

# FACE.

Families Advocating for Campus Equality

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## CALL TO ACTION:

### IMPORTANT ISSUES

*in*

## SUBMITTING COMMENTS ON POTENTIAL CHANGES TO TITLE IX RULES

Dear FACE Families, Students, and Friends of FACE,

Together we must **STRONGLY ADVISE** the Department of Education that we will not idly stand by and watch more lives devastated by its plan to implement unfair, result-driven, and un-American Title IX practices.

**WE NEED TO FLOOD OCR with our Comments, and force it to justify any changes to the 2020 Rules that we believe would undermine fair and equitable Title IX processes.**

You can either write in the box provided or submit your Comment as an attachment [HERE](#). You should also review the “[Commenter’s Checklist](#)” which is linked on the Comment submission page.

***Please note*** that the title to every Comment submission should include the **name of the regulation**, the **docket letter and number** and the **RIN number** assigned to the proposed regulations, as well as the **Federal Register site** where they are published.

### Here is what you should insert at the top of your Comment:

**Comment on Proposed Title IX Rulemaking**

**Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance**

**Docket No. ED-2021-OCR-0166-0001, RIN 1870-AA16**

**Federal Register Number 2022-13734**

Though OCR prefers any attachments be submitted in Microsoft Word format, if you wish to submit your Comment as a PDF, please be sure it is in “print-to-PDF” or some other searchable text format.<sup>1</sup> Please do *not* submit the PDF in a scanned format.

*Do not*, under any circumstances submit a form or copied Comment; these will be rejected by OCR.

*For additional assistance on how to submit your Comment, please see our [INSTRUCTIONS and TEMPLATE for SUBMITTING COMMENTS TO THE Department of Education Office for Civil Rights on the PROPOSED TITLE IX RULES](#) [HERE](#), and, for a list of issues you may wish to address, see below.*

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<sup>1</sup> Using a print-to-PDF format allows the Department to electronically search and copy certain portions of your submissions to assist in the rulemaking process.” - Federal Register / Vol. 87, No. 132 / Tuesday, July 12, 2022 / Proposed Rules.

## COMPARISON OF 2020 DeVos & 2022 PROPOSED REGULATIONS & IMPORTANT ISSUES TO ADDRESS

The issues listed below are in the order in which we believe to be their importance and relevance. However, it is often most impactful to focus on those issues that most affected you or your student's Title IX experience, and/or policies or procedures that would have generated a more accurate or equitable result.<sup>2</sup>

Under each issue the 2020 DeVos Regulations (2020 DeVos Rules) is summarized in the left column and the 2022 Proposed Regulations (2022 Proposed Rules) in the right:

- 1) Grievance Procedures: Live Hearing and Cross-Examination.
- 2) Grievance Procedures: Access to Investigative Reports and Evidence.
- 3) Grievance Procedures: Standard of Proof.
- 4) Grievance Procedures: Return of the Single Investigator.
- 5) Informal Resolution.
- 6) Retaliation.
- 7) Prohibiting All Forms of Sex Discrimination.
- 8) Defining "Sexual Harassment" and "Sex-based Harassment".
- 9) Responding to Sex Discrimination.
- 10) Title IX Coordinator Response to Sex Discrimination.
- 11) Discrimination Based on Sexual Orientation, Gender Identity, Sex Stereotypes, and Sex Characteristics.
- 12) Addressing Off-Campus Conduct.
- 13) Respecting Complainant Autonomy.
- 14) Ensuring Recipients Learn of Possible Sex Discrimination.
- 15) Biological Women in Sports.

Cynthia P Garrett and Alison Scott, *Co-Presidents*  
Families Advocating for Campus Equality

*Questions?*

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<sup>2</sup> The chart of the Rules and Issues was provided courtesy of the Defense of Freedom Institute. <https://protecttitle9.org>.

# Comparison Chart of the 2020 Rules vs. the 2022 Proposed Rules

A more detailed version of this Chart can be found [HERE](#).

## 1) Grievance Procedures: Live Hearing and Cross-Examination

2020 DeVos Rule §106.45(b)(6)(i)	2022 Proposed Rules §106.46(f)(1), (f)(3)
Conduct a live hearing with cross-examination for the parties including questions challenging credibility. (hearings are optional for K-12 schools).	Would abolish the requirements for postsecondary schools to conduct a live hearing and require cross-examination. §106.46(f)(1).
Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are prohibited as not relevant except in limited circumstances.	Would permit, but not require, questioning by either party (in a live hearing), but only questions the decisionmaker allows and determines are not "unclear" or "harassing," thereby giving the decisionmaker immense unilateral power to arbitrarily limit questioning. §106.46(f)(3).
If a party does not have an advisor, the school must provide (without fee) an advisor of the school's choice, who may but is not required to be an attorney, to conduct cross-examination on behalf of that party.	

