



National Association of College and University Attorneys  
Presents:

**The U.S. Department of Education's Notice of  
Proposed Rulemaking on Title IX and Sexual  
Misconduct**

**Webinar**

**July 18, 2022**

12:00 PM – 2:00 PM Eastern  
11:00 AM – 1:00 PM Central  
10:00 AM – 12:00 PM Mountain  
9:00 AM – 11:00 AM Pacific

**Presenters:**

**Hope Murphy Tyehimba**  
Johns Hopkins University

**Patty Petrowski**  
University of Michigan

**Josh Richards**  
Saul Ewing Arnstein & Lehr

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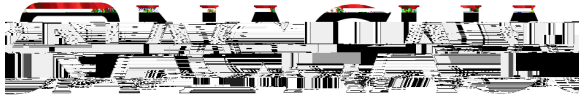
2022) on the NACUA Board of Directors and is on NACUA's Committee on Program for Annual Conference.

**Hope Murphy Tyehimba** is an Associate General Counsel in the Office of the Vice President and General Counsel at The Johns Hopkins University, where she is a member of the Student Affairs and Employment Matters and the Healthcare and Research Practice Groups. At Hopkins, Hope advises on

# Materials

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# Attendance Record

## Webinar

### The U.S. Department of Education 's Notice of Proposed Rulemaking on Title IX and Sexual Misconduct (2022)

July 18, 2022

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\*Total CLE Credits = 120 minutes

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Organization

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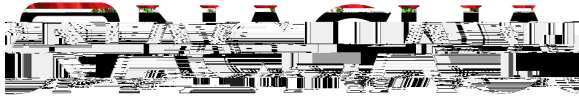
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# Certificate of Attendance

Webinar

## The U.S. Department of Education’s Notice of Proposed Rulemaking on Title IX and Sexual Misconduct (2022)

July 18, 2022

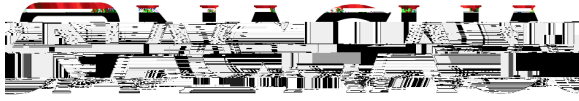
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## Webinar



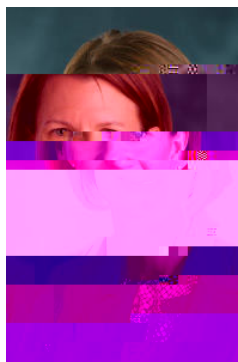
# The U.S. Department of Education's Notice of Proposed Rulemaking on Title IX and Sexual Misconduct (2022)

Hope Murphy Tyehimba, Associate General Counsel, Johns Hopkins University  
Patty Petrowski, Deputy General Counsel, University of Michigan  
Joshua Richards, Partner, Saul Ewing LLP

