

ED's New Title IX Rule: A Careful Review and Suggestions for Public Comment

Higher Education Webinar Series

July 7, 2022



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Presenter Profile

- Practice and Experience

- Assists institutions of higher education to navigate a wide range of legal and regulatory challenges, including those involving discrimination laws.
- Represents institutions in administrative proceedings before the Department and other postsecondary regulators.
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Syllabus

The Title IX Rule: Background & Status

The Obligation to Respond to Sex Discrimination

The Proposed Title IX Procedural Waterfall

New Notification Obligations

Title IX Coordinator Responsibilities Upon Notification of Potential Sex Discrimination

Informal Resolution

Grievance Procedures for all Complaints of Sex-Based Discrimination

Additional Grievance Procedures for Sex-Based Harassment Involving Students

Training Requirements for Employees and Process Administrators

Retaliation

Discrimination Based on Pregnancy or Marital Status

The Title IX Rule: Background & Status



The Title IX Statute

- Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any **education program or activity** receiving federal financial assistance.
 - Covers all forms of discrimination based on sex (not just equity in athletics or sexual misconduct).
 - Protects students and employees.
 - Applies to all institutions that receive federal financial assistance, either directly or indirectly.
 - Enforced by the Office of Civil Rights.

The Title IX Regulations

- The regulations at 34 C.F.R. Part 106 amplify the statute considerably, expressly prohibiting sex discrimination in a wide range of areas impacting **students**, including:

admissions &
recruitment

student services
& activities

academic
programs

housing &
facilities

class & school
access

athletics

counseling

financial &
employment
assistance

health insurance
& benefits

marital or
parental status

The Title IX Regulations

- Similarly, the regulations expressly prohibit sex discrimination in a wide range of areas concerning **employees**, such as:

employment

recruitment

compensation &
benefits

job classification &
structure

marital or parental
status

advertising

pre-employment
inquiries

employment
criteria

The 2020 Title IX Rule

- In 2020, ED [promulgated](#) the first significant regulation addressing sexual misconduct on campus since 1975.
- The 2020 Title IX rule put into place a complex framework for managing allegations of sexual harassment on campus.

The screenshot displays the Federal Register website for the 2020 Title IX Rule. The page title is "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance". It is a rule by the Education Department, dated 05/19/2020. The document details include:

- AGENCY:** Office for Civil Rights, Department of Education.
- ACTION:** Final rule.
- SUMMARY:** The Secretary of Education amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, (hereinafter collectively referred to as "recipients" or "schools"), must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination. These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities. The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims. The final regulations also clarify and modify Title IX regulatory requirements regarding remedies the Department may impose on recipients for Title IX violations, the intersection between Title IX, Constitutional protections, and other laws, the

Document details on the right side of the page include:

- Printed version:** PDF
- Publication Date:** 05/19/2020
- Agency:** Department of Education
- Dates:** These regulations are effective August 14, 2020.
- Effective Date:** 08/14/2020
- Document Type:** Rule
- Document Citation:** 85 FR 30026
- Page:** 30026-30579 (554 pages)
- CFR:** 34 CFR 106
- Agency/Docket Number:** Docket ID ED-2018-OCR-0064
- RIN:** 1870-AA14
- Document Number:** 2020-10512

Title IX Redux

- On April 6, 2021, Biden administration [announced](#) that it would be overhauling the 2020 Title IX rule.
- On June 23, 2022, ED released the [unofficial version](#) of its proposed changes to the Title IX rule and invited public comment.
- This presentation examines ED's proposed rule.



U.S. Department of Education

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The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment

Department Commemorates 50 Years of Protecting and Advancing the Rights of All Students

JUNE 23, 2022

Contact: Press Office, (202) 401-1576, press@ed.gov

Today, in celebration of the 50th anniversary of Title IX – the landmark civil rights law that has opened doors for generations of women and girls – the U.S. Department of Education released for public comment proposed changes to the regulations that help elementary and secondary schools and colleges and universities implement this vital legislation. The proposed amendments will restore crucial protections for students who are victims of sexual harassment, assault, and sex-based discrimination – a critical safety net for survivors that was weakened under previous regulations. The proposed regulations will advance educational equity and opportunity for women and girls across the country to ensure that every student in America, from kindergarten through a doctorate degree, can achieve her dreams.

"Over the last 50 years, Title IX has paved the way for millions of girls and women to access equal opportunity in our nation's schools and has been instrumental in combating sexual assault and sexual violence in educational settings," said U.S. Secretary of Education Miguel Cardona. "As we celebrate the 50th Anniversary of this landmark law, our proposed changes will allow us to continue that progress and ensure all our nation's students – no matter where they live, who they are, or whom they love – can learn, grow, and thrive in school. We welcome public comment on these critical regulations so we can further the Biden-Harris Administration's mission of creating educational environments free from sex discrimination and sexual violence."

The proposed regulations will advance Title IX's goal of ensuring that no person experiences sex discrimination, sex-based harassment, or sexual violence in education. As the Supreme Court wrote in *Boastock v. Clayton County*, 140 S. Ct. 1731 (2020), it is "impossible to discriminate against a person" on the basis of sexual orientation or gender identity without "discriminating against that individual based on sex." The regulations will require that all students receive appropriate supports in accessing all aspects of education. They will strengthen protections for LGBTQI+ students who face discrimination based on sexual orientation or gender identity. And they will require that school procedures for complaints of sex discrimination, including sexual violence and other sex-based harassment, are fair to all involved. The proposed regulations also reaffirm the Department's core commitment to fundamental fairness for all parties, respect for freedom of speech and academic freedom, respect for complainants' autonomy, and clear legal obligations that enable robust enforcement of Title IX.

The proposed regulations would:

- Clearly protect students and employees from all forms of sex discrimination.
- Provide full protection from sex-based harassment.
- Protect the right of parents and guardians to support their elementary and secondary school children.
- Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities – and to prevent its recurrence and remedy its effects.
- Protect students and employees who are pregnant or have pregnancy-related conditions.
- Require schools to respond promptly to all complaints of sex discrimination with a fair and reliable process that includes trained, unbiased decisionmakers to evaluate the evidence.
- Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment.
- Protect LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics.
- Clarify and confirm protection from retaliation for students, employees, and others who exercise their Title IX rights.

