

TITLE IX SOLUTIONS, LLC

TITLE IX: A New Era

Patrick Mathis, JD LLM MBA

Adrienne Mathis



Patrick Mathis, JD LLM MBA

CO-FOUNDER AND MANAGING MEMBER



Adrienne Mathis

EXECUTIVE DIRECTOR

Learning Objectives

Review key elements of the 2020 Title IX Regulations.

Analyze lessons learned and best practices related to the Title IX grievance process.

Examine the 2022 Notice of Proposed Rulemaking (NPRM) and highlight key proposed changes for Title IX practitioners to consider.

Title IX Statute

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title IX of the Education Amendments of 1972

1972: TITLE IX OF THE EDUCATION AMENDMENTS

Addresses sex discrimination generally

2020: TITLE IX REGULATIONS ON SEXUAL HARASSMENT ("FINAL RULE")

Specifically outlines a recipient's required response to sexual harassment as a form of sex discrimination

2022: NOTICE OF PROPOSED RULEMAKING (NPRM)

Aims to address a recipient's response to all forms of sex discrimination, including sex-based harassment

2022 NPRM

The purpose of this part is to effectuate Title IX, 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. (106.1)

Includes discrimination and harassment on the basis of:

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

Sex Discrimination

**1972 Title IX of the Education
Amendments of 1972**

Sexual Harassment

2020 Regulations

Practical Points



NONDISCRIMINATION POLICIES

How might the NPRM impact these policies?



SEXUAL HARASSMENT POLICIES

How might the NPRM impact these policies?



FEDERAL, STATE, AND LOCAL LAWS

How might other laws impact your policies?



Sexual Harassment vs. Sex-Based Harassment

*Understanding the differences between the
2020 and 2022 terms*

Sexual Harassment (2020)

Conduct on the basis of sex that satisfies one or more of the following:

- *Quid Pro Quo Harassment*
- *"Severe, pervasive and objectively offensive" conduct (Davis Standard Harassment)*
- *Sexual assault, dating violence, domestic violence and stalking*

Sex-Based Harassment (2022)

Sexual harassment, harassment on the bases described in 106.10* and other conduct on the basis of sex that is:

- *Quid Pro Quo Harassment*
- *Hostile Environment Harassment*
- *Sexual assault, dating violence, domestic violence and stalking*
- **Sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity*

2020 Regulations

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

2022 Regulations

An employee, **agent, or other person authorized by the recipient** to provide an aid, benefit, or service under the recipient's education program or activity **explicitly or impliedly** conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

Quid Pro Quo Harassment

Davis Standard Harassment

VS.

Hostile Environment Harassment

2020 Regulations

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

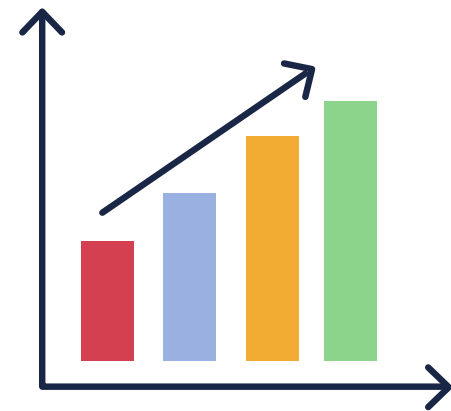
2022 Regulations

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 (i.e., creates a hostile environment).

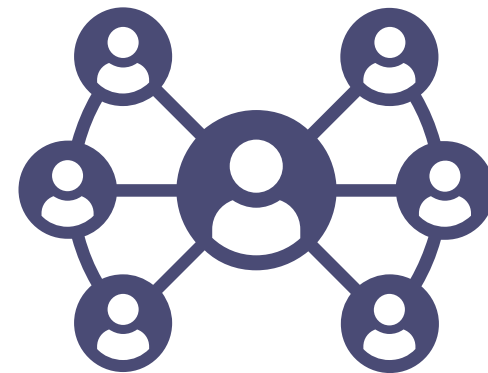
Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:



Degree to which the conduct affected the complainant's ability to access the education programs or activities



