

**Summary and Comparison of the U.S. Department of Education’s
2020 Title IX Rule and 2022 Title IX NPRM**

Issue	<u>2020 Title IX Rule</u>	2022 Title IX NPRM
<p><i>Discrimination Based on Sexual Orientation, Gender Identity, Sex Stereotypes, and Sex Characteristics</i></p>	<p>The <u>2020 Rule</u> prohibits sexual harassment as a form of discrimination based on sex forbidden under Title IX. It does not address or purport to expand the scope of Title IX protections against discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity. §§ 106.31, 106.30(a).</p>	<ul style="list-style-type: none"> • The <u>2022 NPRM</u> proposes to dramatically expand the scope of prohibited sex discrimination to include discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity (indicia which, with the exception of pregnancy and related conditions, exceed Title IX’s statutory language). Proposed §§ 106.10, 106.2. • The 2022 NPRM proposes, when Title IX or its implementing regulations allow different treatment or separation based on sex, to prohibit such separation or treatment when it subjects a person to more than minimal harm. The NPRM also proposes to define as <i>more than minimal harm</i> any policies that prevent a student from participating in a school’s education program or activity “consistent with their gender identity.” Proposed § 106.31(a)(2). • This prohibition would allegedly not apply if the separation or treatment is “otherwise permitted by Title IX” or the regulations, such as limited situations in which Title IX allows for sex-segregated undergraduate admissions, sex-segregated living facilities, membership practices of fraternities and sororities, or pursuant to the religious exemption. Proposed § 106.31(a)(2).

		<ul style="list-style-type: none"> Although ED indicates that they intend to conduct rulemaking in the near future concerning women’s and girls’ athletics, nothing in the text of the NPRM preserves women’s and girls’ sports based on biology. Schools, colleges, and universities would be required to permit biologically male and female students to play competitive school sports according to their acclaimed gender identity (any policy to the contrary would, according to the NPRM, result in more than minimal harm). Proposed § 106.31(a)(2).
<i>Prohibiting All Forms of Sex Discrimination</i>	The 2020 Rule addresses how federally funded educational institutions respond to and adjudicate allegations of sexual harassment, including sexual assault, in their education programs and activities (in accord with Title IX’s clear and limited prohibition of discrimination on the basis of sex).	The 2022 NPRM covers entirely new forms of sex discrimination (exceeding the Title IX’s clear and limited prohibition of discrimination on the basis of sex).
<i>Defining “Sexual Harassment” and “Sex-based Harassment”</i>	<p>The 2020 Rule prohibits sexual harassment as a kind of sex discrimination. The Rule defines sexual harassment to include (§ 106.30(a)):</p> <ul style="list-style-type: none"> A school employee conditioning education benefits on participation in unwelcome sexual conduct (<i>i.e.</i>, <i>quid pro quo</i>); § 106.30(a)(1) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the school’s education program or activity; § 106.30(a)(2) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking (as defined in the Violence Against Women Act). § 106.30(a)(3) 	The 2022 NPRM would prohibit “sex-based harassment” as a kind of sex discrimination. The NPRM defines sex-based harassment to include “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” an education program or activity (<i>i.e.</i> , hostile environment). Proposed § 106.2.
<i>Permitting Parties Other than Students</i>	The 2020 Rule permits a current student or employee alleged to be the victim of the discrimination to file a complaint, as well as a parent or guardian (lawfully	The 2022 NPRM covers persons other than students or employees of schools who were participating or attempting to participate in the educational program or activity when