Opportunity to Comment

- The public will have 60 days to comment.
- The clock starts on the day the official NPRM is published in the Federal Register (anticipated in mid-July).
- Comments may be submitted and viewed via the [Federal eRulemaking Portal](#).
- Reference Docket [ID ED-2021-OCR-0166].

The screenshot shows the Regulations.gov website. At the top, the logo reads "Regulations.gov Your Voice in Federal Decision Making" with a "SUPPORT" button. Below the logo is a navigation bar with the text "Make a difference. Submit your comments and let your voice be heard." and a search bar containing the text "Search for Rules, Proposed Rules, Notices or Supporting Documents" and a "Search" button.

The main content area is divided into several sections:

- What's New on Regulations.gov:** A section with a light blue background and an icon of a magnifying glass over a document. Text: "New features recently added include docket subscriptions and the ability to browse all posted comments to a docket. See FAQs for more detail."
- Explore:** A sidebar on the right with a blue header. It contains two sub-sections:
 - Comments Due Soon:** A list of comment counts for different time periods: Next 3 Days (2), Next 7 Days (190), Next 15 Days (291).
 - Posted Recently:** A list of comment counts for different time periods: Last 3 Days (187), Last 7 Days (461), Last 15 Days (840).
- What's Trending:** A section with a light blue background and an icon of a magnifying glass over a document. It contains six cards, each representing a regulation with a title, agency, and comment due date:
 - Card 1: "Tobacco Product Standard for Menthol in Cigarettes" by the Food and Drug Administration, comments due August 02, 2022.
 - Card 2: "Ortho-phthalates for Food Contact Use: Request for Information" by the Food and Drug Administration, comments due July 19, 2022.
 - Card 3: "Tobacco Product Standard for Characterizing Flavors in Cigars" by the Food and Drug Administration, comments due August 02, 2022.
 - Card 4: "Request for Information To Inform Interagency Working Group on Mining Regulations, Laws, and Permitt..." by the Department of the Interior, comments due July 31, 2022.
 - Card 5: "Vaccines and Related Biological Products Advisory Committee: Notice of Meeting; Establishment of a ..." by the Food and Drug Administration, comments due June 27, 2022.
 - Card 6: "Cybersecurity in Medical Devices: Quality System Considerations and Content of Premarket Submission..." by the Food and Drug Administration, comments due July 07, 2022.
- Dockets:** A sidebar on the right with a light blue background. It contains a list of docket counts: Deregulatory (646), Economically Significant (982), Major Rule (1,026).
- Help Improve Regulations.gov:** A section with a light blue background and an icon of a magnifying glass over a document. Text: "We design this site in phases to launch new features faster than ever! We are improving it and need your input to make this site better. Please tell us what you think and help us keep improving!" and a "Provide Feedback" button.

Title IX: Study Aids

- ED [Summary of Major Changes](#) chart.
- TC [comparison](#) document showing proposed changes to current rule in redline format.
- Preamble to the proposed rule.



Comparison Showing Proposed Changes
to Title IX Rule Circulated June 23, 2022

Last Updated: June 27, 2022

On June 23, 2022, the U.S. Department of Education circulated the unofficial version of its forthcoming Notice of Proposed Rulemaking ("NPRM"), in which it proposes to amend the current Title IX regulations. Among other things, the NPRM contemplates changes to the role of the Title IX Coordinator, definitions of critical concepts (e.g., sexual harassment), requirements for responding to allegations of sexual misconduct, protections for transgender students, and procedural standards.

Below, we provide a redline that compares the changes proposed in the NPRM to the current version of 34 C.F.R. Part 106. We have created this document to assist institutions as they work to understand the proposed changes and to prepare comments. Institutions interested in commenting on the proposed rule must do so within 60 days of the NPRM's official publication in the Federal Register. Comments may be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>.

Institutions with questions regarding the proposed Title IX rule are welcome to contact Aaron Lacey (alacey@thompsoncoburn.com), Scott Goldschmidt (sgoldschmidt@thompsoncoburn.com), or Stephanie Cohan (scohan@thompsoncoburn.com). Aaron, Scott, and Stephanie are all part of Thompson Coburn's Higher Education Practice, and routinely advise postsecondary institutions on matters involving Title IX and other federal and state anti-discrimination laws.

Disclaimer

Please note that the purpose of this document is to provide information on a regulatory matter and all content provided is for informational purposes only and should not be considered legal advice. The transmission of information from this document does not establish an attorney-client relationship with the reader. If you desire legal advice for a particular situation, you should consult an attorney.

PART 106 – NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A - Introduction

§106.1 Purpose ~~and effective date.~~

The purpose of this part is to effectuate ~~title Title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments),~~ which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. ~~The effective date of this part shall be July 21, 1975.~~

The Obligation to Respond to Sex Discrimination



The Obligation to Respond

- Proposed 106.44(k) provides that a school “must take prompt and effective action to end any **sex discrimination** that has occurred in its **education program or activity**, prevent its recurrence, and remedy its effects.”
- Under proposed 106.44(f), a Title IX Coordinator would be required to take certain steps upon being notified of conduct that may constitute sex discrimination under Title IX, by an employee or any other party, and without regard to whether a complaint has been made requesting the institution to initiate its grievance procedures.
- Understanding the full scope of these obligations requires a review of new and revised definitions and concepts.

