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TNG

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.

CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

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AGENDA

1. 2022 NPRM
2. Scope & Applicability
3. Reporting & Response
4. Intake & Evaluation
5. Grievance Procedures
6. Pregnancy & Related Conditions
7. 2023 Athletics NPRM
8. What's Next?

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LEARNING OUTCOMES

After completing this course, participants will be able to:

- Explain the NPRM rulemaking process and anticipated timeline for next steps
- Identify specific policy and process changes anticipated for compliance with the new regulations
- Evaluate current staffing and team structure and determine recommended changes
- Develop a training plan for all stakeholder groups

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LEARNING OUTCOMES CONT.

- Assess current pregnancy and related conditions services and support and recommend necessary changes
- Distinguish between sex discrimination and sex-based harassment
- Understand areas where the sex-based harassment final rule is expected to allow flexibility to pursue best practices that exceed minimum compliance standards to ensure programmatic excellence and effective risk mitigation

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2022 NPRM

NPRM OVERVIEW

- The U.S. Department of Education (ED) released a 701-page Notice of Proposed Rulemaking (NPRM) on June 23, 2022 – the 50th Anniversary of Title IX
- Published in the Federal Register on July 12
  - 60-day comment period ran until September 12
  - ED received over 240,000 comments
  - ED must now respond to all comments as part of the rulemaking process
- Final version will likely differ from the NPRM
  - Less deviation expected than in the 2018 NPRM versus 2020 Regulations

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NPRM, GENERALLY

- Broader than the 2020 Regulations
  - Includes the behavior covered by the 2020 Regulations
  - Expands to provide procedures to respond to other forms of sex discrimination
- Elements of both previous White House Administrations' guidance/regulations
- Adds in greater flexibility
- Return to Stop, Prevent, Remedy,

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THE FINAL RULE

- ED expects to release its Final Rule in October 2023
  - 2020 Regulations had approximately 100-day implementation period

*See Slides 77-88 for Information on the 2023 Athletics NPRM

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SCOPE & APPLICABILITY

SCOPE (§ 106.10)

- NPRM is broader than the 2020 Regulations
- Discrimination on the basis of sex includes
  - Sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
- Sex discrimination includes **sex-based harassment**
  - Replaces "**sexual harassment**" and includes
    - Quid pro quo, Hostile Environment, Sexual Assault, Dating Violence, Domestic Violence, and Stalking
- ED has announced a final rule regarding athletic eligibility based on gender will be released in October, as well.

NPRM pg. 666

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HOSTILE ENVIRONMENT

- Hostile Environment Harassment (pg. 657-58)
  - 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

§ 106.2

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SPOO VS. SORP

SPOO (2020 Regulations)

Severe **AND** Pervasive **AND** Objectively Offensive

SORP (2022 NPRM)

Sufficiently Severe **OR** Pervasive **AND** Evaluated Objectively **AND** Subjectively

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HOSTILE ENVIRONMENT (CONT.)

- OCR's proposed definition also provides factors for evaluating whether a hostile environment exists including:
  - Complainant's ability to access the education program or activity
  - The type, frequency, and duration of the conduct
  - The parties' ages, roles, and previous interaction(s)
  - The location and context of the conduct
  - The control the Recipient has over the Respondent
- Potential intersection with First Amendment

§ 106.2

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APPLICABILITY

- **Education program or activity**
  - Broadly interpreted to include:
    - Academic, extracurricular, and athletic programs
    - Activities on school network, bus, class, or facilities
- De Minimis Harm
  - 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"

§ 106.31; NPRM pg. 668

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APPLICABILITY (CONT.)

- **Jurisdiction** includes:
  - Conduct subject to Recipient's disciplinary authority,
  - Conduct in a building owned or controlled by a student organization officially recognized by a postsecondary institution
- Removes geographical restrictions
  - Conduct outside the United States may need to be addressed under Title IX
    - Downstream (in-program) effects
    - Charging decisions may become more complicated

