



CUPA-HR Washington Update: Proposed Changes to Title IX

Tuesday, July 19, 2022 | 12:00 p.m. ET

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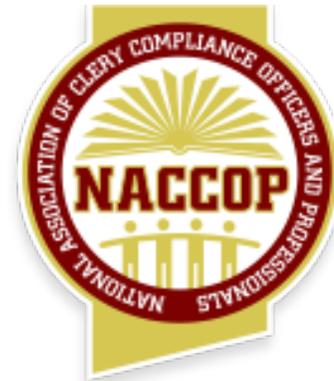


CUPA-HR Webinar

Presented in Cooperation With



D. STAFFORD
& ASSOCIATES



Presenter



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Have a Question?



Submit questions to our presenter using
the Chat.

Title IX

20 USCA § 1681 Sex

(a) Prohibition against discrimination

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. . .

Federal Law



Statutes

20 U.S.C.D. §1681-1688



Regulatory Guidance

34 C.F.R. § 106



Sub-Regulatory Guidance

Dear Colleague Letters
OCR Website



Executive Orders

2022 Draft Title IX Regulations

- Released June 23, 2022 (official July 12)
- Unofficial version is approximately 700 pages
- The following words are mentioned x times:

Student: 1,476

Sexual assault: 40

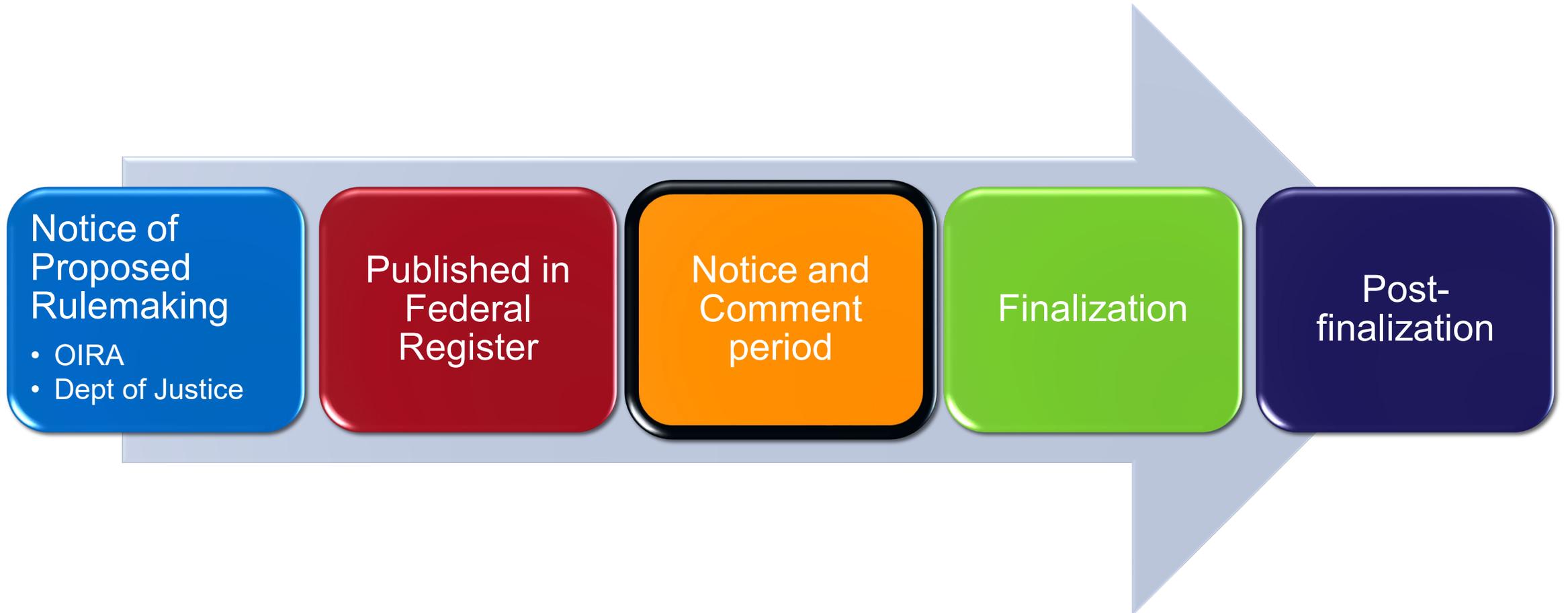
Employee: 715

Lactation: 107

Pregnant: 83

Sexual harassment: 307

Regulatory Process





Draft Regs *Do Not* Include Athletics Eligibility

The U.S. Department of Education did NOT include athletic eligibility in the amended Title IX regs.