Proposed Definitions: Heat Map

Actual knowledge (removed)	Complainant (meaningful revision)	Consent (removed)	Complaint (new)	Confidential employee (new)
Disciplinary sanctions (new)	Formal complaint (removed)	Parental status (new)	Pregnancy or related condition (new)	Relevant (new)
Remedies (new)	Respondent (meaningful revision)	Retaliation (meaningful revision)	Sex Discrimination (new)	Sexual harassment (removed)
Sex-based harassment (new)	Specific Offenses (new)	Student with a disability (new)	Supportive measures (meaningful revision)	Transition Plan (removed)

Proposed Definition: Sex Discrimination

- “On the basis of sex” has been interpreted differently across administrations.
- In *Bostock v. Clayton County, Georgia*, No. 17-1618 (S. Ct. June 15, 2020)[1], the Supreme Court held that firing individuals because of their sexual orientation or transgender status **does** violate Title VII’s prohibition on discrimination because of sex.
- On June 22, 2021, OCR issued a [Notice of Interpretation](#) in the Federal Register to make clear that the Department “has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*... guides the Department's interpretation of discrimination “on the basis of sex” under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.”

Proposed Definition: Sex Discrimination

Proposed 106.10 builds on *Bostock* and the Notice of Interpretation, expressly providing that discrimination on the basis of sex includes discrimination based on:

- Sex stereotypes
- Sex characteristics
- Pregnancy or related conditions
- Sexual orientation
- Gender identity

Proposed Definition: Sex-Based Harassment

Sex-based harassment would include any harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity, or other sexual harassment or sex-based conduct that is:

Quid Pro Quo
Harassment

Hostile Environment
Harassment

One of Several
Specific Offenses

(Sexual Assault, Dating Violence,
Domestic Violence, or Stalking)

Proposed Definition: Quid Pro Quo Harassment

- Under the proposed rule, quid pro quo harassment occurs when:
 - An **employee, agent, or other person** authorized by the school to provide an aid, benefit, or service under the institution's education program or activity
 - **explicitly or implicitly conditions** the provision of an aid, benefit, or service on a person's participation in unwelcome sexual conduct.

Proposed Definition: Hostile Environment Harassment

- Per the proposed rule, hostile environment harassment is:
 - Unwelcome sex-based conduct
 - that is sufficiently severe **or** pervasive
 - that, **based on the totality of the circumstances and evaluated subjectively** and objectively, it denies **or limits** a **person's ability to participate in or benefit from** the school's education program or activity.
- Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the five concepts on the following slide.

Proposed Definition: Hostile Environment Harassment

- The degree to which the conduct affected the complainant's ability to access the education program or activity.
- The type, frequency, and duration of the conduct.
- The parties' ages, roles, previous interactions, and other relevant factors.
- The location of the conduct, the context in which the conduct occurred, and the control the school has over the respondent.
- Other sex-based harassment in the school's education program or activity.

Proposed Definition: Specific Offenses

- Similar definitions to current regulations.
- Rape, Fondling, Incest, Statutory Rape
 - ED proposes clarifying confusion by suggesting institutions look to Clery Act regulations (34 CFR Part 668, Subpart D, Appendix A)
- Dating Violence, Domestic Violence, Stalking
 - Definitions from VAWA 2022 (Effective October 1, 2022)

Note on “Unwelcome Conduct”

- The presence of unwelcome conduct is key to Quid Pro Quo and Hostile Environment Harassment. The commentary to the NPRM provides additional context:
 - Conduct would be unwelcome if a person did not request or invite it and regarded the conduct as undesirable or offensive.
 - The fact that a person may have accepted the conduct does not mean that they welcomed it.
 - If a student actively participates in sexual banter and discussions and gives no indication that they object, then that would generally support a conclusion that the conduct was not unwelcome, depending on the facts and circumstances.
 - Specific issues related to welcomeness may also arise if the person who engages in harassment is in a position of authority.

Revised Scope of “Program or Activity”

- Proposed 106.11 would revise the scope of “program or activity” for purposes of Title IX grievance procedures, clarifying that Title IX’s prohibition on sex discrimination applies to all sex discrimination occurring under a school’s education program or activity in the United States.
 - “...conduct that occurs under a [school]’s education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution **and conduct that is subject to the [school]’s disciplinary authority**. A [school] has an obligation to address a sex-based hostile environment under its education program or activity, **even if sex-based harassment contributing to the hostile environment occurred outside the [school]’s education program or activity or outside the United States.**”

The Proposed Title IX Procedural Waterfall



The Title IX Procedural Waterfall

106.44(c) Notice Received	Title IX Coordinator receives <u>notice</u> of conduct that may constitute sex discrimination under Title IX.
106.44(f)-(k) Response to Notice	In response to <u>notice</u> of possible sex discrimination, Title IX Coordinator conducts initial assessment and response, without regard to whether complaint has been filed or alleged behavior involves sex-based harassment.
106.45 Response to Complaint	In response to <u>complaint</u> of possible sex discrimination, Title IX Coordinator initiates universal grievance procedures, without regard to whether alleged behavior involves sex-based harassment involving a student.
106.46 Response to Sex-Based Harassment Involving Student	In response to <u>complaint</u> of possible sex discrimination that involves sex-based harassment involving a student, Title IX Coordinator follows both universal grievance procedures <u>and</u> additional procedures for complaints of sex-based harassment involving a student.

New Notification Obligations



New Notification Obligations

- Section 106.44(c) of the proposed rule obligates nearly all employees at postsecondary institutions (who are **not** confidential employees) to notify the Title IX Coordinator if they have information about conduct that may constitute sex discrimination under Title IX.
 - Consider whether individual is a student or employee – look to primary relationship with institution.
- This is a significant change and will require training. However, we have found in jurisdictions with similar rules, once trained this process is manageable.

New Notification Obligations: Employee Response

Employees who can implement corrective measures.

- Must notify the Title IX Coordinator when the employee has any information about conduct that may constitute sex discrimination under Title IX.

Administrative leadership, teaching, or advising employees.

- Must notify the Title IX Coordinator when the employee has information of a student complainant of conduct that may constitute sex discrimination under Title IX.

Administrative leadership, teaching, or advising employees.

- Must either notify the Title IX Coordinator when the employee has information of an employee complainant about conduct that may constitute sex discrimination under Title IX or provide the employee with contact information for the Title IX Coordinator and information on how to report sex discrimination.

All other employees who are not confidential employees.