§ 106.11; NPRM pg. 666
§ 106.31; NPRM pg. 668

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IF THE CONDUCT…

Occurred in your program or activity

AND/OR

Is subject to your disciplinary authority

AND/OR

Has led to a hostile environment within your program or activity

AND would meet Title IX, if proven…

YOU LIKELY HAVE JURISDICTION

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OTHER POLICIES & LAWS

- The proposed regulations will likely overlap with existing policies and laws
  - Title VII
  - Fair Housing Act
  - Violence Against Women Act Amendments to the Clery Act
  - State statutory definitions of sexual harassment applicable to students and/or employees
  - State or jurisdiction requirements for sexual harassment investigations and/or reporting requirements
- Work with your legal counsel to figure out the best way to ensure all institutional policies co-exist cohesively

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REPORTING & RESPONSE REQUIREMENTS

- Reporting & Response Requirements
- Reporting Categories
- Exceptions
- Additional Requirements

REPORTING & RESPONSE TO DISCLOSURES REQUIREMENTS (§ 106.44)

EMPLOYEE ROLE	DISCLOSURE FROM	NOTIFY TITLE IX COORDINATOR	PROVIDE TIXC INFO
Confidential Employees	• Student • Employee	NO	YES
Employees with the **authority to institute corrective measures**	• Student • Employee	YES	YES
Employees with responsibility for **administrative leadership, teaching, and advising**	• Student	YES	YES
	• Employee	CHOOSE ONE OR THE OTHER	
All other employees who are not confidential employees	• Student • Employee	CHOOSE ONE OR THE OTHER	

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NPRM pg. 672-75

REPORTING CATEGORIES

- Four Types of Employee Roles (pg. 674-75)
  - Does not replace Title VII, Clery Act, or state law reporting obligations
- **Confidential Employees** (pg. 651)
  - Can be designated by the Recipient
  - Institution must notify all employees and students of the identity of confidential employees
  - Confidential employees must explain confidential status and provide Title IX Coordinator (TIXC) information

§ 106.44

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BEST PRACTICES

Designate all non-confidential employees mandated reporters.

Require all employees, regardless of confidential status, to provide contact information for the Title IX Coordinator to any person making a disclosure of conduct that may implicated Title IX.

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REPORTING EXCEPTIONS

- No self-reporting requirement for employee Complainants
- Postsecondary public awareness events (§ 106.44(e))
  - Institution not obligated to respond to information provided during public event, including on online platforms
    - Unless information reveals an immediate and serious threat to the health or safety of students or other persons in the postsecondary institution's community, institution must respond
  - Must incorporate information/trends revealed at public awareness events into prevention education

§ 106.44; NPRM pg. 674-675

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TRAINING REQUIREMENTS (§ 106.8)

- Various training requirements for:
  - All employees
  - Investigators, Decision-makers, and others responsible for implementing grievance procedures or modifying/terminating supportive measures
  - Informal Resolution Facilitators
  - Title IX Coordinator
  - No training requirement for students under NPRM
- All training materials must be made available on institution's website

NPRM pg. 662-665

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BEST PRACTICES

Provide process, policy, and reporting training on a recurring basis.

Train Title IX team members on supportive measures.

Offer training to Recipient-provided Advisors, if any.

Offer prevention education for employees and students.

Ensure training and prevention education programs meet all federal and state audience and content requirements.

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ADDITIONAL REQUIREMENTS (§ 106.44)

- Monitoring
  - TIXC must monitor education program or activity for barriers to reporting information and take reasonable steps to address such barriers
    - Identity-based barriers
    - Perceived delays in responding to reports
    - Infrequent communication/updates
    - Fears of retaliation
    - Collateral conduct charges/lack of amnesty policies
    - Limited supportive measures offered
    - Lack of awareness of Title IX Office/TIXC
    - Perceived inadequate response

NPRM pg. 672

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GROUP BRAINSTORM

How can you collect and analyze barrier information?

INTAKE & EVALUATION

- Notice & Complaints
- Intake & Initial Evaluation
- Dismissals
- Supportive Measures
- Removals
- Informal Resolution

NOTICE & COMPLAINTS

- "Complaint" replaces "Formal Complaint"
- Notice (and complaints) can be verbal or written
  - Complaints **do not** have to be submitted to Title IX Coordinator/Title IX Team Member
- Complaints can be made by a Complainant or the TIXC
  - If a parent, guardian, or other authorized legal representation has the authority to act on behalf of a person, then that person can also file a complaint
- For allegations of sex discrimination, other than sex-based harassment, any student, employee, or third party may make a complaint