## 2) Grievance Procedures: Access to Investigative Reports and Evidence

2020 DeVos Rule §106.45(b)(5)(vi)	2022 Proposed Rules §106.45(f)(4) & (b)(7)(iii)
Requires each party to a sexual harassment grievance proceeding be granted an equal opportunity to inspect and review the actual evidence obtained in the investigation that is directly related to the allegations.	For K-12, §106.45(f)(4) would not require the school to provide investigative reports to the parties but allows Title IX Coordinator to give these parties a summary of the evidence.
	For postsecondary institutions, §106.46(e)(6) would require schools offer "equitable access" to relevant and not otherwise impermissible evidence or to an investigative report summarizing the evidence. If the institution provides the report, and any party seeks access to evidence, it must give parties access to the relevant and not otherwise impermissible evidence.
	§106.45(b)(7)(iii) defines "otherwise impermissible evidence" to include evidence of a complainant's sexual interests and prior sexual conduct.

## 3) Grievance Procedures: Standard of Proof

2020 DeVos Rule §106.45(b)(1)(vii)	2022 Proposed Rule §106.45(h)(1)
Permits schools to use higher standard of proof ("clear and convincing evidence") and to state clearly whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or clear and convincing evidence standard.	Would require schools to use a preponderance of the evidence standard of proof unless a clear and convincing standard is used in all other comparable proceedings. This would substantially lower the burden of proof for obtaining a "conviction" of the accused.
Requires that schools apply the same evidentiary standard for students and employees, including faculty.	Proposes to permit schools to apply a standard of proof to faculty and other employees that is different from the standard of proof applied to students, inexplicably providing greater due process protections for accused employees than for accused students.

#### 4) Grievance Procedures: Return of the Single Investigator

2020 DeVos Rule §106.45(b)(7)(i)	2022 Proposed Rule §106.45(b)(2)
Prohibits use of the “single investigator model” in which a single school official may investigate and adjudicate sexual harassment allegations and impose punishment. Requires at least three separate school officials to participate in the grievance process (a coordinator who receives reports of sexual harassment, an investigator, and a decision-maker).	Would permit the return of the single investigator model, where the coordinator, investigator, and adjudicator may all be the same person (i.e., “kangaroo courts”)

#### 5) Informal Resolution

2020 DeVos Rules §106.45(b)(9) & (b)(9)(iii)	2022 Proposed Rule §106.45(k)
Provides that a school may offer informal resolution (e.g., mediation or restorative justice) if a formal complaint has been filed and if both parties give voluntary written consent to proceed. §106.45(b)(9).	Would permit an informal resolution process to occur even if a formal complaint has not been filed.
Does not permit schools to use informal resolution processes when an employee is alleged to have sexually harassed a student. §106.45(b)(9)(iii).	

#### 6) Retaliation

2020 DeVos Rules §106.71(a), (b)(2), (b)(1)	2022 Proposed Rules §106.2 & §106.71
Prohibits retaliation against any individual for exercising Title IX rights: no school or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing. §106.71(a).	Proposes to require schools to move forward with their grievance procedures whenever they receive a complaint alleging “retaliation.” §106.71
Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute prohibited retaliation. §106.71(b)(2).	Would remove the provision from the 2020 Rule stating that the exercise of one’s First Amendment rights does not constitute prohibited retaliation. Proposed § 106.71
The 2020 Rule explicitly provides that the exercise of one’s First Amendment rights does not constitute prohibited retaliation. §106.71(b)(1).	Would expand protection from retaliation to include “peer retaliation” (defined as retaliation by one student against another). §§106.2, 106.71

#### 7) Prohibiting All Forms of Sex Discrimination

2020 DeVos Rules §106.71(a), (b)(2), (b)(1)	2022 Proposed Rules §106.2 & §106.71
Addresses how federally funded educational institutions respond to and adjudicate allegations of sexual harassment, including sexual assault, in their education programs and activities (consistent with Title IX’s limited prohibition of discrimination on the basis of sex)	Would extend Title IX to include entirely new forms of sex discrimination (exceeding its clear and limited prohibition of discrimination on the basis of sex).