They are expected to undertake a separate rulemaking process for determining sports eligibility. *A timeline for that process has not been established yet.*

Let the lawsuits begin!

Federal judge blocks Education Department's Title IX guidance that protects transgender students

"A coalition of 20 Republican attorneys general is being led by Tennessee Attorney General Herbert Slatery. They have argued their states face a "credible threat" of losing significant federal funding due to their policies and laws.

The states also argued that forcing schools to use transgender students' pronouns is illegal under the First Amendment and that the Education Department violated the Administrative Procedure Act and the Tenth Amendment, which delegates certain powers to the states.

The Education Department, Equal Employment Opportunity Commission and Justice Department, along with their leaders, are listed as defendants. They had urged the court to dismiss the lawsuit, which Atchley denied."

<https://www.msn.com/en-us/news/us/federal-judge-blocks-education-department-e2-80-99s-title-ix-guidance-that-protects-transgender-students/ar-AAZEmjo>



Things to remember...

It's a DRAFT



Nothing changes NOW



We anticipate winter 2022/spring 2023 release of final with **MANY** challenges...(but it will drop when it drops!)

1. *Sex Discrimination versus Sex-based Harassment*

Sex-based harassment means sexual harassment and harassment on the basis described in 106.10.

Sex discrimination means discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity. (41392: *Background*)

1. *Sex-based Harassment versus Sex Discrimination*

Sex-based Harassment

Sexual harassment;

- Quid pro quo
- Hostile environment
- Sexual assault, dating violence, domestic violence and stalking

Harassment based on sex discrimination

Sex Discrimination

Sex stereotypes

Sex characteristics

Pregnancy or related conditions

Sexual orientation

Gender identity

Definitions of Sex-Based Harassment

- (1) Quid pro quo harassment. 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;
- (2) Hostile environment harassment. 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).

Definitions of Sex-Based Harassment

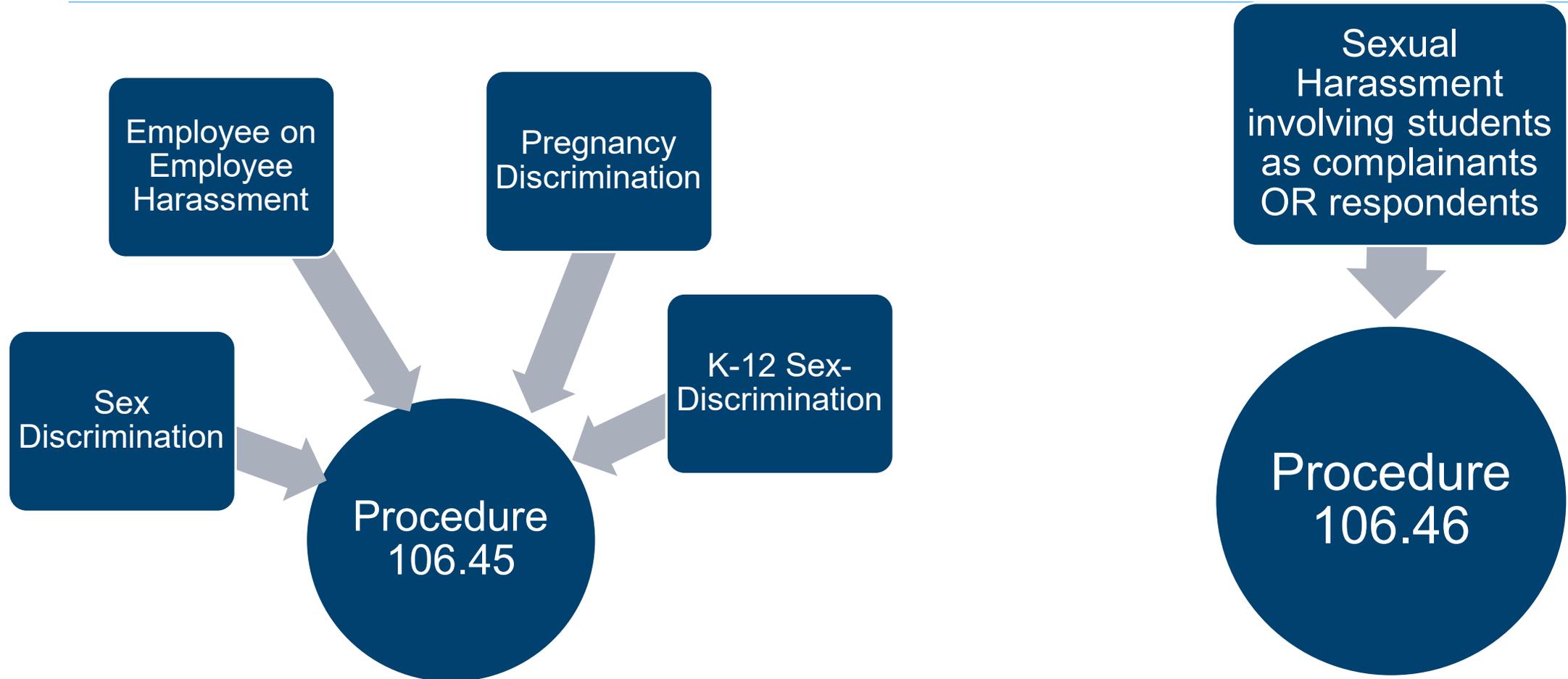
- (i) Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;
- (ii) Dating violence meaning violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim;
- (iii) Domestic violence meaning felony or misdemeanor crimes of violence committed by a person who: (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim; (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) Shares a child in common with the victim; or (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or
- (iv) Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) Fear for the person's safety or the safety of others; or (B) Suffer substantial emotional distress.

