve impartially.
 - Institutions would be required to provide the Title IX Coordinator and designees with additional training regarding their responsibilities, including recordkeeping responsibilities.
 - Institutions would be required to maintain for at least seven years records documenting the informal resolution or grievance process and the resulting outcome and actions the institution took to meet its obligation to prevent and remedy sex discrimination, including discrimination based on parental status and pregnancy or related conditions.
 - Institutions would be required to maintain for at least seven years records of all training materials and to publish such materials on its website.

V. INFORMAL RESOLUTION

- The NPRM would permit institutions to offer informal resolution in some circumstances.
 - Informal resolution would be allowed at any point before a formal determination is made.
 - Informal resolution would not be allowed if there are allegations of employee-on-student sex discrimination or if such a process would conflict with federal, state, or local law.
 - Institutions would have discretion to determine whether it is appropriate to offer an informal resolution process and may decline to do so despite one or more of the parties' wishes, such as when the institution determines that the alleged sex discrimination would pose a future risk of harm to others.
 - The NPRM would prohibit institutions from requiring or pressuring parties to participate in informal resolution and from requiring a waiver of a right to an investigation or adjudication.

- Before initiating informal resolution, institutions would be required to provide notice explaining:
 - The allegations;
 - The requirements of the informal resolution process;
 - The right, prior to agreeing to a resolution, to withdraw from informal resolution and to initiate or resume the grievance procedures;
 - That agreeing to a resolution would prevent the parties from initiating or resuming grievance procedures arising from the same allegations;
 - The terms that are available in informal resolution;
 - The records that will be maintained and could be shared;
 - That use of the grievance process would preclude use or disclosure of information obtained solely through informal resolution; and
 - That the informal resolution facilitator could serve as a witness for other purposes if the grievance process is used.

- The NPRM would require that the facilitator for informal resolution could not:
 - Be the same person as the investigator or decisionmaker under the grievance procedures;
 - Have a conflict of interest or bias.

VI. GRIEVANCE PROCEDURES FOR SEX DISCRIMINATION CLAIMS

- Institutions would be required to adopt and publish grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination.

- Students, employees, and third parties who participated or attempt to participate in the school's educational program or activity at the time the alleged sex discrimination occurred would be allowed to file a complaint requesting initiation of the institution's grievance procedures.

- The NPRM would require the grievance procedures to:
 - Treat both parties equitably;
 - Prohibit Title IX Coordinators, investigators, and decisionmakers from having a conflict of interest or bias;
 - Permit the single-investigator model;
 - Include a presumption that the respondent is not responsible;
 - Establish reasonably prompt time frames for the major stages of the grievance procedures, with reasonable extensions for good cause available;
 - Take reasonable steps to protect the privacy of the parties and witnesses, as long as such steps do not interfere with the parties' ability to prepare for the proceeding;
 - Require an objective evaluation of relevant evidence;
 - Exclude evidence that is privileged, are treatment records, or relate to the complainant's sexual history, unless such evidence is offered to prove that someone other than the respondent committed the alleged conduct or to establish consent; and
 - For sexual harassment complaints, describe the range of available supportive measures, remedies, and disciplinary sanctions.

- Institutions would, upon initiating grievance procedures, be required to provide notice of the allegations to the parties whose identities are known.

- The NPRM would require the notice to include:
 - A copy of the grievance procedures and, if applicable, the informal resolution process;
 - Sufficient information to allow the parties to respond to the allegations, including, if available, the identities of the parties, the alleged conduct, and the date and location of the incident;
 - A statement that retaliation is prohibited; and
 - Information about any additional allegations that the institution decides to investigate during the course of the investigation.
- Institutions have the option to dismiss complaints of sex discrimination if:
 - The institution is unable to identify the respondent;
 - The respondent is not an employee or otherwise participating in the institution's program or activity;
 - The complainant voluntarily withdraws any or all of the allegations and any remaining conduct does not constitute sex discrimination; and
 - The institution determines that the alleged conduct does not constitute sex discrimination.
- The NPRM would require institutions to notify the complainant of the basis for dismissal, as well as the respondent if the respondent had previously been notified of the allegations.
 - After dismissal, institutions would be required to offer appropriate supportive measures to the complainant and to the respondent, if the latter has been notified of the allegations.
- Institutions would be required to provide an opportunity to appeal the dismissal and notify the parties of that right.
 - For appeals of dismissals, institutions would be required to:
 - Notify the parties when an appeal is filed;
 - Implement appeal procedures equally;
 - Ensure that the decisionmaker for the appeal did not take part in the investigation or dismissal of the complaint;
 - Ensure that the decisionmaker has been trained;
 - Provide both parties an opportunity to make a statement regarding the appeal; and
 - Notify the parties of the result of the appeal and rationale.
- The NPRM would permit institutions to consolidate complaints when allegations arise out of the same facts or circumstances.

- During an investigation, institutions would be required to:
 - Assume the burden of gathering evidence;
 - Provide both parties with an equal opportunity to present relevant witnesses and evidence;
 - Review and determine what evidence is relevant or impermissible; and
 - Provide each party with a description of the evidence and an opportunity to respond.
- The NPRM would require institutions to provide a process that enables the decisionmaker to assess the creditability of parties and witnesses.
- In making a determination, institutions would be required to:
 - Use the preponderance of the evidence standard of proof, except:
 - The institution would be permitted to use the clear and convincing standard if the school uses such a standard in all other comparable proceedings;
 - Notify the parties of the outcome and appeal rights, if applicable;
 - Provide remedies to the complainant if it is determined that sex discrimination occurred;
 - Impose disciplinary sanctions;
 - Not punish parties or witnesses for making false statements or engaging in consensual sex; and
 - Apply any additional procedures an institution chooses to adopt equally to both parties.