§ 106.2; NPRM pg. 651
§ 106.6; NPRM pg. 665
§ 106.45; NPRM pg. 682

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INTAKE & INITIAL EVALUATION

- Upon notification of sex discrimination allegations, TIXC must:
  - Treat parties equitably
  - Notify Complainant of procedures and, in the event of a complaint, prepare to notify the Respondent
  - Offer and coordinate supportive measures
  - Initiate grievance procedures or informal resolution as requested
- Initial Evaluation
  - Provides TIXC with greater latitude to collect information before formal grievance process begins

§ 106.44(f); NPRM pg. 675-76

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DISMISSALS (§ 106.45)

All dismissals are discretionary, but can occur when:

- The Respondent is unable to be identified *after reasonable steps to do so*
- The Respondent is no longer participating in the educational program or employed by the Recipient
- The Complainant withdraws all or a portion of the complaint and any remaining conduct ≠ discrimination under Title IX
- It is determined that the conduct, even if proven, would ≠ discrimination under Title IX
  - *Prior to dismissing the complaint, the Recipient must take reasonable efforts to clarify the allegations with Complainant*

NPRM pg. 685-86

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DISMISSALS (§ 106.45) (CONT.)

Upon dismissing a complaint:

- A Recipient must notify the Complainant of the basis for the dismissal
- Supportive measures should still be offered to the Complainant
- Must notify the Respondent of the dismissal and offer supportive measures if the Respondent has already been notified of the complaint
- All parties have a right to appeal the dismissal
  - What's Unclear?
    - Whether an unaware Respondent has this right

NPRM pg. 686-87

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BEST PRACTICES

Encourage use of a centralized reporting process to ensure that information gets to those who are trained to respond in a timely and efficient manner.

Provide written notice of any determination, including a notice of dismissal.

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SUPPORTIVE MEASURES (§ 106.44)

- Should restore or preserve the party's access
  - May not impose burdensome measures for punitive or disciplinary reasons, but permits burdening Respondent for other reasons during the grievance process
- Supportive measures may be continued, modified, or terminated at the end of the grievance process or IR
- 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

NPRM pg. 676-77

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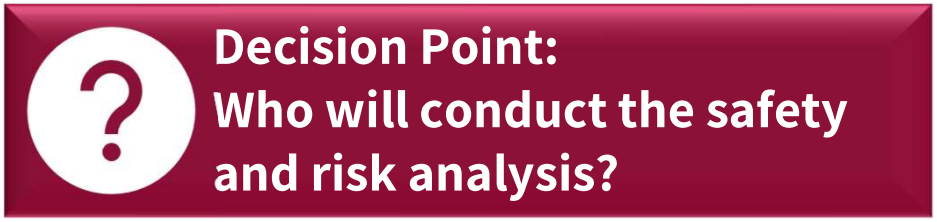
REMOVALS (§ 106.44)

- **Administrative Leave**
  - Institutions may place **employee** Respondents on administrative leave during grievance process
- **Emergency Removal**
  - Institutions may remove **student** Respondents, on an emergency basis, if an individualized safety and risk analysis determines:
    - An immediate and serious threat exists and arises from the allegations
  - Removes the "physical" threat requirement from the 2020 Regulations



NPRM pg. 679

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REMOVALS (§ 106.44) (CONT).

- Following an emergency removal
  - A Recipient must provide the Respondent notice and an opportunity to challenge the removal
- What's Unclear?
  - Whether supportive measures that burden a student Respondent constitute a "partial removal" that can only be implemented after an individualize safety and risk analysis
  - Whether a "partial removal" can be implemented as a supportive measure to preserve Complainant's access without an individualized safety and risk analysis

NPRM pg. 679

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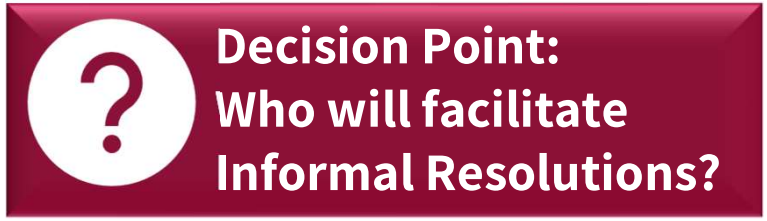
INFORMAL RESOLUTION (§ 106.44)

- Informal Resolution Requirements:
  - Voluntary by parties
  - TIXC must agree
  - Provide notice to parties in advance (detailed requirements)
  - Facilitator may not be Investigator or Decision-maker
  - Not permitted in complaints with a student Complainant and an employee Respondent
- Informal Resolution can occur **without** a formal complaint
  - Can look like a supportive measures only response
- Information and records from the Informal Resolution cannot be used in the grievance process if the Informal Resolution is unsuccessful



NPRM pg. 680-82

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BEST PRACTICES

Implement informal resolution methods to allow for an alternative to the formal grievance process.