2.
Nondiscrimination
Policy and
Grievance
Procedures

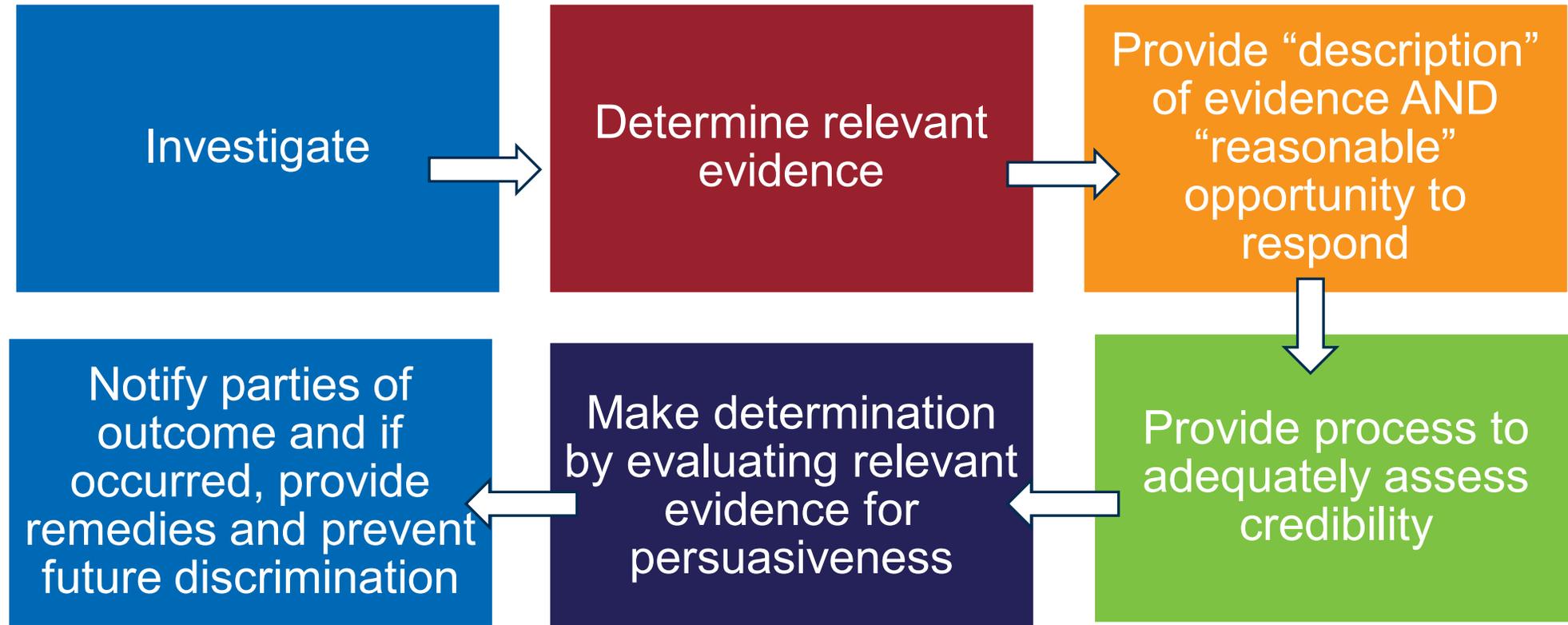
Must publish policy on
nondiscrimination on the
basis of sex and prohibition
on sex discrimination

Must publish grievance
procedures consistent with
the requirements of 106.45
and 106.46.