<p><i>and Employees to File Complaints</i></p>	<p>authorized to act on behalf of an individual) and the Title IX Coordinator (although the Coordinator may investigate allegations of misconduct involving former students or employees). The complaint must be in written form in person, by mail, or by electronic mail. § 106.30.</p>	<p>the alleged conduct occurred, including former students or employees who may be alleging discrimination by other former students or employees. Proposed § 106.2.</p>
<p><i>Addressing Off-Campus Conduct</i></p>	<p>The 2020 Rule provides that schools must respond to allegations of sexual harassment when it occurs:</p> <ul style="list-style-type: none"> • In the school’s education program or activity, against a person in the United States (to include locations, events, or circumstances over which the school exercises substantial control over both the respondent and the context in which the alleged sexual harassment occurs); §§ 106.44(a), 106.8(d). • Any building owned or controlled by a student organization that is officially recognized by the postsecondary institution). § 106.44(a). 	<p>The 2022 NPRM proposes to dramatically expand Title IX’s jurisdiction by covering allegations of sex-based harassment that occur outside of a school’s educational programs or activities or outside of the United States, if the behavior creates a “hostile environment” in a school’s program. Proposed § 106.11.</p>
<p><i>Responding to Sex Discrimination</i></p>	<p>The 2020 Rule requires that a school must respond when:</p> <ul style="list-style-type: none"> • The school has actual knowledge of sexual harassment, (defining actual knowledge as meaning notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school); §§ 106.44(a), 106.30(a). • The sexual harassment or allegations of sexual harassment occurred within the school’s education program or activity; § 106.44(a). • The sexual harassment or allegations of sexual 	<ul style="list-style-type: none"> • The 2022 NPRM proposes to require schools to take “prompt and effective action” to stop any sex discrimination that occurs in its programs or activities, regardless of actual knowledge of such alleged discrimination by the school. This means that schools could be responsible for sex-based discrimination for which they have no notice or actual knowledge that alleged discrimination may be occurring. Proposed § 106.44(a). • The NPRM would also require schools to prevent the recurrence of any discrimination and “remedy its effects,” giving broad unilateral authority to Title IX Coordinators to impose potentially cumbersome, ill-defined, remedies. Proposed § 106.44(a).

	<p>harassment occurred against a person in the United States. §§ 106.44(a), 106.8(d).</p>	
<p><i>Ensuring Recipients Learn of Possible Sex Discrimination</i></p>	<p>The 2020 Rule requires that each school:</p> <ul style="list-style-type: none"> • Designate and authorize at least one employee as a Title IX Coordinator; § 106.8(a). • Notify all applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions, of the name, title, address, email address, and telephone number of the employee or employees designated as the Title IX Coordinator; § 106.8(a). • Allow any person to report sex discrimination, including sexual harassment (whether or not the person reporting is the alleged victim of conduct that could constitute sex discrimination or sexual harassment) by any means that results in the Title IX Coordinator receiving the person’s report. § 106.8(a). <p>The 2020 Rule further provides that a school has notice (requiring a response) when it has actual knowledge of sexual harassment or allegations of sexual harassment (if that information is known to the Title IX Coordinator, any official of the school with authority to institute corrective measures on behalf of the school, or any employee of an elementary and secondary school). § 106.44(a).</p>	<ul style="list-style-type: none"> • The 2022 NPRM proposes that any employee of an elementary school or secondary school (other than confidential employees, such as counselors) must notify the Title IX Coordinator of information about any conduct that could conceivably constitute sex discrimination, imposing a massive new burden on all employees to monitor the behavior and spoken words of all students. Proposed § 106.44(c)(1). • The 2022 NPRM would require that only postsecondary employees with authority to take corrective action or, for incidents involving students, have responsibility for administrative leadership, teaching, or advising, would be obligated to notify the Title IX Coordinator. Proposed § 106.44(c)(2). • All other postsecondary employees (other than confidential employees, such as counselors) would be required to give an individual who provided information alleging prohibited misconduct with the Title IX Coordinator’s contact information and specific direction about reporting the alleged discriminatory conduct. Proposed § 106.44(c)(2)(iv).
<p><i>Respecting Complainant Autonomy</i></p>	<ul style="list-style-type: none"> • The 2020 Rule provides that schools must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, or as required by law, or as necessary to carry out a Title IX proceeding. § 106.71(a). 	<ul style="list-style-type: none"> • The 2022 NPRM proposes to require the Title IX Coordinator to determine whether to make a complaint in some circumstances where the alleged victim decides not to move forward with one. Proposed § 106.44(f)(5).