#### 8) Defining “Sexual Harassment” and “Sex-based Harassment”

2020 DeVos Rules §106.30(a)(1), (2), (3)	2022 Proposed Rule §106.2
Prohibits sexual harassment as a kind of sex discrimination. §106.30(a):  The Rule defines sexual harassment to include:	Would prohibit “sex-based harassment” as a type of sex discrimination and include “unwelcome sex-based conduct that is sufficiently severe <b>OR</b> pervasive that, based on the totality of the circumstances and <i>evaluated subjectively</i> and objectively, denies or limits a person’s ability to participate in

	or benefit from” an education program or activity (i.e., hostile environment).
A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo). §106.30(a)(1)	
Unwelcome conduct that a reasonable person would determine is so severe, pervasive, <b>AND</b> objectively offensive that it effectively denies a person equal access to the school’s education program or activity. § 106.30(a)(2)	
Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking. §106.30(a)(3)	

## 9) Responding to Sex Discrimination

2020 DeVos Rules §106.44(a), §106.30(a)	2022 Proposed Rule §106.44(a)
The school has <b>actual knowledge</b> of sexual harassment, (defining actual knowledge as meaning notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school).	Would require schools take “prompt and effective action” to stop any sex discrimination that occurs in its programs or activities, <i>regardless of its actual knowledge of the alleged discrimination</i> . Thus, schools could be responsible for sex-based discrimination for which they have no notice or actual knowledge that discrimination may be occurring.
The sexual harassment or allegations of sexual harassment occurred within the school’s education program or activity. §106.44(a)	Would also require schools to prevent the recurrence of any discrimination and “remedy its effects,” giving broad unilateral authority to Title IX Coordinators to impose potentially cumbersome, ill-defined, remedies.
The sexual harassment or allegations of sexual harassment occurred against a person in the United States. §§106.44(a), 106.8(d)	

## 10) Title IX Coordinator Response to Sex Discrimination

2020 DeVos Rules §106.45(b)(1)(iv), (b), (b)(1)(iii),	2022 Proposed Rules §106.44(f)(6), §106.45(h)(3), (g)(2)
Presumes the innocence of the respondent during the investigation. §106.45(b)(1)(iv)	Would require Title IX Coordinator to take wide-ranging “prompt and effective steps” (in addition to remedies provided to the alleged victim) to ensure that sex discrimination does not continue or recur. §106.44(f)(6).
Provides for a grievance process that complies fully with the 2020 DeVos Rules, including investigating formal complaints of sexual harassment (document filed by complainant or signed by the Title IX Coordinator alleging sexual harassment and requesting the school investigate). §106.45(b)	Would increase the Title IX Coordinator’s authority to implement a wide range of what he/she deems to be a remedy sufficient to prevent the continuation or recurrence of sex discrimination. §106.45(h)(3)
Title IX Coordinator (and all Title IX personnel) must be free from conflicts of interest and bias. §106.45(b)(1)(iii)	Would allow Title IX Coordinator to impose “supportive measures” that burden a person accused of misconduct prior to any finding of responsibility (i.e., abandoning the presumption of innocence for the accused). §106.45(g)(2)
Title IX Coordinator must treat someone as a complainant any time school has notice the person is alleged to be the victim of possible sexual harassment (regardless of whether the alleged victim or a third party reported the alleged conduct) and regardless of whether a formal complaint is filed by the complainant. §§106.44(a)-(b), 106.30, 106.8(a)	

## 11) Discrimination Based on Sexual Orientation, Gender Identity, Sex Stereotypes, and Sex Characteristics.

2020 DeVos Rules §§106.31, 106.30(a)	2022 Proposed Rules §§106.10, 106.2, 106.31(a)(2)
Prohibits sexual harassment as discrimination based on sex forbidden under Title IX. Doesn't address or expand the scope of Title IX protections against discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity.	Would dramatically expand "sex discrimination" to include sex stereotypes, sex characteristics, sexual orientation, and gender identity (pregnancy and related conditions do not exceed Title IX's statutory language). §§106.10, 106.2
	Proposes, when Title IX or its implementing regulations allow different treatment or separation based on sex, to prohibit such separation or treatment when it subjects a person to more than "minimal harm", defined as any policies that prevent a student from participating in a school's education program or activity "consistent with their gender identity." §106.31(a)(2)
	Would supposedly not apply if the separation or treatment is "otherwise permitted by Title IX" or the regulations, such as limited situations in which Title IX allows for sex-segregated undergraduate admissions, sex-segregated living facilities, membership practices of fraternities and sororities, or pursuant to the religious exemption. §106.31(a)(2)