- Must either notify Title IX Coordinator of conduct that may constitute sex discrimination under Title IX or provide contact information for Title IX Coordinator and information on how to report sex discrimination.

New Notification Obligations: Limited Obligations

- Under the proposed rule, there would be certain instances where employees or the Title IX Coordinator are **not** obligated to report.
 - The proposed requirements do not apply when the only person with knowledge about conduct that may constitute sex discrimination under Title IX is the employee-complainant.
 - Confidential employees (who engaged in privileged communications or otherwise confidential) must inform a person who discloses sex discrimination of their confidential status and provide that person with contact information for the Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX.
 - The proposed rule further provides that for postsecondary institution, a Title IX Coordinator is not obligated to respond to claims of sex discrimination or harassment that occur at public awareness event, unless the claim poses serious threat to health and safety of community members.

Title IX Coordinator Responsibilities Upon Notification of Potential Sex Discrimination



Title IX Coordinator: Initial Response

- Under proposed 106.44(f), a Title IX Coordinator would be required to take certain steps upon being **notified of conduct** that may constitute sex discrimination under Title IX, by an employee or any other party, and without regard to whether a complaint has been made requesting the institution to initiate its grievance procedures.

Title IX Coordinator: Initial Response

Equitable Treatment

- Treat complainants and respondents equitably.

Notification of Grievance Procedures

- Notify the complainant of the institution's grievance procedures. If a complaint is made, notify the respondent of the applicable grievance procedures and notify the parties of any available, informal resolution process.

Supportive Measures

- Offer and coordinate supportive measures, as appropriate, to the complainant and respondent.

Initiation of Procedures

- In response to a complaint, initiate the institution's grievance procedures or informal resolution process.

Determination of Whether to Initiate a Complaint by the Institution

- In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination if necessary to address conduct that may constitute sex discrimination under Title IX.

Prevention & Remediation

- Take other appropriate steps to ensure that sex discrimination does not continue or recur (in addition to remedies provided to an individual complainant).

Title IX Coordinator: Supportive Measures

- Under the proposed rule, the Title IX Coordinator must offer supportive measures, as appropriate, to the complainant **or** respondent to the extent necessary to restore or preserve that party's access to the education program or activity.
 - Supportive measures may vary depending on what the school deems to be available and reasonable.
 - A school must ensure that it does not disclose information about any supportive measures to persons other than the complainant or respondent unless necessary to provide the supportive measure.
 - Supportive measures that burden a respondent may be imposed only during the pendency of the grievance process. These measures must be no more restrictive than is necessary to restore or preserve the complainant's access to the education program or activity. A school may not impose such measures for punitive or disciplinary reasons.
- A school must provide a complainant or respondent with a timely opportunity to seek modification or reversal of supportive measures. If the supportive measure burdens the respondent, the initial opportunity to seek modification or reversal must be provided before the measure is imposed or as soon as possible after the measure has taken effect.

Title IX Coordinator: Removal and Leave

- The proposed rule **would** permit an institution to remove a respondent from the school's education program or activity on an emergency basis, provided that the institution:
 - undertakes an individualized safety and risk analysis;
 - determines that an immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sexual harassment justifies removal; and
 - provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- The proposed rule also would permit an institution to place an employee respondent on administrative leave from employment responsibilities during the school's grievance procedures.

Informal Resolution



Informal Resolution: Permissibility

- Under the proposed rule, a school could offer the parties an informal resolution process at any time prior to determining whether sex discrimination occurred, **unless** there are allegations that an employee engaged in sex discrimination toward a student, or such a process would conflict with applicable laws.
- An institution would not be permitted to require or pressure the parties to participate in an informal resolution process.
- A school would be required to obtain the parties' voluntary consent to the informal resolution process and prohibited from requiring waiver of the right to an investigation and adjudication of a complaint as a condition of enrollment or continuing enrollment, or employment or continuing employment, or exercise of any other right.
- A school could decline to offer informal resolution despite one or more of the parties' wishes. Reasons for declining would include, but not be limited to, when the school determines that the alleged conduct would present a future risk of harm to others.

Informal Resolution: Notice of Rights and Process

Before initiation of an informal resolution process, the school would be required to provide to the parties a notice with these elements.

The allegations, the requirements of the informal resolution process, the potential terms that may be requested or offered in an informal resolution agreement, and which records will be maintained and could be shared.

That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the school's grievance procedures.

That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations.

That if the school initiates or resumes its grievance procedures, neither the school nor a party may disclose or otherwise use information obtained solely through the informal resolution process as part of the investigation or determination of the outcome of the complaint.

That, when applicable, and if the school resumes its grievance procedures, the informal resolution facilitator could serve as a witness for purposes other than providing information obtained solely through the informal resolution process.

Informal Resolution: Additional Requirements

- **Facilitator Qualifications.** Per the proposed rule, the facilitator for an informal resolution process must not (1) be the same person as the investigator or the decisionmaker in the school's grievance procedures or (2) have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The facilitator also must have received the training required under 106.8(d)(3).
- **Informal resolution agreements.** The proposed rule observes that such agreements may include, among others, terms (1) restricting contact or (2) restricting the respondent's participation in one or more of the school's programs or activities or attendance at specific events.

Grievance Procedures for all Complaints of Sex-Based Discrimination



Universal Procedures: Initiation of a Complaint

- Pursuant to proposed 106.44(f)(4), the Title IX Coordinator must initiate the institution's grievance procedures in response to a complaint.
 - A "complaint" would include any "oral or written request to the institution to initiate the institution's grievance procedures."
- Proposed 106.45(a)(2) provides that the following persons have a right to make a complaint of sex discrimination:
 - A complainant (which includes a student or employee who is alleged to have been subjected to the alleged sex discrimination, or a person other than a student or employee who is alleged to have been subjected to the alleged sex discrimination and who was participating or attempting to participate in the school's education program or activity when the alleged sex discrimination occurred;
 - A parent, guardian, or other authorized legal representative of a complainant;
 - The Title IX Coordinator; or
 - With respect to complaints of sex discrimination other than sex-based harassment, **any student or employee**; or third party participating or attempting to participate in the school's education program or activity when the alleged sex discrimination occurred.