	<ul style="list-style-type: none"> • The 2020 Rule also provides that either the complainant or the Title IX Coordinator can make a decision to file a complaint, but former students or employees no longer participating or attempting to participate in the school’s education program or activity are ineligible to file complaints. § 106.30(a). 	<ul style="list-style-type: none"> • The 2022 NPRM would permit former students or employees to file complaints (regardless of why the former student or employee left the school’s education program or activity) against current students or employees or former students or employees. Proposed § 106.2. • The 2022 NPRM would vastly expand the power of the Title IX Coordinator to “monitor” the school’s Title IX program for “barriers to reporting information” and would enable the Coordinator to force the school to take steps “reasonably calculated” to address the alleged barriers. Proposed § 106.44(b).
<p><i>Title IX Coordinator Response to Sex Discrimination</i></p>	<p>The 2020 Rule requires that schools:</p> <ul style="list-style-type: none"> • Presume the innocence of the respondent during the investigation; § 106.45(b)(1)(iv). • Institute and follow a grievance process that complies fully with the 2020 Rule, including investigating formal complaints of sexual harassment (a “formal complaint” is a document filed by a complainant or signed by the Title IX Coordinator alleging that sexual harassment occurred and requesting that the school investigate the allegations); § 106.45(b). • The Title IX Coordinator (and all Title IX personnel) must be free from conflicts of interest and bias; § 106.45(b)(1)(iii). • The Title IX Coordinator must treat a person as a complainant at any time the school has notice that the person is alleged to be the victim of conduct that could constitute sexual harassment (regardless of whether the alleged victim or a third party 	<ul style="list-style-type: none"> • The 2022 NPRM would require the Title IX Coordinator to take wide-ranging “prompt and effective steps” (in addition to remedies provided to the alleged victim) to ensure that sex discrimination does not continue or recur. Proposed § 106.44(f)(6). • The NPRM would increase the authority of the Title IX Coordinator to implement a wide range of what the Coordinator deems to be sufficient remedies to prevent the continuation or recurrence of sex discrimination. Proposed § 106.45(h)(3). • The 2022 NPRM proposes to allow the Title IX Coordinator to impose “supportive measures” that burden a person accused of misconduct prior to any finding of responsibility (<i>i.e.</i>, abandoning the presumption of innocence for the accused). Proposed § 106.45(g)(2).

	reported the alleged conduct) and regardless of whether a formal complaint is filed by the complainant. §§ 106.44(a)-(b), 106.30, 106.8(a).	
<i>Grievance Procedures: Return of the Single Investigator Model</i>	The 2020 Rule prohibits use of the “single investigator model” in which a single school official may investigate and adjudicate sexual harassment allegations and impose punishment. It requires at least three separate school officials to participate in the grievance process (a coordinator who receives reports of sexual harassment, an investigator, and a decision-maker). § 106.45(b)(7)(i).	The 2022 NPRM would permit the return of the single investigator model, where the coordinator, investigator, and adjudicator may all be the same person (<i>i.e.</i> , “kangaroo courts”). Proposed § 106.45(b)(2).
<i>Grievance Procedures: Live Hearing and Cross-Examination</i>	<p>The 2020 Rule requires that postsecondary schools:</p> <ul style="list-style-type: none"> • Conduct a live hearing with cross-examination opportunities for the parties (hearings are optional for K-12 schools); § 106.45(b)(6)(i). • At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions (questions must be reviewed by the decision-maker prior to being posed), including questions challenging credibility; § 106.45(b)(6)(i). • Cross-examination is to be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally; § 106.45(b)(6)(i). • Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are prohibited as not relevant except in limited circumstances; § 106.45(b)(6)(i). 	<ul style="list-style-type: none"> • The 2022 NPRM would abolish the requirements for postsecondary schools to conduct a live hearing and require cross-examination. Proposed § 106.46(f)(1). • The 2022 NPRM would permit, but not require, questioning by one side of the other (if a live hearing occurs), but would only permit the questions the decisionmaker allows and determines are not “unclear” or “harassing,” thereby giving the decisionmaker immense unilateral power to arbitrarily limit questioning. Proposed § 106.46(f)(3).

- If a party does not have an advisor, the school must provide (without fee or charge to that party) an advisor of the school's choice, who may but is not required to be an attorney, to conduct cross-examination on behalf of that party; § 106.45(b)(6)(i).
- Live hearings may be conducted in the same geographic location or virtually (if participants can simultaneously see and hear each other); § 106.45(b)(6)(i).
- Schools must create a recording or transcript and make it available to the parties for inspection and review. § 106.45(b)(6)(i).

The 2020 Rule **prohibits questions and evidence about the complainant's sexual predisposition or prior sexual behavior** as not relevant unless such questions and evidence is offered to prove that someone other than the respondent committed the conduct alleged by the complainant or if the questions and evidence concern specific incidents of the complaint's prior sexual behavior with the respondent and are offered to prove consent.