The type, frequency, and duration of the conduct



Parties ages, roles, previous interactions, and other factors



Location and context of the conduct, and the control the recipient has over the respondent



Other sex-based harassment in the recipient's education program or activity

Specific Offenses

2020 Regulations

- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v)
- “Dating violence” as defined in 34 U.S.C. 12291(a)(10)
- “Domestic violence” as defined in 34 U.S.C. 12291(a)(8), or
- “Stalking” as defined in 34 U.S.C. 12291(a)(30)

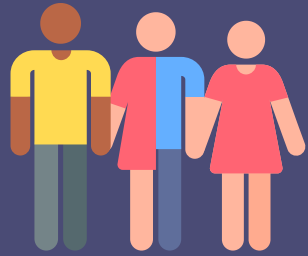
2022 Regulations

- Sexual assault
- Dating violence
- Domestic violence
- Stalking

*As defined under the 2022 NPRM



Sex Stereotypes



Sex Characteristics



**Pregnancy or
Related Conditions**



Sexual Orientation



Gender Identity

Additional bases of sex-based harassment

*ALSO CONSIDERED BASES OF SEX
DISCRIMINATION (2022)*



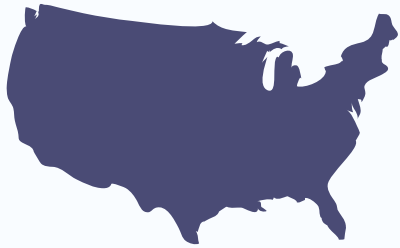
Application of Title IX

Defining "Education Program or Activity"

2020 Regulations



Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.



Sexual harassment occurred against a person in the United States.

2022 Regulations

A building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and **conduct that is subject to the recipient's disciplinary authority.**



A recipient 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 recipient's education program or activity or outside the United States.**



Practical Points



DISCIPLINARY AUTHORITY

Sex discrimination should be addressed in the same way as other code of conduct violations that occur off campus.



STUDY ABROAD PROGRAMS

Incidents abroad MAY fall under Title IX if they create a hostile environment on campus.



FACT-SPECIFIC INQUIRIES

If sex-based harassment occurred outside of a school's education program or activity and outside of the US, and the harassment does not contribute to a hostile environment, Title IX does not apply.

Responding to Sexual Harassment & Sex Discrimination

Outlining what is required to respond to sexual harassment (2020) or sex discrimination (2022)

106.44. Recipient's Response to Sexual Harassment (2020)

A recipient with *actual knowledge* of sexual harassment *in an education program or activity* of the recipient against a person *in the United States*, must respond promptly in a manner that is ***not deliberately indifferent***.

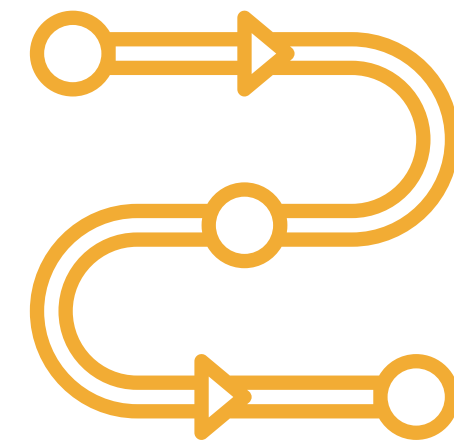
Additional requirements:



Treat Complainants
and Respondents
equitably



Offer supportive
measures to
Complainants



Follow
grievance process before
imposing sanctions

Practical Point

UNDER 2020 REGULATIONS

A school's required response focuses on addressing specific incidents and responding to the individuals or involved parties.



106.44. Action by a Recipient to Operate its Education Program or Activity Free from Sex Discrimination (2022)

A recipient 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**. To ensure that it can satisfy this obligation, a recipient must comply with this section.

➤ **Monitoring**

- Barriers to reporting

➤ **Notification requirements**

- Elementary and secondary school employee requirements
- Notify the Title IX Coordinator of conduct that may constitute sex discrimination
- Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination

106.44. Action by a Recipient to Operate its Education Program or Activity Free from Sex Discrimination (2022)

- › Confidential Employee Requirements
- › Public Awareness Events
- › Title IX Coordinator Requirements

Practical Points

UNDER 2022 NPRM

A school's required response focuses on the broader community and campus environment.