Universal Procedures: Required Elements

- | | |
|-------------------------------------|--|
| Equitable Treatment | <ul style="list-style-type: none">• Treat complainants and respondents equitably. |
| Conflicts of Interest | <ul style="list-style-type: none">• Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias; however, the decisionmaker may be the same person as the Title IX Coordinator or investigator. |
| Presumption Against Responsibility | <ul style="list-style-type: none">• Include a presumption that the respondent is not responsible for the alleged conduct until a determination is reached. |
| Reasonable Timeframes | <ul style="list-style-type: none">• Establish reasonably prompt timeframes for the major stages of the grievance procedures. |
| Protection of Privacy | <ul style="list-style-type: none">• Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a school's grievance procedures. |
| Relevancy & Credibility | <ul style="list-style-type: none">• Require an objective evaluation of all relevant evidence and provide that credibility determinations not be based on status as a complainant, respondent, or witness. |
| Exclusion of Impermissible Evidence | <ul style="list-style-type: none">• Exclude specific categories of evidence, and questions seeking that evidence. |

Universal Procedures: Excluded Evidence

Privileged Evidence

- Evidence that is protected under a privilege as recognized by Federal or State law, unless the person holding such privilege has waived the privilege voluntarily in a manner permitted in the school's jurisdiction;

Treatment Records

- A party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent for use in the school's grievance procedures; and

Evidence of Sexual Interests or Prior Conduct

- Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. The fact of prior consensual sexual conduct between the complainant and respondent does not demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.

Universal Procedures: Notice of Allegations

- The notice must include:
 - The institution's grievance procedures under 106.45, and if applicable 106.46, as well as any informal resolution process
 - Sufficient information to allow the parties to respond to the allegations, including the identities of the parties, the alleged sex discrimination, and the date and location of the alleged conduct, to the extent that information is available
 - A statement that retaliation is prohibited.
- If, during the investigation, the school decides to investigate additional allegations, it must provide the parties an updated notice.

Universal Procedures: Optional Dismissal

Acceptable reasons for optional dismissal.

The school is unable to identify the respondent following reasonable efforts to do so.

The respondent is not participating in the school's education program or activity and is not employed by the school.

The complainant voluntarily withdraws some or all allegations and the school determines that without the withdrawn allegations, the conduct that remains alleged would not constitute sex discrimination even if proven.

The school determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX.

Universal Procedures: Optional Dismissal

Notification of dismissal.

- Following a dismissal, a school would be required to promptly notify the complainant of the dismissal and, if the respondent has been notified of the complaint, the respondent.

Appeal of dismissal.

- The school must provide the parties with an opportunity to appeal a dismissal and must follow specified procedures for appeals.

Supportive measures following dismissals.

- In connection with a dismissal, a schools would be required to offer supportive measures to the complainant and, if the respondent has been notified of the allegations, to the respondent, as well.

Remediation following dismissals.

- Schools also would be required to ensure that the Title IX Coordinator take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur.

Universal Procedures: Consolidation of Complaints

- The new rule would permit an institution to consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances.
- If one of the complaints to be consolidated is a complaint of sex-based harassment involving a **student** complainant or **student** respondent, the school would be required to follow the additional grievance procedures required under 106.46.

Universal Procedures: Investigations

Burden of investigation

- Ensure that the burden is on the school - not the parties - to gather sufficient evidence for a determination.

Equal opportunity

- Provide an equal opportunity for the parties to present relevant fact witnesses and other inculpatory and exculpatory evidence.

Evidentiary determinations

- Review all evidence and to determine what evidence is relevant and what evidence is impermissible regardless of relevance.

Description of evidence

- Provide each party with a description of the relevant evidence that is not impermissible and a reasonable opportunity to respond.

Credibility determinations

- Provide a process that enables the decisionmaker to adequately assess credibility of parties and witnesses.

Universal Procedures: Determinations

Evidentiary standard

- Use the preponderance of evidence standard, unless the school uses the clear and convincing standard in all other comparable proceedings.

Notification of determination

- Notify the parties of the outcome of the complaint and the process and bases for appeal, if applicable.

Remediation

- As appropriate, require the Title IX Coordinator to implement remedies for complainants or other impacted persons and to take other appropriate steps to ensure that sex discrimination does not continue or recur.

Procedural Protection

- Follow the institution's grievance process before the imposition of any disciplinary sanctions against a respondent.

Discipline

- Not discipline a party, witness, or others participating in a grievance process for making a false statement or for engaging in consensual sexual conduct based solely on the school's determination of whether sex discrimination occurred.

Universal Procedures: Sex-Based Harassment

- For complaints alleging sex-based harassment, the **universal** grievance procedures must:
 - Describe the range of supportive measures available to complainants and respondents; and
 - Describe the range of possible disciplinary sanctions and remedies that the school may impose following a determination that sex-based harassment occurred.

Additional Grievance Procedures for Sex- Based Harassment Involving Students



Additional SBH Procedures: Scope

- Proposed 106.46 contains additional requirements if the complaint of sex-based harassment **includes a postsecondary student** complainant or postsecondary student respondent.
- When a complainant or respondent is both a student and employee, fact specific inquiry to determine if 106.46 applies.
- The following requirements must be included as part of institution's prompt and equitable grievance procedures.

Additional SBH Procedures: Written Notice

- Written notices to the parties required of allegations, dismissal, delays, meetings, interviews, and hearings.
- Written notice of allegations must include:
 - All information required under 106.45(c).
 - Notice of allegations with sufficient time to prepare before an initial interview.
 - Presumption that respondent is not responsible until determination.
 - Opportunity for parties to present relevant evidence to trained, impartial decisionmaker.
 - Each party may have advisor of choice.
 - Each party is entitled to receive access to relevant evidence or to an investigative report that accurately summarizes this evidence.
 - If applicable, provision in code of conduct that prohibits knowingly making false statements.
- Institution can delay written notice if legitimate concerns for safety.