## Presenters



Hope Murphy Tyehimba  
Associate General Counsel  
Johns Hopkins University

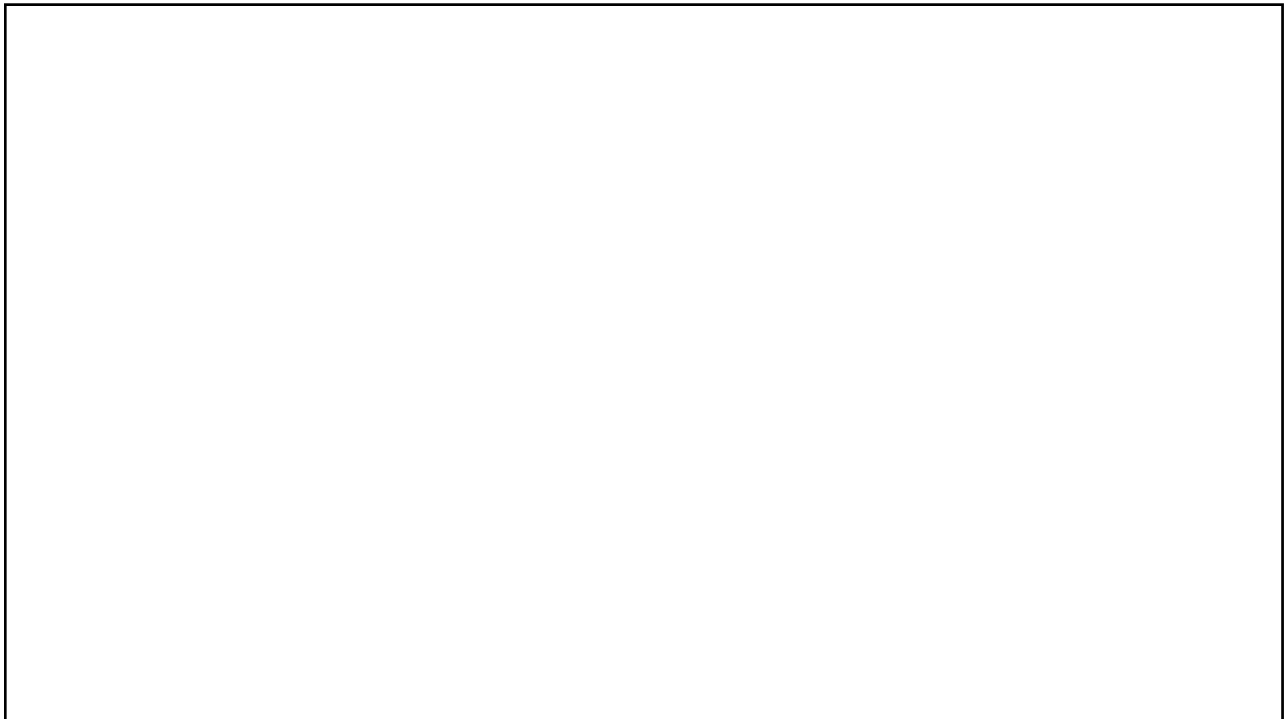


Patty Petrowski  
Deputy General Counsel  
University of Michigan



Josh Richards  
Partner  
Saul Ewing LLP

# Context



## Big Picture

Recipients have an obligation to respond appropriately to notice of sex discrimination in its programs and activities.

- The reach and scope of each of these terms has changed and generally to broaden both what triggers an institutional response and what that response needs to be.

## What Triggers A Response Obligation?



\*Not drawn to scale...

# What Triggers A Response Obligation?

## SexDiscrimination

- Sexstereotypes
- Sexcharacteristics
-

## What Triggers A Response Obligation?

“The Department’s current view is that these decisions are correct in . .  
. requir[ing] a recipient to address a hostile ^Â ő ;Vë®ß "E Aa | @ ì Q P

## What Triggers A Response Obligation?

- Actual knowledge no longer triggers recipient's response obligations.
- Instead, various categories of employees who receive notification of possible sex discrimination will trigger response obligations.
- Much broader than officials with authority to institute corrective measures under the current regulations.

## Notification To Certain Categories Of Employees Triggers Response Obligations

- Employees with authority to institute corrective measures
- Administrative leadership, teaching, or advising
- All other employees

## Notification That Does Not Trigger A Response Obligation

- Confidential Employees
  - Employees subject to applicable

# Response Obligations

## Title IX Coordinator Responsibilities

- Once a recipient is on notice, the Title IX Coordinator must:
  - Treat both parties equitably;
  - Notify complainant of grievance procedures;
  - If complaint is made, notify respondent of applicable grievance procedures and both parties of informal resolution;
  - Offer and coordinate supportivemeasures;
  - Initiate grievance procedures or informal resolution;
  - If no complaint, determine whether to initiate grievance procedures and
  - Take other steps to ensure that sex discrimination does not continue or recur.

NPRM §106.44(f)





## Initiating The Grievance Process (Unwilling Complainant)

- A complaint generally should be initiated when there is:
  - An immediate and serious threat to the health and safety of any community member; or
  - Corroborating evidence available.

## Initiating Grievance Process (Unwilling Complainant)

- Factors to consider:
  - Risk of additional sex discrimination;
  - Seriousness of alleged sex discrimination;
  - Age and relationship of parties;
  - Scope of alleged sex discrimination;
  - Availability of evidence; and
  - Disciplinary sanction

NPRM Preamble at 204-206

## Title IX Coordinator Responsibilities

- Upon receiving notice that a student is pregnant, Title IX Coordinator must:
  - Inform student of the recipient's obligations re: pregnancy and related conditions;
  - Provide student with option of reasonable modification to policies/practices/procedures;
  - Allow voluntary access to a separate portion of program or activity;
  - Allow leave of absence;
  - Ensure availability of lactation space; and
  - Maintain grievance procedures under §106.45 and §106.46.

NPRM §106.40(b)(3)(i)(iv)

## Supportive Measures

"Upon being notified of conduct that may constitute sex discrimination under Title IX, a 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 recipient's education program or activity." NPRM 106.44(g)

# Supportive Measures

- Factors to Consider When Offering Supportive Measures:
  - Need expressed by the complainant or respondent;
  - Ages of the parties involved, the nature of the allegations, and their continued effect on the complainant or respondent;
  - Whether the parties continue to interact directly in the recipient's education program the £

## Informal Resolution

“A recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that may constitute sex discrimination under TIX or a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of a parties’ wishes.”

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Questions?