The 2020 Rule requires for **K-12 schools** (and other recipients that are not postsecondary institutions):

- The school's grievance process may, but need not, provide for a hearing;
- **The school must send the investigative report to the parties;**
- **The school must permit the parties to submit written, relevant questions that a party wants asked of any party or witness; and**

	<ul style="list-style-type: none"> • The school must provide each party with the responses, and allow additional, limited follow-up questions from each party. § 106.45(b)(6)(ii). 	
<p><i>Grievance Procedures: Access to Investigative Reports and Evidence</i></p>	<p>The 2020 Rule requires that each party to a sexual harassment grievance proceeding be granted an equal opportunity to inspect and review the actual evidence obtained in the investigation that is directly related to the allegations. § 106.45(b)(5)(vi).</p>	<ul style="list-style-type: none"> • For K-12, the 2022 NPRM would not require the school to provide investigative reports to the parties but allows the Title IX Coordinator to give these parties a summary of the evidence. Proposed § 106.45(f)(4). • For postsecondary institutions, the 2022 NPRM would require that schools offer “equitable access” to relevant and not otherwise impermissible evidence or to an investigative report summarizing this evidence. If the postsecondary institution provides the report, and any party seeks access to evidence, it must give parties access to the relevant and not otherwise impermissible evidence. Proposed § 106.46(e)(6). • The 2022 NPRM defines “otherwise impermissible evidence” to include evidence of a complainant’s sexual interests and prior sexual conduct. Proposed § 106.45(b)(7)(iii).
<p><i>Grievance Procedures: Standard of Proof</i></p>	<ul style="list-style-type: none"> • The 2020 Rule permits schools to use of a higher standard of proof (the “clear and convincing evidence” standard) and to state clearly whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or clear and convincing evidence standard. § 106.45(b)(1)(vii). 	<ul style="list-style-type: none"> • The 2022 NPRM proposes to require schools to use a preponderance of the evidence standard of proof unless they use a clear and convincing standard in all other comparable proceedings, substantially reducing the burden of proof for obtaining a “conviction” of the accused. Proposed § 106.45(h)(1). • The 2022 NPRM proposes to permit schools to apply a standard of proof to faculty and other

	<ul style="list-style-type: none"> The 2020 Rule requires that schools apply the same evidentiary standard for students and employees, including faculty. § 106.45(b)(1)(vii). 	<p>employees that is different from the standard of proof applied to students, inexplicably providing greater due process protections for accused employees than for accused students. Proposed § 106.45(h)(1).</p>
<i>Informal Resolution</i>	<ul style="list-style-type: none"> The 2020 Rule provides that a school may offer informal resolution options (<i>e.g.</i>, mediation or restorative justice) if a formal complaint has been filed and if both parties give voluntary, informed, written consent to proceed with an informal resolution option. § 106.45(b)(9). The 2020 Rule does not permit schools to use informal resolution processes when an employee is alleged to have sexually harassed a student. § 106.45(b)(9)(iii). 	<p>The 2022 NPRM would permit an informal resolution process to occur even if a formal complaint has not been filed. Proposed § 106.45(k).</p>
<i>Retaliation</i>	<ul style="list-style-type: none"> The 2020 Rule prohibits retaliation against any individual for exercising Title IX rights (no school or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing). § 106.71(a). Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute prohibited retaliation. § 106.71(b)(2). The 2020 Rule explicitly provides that the exercise of one’s First Amendment rights does not constitute prohibited retaliation. § 106.71(b)(1). 	<ul style="list-style-type: none"> The 2022 NPRM proposes to require schools to move forward with their grievance procedures whenever they receive a complaint alleging “retaliation.” Proposed § 106.71. The 2022 NPRM would remove the provision from the 2020 Rule stating that the exercise of one’s First Amendment rights does not constitute prohibited retaliation. Proposed § 106.71. The 2022 NPRM would expand protection from retaliation to include “peer retaliation” (defined as retaliation by one student against another). Proposed §§ 106.2, 106.71

<p><i>Discrimination Based on Pregnancy or Related Conditions</i></p>	<ul style="list-style-type: none"> • The 2020 Rule prohibits discrimination against students, employees, and applicants based on a student’s actual or potential parental, family, or marital status which treats students differently on the basis of sex. § 106.40(a). • The 2020 Rule prohibits discrimination against any student based on pregnancy and related conditions, including pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom. § 106.40(b)(1)-(5). 	<ul style="list-style-type: none"> • The 2022 NPRM proposes to prevent discrimination based on “pregnancy or related conditions” by requiring schools to provide “reasonable modifications” to their education programs or activities for students, private lactation stations for students and faculty, and related breaktimes. Proposed § 106.40(b)(3)–(4). • The 2022 NPRM would require schools to inform a student (or a student’s parent, guardian, or legal representative) who informs the school about the student’s pregnancy or related conditions, on how to contact the Title IX Coordinator for additional assistance. Proposed § 106.40(b)(2). • The 2022 NPRM would require schools to provide students a leave of absence for medical reasons (and reinstatement upon return). Proposed § 106.40(b)(3)(iii).
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