Additional SBH Procedures: Dismissal

- Parties must be provided simultaneous written notice of the dismissal and the basis for the dismissal, if complaint is dismissed under any of the bases in proposed 106.45(d)(1).
- If a complaint is dismissed based on complainant's voluntary withdrawal of the complaint or allegations under 106.45(d)(1)(iii), voluntary withdrawal must be obtained in writing.

Additional SBH Procedures: Investigation

Notice

- Parties must be provided written notice of date, time, location, participants, and purpose.

Advisors

- Parties must be provided with same opportunities for advisors and others to attend any meeting or proceeding.

Expert Witnesses

- Institutions can choose whether to permit expert witnesses – as long as equitably applied.

Extensions

- Must allow for the reasonable extension of timeframes on a case-by-case basis for good cause.

Evidence

- Must provide equitable access to relevant evidence or a written report summarizing relevant evidence. Parties must be provided with a reasonable opportunity to review and respond to the evidence prior to the determination of whether sex-based harassment occurred. Must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence.

Compliance

- Compliance with 106.46(e)(6) satisfies requirements of 106.45(f).

Additional SBH Procedures: Credibility

- Must have process to adequately assess credibility of parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment.
- Decisionmakers must be able to ask questions to parties and witnesses during at a live hearing or individual meetings
 - If live hearing, cross-examination through an advisor permitted but not required. Institutions can allow decisionmaker to ask questions, with parties proposing potential questions.

Additional SBH Procedures: Credibility

- Decisionmaker must determine whether a proposed question is relevant and not otherwise impermissible prior to the question being posed and must explain any decision to exclude a question as not relevant.
 - Unclear or harassing questions not permitted.
 - Reasonable rules or decorum permitted if equitable.
- Decisionmakers cannot rely on a statement that supports that party's position if the party does not respond to questions related to their credibility.
- Decisionmakers also cannot draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to questions related to their credibility.

Additional SBH Procedures: Determinations

- Written notice of determination must include:
 - Description of the allegations;
 - Information about the policies and procedures;
 - Evaluation of the relevant evidence and determination of whether sex-based harassment occurred;
 - Disciplinary sanctions and remedies if relevant; and
 - Information about appeal procedures.
- Determination of responsibility final date upon result or appeal or, if no appeal, date which appeal would not be considered timely.

Additional SBH Procedures: Appeals

- Institutions must provide opportunity to appeal based on:
 - Procedural irregularity that would change the determination;
 - New evidence not reasonably available that would change the determination;
 - Conflict of interest or bias of Title IX Coordinator, investigator, or decisionmakers that would change the outcome of the matter; or
 - Any other bases offered equally to the parties by the school.
- Must also comply with the requirements in 106.45(d)(3)(i), (iv), and (v) in writing.

Training Requirements for Employees and Process Administrators



Expanded Training

- Proposed 106.8(d)(1) requires that all employees be trained on the school's obligation to address sex discrimination in its education program or activity, the scope of conduct that constitutes sex discrimination, including the proposed definition of "sex-based harassment," and all applicable notification and information requirements under proposed 106.40(b)(2) (pregnancy and marital status) and 106.44 (actions by a school).
 - The proposed rule separates out who needs to be trained and on what topics. It helps to clarify the required training.
 - Ensures "that training does not rely on sex stereotypes and that individuals receive training related to their responsibilities."

Expanded Training: Specific Employees

- The proposed 106.8(d) also enumerates three groups of employees requiring specific training beyond the requirements for all employees: Investigators, decisionmakers, and other persons who are responsible for implementing grievance procedures or have the authority to modify or terminate supportive measures under proposed 106.44(g)(4).
- These groups must be trained on:
 - The school's obligations under respond to claims of sex discrimination;
 - The school's grievance procedures;
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
 - The meaning and application of the term relevant in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under 106.45, and if applicable 106.46.
- Facilitators of Informal Resolution Process must be trained on the rules and procedures the information resolution process including issues of impartiality and bias.
- Title IX Coordinators must be trained on their specific duties.

Retaliation



Retaliation Generally

- The Title IX statutory language does not contain a prohibition on retaliation.
- Although it is not explicit in the statutory language of Title IX, the Supreme Court and ED have long interpreted Title IX to prohibit retaliation.

Retaliation: A New Definition

- The proposed rule defines the term “**retaliation**” as: “intimidation, threats, coercion, or discrimination against any person by the [school] or by a specific individual affiliated with the [school], including a student, an employee, or a person who provides aid, benefit, or service under the [school]’s education program or activity, or [school] for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process under § 106.44(k), in grievance procedures under § 106.45, and if applicable § 106.46, and in any other appropriate steps taken by a [school] in response to sex discrimination under § 106.44(f)(6).”
- The proposed definition of “**peer retaliation**” is: “retaliation by a student against another student.”
- The goal is to address inadequate prior regulatory language that did not specifically define retaliation.

Prohibition on Retaliation

- The proposed rules provides that a school **must** prohibit retaliation.
- When a school receives information about conduct that may constitute retaliation, the school is obligated to comply with 106.44.
- Proposed Section 106.71, provides two specific examples of retaliation:
 1. Initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX or this part; or
 2. **Peer retaliation.**
- The proposed rule takes out the affirmative statement that an exercise of rights under the First Amendment is not retaliation, as it is redundant. There is also a history of ED enforcing Title IX consistent with the protections of the First Amendment.

Discrimination Based on Pregnancy or Marital Status



A Focus on Pregnancy

- Other laws and guidance have addressed pregnancy and pregnancy related conditions for many years:
 - Title VII and the Pregnancy Discrimination Act (1978) prohibits discrimination “on the basis of pregnancy, childbirth, or related medical conditions.”
 - EEOC guidance from 2015 reinforces the prohibition of discrimination “based on current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth, including lactation.”
 - The Affordable Care Act, which amended the Fair Labor Standards Act “require[s] employers to provide reasonable break times and a private place, other than a bathroom, for covered employees who are breastfeeding to express milk for one year after the child’s birth[.]”