Role of the Title IX Coordinator

Understanding what is required of a Title IX Coordinator

2020 Requirements

- Promptly contact the complainant to discuss the availability of supportive measures
- Consider the complainant's wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without filing a formal complaint
- Explain to the complainant the process for filing a formal complaint
- Coordinating the effective implementation of supportive measures
- Implement remedies

2022 Requirements

- Treat the complainant and respondent equitably;
- Notify the complainant of the grievance procedures
- If a complaint is made, notify the respondent of the applicable grievance procedures and notify the parties of the informal resolution process if available and appropriate;
- Offer and coordinate supportive measures to the complainant and respondent
- In response to a complaint, initiate the grievance procedures or informal resolution process
- In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination
- Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, in addition to remedies provided to an individual complainant.

Title IX Grievance Procedures

Highlighting key elements of the 2020 and 2022 grievance procedures

2020 Regulations

Discrimination on the basis of sex. A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX.

Grievance process. For the purpose of addressing **formal complaints of sexual harassment**, a recipient's grievance process must comply with the requirements of this section.

**Grievance
process for formal
complaints of
sexual
harassment
(\$106.45)**

Formal Complaint of Sexual Harassment

2020 Title IX Regulations

Document filed by a complainant or signed by the Title IX Coordinator

Alleges sexual harassment against a respondent

Requests the recipient investigate the allegation of sexual harassment

Contains complainant's physical or digital signature

Unless signed by the Title IX Coordinator



2022 NPRM Grievance Procedures

§106.45

Grievance procedures for the prompt and equitable resolution of **complaints of sex discrimination**

§106.46

Grievance procedures for the prompt and equitable resolution of **complaints of sex-based harassment involving student complainants or student respondents at postsecondary institutions**

§ 106.45

Applies to all complaints of sex discrimination

Includes complaints involving:

- Sex discrimination and sex-based harassment in the K-12 environment
 - Employee, students, and third-parties
- Sex discrimination and sex-based harassment in postsecondary institutions
 - Employees and third-parties
- Sex discrimination in postsecondary institutions
 - Students

§ 106.46

Applies to complaints of:

- Sex-based harassment
- Postsecondary institutions
- Involving students
(complainant or respondent)

\$106.45

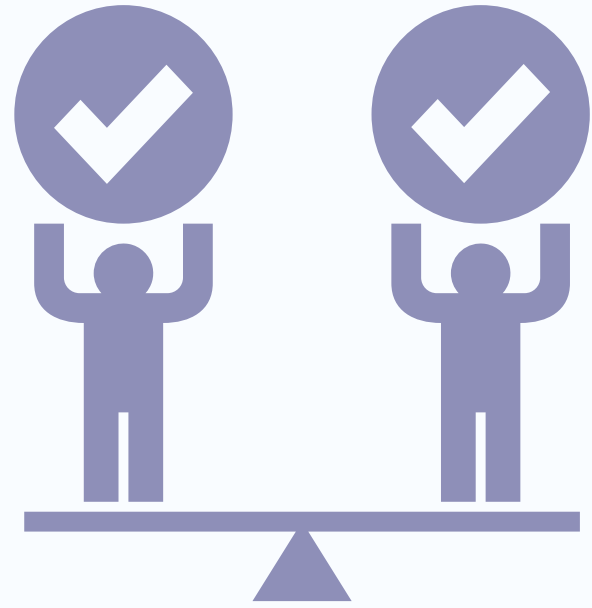
Grievance Procedures for All Sex Discrimination Complaints under Title IX

Proposes changes to the overall grievance procedures for all K-12 complaints and postsecondary complaints not involving students

Complaint

- May be written or oral
- May be filed by complainant, person who has a right to make a complaint on behalf of a complainant, or the Title IX Coordinator
 - Any student or employee; or third-party participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred (non sex-based harassment complaints only)

Purpose of Grievance Procedures in §106.45



Foundation for a prompt, fair & equitable process



Transparent and reliable outcomes



Consistent approach to all complaints of sex discrimination, including sex-based harassment