## 12) Addressing Off-Campus Conduct.

2020 DeVos Rules §§106.44(a), 106.8(d)	2022 Proposed Rule §106.11
Provides that schools must respond to allegations of sexual harassment when it occurs . . . 1. in the school's education program or activity, against a person in the United States (includes locations, events, or circumstances over which the school exercises substantial control over both the respondent and the context in which the alleged sexual harassment occurs). §§106.44(a), 106.8(d) 2. Any building owned or controlled by a student organization that is officially recognized by the postsecondary institution. §106.44(a).	Would dramatically expand Title IX's jurisdiction by covering allegations of sex-based harassment that occur outside of a school's educational programs or activities or outside of the United States, if the behavior creates a "hostile environment" in a school's program.

## 13) Respecting Complainant Autonomy.

2020 DeVos Rules §§106.71(a), 106.30(a)	2022 Proposed Rules §§106.44(f)(5), (f)(b), 106.2
Provides that schools must keep confidential identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, or as required by law, or as necessary to carry out a Title IX proceeding. § 106.71(a)	Would require Title IX Coordinator to decide whether to make a complaint where the alleged victim decides not to move forward. §106.44(f)(5)
Provides that either the complainant or the Title IX Coordinator can decide to file a complaint, but former students or employees no longer participating or attempting to participate in the school's education program or activity cannot. § 106.30(a) This is based on Title IX preserving "access to education."	Would permit former students or employees to file complaints (regardless of why they left the school's education program or activity) against current students or employees or former students or employees. §106.2
	Would vastly expand the power of Title IX Coordinators to "monitor" the school's Title IX program for "barriers to reporting information" and would enable them to force the school to take steps "reasonably calculated" to address the alleged barriers. §106.44(b)



## 14) Ensuring Recipients Learn of Possible Sex Discrimination

2020 DeVos Rules §§106.8(a), 106.44(a)	2022 Proposed Rules §§106.44(c)(1), (c)(2), (c)(2)(iv)
Designate and authorize at least one employee as a Title IX Coordinator. §106.8(a)	Proposes any employee of an elementary or secondary school (other than confidential employees, such as counselors) notify the Title IX Coordinator of conduct that could <i>conceivably</i> constitute sex discrimination; imposes a massive new burden on all employees to monitor the behavior and spoken words of students. §106.44(c)(1)
Notify all applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions, of the name, title, address, email address, and telephone number of the employee or employees designated as the Title IX Coordinator. § 106.8(a)	Provides only postsecondary employees with authority to take corrective action or, for incidents involving students, have responsibility for administrative leadership, teaching, or advising, would be obligated to notify the Title IX Coordinator. §106.44(c)(2)
Allow any person to report sex discrimination, including sexual harassment (whether or not the person reporting is the alleged victim of conduct that could constitute sex discrimination or sexual harassment) by any means that results in the Title IX Coordinator receiving the person's report. §106.8(a)	All other postsecondary employees (other than confidential employees, such as counselors) would be required to give an individual who provided information alleging prohibited misconduct with the Title IX Coordinator's contact information and specific direction about reporting the alleged discriminatory conduct. §106.44(c)(2)(iv)
Provides that a school has notice (requiring a response) when it has actual knowledge of sexual harassment or allegations of sexual harassment (if that information is known to the Title IX Coordinator, any official of the school with authority to institute corrective measures on behalf of the school, or any employee of an elementary and secondary school). §106.44(a)	

## 15) Biological Women in Sports

2020 DeVos Rule	2022 Proposed Rule § 106.31(a)(2)
	Requires schools to permit biological males who identify as females to play in women's and girls' athletics. No protections preserve athletics for biological females. In fact, under the proposed rule, institutions must take "prompt and effective" to end such policies and protections because they would constitute "discrimination on the basis of . . . gender identity" under the scope of the new rule. If the proposed rule becomes final without additional changes, a biological man or boy who identifies as a woman or a girl will be able to compete against women or girls in sports like swimming, weightlifting, and running. These are fatal defects that deserve intense public scrutiny and comment.

*The mission of FACE is to support and advocate for equal treatment and due process for those affected by inequitable Title IX campus disciplinary processes, and influence campus culture through outreach and education.*

*FACE is a 501(c)(3) tax-exempt organization.*

[www.facecampusequality.org](http://www.facecampusequality.org)