A Focus on Pregnancy

- The proposed rule expands on current law to continue to fight sex discrimination by considering the historical context and adding clarifications.
 - Must not adopt a **policy, practice, or procedure** concerning a student's (or employee's) current, potential, or past parental, family, or marital status that treats students differently on the basis of sex
- Generally, cannot require a certification to participate in a program unless a certification is required from all students.

A Focus on Pregnancy

- The proposed rule clarifies protections for both pregnancy and pregnancy related conditions (for both students 160.40 and employees 160.57).
- Can be based on a reasonable belief that individual is pregnant, which is very broad.
- Cannot take into account the primary wage earner if used discriminatorily.
- Must provide students with information on how to contact Title IX coordinator.

A Focus on Pregnancy

- Treated the same as any other temporary disability.
- Under the proposed rule, a school must take affirmative steps to allow for equal access for pregnant students.
- A school must inform student of:
 - Prohibition on discrimination based on pregnancy or related conditions
 - Access to reasonable modifications (individualized assessment)
 - Access to comparable/separate program
 - Voluntary leave
 - Lactation space
 - Grievance procedures

A Focus on Pregnancy

- Reasonable modifications must be provided to a student, if needed.
- Must be considered on an individualized and voluntary basis unless the school can demonstrate that making the modification would fundamentally alter the school's education program or activity.
 - "A fundamental alteration is a change that is so significant that it alters the essential nature of the [school]'s education program or activity."
- Must be implemented and documented by the Title IX Coordinator.
- Examples of reasonable modifications include:
 - Breaks during class to attend to related health needs, expressing breast milk, or breastfeeding; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course...
- The proposed rule also addresses lactation time and space to provide protections for nursing employees and students.

Title IX Timeline



Title IX Timeline

Date	Rulemaking Event
June 1972	Title IX of the Education Amendments of 1972
July 1975	ED publishes 34 CFR Part 106 , which implements Title IX.
March 1997	ED publishes Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties .
June 1998	Gebser v. Lago Vista Ind. Sch. Dist. , 524 U.S. 274 (1998) (holding that an individual may only recover monetary damages under Title IX when a school official with authority to institute corrective measures has actual notice of the harassment but is deliberately indifferent to it).
May 1999	Davis v. Monroe Cty. Bd. of Educ. , 526 U.S. 629 (1999) (holding that a school can be liable under Title IX for student-on-student sexual harassment, but only if the school is deliberately indifferent to known sexual harassment, the respondent is under the school's disciplinary authority, and the behavior is so severe, pervasive, and objectively offensive that it denies access to the school's program and activities).

Title IX Timeline

Date	Rulemaking Event
Nov. 2000	ED updates Title IX rules to incorporate the Civil Rights Restoration Act's broadened definitions of "program or activity" and "program."
Jan. 2001	Following significant judicial activity, ED publishes Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties . ED draws distinction between standards for administrative enforcement and standards for private litigation for monetary damages.
Oct. 2006	ED updates Title IX rules to clarify and modify requirements regarding single-sex schools, classes, and extracurricular activities in elementary and secondary schools.
April 2011	ED publishes DCL with extensive guidance concerning school responsibilities for preventing and addressing sexual harassment and sexual violence.
April 2014	ED publishes Questions and Answers on Title IX and Sexual Violence, further clarifying guidance articulated in 2001 Guidance and 2011 DCL.
May 2016	ED and DOJ issue joint DCL regarding treatment of transgender students, accompanied by Examples of Policies and Emerging Practices for Supporting Transgender Students.

Title IX Timeline

Date	Rulemaking Event
Feb. 2017	ED publishes DCL rescinding May 2016 DCL regarding treatment of transgender students.
Sept. 2017	ED publishes DCL rescinding April 2011 DCL as well 2014 Q&A on Campus Sexual Misconduct.
Nov. 2018	On November 29, 2018, ED publishes the official version of its proposed Title IX rule in the Federal Register. The first significant rule concerning sexual misconduct since 1975.
May 2020	On May 19, 2020, ED publishes the official version of its final Title IX rule in the Federal Register.
June 2020	The Supreme Court in Bostock v. Clayton County , concludes that discrimination based on sexual orientation or gender identity inherently involve treating individuals differently because of their sex, and thus is prohibited under Title VII of the Civil Rights Act of 1964.
Aug. 2020	ED's new Title IX Rule takes effect on August 14.

Title IX Timeline

Date	Rulemaking Event
April 2021	ED announces that it will be overhauling the Title IX regulations put into place by the Trump administration and releases Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) .
June 2021	OCR issues Notice of Interpretation stating that ED interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity, consistent with <i>Bostock v. Clayton County</i> .
July 2021	Federal district court in Massachusetts issues a decision in Victim Rights Law Center et al. v. Cardona vacating part of regulation that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing.
July 2022	ED releases the unofficial version of its proposed changes to its Title IX rule and invites public comment.

Title IX Training Series (Current Rule)



Title IX Training Series (Current Rule)

The image shows a YouTube video player interface. At the top, there is a search bar and navigation icons. The main video player displays a video titled "An Introduction to Managing Title IX Sexual Harassment on Campus" by Thompson Coburn LLP, part of the Title IX Training Series | July 2020. The video player includes a progress bar and control icons. To the right of the video player is a playlist titled "Title IX Training Series" by Thompson Coburn LLP - 1 / 6. The playlist contains six modules:

- Module 1 – An Introduction to (1:17:06)
- Module 2 – Formal Complaints of Title (46:21)
- Module 3 – Title IX Investigations & (1:27:38)
- Module 4 – Title IX Hearings (1:18:19)
- Module 5 – Title IX Determinations (52:01)
- Module 6 – Title IX

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New GAO report signals increased scrutiny of Higher Ed contracts with online program managers

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On May 5, 2022, the U.S. Government Accountability Office (GAO) released a long awaited report scrutinizing the U.S. Department of Education's (ED) oversight of relationships between institutions of higher education and Online Program Managers (OPMs). [READ MORE](#)