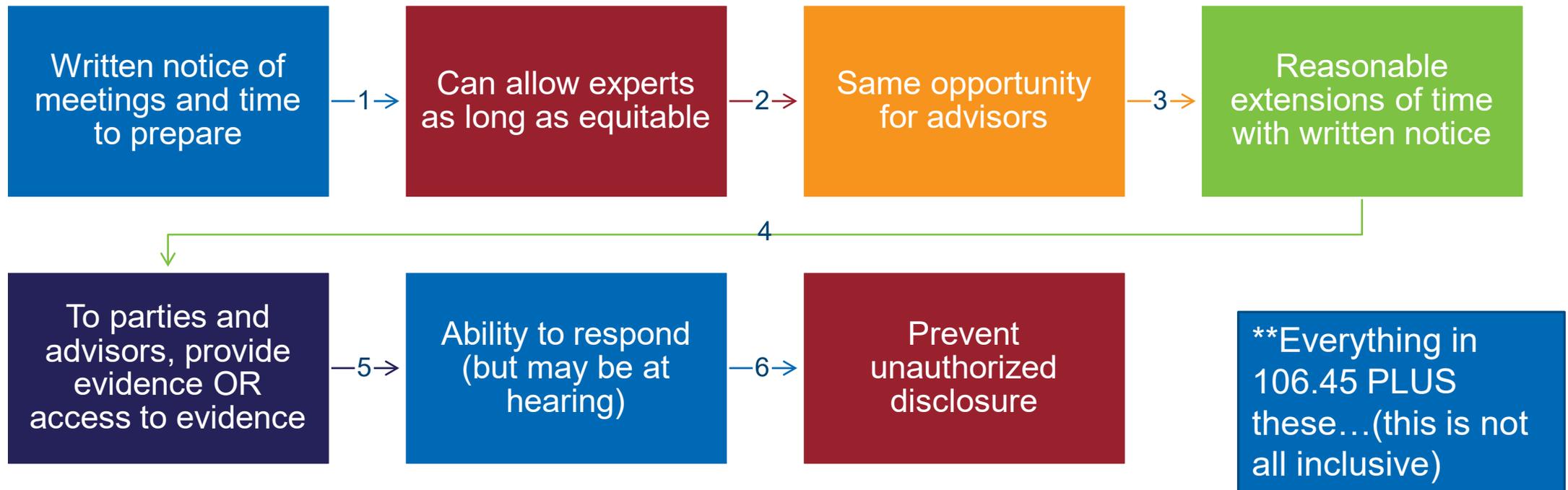
2. Two Grievance Procedures



2. New Proposed 106.45-Sex Discrimination Grievance Procedures



2. New Proposed 106.46-Sex-based Harassment Grievance Procedures



3. Jurisdiction of Title IX

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.



4. “Complaint” versus “Signed Formal Complaint”

A complaint means an oral or written request to the institution to initiate the school’s grievance procedures under 106.45 and/or 106.46.

4. No More “Actual Knowledge”

Title IX requires all recipients to operate their education programs or activities free from prohibited sex discrimination at all times.

To fulfill this requirement, the proposed regulations would require a recipient to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. (Proposed § 106.44(a))

5. Who is a Complainant?

A “complainant” means a student or employee who is alleged to have been subjected to sex discrimination under Title IX; or

A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination AND who was participating in or attempting to participate in the educational program or activity when the alleged sex discrimination occurred.

6. Employee
Training:
All Employees

All employees must be trained
on: obligation of institution to address sex discrimination; and what constitutes sex discrimination, including sex harassment; and all applicable notification requirements, including how to contact the Title IX Coordinator; and information on the institution's policy and applicable grievance procedures.

6. Employee Training: Investigators, Decisionmakers, and others in process

Investigators, Decisionmakers, and other persons who are responsible for implementing the grievance procedure OR has the authority to modify or terminate supportive measures: obligation of institution to address sex discrimination; and the institution's obligations pursuant to their (compliant) institutional policy; how to serve impartially, including prejudgment of facts; avoiding conflict and bias; the meaning and application of the term "relevant" in relation to questions and evidence; the type of evidence that are impermissible.