Consider offering multiple types of informal resolution that are consistent with the institutional culture and needs and are supported by necessary training and resources.

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GRIEVANCE PROCEDURES

- Investigating
- Decision-making
- Appeals
- Advisors
- Evidence

WHICH GRIEVANCE PROCEDURES TO USE?

	§ 106.45	§ 106.46
K-12	Everything	N/A
Higher Education	Sex discrimination complaints that are **NOT** sex-based harassment Sex-based harassment complaints that do not involve a student	All sex-based harassment complaints involving a student Complainant or Respondent, including: ▪ Student-on-student ▪ Student-on-employee ▪ Employee-on-student

NPRM pg. 682-697

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§ 106.45 VS. § 106.46

- Section 106.45 is a bare-bones civil rights process
  - Section 106.46 is a more robust process that incorporates all of the elements of § 106.45 and retains many features from the 2020 regulations
- Two separate policies are permitted, but not required

NPRM pg. 682-697

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BEST PRACTICE

Offer a streamlined, § 106.46-compliant, process to provide for a consistent response to stop, prevent, and remedy all forms of discrimination, including:

- Written Notice
- Right to an Advisor of choice
- Comprehensive, written investigation report
- Opportunity for report review and response
- Separation between investigator and decision-maker
- Cross examination
- Written determination
- One level of appeal

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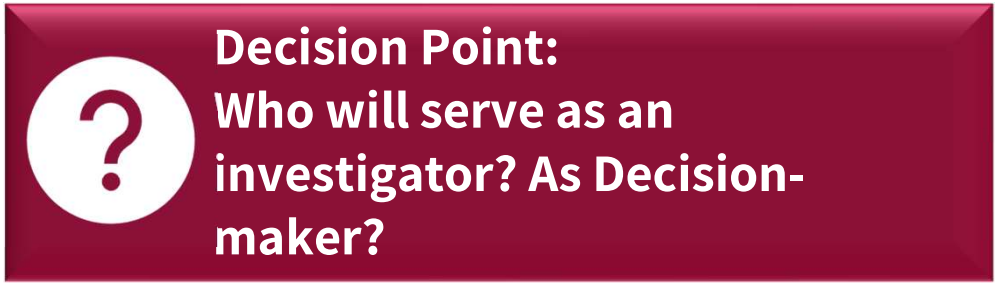
GRIEVANCE PROCEDURES

- Section 106.45 outlines a list of requirements for written grievance procedures that generally apply to both § 106.45 and § 106.46.
- Prohibits conflicts of interest or bias
- Allows for single-investigator model
  - No requirement for a separate Decision-maker
  - Permissible for the Investigator to serve as the Decision-maker
  - Permissible for the TIXC to serve as the Investigator (and/or DM)



NPRM pg. 682-90

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BEST PRACTICES

Provide a process that includes a separation between investigation and decision-making responsibilities.

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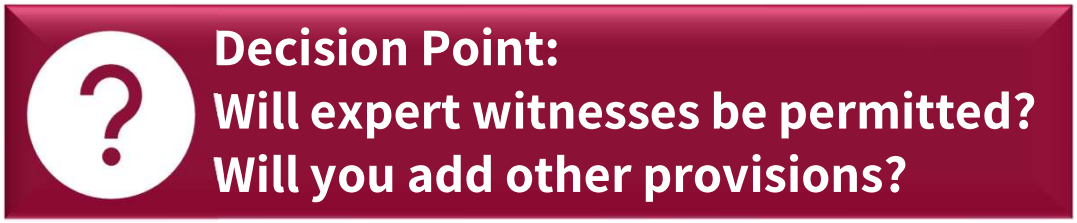
GRIEVANCE PROCEDURES (CONT.)