VII. GRIEVANCE PROCEDURES FOR SEXUAL HARASSMENT CLAIMS INVOLVING STUDENTS AT POSTSECONDARY INSTITUTIONS

- In addition to the grievance procedures that all educational institutions would be required to follow, the NPRM sets forth additional requirements that would apply to grievance procedures for sexual harassment claims involving students at colleges and universities.
- Additional procedures would require notification of allegations with sufficient time for parties to prepare before initial interviews.
 - Such notification could be reasonably delayed if the institution has legitimate safety concerns.
- Such notification would also require Institutions to inform the parties via written notice that:
 - The respondent is presumed not responsible;
 - The parties will have an opportunity to present relevant evidence;
 - The parties may have an advisor of their choice, who may be an attorney;
 - The parties are entitled to access relevant evidence or an investigative report that summarizes the evidence; and
 - If applicable, provisions in the institution's code of conduct prohibit knowingly making false statements or submitting false information.
- Institutions dismissing sexual harassment complaints would be required to provide the parties notice of the dismissal and the basis for the dismissal, as well as to secure the complainant's withdrawal in writing if dismissing a complaint based on the complainant's voluntary withdrawal.
- When investigating complaints, institutions would be required to:

- Provide all participating parties with written notice of the date, time, location, participants, and purpose of all meetings, interviews, or hearings with sufficient time for the parties to prepare;
 - Provide both parties with an opportunity to be accompanied to all meetings or proceedings by an advisor of their choice, who may be an attorney;
 - Apply any limitations on an advisor's participation in the grievance procedures equally to both parties;
 - Provide both parties with the same opportunity, if any, to have other individuals present during meetings or proceedings;
 - At the institution's discretion, provide both parties an equal opportunity to present expert witnesses; and
 - Allow for reasonable good-cause extensions of time frames on a case-by-case basis and provide written notice of any such delay.
- Institutions would be required to provide parties and their advisors with equitable access to all relevant evidence that is not otherwise impermissible.
 - Alternatively, institutions would be permitted to provide access to a written investigative report that summarizes such evidence, although institutions would still be required to provide access to relevant evidence if requested by the parties.
 - Institutions would be required to provide parties with an opportunity to review and respond to the evidence.
 - Institutions that choose to conduct a live hearing must provide the parties with an opportunity to review and respond to the evidence in advance of the live hearing.
 - Institutions would have discretion to determine whether an opportunity to respond to the evidence is provided before or during the live hearing, or both.
 - Institutions would be required to take reasonable steps to prevent and address unauthorized disclosure of information and evidence obtained during the grievance procedures.
- Institutions would have the option to provide a live hearing.
 - When offered, live hearings would, at the institution's discretion or a party's request, be required to allow parties to participate from separate locations via technology.
 - Institutions would be required to create an audio or video recording or transcript of any live hearing and make it available to the parties for review.
- Institutions would be required to provide a process that enables a decisionmaker to assess the credibility of parties and witnesses, as long as such assessment either:
 - Allows the decisionmaker to question parties and witnesses and allows parties to propose questions for the decisionmaker to ask; or
 - Allows an advisor for each party to question parties and witnesses as part of a live hearing.
 - Parties would not be allowed to conduct questioning.
 - If advisors are permitted to question witnesses and parties and one of the parties does not have an advisor, an institution would be required to provide an advisor to the party at no charge.
 - Decisionmakers would be required to determine when a proposed question is relevant and not otherwise impermissible and, if a question is excluded, explain why.
 - Institutions would be required to prohibit questions that are unclear or harassing of the party being questioned and may impose other equally applicable rules regarding decorum.

- Decisionmakers would not be permitted to rely on statements that support a party's position if that party does not respond to questions regarding credibility, but the decisionmaker would be prohibited from drawing any inferences about whether sex discrimination occurred based on a refusal to respond to questions.
- The NPRM would require institutions to provide a written determination of whether sexual harassment occurred to both parties simultaneously.
 - Such determination must include a description of the allegations, information about the applicable procedures, the decisionmaker's evaluation of the evidence and final determination, any remedies or disciplinary sanctions imposed, and appeal procedures.
- The NPRM would require institutions to offer parties an appeal from sexual harassment determinations or dismissals based on the following rationales:
 - Procedural irregularity that would affect the determination;
 - New evidence that would change the outcome and was not reasonably available previously; and
 - Conflict of interest or bias on the part of the Title IX Coordinator, investigator, or decisionmaker.
- Institutions would have discretion to offer both parties an equal opportunity to appeal on other grounds.
- If an institution offers informal resolution for complaints of sexual harassment, it would be required to comply with all informal resolution requirements in writing.

VIII. ENFORCEMENT

- The NPRM would retain a provision specifying that the Department will not deem an institution to have violated Title IX solely because the agency would have reached a different determination.
- The NPRM would retain the current procedural provisions that govern compliance and enforcement.

IX. OTHER PROVISIONS

- Institutions would be required to comply with the new requirements regardless of state or local laws, but the NPRM would not preempt state or local laws that provide greater protections against sex discrimination and that do not conflict.
- The NPRM would clarify that nothing in FERPA precludes institutions from complying with the Title IX regulations.
- If a complainant or respondent is a student with a disability, an institution would be permitted to consult with its office responsible for providing disciplinary services in order to ensure consistency with section 504 of the Rehabilitation Act.