Schools may adopt additional provisions (including the more prescriptive §106.46) as part of their grievance procedures as long as they apply equally to the parties

\$106.46

**Additional grievance
procedures for
complaints of sex-
based harassment
involving
postsecondary
students**

Applies to incidents of sex-based harassment when a student is a complainant or respondent at a postsecondary institution

Student Employees

- When a complainant or respondent is both a student and an employee of a postsecondary institution, the postsecondary institution must make a fact-specific inquiry to determine whether 106.46 applies. For example:
 - Is the party's primary relationship with the postsecondary institution to receive an education?
 - Did the alleged sex-based harassment occur while the party was performing employment-related work?

Purpose of Grievance Procedures in §106.46



Maturity, independence and needs of postsecondary students are unique



Complaints are highly personal



Requires greater participation by complainant and respondent



Potential disciplinary sanctions necessitates additional procedural protections

2020 Regulations

Reasonably prompt time frames for conclusion of the grievance process.

2022 Regulations

Reasonably prompt timeframes for the **major stages** of the grievance procedures.

Major stages: evaluation, investigation, determination, appeal, etc.

Timelines

Practical Points

UNDER 2022 NPRM

Schools may be able to complete the 2022 NPRM grievance procedures in a significantly shorter amount of time than the 2020 grievance procedures.



Title IX Personnel

Any Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process cannot have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

2020 Regulations

- Title IX Coordinator may serve as the coordinator, investigator, hearing facilitator, and/or informal resolution facilitator
- Title IX Coordinator cannot be a decision-maker

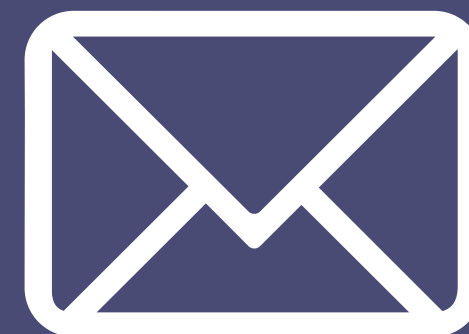
2022 Regulations

- Title IX Coordinator may serve as the coordinator, investigator, **decision-maker**, and/or informal resolution facilitator (in some cases)
- Single-investigator model permitted

Practical Points

UNDER 2022 NPRM

Share your thoughts with the Department of Education regarding the single-investigator model during this comment period.



Notice of Allegations

2020 Regulations

- Written notice
- Grievance process
- Allegations with sufficient details and time
- Respondent presumed not responsible
- Right to an advisor
- May inspect and review evidence
- False statements and information

2022 NPRM - §106.45

- Grievance procedures
- Sufficient information to allow the parties to respond
- Retaliation is prohibited

2022 NPRM - §106.46

- Written Notice
- 106.45 Requirements
- Allegations with sufficient time
- Respondent presumed not responsible
- Right to an advisor
- Right to access evidence or investigative report
- False statements and information

Practical Points

NOTICE OF ALLEGATIONS

These notices can serve as a guide for Title IX investigators and decision-makers as they conduct their fact-finding responsibilities.

Include specific policy violations in question in this notice.

Recipient MUST dismiss the formal complaint:

Alleged conduct would not constitute sexual harassment even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States

Recipient MAY dismiss the formal complaint:

Complainant withdraws complaint in writing, respondent is no longer enrolled or employed by the recipient, or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination

Written notice of dismissal

Dismissal of Formal Complaints (2020)

Dismissal of Complaints (2022)

§106.45 Dismissal

A recipient MAY dismiss a complaint:

- Unable to identify respondent after taking reasonable steps to do so
- Respondent is not participating in the recipient's education program or activity and is not employed by the recipient
- Complainant voluntarily withdraws allegations
- Conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX

§106.46 Dismissal

Written Notice of Dismissal and complainant's withdrawal of allegations in writing

Investigations

2020 REGULATIONS

- ◆ Burden of proof and gathering evidence on recipient
- ◆ Parties may present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- ◆ Right to have others present during any grievance proceeding, including the right to an advisor of their choice
- ◆ Written invitation to interviews
- ◆ Right to inspect, review and respond to all directly related evidence before completion of the investigative report (10 days to respond)
- ◆ Investigative report that fairly summarizes relevant evidence (issued 10 days prior to hearing)

Practical Points



TEMPLATES

Have you created templates for investigators?