- Reasonably prompt timeframe for major process stages
  - Evaluation, Investigation, Determination, Appeal
- Reasonable steps to protect privacy without restricting a party's ability to obtain and present evidence
  - Section 106.46 specifies that expert witnesses may be allowed if the right is offered to all parties
- Objective evaluation of permissible relevant evidence
- Allows for additional provisions, so long as they are applied equally to the parties



NPRM pg. 682-690

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GRIEVANCE PROCEDURES (CONT.)

- Notice must be provided to parties at the beginning of an investigation

§ 106.45	§ 106.46
• Notice does not have to be written • No waiting period between notice and interview	• Written notice required • Sufficient time to prepare before an interview required • May be accompanied by an Advisor of choice • Presumption of non-responsibility • Prohibition against false statements, if any

Decision Point:
Do you have policies prohibiting false statements? If not, will you add them?

NPRM pg. 682-92

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GRIEVANCE PROCEDURES (CONT.)

- Complaints can be consolidated in some situations
- The burden to conduct an investigation and gather sufficient information to make a determination is on the Recipient
- For sex-based harassment complaints only, the grievance procedures must:
  - Describe the range of supportive measures available
  - Describe the range of possible disciplinary sanctions and remedies that could be imposed

Decision Point:
What are the range of sanctions and remedies for students? For Employees?

Decision Point:
What supportive measures are available?

NPRM pg. 682-90

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INVESTIGATING

- Adequate, reliable, and impartial investigations of complaints
- Equal opportunity for parties to present inculpatory and exculpatory evidence
- Investigators must collect evidence and determine relevance

§ 106.45	§ 106.46
• Written or verbal description of relevant evidence	• Equitable access to all relevant evidence **or** to an investigation report that summarizes the evidence
• Reasonable opportunity for parties to respond	• Reasonable opportunity to review and respond • Review must take place before the hearing, if any

NPRM pg. 682-90

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BEST PRACTICES

Allow parties to offer expert witnesses.

Provide a comprehensive investigation report to all parties and their Advisors.

Provide all relevant evidence to parties prior to the completion of the investigation report and offer an opportunity to respond to the evidence.

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DECISION-MAKING

	§ 106.45	§ 106.46
Second 10-day period	• Not required	• Not required
Credibility Assessment	• Decision-maker is required to assess credibility • Does not have to occur during a hearing or live questioning	• Decision-maker(s) required to assess credibility through live questioning during a **live hearing** or through **individual meetings**
Live Hearing	• Not required	• Permissible • Required in some jurisdictions

NPRM pg. 682-90

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DECISION-MAKING (CONT.)

	§ 106.45	§ 106.46
Cross-examination	• Not required	• Required • Can occur through the Decision-maker or through party Advisors (during a live hearing)
Written Outcome	• Permitted but not required	• Required
Appeal	• Permitted but not required • May be otherwise required	• Required

NPRM pg. 682-690

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INDIVIDUAL MEETINGS

- Under § 106.46 if a Recipient chooses to conduct individual meetings, Decision-makers must be permitted to pose their own relevant questions and relevant questions from the parties
  - Parties may provide questions directly to Decision-maker or, if separate, to the Investigator
- What's Unclear?
  - If an institution utilizes the same administrator for investigating and decision-making, can cross-examination take place during the investigation?
  - Does cross-examination have to occur after the investigation has concluded?

§ 106.46(f); NPRM pg. 694

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LIVE HEARINGS

- Under § 106.46 if a Recipient conducts live hearings:
  - Decision-makers must be allowed to pose their own relevant questions and relevant questions from the parties, **OR**
  - Each party's Advisor must be allowed to ask **any party** and any witnesses all relevant questions
- Can include questions going to credibility
- Parties can never ask questions directly

§ 106.46(f); NPRM pg. 694

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SUPPRESSION RULE

- Section 106.46 includes a “suppression rule”
  - If a party does not respond to **questions related to their credibility**, the Decision-maker(s) must not rely on any statement of that party **that supports that party’s position**
  - Decision-maker(s) must not draw an inference on whether the harassment occurred based solely on a refusal to respond to questions about credibility

§ 106.46(f)(4), NPRM pg. 695

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OUTCOME DETERMINATION

- After making a determination as to whether the sex-based harassment occurred, the Recipient must provide that determination to the parties
  - Under § 106.45
    - Does not have to be in writing
  - Under § 106.46
    - **Written** determination must include:
      - 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

NPRM pg. 696

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APPEALS

- Under § 106.46 institutions are required to offer an opportunity to request an appeal after a final determination
  - Outcome 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
- Appeal Decision-maker(s) cannot be the Investigator or Decision-Maker

NPRM pg. 696

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BEST PRACTICES

Provide a written outcome notification including the determination, any sanctions or remedies, and any opportunities for appeal.