Negotiated rulemaking and the new 90/10 rule

[Aaron Lacey](#) [Katie Wendel](#) [Stephanie Cohan](#) [Hope Watson](#) April 13, 2022



A year ago, President Biden signed into law the

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Financial Responsibility Reporting Under the Borrower Defense to Repayment Rule

Last Updated: August 1, 2021

On September 23, 2019, the U.S. Department of Education published the final version of its 2019 "borrower defense to repayment" rule (the "2019 Rule"). The 2019 Rule, which took effect on July 1, 2020, revised the financial responsibility regulations that require institutions of higher education to report certain "triggering events" to the Department (located at 34 CFR 668.371). If an institution fails to make a required notification under the 2019 Rule, the Department may take administrative action against the institution, to include the initiation of a proceeding to fine, limit, suspend, or terminate the institution's participation in the federal financial aid programs.

On the following pages, we provide a chart that details the reporting obligations under the 2019 Rule. Pending further guidance from the Department, we suggest that institutions continue to submit financial responsibility notifications via email to FSAPRN@ed.gov.¹ The Department has not specified any required form or content for notices made under the 2019 Rule. However, in a Q&A document issued on June 3, 2019, the agency offered recommendations.² Institutions should continue to watch for updated guidance from the Department concerning the reporting of triggering events. The Department also has announced its intent to revisit the financial responsibility regulations in a forthcoming negotiated rulemaking.³

¹ The Department established this email address for reporting purposes in guidance issued on March 15, 2019, detailing how institutions should report events under the 2016 version of the borrower defense rule (the "2016 Rule"). As of August 1, 2021, the Department has not issued any further guidance concerning how to report triggering events.
² As of August 1, 2021, the Department has not issued any further guidance concerning the form or content of notices of triggering events.
³ Additional information regarding the Department's negotiated rulemaking agenda for 2021-2022 is located [here](#). It is unlikely that any new regulations concerning financial responsibility reporting would become effective prior to July 1, 2023.



Institutional Loans: Compliance Considerations

Last Updated: July 2021

For a wide range of reasons, institutions of higher education frequently determine to offer students the opportunity to finance all or part of their education using some form of institutional credit. These arrangements can vary greatly, from a simple, short-term, no interest payment plan to a fully-formed, traditional, interest-bearing loan. Schools should be aware, however, that in many cases, such arrangements will qualify as a "private education loan" under federal law, subjecting the institution to a multitude of federal regulations that must be followed. These arrangements also will frequently be subject to state consumer finance laws, and in some instances, to state laws governing the authorization of postsecondary institutions.

Staying apprised of these federal and state laws, and administering an institutional student loan program in accordance with their complex requirements, is a significant challenge. This is particularly true where institutions operate campuses in multiple jurisdictions, have students who reside in multiple jurisdictions, or offer a variety of student financing options (e.g., loans, payment plans, retail installment contracts). Compliance is critical, however, as the ramifications for noncompliance can be severe. Furthermore, federal and state regulators have made clear that they intend to aggressively enforce the regulatory framework that applies to student financing opportunities offered by schools.¹ Indeed, institutions of higher education that offer private education loans should expect meaningful and coordinated scrutiny from the U.S. Department of Education (the "Department"), the Consumer Financial Protection Bureau (the "CFPB"), state attorneys general, and other regulators.

The purpose of this memorandum is to provide an overview of certain significant federal requirements that institutions of higher education should consider when contemplating an institutional loan program, or any other student financing opportunity. **We strongly emphasize that this document does not provide an exhaustive list of all legal requirements related to the offering of such loans, and in particular, does not address applicable state laws and regulations, which vary based on the jurisdiction(s) in which an institution is operating.** We encourage institutions contemplating any form of student financing opportunity (even simple payment plans), to confer with counsel and other qualified advisors to determine whether the opportunity is subject to federal or state laws governing private education loans or other extensions of credit, and to develop a plan for compliance.

¹ By way of example, in May 2021, the Biden Administration selected Richard Cordray, the former director of the CFPB to serve as the senior official overseeing the federal student aid programs.



Maintaining Compliance with the Evolving 90/10 Rule

Last Updated: April 2021

On March 11, 2021, President Biden signed into law the [American Rescue Plan Act of 2021](#) (the "Act"), a \$1.9 trillion stimulus package containing emergency pandemic relief and a number of provisions important to the higher education sector. Of particular significance to proprietary institutions is Section 2013 of the Act, which amends the longstanding and controversial "90/10 rule." Under the current 90/10 rule, to remain eligible to participate in the federal student aid programs, a proprietary institution must "derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds."¹ Section 2013 amends this language, requiring instead that covered institutions derive at least 10 percent of their revenue from sources other than "Federal education assistance funds." Federal education assistance funds are defined as "[f]ederal funds that are disbursed or delivered to or on behalf of a student to be used to attend such institution."

Pursuant to the Act, the earliest this revision to the 90/10 rule may take effect is for institutional fiscal years beginning on or after January 1, 2023. Congress has directed the U.S. Department of Education ("ED") to engage in a negotiated rulemaking before it implements the revision. It presently is unclear which federal funding programs will be deemed "Federal education assistance funds." However, we anticipate that during the negotiated rulemaking, the current administration will propose a broad interpretation, which will include GI Bill benefits for veterans, Military Tuition Assistance benefits for active military, and Trade Adjustment Assistance for workers, among others.

Given this imminent change to the 90/10 rule, and the challenge we expect it will create for many proprietary institutions, we determined to create this compilation of strategies we have seen used in the past for managing 90/10 rule compliance, and to include thoughts and considerations, as appropriate. We strongly emphasize that the compliance strategies detailed below should not be viewed as recommendations, and may not be appropriate for every institution. Each institution should consult its own legal advisors, accountants, and other trusted professionals to determine whether to employ any particular strategy for complying with the 90/10 rule.

¹ 34 CFR §668.14(a)(16); see also 20 U.S.C. §1094(a)(24).

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