6. Employee Training: Informal Resolution Facilitators

Informal Resolution

Facilitators: in addition to receiving the “all employee” training, those employees who facilitate informal resolution must be trained on the rules and practices associated with the institution’s informal resolution process and how to serve impartially, including avoiding conflicts of interest and bias.

6. Employee Training

Title IX Coordinator and Designees: everything all prior groups must be trained on as well as all responsibilities outlined in the law, including how to discharge the policy and grievance procedures appropriately and retain records in accordance with the law.

7. Employee Reporting





7. Employee Reporting- Notification Requirement

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

7. Confidential Employees DEFINED

PRIVILEGED (IN ROLE)

DESIGNATED (WHEN PROVIDING SERVICES)

HUMAN-SUBJECTS RESEARCH ON SEX
DISCRIMINATION

7. Reporting Requirements (Post-Secondary)

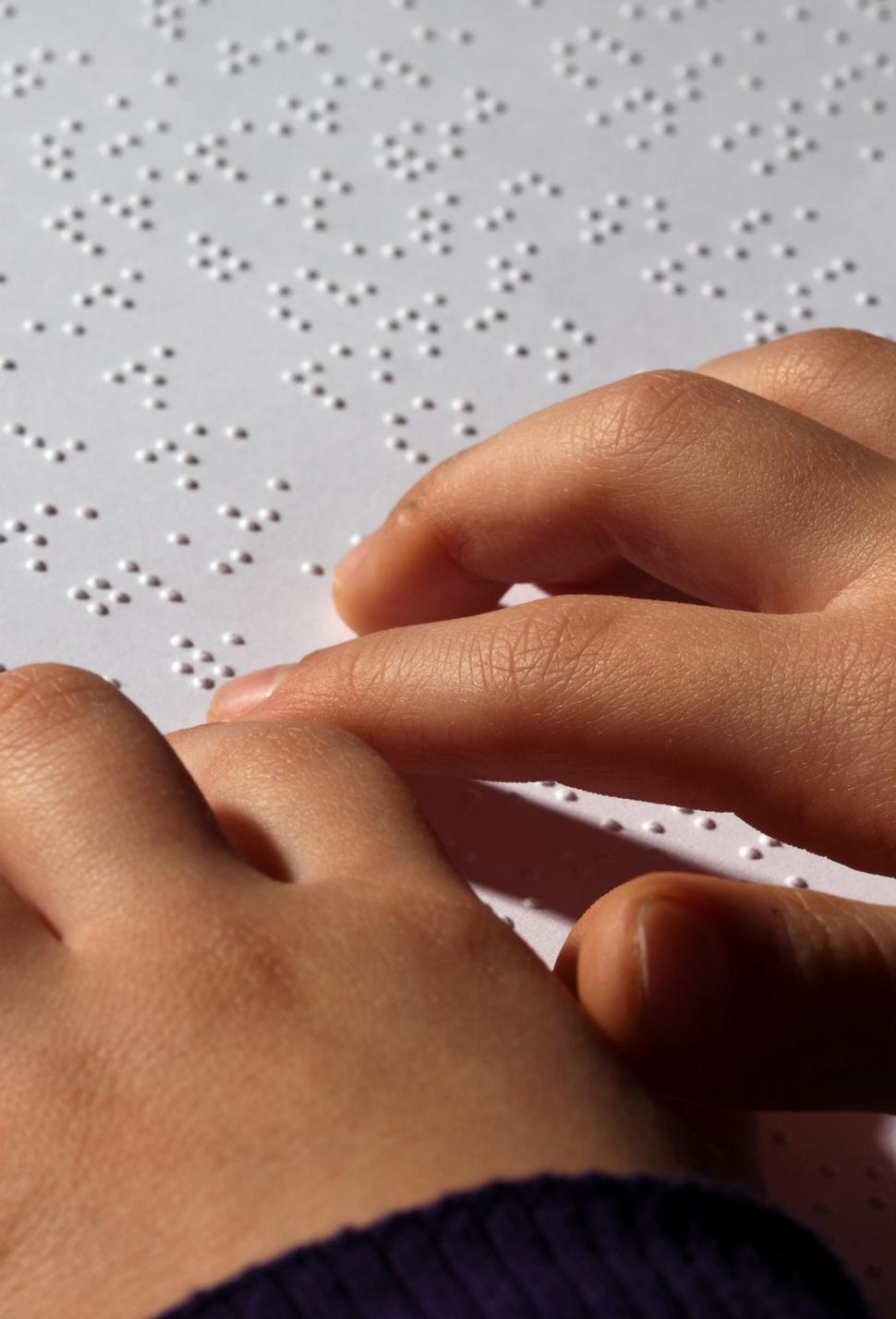
Employee Role	Involving	Notify T9	Provide T9 info*
Confidential Employee	Student or Employee	No	Yes
Employee with ability to institute corrective measures	Student or Employee	Yes	
Employee responsible for administrative leadership, teaching, or advising	Student	Yes	
Employee responsible for administrative leadership, teaching, or advising	Employee	Yes	OR Yes
All other employees	Student or Employee	Yes	OR Yes