Offer one level of appeal and ensure comparable procedures for complaints other than sex discrimination also offer one level of appeal.

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STANDARD OF PROOF

- Standard of Proof
  - Language shift from “burden of proof” or “standard of evidence”
- Must use preponderance of the evidence *unless*
  - Clear and convincing is used in all other **comparable proceedings, including other discrimination complaints (Title VII, Title VI)**
    - Employee Respondent vs. Student Respondent complaints are not comparable

§ 106.6(g); NPRM pg. 688

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BEST PRACTICES

Adopt the “preponderance of the evidence” standard in all complaints unless it conflicts with other contract rights.

Negotiate future contract rights to allow for the preponderance of the evidence to be used.

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ADVISORS

- Under § 106.45, Recipients are not required to permit Advisors
  - Recipients are not prohibited from doing so, as long as all parties are treated equitably
  - Advisors may otherwise be required
    - VAWA
    - Union/CBA Agreements
- Under § 106.46, all parties have the right to be accompanied by an Advisor of choice
  - An Advisor is not required unless an institution has chosen to implement live hearings with Advisor-led cross-examination
    - If a party does not have an Advisor, the Recipient must provide an Advisor at no cost

§ 106.46(e)(2); NPRM pg. 692

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BEST PRACTICES

Permit access to Advisors for all parties in all formal processes.

If an institution provides Advisors, provide them with adequate training on the institution's policies and procedures.

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TYPES OF EVIDENCE

Relevant

Impermissible (regardless of relevance)

Not Relevant

§ 106.6; NPRM pg. 684

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EVIDENCE

- Relevant
  - Includes inculpatory and exculpatory evidence
  - Initial determinations about relevance occur at the investigation stage
  - Decision-maker(s) must objectively evaluate all relevant evidence
- Impermissible
  - Must not be accessed, considered, disclosed, or otherwise used, regardless of relevance
- Not Relevant

Decision Point:
How will parties receive the evidence? How long will the parties have to review?

§ 106.6; NPRM pg. 684

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IMPERMISSIBLE EVIDENCE

- Evidence that is protected as privileged, unless the person holding the privilege has voluntarily waived it
- A party's records maintained by a physician, psychologist, or other recognized professional/paraprofessional in connection with treatment, unless the Recipient obtains that party's voluntary written consent
- Evidence that relates to the Complainant's sexual interests or prior sexual conduct, unless:
  - Evidence is offered to prove someone other than Respondent committed the alleged conduct
  - Specific evidence of prior conduct with the Respondent is offered to prove consent

§ 106.6; NPRM pg. 684

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GROUP BRAINSTORM

How does your institution intend to structure staffing for investigations and decision-making?

PREGNANCY & RELATED CONDITIONS

- Pregnancy Discrimination
- Reasonable Modifications
- Pregnancy Leave
- Lactation Space

PREGNANCY DISCRIMINATION

- Pregnancy or related conditions:
  1) Pregnancy, childbirth, termination of pregnancy, or lactation
  2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
  3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions
- Nondiscrimination
  - Cannot adopt policies, practices, or procedures
    - To treat a student **OR** employee differently based on current, potential, or past pregnancy related conditions

§ 106.2; NPRM pg. 655
§ 106.21; NPRM pg. 667

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PREGNANCY DISCRIMINATION (CONT.)

- Admissions/Enrollment
  - No pre-admission or enrollment inquiries regarding marital status
    - Including asking “Miss or Mrs.”
    - Self-identification of sex is permissible if required from all applicants
- What’s Unclear?
  - Non-birthing parents
  - Scope of parental protections

§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 698-99

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RESPONSE TO 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 voluntary access to separate and comparable program, if desired
  - Voluntary leave of absence
  - Availability of lactation space
  - Grievance procedures for sex discrimination complaints

§ 106.40; NPRM pg. 669-72

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BEST PRACTICES

Offer support to non-birthing parents in the event of a medical need for a birthing parent or newborn.