RECORDINGS & TRANSCRIPTS

Is this permitted or required under your school's policy?



INTERSECTING INVESTIGATIONS

What happens when a Title VII or criminal investigation is also occurring?

§106.45 Complaint Investigation

- Burden is on the recipient to gather sufficient evidence
- Right to present relevant fact witnesses and other inculpatory and exculpatory evidence
- Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance
- Provide each party with a description of the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, as well as a reasonable opportunity to respond.

§106.46 Complaint Investigation

- Written invitation to interviews and meetings
- Right to an advisor during meetings and grievance proceedings
- Right to have persons other than the advisor of the parties' choice present during any meeting or proceeding
- Discretion to determine whether the parties may present expert witnesses as long as the determination applies equally to the parties
- Provide each party a reasonable opportunity to review evidence in advance of the hearing and respond to the evidence prior to, during or both prior to and during the live hearing

§ 106.46 Complaint Investigation

A postsecondary institution must provide either:

Access to the relevant and not otherwise impermissible evidence

OR

The same written investigative report that accurately summarizes the relevant and not otherwise impermissible evidence

If a postsecondary institution chooses to provide an investigative report and a party requests access to the evidence, the institution would be required to provide access to the relevant and not otherwise impermissible evidence to all parties.

Hearings

2020 Title IX Regulations

Required at postsecondary institutions

Cross-examination conducted by advisors

Relevance determinations during questioning

Recipient must provide an advisor to conduct cross-examination, if necessary

Submitting to Cross-examination (2020)

2020 REGULATIONS

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility

2021: DEPARTMENT OF EDUCATION CEASES TO ENFORCE THIS POINT

"A decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process."

-Letter to Students Educators and other Stakeholders re Victims Rights Law Center et al. v. Cardona

Distinct decision- making process

*Relevant questions for parties
and witnesses are submitted to
the decision-maker in writing*

K-12 Decision- Making Process

*Hearings are not required in
elementary and secondary
schools (2020)*

Practical Points



HEARING PROCEDURES

Are these outlined in the policy or internal?




PRE-HEARING MEETINGS

Are they permitted or required under your school's policy?



REFUSAL TO PARTICIPATE

Does the school have protocols in place should a party refuse to participate in the hearing?



2022 NPRM Evaluating Allegations & Assessing Credibility

§106.45

A recipient must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination

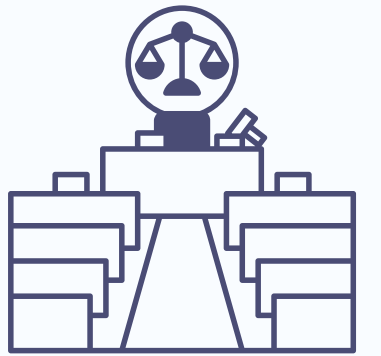
§106.46

- 1
- 2
- 3

Outlines process for evaluating allegations and assessing credibility



Decision-maker asks parties and witnesses questions during individual meetings or a live hearing



Parties may propose relevant questions (advisors must conduct questioning during live hearing)



Relevance determinations during questioning

2022 NPRM Evaluating Allegations & Assessing Credibility

Submitting to Credibility Assessment (2020)

2022 NPRM - 106.46

If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position.

Determinations

2020 Regulations

- Written Determination of Responsibility
- Allegations
- Procedural Steps
- Findings of Fact
- Conclusions regarding code of conduct
- Statement of and rationale for each allegation
- Disciplinary sanctions
- Whether remedies provided
- Appeal procedures

2022 NPRM - §106.45

- Determination of Whether Sex Discrimination Occurred
- Outcome of complaint
- Appeal procedures

2022 NPRM - §106.46

- Written Determination of Whether Sex-Based Harassment Occurred
- Allegations
- Policies and procedures
- Evaluation of evidence
- Determination of whether sex-based harassment occurred
- Disciplinary sanctions
- Whether remedies provided
- Appeal procedures

Practical Points

2020 REGULATIONS

It is permitted to have one decision-maker reach the determination regarding responsibility and one decision-maker determine the appropriate remedies and sanctions.