8. Appeals- Sex-based Harassment Procedures ONLY

Procedural irregularity that would change the determination of whether sex-based harassment occurred

New evidence that would change the outcome of the matter and that was not reasonably available at the time the determination of whether sex-based harassment occurred or dismissal was made

Title IX Coordinator, investigator or decision-maker had conflict of interest or bias that would change the outcome



9. Other Miscellaneous Items

Emergency Removal

Supportive Measures

Informal Resolution

Exercise by Rights of Parents of
Minors

504 and ADA Implications

10. Pregnancy and Parental Status Discrimination: Intent

“The Department describes its proposed revisions to the Title IX regulations related to pregnancy or related conditions as well as sex discrimination related to marital, parental, and family status, to provide clarity to recipients about their obligation not to discriminate against students or employees who are pregnant or experiencing pregnancy-related conditions.

10. Parental Status

“Parental status, as used in §§ 106.21(c)(2)(i), 106.37(a)(3), 106.40(a), and 106.57(a)(1), means the status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

- (1) A biological parent;
- (2) An adoptive parent;
- (3) A foster parent;
- (4) A stepparent;
- (5) A legal custodian or guardian;
- (6) In loco parentis with respect to such a person; or
- (7) Actively seeking legal custody, guardianship, visitation, or adoption of such a person.”



10. Parental, family, or marital status; pregnancy or related conditions means...

Pregnancy or related conditions means:

- (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
- (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.

10. Pregnancy Leave

“In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.”
(Proposed 106.57)



10. Lactation

Institutions must provide reasonable break time for an employee to express breast milk or breastfeed as needed.

Institutions must ensure the availability of a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing.

10. Pregnancy and Parental Status Discrimination

Sections applying to Employees and Students

Lactation time and space

Comparable treatment to temporary disabilities or conditions

When employee informed of student pregnancy ...promptly informs that person of how to notify the Title IX Coordinator

When Title IX learns...must inform student

- prohibit sex discrimination
- reasonable modifications
- Allow access to separate and comparable program or activity
- Allow voluntary leave of absence
- Lactation space
- Grievance procedures



What do I do now?

1. Stay tuned....we only have draft regs and a notice and comment period to get through!
2. Be thinking about your current policy and procedure structure—who will need to be at the table to start amending documents when the regs drop?
3. Many schools are going to have to seriously up their game on pregnancy, parenting, and lactation requirements if these pass as is...this far exceeds what HR has previously been required to do under Federal law.
4. See #3, but related to broader sex discrimination requirements, should they go into effect. While this is the area where we expect the most debate and pushback, if this passes, some of you will have to decide whether to comply with Federal law or state law (quick tip-Federal law wins unless you want to risk losing federal monies)
5. **SUBMIT FEEDBACK to OCR!!!**
<https://www.regulations.gov/document/ED-2021-OCR-0166-0001>

D. Stafford & Associates Primary Service Areas

Clery Act
Compliance
Services

Title IX
Compliance
Services

Organizational &
Physical
Security
Assessments

Chief/Director
Searches and
Interim
Assignments

Other

Title IX/VAWA Services

Sexual Assault/Sexual
Misconduct Response
Assessments &
Training

Title IX Policy
Development/Review

Title IX Independent
Investigations

Title IX Coordinator
Searches

Title IX Trainings
(campus-based)

National Classes (Title
IX Coordinators and
Investigators)

Upcoming In-Person and Virtual Training Courses

- Intro to Title IX
- Title IX Coordinator
- Investigations
- Advanced Investigations
- Webinar Series (www.NACCOP.org)
- Decision-Maker and Mock Hearing courses for Individual Campus Clients



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