Provide information on institutional website including:

- The rights of pregnant students under Title IX
- How to request support for pregnancy or related conditions
- The processes available for requesting assistance and for challenging when a denial of assistance occurs.

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REASONABLE MODIFICATIONS

- Reasonable modifications may include:
  - Breaks to attend health needs
  - Breaks for breastfeeding or expressing breast milk
  - Absences for medical appointments
  - Access to online or homebound education
  - Changes in sequence or schedule of courses
  - Extensions or rescheduling examinations
  - Counseling
  - Elevator access

§ 106.40; NPRM pg. 669-72

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PREGNANCY-RELATED LEAVE

- Pregnancy or related conditions serve as a justification for a reasonable, voluntary leave of absence
  - Can be unpaid
  - Applies to employees and students
    - Even if there is no policy **or** the person does not qualify under the policy
- Upon return, the person should be reinstated to their prior or a comparable status
  - For employees, there should be no decrease in compensation
  - For students, this includes academic and extracurricular status

§ 106.40; NPRM pg. 670
§ 106.57; NPRM pg. 699

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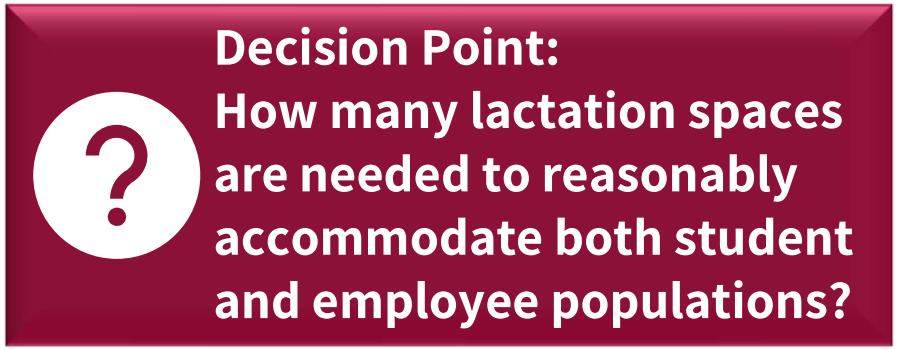
LACTATION TIME & SPACE

- Employees and students must be provided reasonable break times for breastfeeding or expressing breast milk
- Lactation Space
  - Not a bathroom
  - Clean, shielded from intrusion
  - Can be used by a student or employee, as needed



§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 699

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BEST PRACTICES

Offer multiple spaces that include access to sinks, outlets, and refrigerators.

Provide access to the lactation room without having to request permission.

Add lactation spaces to cleaning schedules in that facility.

Ensure space is available during evening and weekend classes or programs.

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2023 ATHLETICS NPRM

ATHLETICS NPRM OVERVIEW

- The U.S. Department of Education (ED) released a 115-page Notice of Proposed Rulemaking (NPRM) on April 6, 2023
- Published in the Federal Register on April 13
  - 30-day comment period ran until May 15
  - ED received over 150,000 comments
  - ED must now respond to all comments as part of the rulemaking process
- Final version will likely differ from the NPRM
- ED expects to release a Final Rule in October 2023

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CURRENT REGULATION - § 106.41(B)

(b) **Separate teams**. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

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PROPOSED REGULATION - § 106.41(B)(2)

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:

(i) be substantially related to the achievement of an important educational objective, and

(ii) minimize the harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

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SEX-RELATED ELIGIBILITY CRITERIA – ELEMENT I

Be substantially related to the achievement of an important educational objective.