However, a single written determination must include the determination regarding responsibility and the remedies and sanctions.

Relevance

2020 Regulations

“The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”

2022 NPRM

Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

2020 Regulations

Preponderance of the evidence standard or clear and convincing evidence standard

Apply the same standard of evidence for formal complaints against students and employees

2022 NPRM

Preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred.



Standard of Proof

Informal Resolution

2020 Regulations

- Formal complaint required
- Written notice
- Voluntary process
- Written consent
- Not available if employee allegedly sexually harassed a student

2022 Regulations

- School has discretion to offer informal resolution and may decline to offer informal resolution despite parties' wishes
- Voluntary process, consent required
- Complaint not required
- Notice to parties (written under 106.46)
- Facilitator cannot be the investigator or decision-maker
- Potential terms outlined

Discretion to offer informal resolution in some circumstances

Even if the parties reach an informal resolution, sex discrimination the recipient's education program or activity may impact individuals beyond the parties.

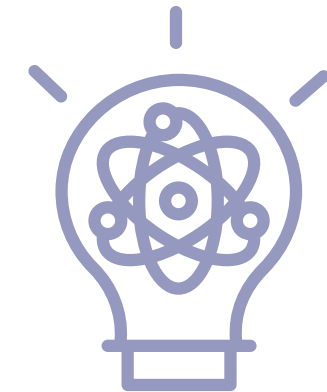
Therefore, the recipient may need to:



Provide additional training for staff on how to respond appropriately to sex discrimination

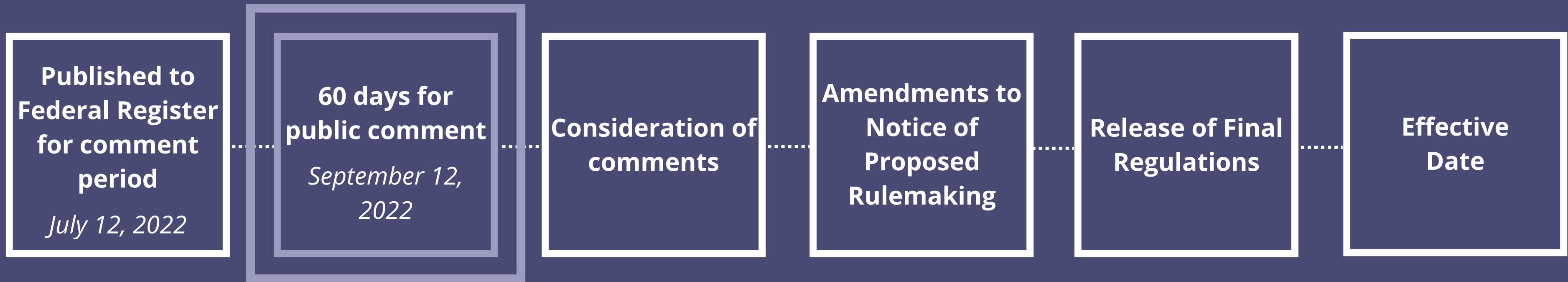


Monitor known risks of sex discrimination in programs and activities in which sex discrimination has been reported in the past



Pursue strategies other than discipline to address the conduct

Timeline for Implementation



For reference, the previous NPRM was published on November 29, 2018, comments closed January 28, 2019, Final Rule was released May 6, 2020, effective date of August 14, 2020.

Spring 2023?

Public Comment Period- Open Now

- 60 day comment period (following publication in Federal Register)
- Can submit at <http://www.regulations.gov>
 - Select Docket ID Number *ED 2021-OCR-0166*
 - Encouraged to use Microsoft Word
 - Comments are made available for public viewing, so only include information you are comfortable with being made public
- Comment on those proposed changes you believe will affect your students/employees, role, budget, time, or other resources
- ANYONE can provide comment