The Grievance Process



**The Grievance Process: §106.45**

Single Investigator Model Okay: “The decision maker may be the same person as the Title IX Coordinator or investigator.”  
BUT, no conflict of interest or bias permitted.  
NPRM §106.45(b)(2)

**The Grievance Process: §106.45**

Respondents Presumed Not Responsible: “Include a presumption that the respondent is not responsible for the alleged conduct until a determination whether sex discrimination occurred is made at the conclusion of the recipient’s grievance procedure for complaints of sex discrimination.” NPRM §106.45(b)(3)

\*Presumption no longer limited to complaints involving sexual harassment but applied to all complaints of sex discrimination.



## The Grievance Process: §106.45

### Reasonable Timeframes:

“Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case by case basis for good cause with notice to the parties that include the reason for the delay.”

NPRM §106.45(b)(4)

### Major Stages:

1. Evaluation/dismissal determinations
2. Investigation
3. Determination
4. Appeal (if any)

## The Grievance Process: §106.45

The Grievance Process: §106.45

Notice of allegations: "Upon

## The Grievance Process: §106.45

Investigation of the complaint

NPRM §106.45(f)

## The Grievance Process:

§106.45

Standard of Proof  
NPRM §106.45(h)(1)



## The Grievance Process:

§106.45

Notice of Outcome: “Notify the parties of the outcome of the complaint, including the determination of whether sex discrimination occurred under Title IX, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable.”

NPRM §106.45(h)(2).

The Grievance Process: §106.45

## The Grievance Process: §106.45

- Additional Provisions "If a recipient adopts additional provisions as part

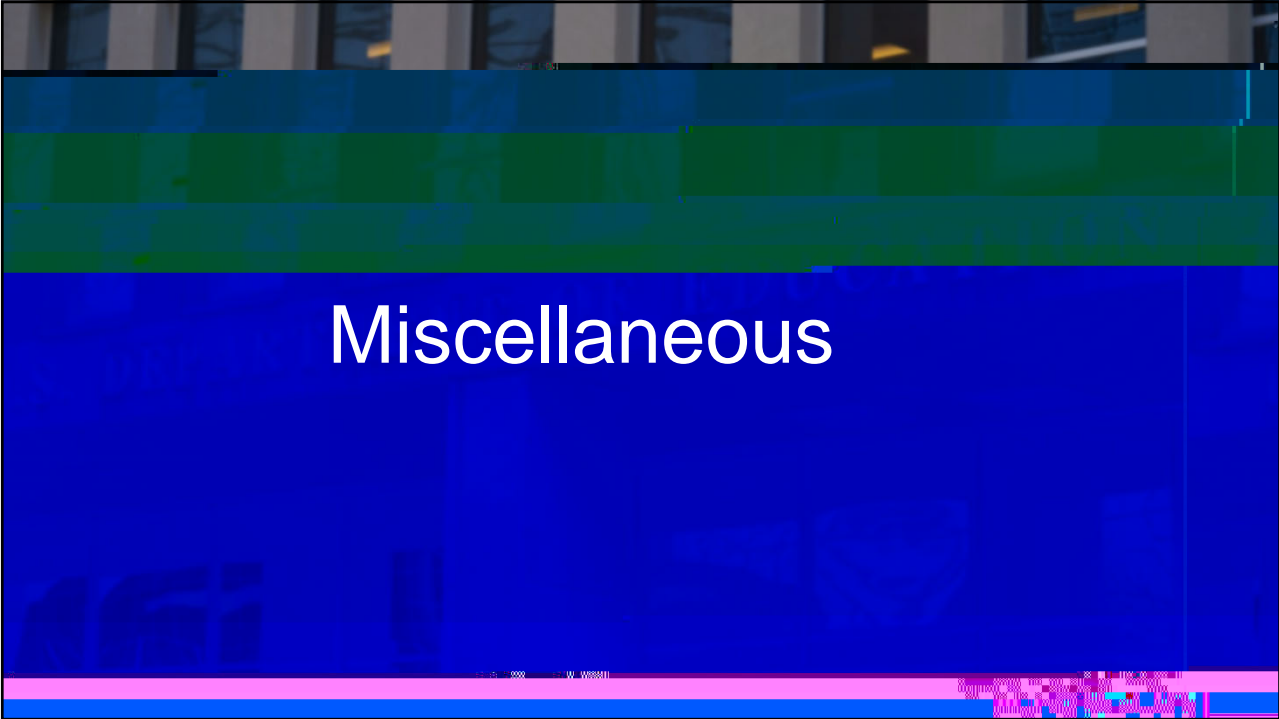
The Grievance Process: §106.46

The Grievance Process: §106.46



The Grievance Process: §106.46

Determination of Responsibility: “The postsecondary institution must provide the determination whether sex based harassment



Retaliation (§106.71)

# Training

- All employees must be trained on:
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# Questions?

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