- Proposed regulation does not limit the important educational objectives a recipient may seek to achieve
- Recipients must consider whether the objective could be accomplished through alternative criteria that would not limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity
- Recipients would not be permitted to rely on false assumptions about transgender students
- Any sex-related eligibility criteria must account for factors that affect students in the particular grade or education level

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SEX-RELATED ELIGIBILITY CRITERIA – ELEMENT II

Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

- **Limit** – to disallow transgender students from participating fully on a male or female team consistent with their gender identity
- **Deny** –to foreclose students' opportunity to participate on male or female teams consistent with their gender identity
- A recipient would be in violation of the proposed regulation if it can reasonably adopt or apply alternative criteria that would be a less harmful means of achieving the recipient's important educational objective

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EFFECT OF THE PROPOSED RULE

- The proposed rule effectively prohibits categorical bans applied to entire groups of student-athletes based on gender identity:
  - Examples of Prohibited Laws and Policies:
    - A state law that would require that all students participate on athletic teams consistent with their sex assigned at birth
    - A state law that prohibits all student-athletes who are trans girls or trans women from participating on girls' or women's athletic teams
    - A policy that requires all prospective trans female student-athletes to submit to hormonal testing but does not require the same of trans male or cisgender student-athletes

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WHAT IS UNKNOWN?

- What does “minimize the harm” mean in application?
- Does the harm minimization element apply to cisgender students who alleged their athletic opportunity is limited or denied by policy permitting participation in accordance with gender identity?
- What creates a competitive lack of fairness?
- Will the regulation prohibit limiting athletic participation based on hormonal differences?
- How should intersex and non-binary scholarship recipients be counted for purposes of assessing proportionality for equity purposes?
- How should recipients respond in situations in which a student identifies as gender fluid?

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WHAT IS UNKNOWN? (CONT.)

- Whether the proposed rule:
  - Requires recipients to accommodate a student based solely on their own representations of their gender identity.
  - Permits or prohibits recipients from requiring parental/guardian or doctor verification of gender identity to "prove" gender identity in situations in which the student is a minor.
  - Permits or prohibits recipients from requiring a birth certificate or updated birth certificate information to "prove" gender identity.
  - Permits or prohibits recipients from requiring parental/guardian notification of gender identity to "prove" or "confirm" gender identity in situations in which the student is a minor.

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ATHLETIC-RELATED DECISION POINTS

Decision Point:
Will the institution implement a policy that restricts athletic participation based on gender identity?

Decision Point:
How will the institution navigate conflicting state law or governing body policies and federal regulations?

Decision Point:
How will the institution document its attempts to minimize harm and rationale for such actions?

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ATIXA'S SUGGESTIONS FOR MINIMIZING HARM

- Involve effected student(s) in an iterative process or conversation to identify the harm caused by the policy and determine strategies or remedies that could be successful given the student's circumstances and wishes.
- Establish an all-gender league with no sex- or gender-related criteria. Some situations may lend themselves to this kind of solution, like recreational leagues or some club sports.
  - Minimizing harm would probably necessitate a reasonable level of competition in any alternative league.
- Collaborate with the student to identify alternative athletic opportunities and facilitate participation in those opportunities.
  - Another sport or competition may not have the same kinds of safety or fairness concerns, depending on age or level.
- Identify opportunities with other recipients that may be suitable for the individual and facilitate pursuit of those opportunities.

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BEST PRACTICES

Permit all student-athletes to participate in athletics in alignment with their gender identity.

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WHAT'S NEXT?

POSSIBLE LEGAL CHALLENGES

- 2020 Regulations saw several legal challenges
  - *Cardona* decision ultimately struck the suppression clause
  - No challenges delayed or halted implementation
- The Final Rules will likely face many legal challenges
  - Tennessee + 19 other states have a current injunction
    - *State of Tenn., et al. v. U.S. Dep't of Educ.,* No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022)
  - Regulatory overreach
    - *West Virginia v. EPA*, 597 U.S. ___ (2022)
  - Additional challenges likely

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SPECIFIC CONSIDERATIONS

- State Laws & Case Law
  - Does your jurisdiction have requirements related to hearings or cross-examination?
  - Specific requirements for investigations or determinations?
  - Many states are continuing to introduce state laws related to Title IX
- Athletic Governing Bodies
  - May adopt policies that conflict with Title IX regulations
- Post-*Dobbs*
  - High potential for impact in school settings

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THINGS TO DO BEFORE IMPLEMENTATION

- Review today's decision points
- Prepare to expedite policy revisions at your institution
- Educate community about future changes
  - The final changes may be different from the NPRMs
- Review current policies, practices, publications, and websites
  - Create a checklist of changes that will need to be made to each
- Work with your legal counsel to determine how the proposed regulations intersect with other policies and governing laws
- KEEP FOLLOWING THE 2020 REGULATIONS!

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Questions?

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Thanks for joining us today.

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