

National Association of College and University Attorneys

The Title IX Regulations

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| Definitions | | | |
| Actual Knowledge | “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient....” | | §106.30 |
| | “This [actual knowledge] standard is not met when the only official of the recipient with actual knowledge is the respondent.” | | §106.30 |
| | “The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.” | | §106.30 |

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| | Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment). | | §106.8 |
| Clear and Convincing Evidence | | No Regulatory Definition: The Department declines to provide definitions of the “preponderance of the evidence” standard and the “clear and convincing evidence” standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in other legal contexts and intends the “preponderance of the evidence” standard to have its traditional meaning in the civil litigation context and the “clear and convincing evidence” standard to have its traditional meaning in the subset of civil litigation and administrative proceedings where that standard is used. | p. 1319 |
| | | Preamble Definition: [H]aving confidence that a conclusion is based on facts that are highly probable to be true. | p. 1314 |
| | | Preamble Definition: A clear and convincing evidence standard of evidence is understood to mean concluding that a fact is highly probable to be true. <i>E.g., Sophanthavong v. Palmateer</i> , 378 F.3d 859, 866-67 (9th Cir. 2004) (a clear and convincing evidence standard requires “sufficient evidence to produce in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [<i>sic</i>] highly probable.”) (internal quotation marks and citation omitted; brackets in original). | p. 1314, n. 1473 |
| Complainant | “[A]n individual who is alleged to be the victim of conduct that could constitute sexual harassment” | | §106.30 |

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| | | Complainant Connection to Education Program or Activity: [A] complainant must be participating in, or attempting to participate in, the recipient’s education program or activity at the time of filing a formal complaint. | p. 411 <i>See also</i> p. 708 |
| | | Alumni Complainants: A complainant who has graduated may still be “attempting to participate” in the recipient’s education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient’s alumni programs and activities. | p. 411 <i>See also</i> p. 709 |
| | | Complainants on Leaves of Absence: [A] complainant who is on a leave of absence may be “participating or attempting to participate” in the recipient’s education program or activity. | p. 411 <i>See also</i> p. 709 |
| | | Prospective Enrollees: [A] complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is “attempting to participate” in the recipient’s education program or activity. | p. 411 <i>See also</i> p. 709 |
| Consent | The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault. | | §106.30 |
| | | Definition Required: Recipients must clearly define consent and must apply that definition consistently[.] | p.364 <i>See also</i> p. 365 |
| | | Discretion to Craft Definition: The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient’s educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies. | p. 363 <i>See also</i> pps. 545, 1195 |

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| | | Absence of or Negation of Consent: [T]he Department leaves flexibility to recipients to define consent as well as terms commonly used to describe the absence or negation of consent (e.g., incapacity, coercion, threat of force). | p. 487 <i>See also</i> p. 541-42 |
| | | Burden of Proof: [T]o the extent recipients “misuse affirmative consent” (or any definition of consent) by applying an instruction that the respondent must prove the existence of consent, such a practice would not be permitted. | p.364 |
| | | Burden of Proof: The final regulations do not permit the recipient to shift that burden to a respondent to prove consent, and do not permit the recipient to shift that burden to a complainant to prove absence of consent. | p. 365 |
| | | Intersection with Rape Shield Protections: The second of the two exceptions to the rape shield protections refers to “if offered to prove consent” and thus the scope of that exception will turn in part on the definition of consent adopted by each recipient. | p. 1195 |
| Days | | [B]ecause the Department does not require a specific method for calculating “days,” recipients retain the flexibility to adopt the method that works best for the recipient’s operations; for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations. | p. 591 <i>See also</i> pps. 1043, 1105, 1480 |
| Deliberate Indifference | A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. | | §106.44(a) |
| Directly Related | | The Department declines to define certain terms in this provision such as ...“evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning. | p. 1017 |

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| | | We note that “directly related” in § 106.45(b)(5)(vi) aligns with requirements in FERPA, 20 U.S.C. 1232g(a)(4)(A)(i). | p. 1017 |
| Education Program or Activity | “[E]ducation program or activity” includes 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. | | §106.44(a) |
| Final Determination | | A “final” determination means the written determination containing the information required in § 106.45(b)(7), as modified by any appeal by the parties. | p. 1340 |
| Formal Complaint | [A] document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment | | §106.30 |
| | At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. | | §106.30 |

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| Informal Resolution | | The Department believes an explicit definition of “informal resolution” in the final regulations is unnecessary. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. | p. 1370 |
| Preponderance of the Evidence | | No Regulatory Definition: The Department declines to provide definitions of the “preponderance of the evidence” standard and the “clear and convincing evidence” standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in other legal contexts and intends the “preponderance of the evidence” standard to have its traditional meaning in the civil litigation context and the “clear and convincing evidence” standard to have its traditional meaning in the subset of civil litigation and administrative | p. 1319 |
| | | Preamble Definition: [The] conclusion is based on facts that are more likely true than not. | p. 1314 |
| | | Preamble Definition: A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true. <i>E.g., Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.</i> , 508 U.S. 602, 622 (1993) (a preponderance of the evidence standard “requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence”) (internal quotation marks and citation omitted). | p. 1314, n. 1472 |
| Respondent | [A]n individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. | | §106.30 |

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| | | Student, Employee, and Faculty Respondents: [A]ny “individual” can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient. | p. 416 |
| Remedies | Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. | | §106.45(b)(1)(i) |
| Sex (i.e. “Because of Sex”) | | No Regulatory Definition: The Department did not propose a definition of “sex” in the NPRM and declines to do so in these final regulations. | p. 553 <i>See also</i> pps. 556, 557, 560 |
| | | Anyone May Experience Discrimination: Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation. | p. 556 <i>See also</i> pps. 554, 558, 561 |
| | | Sex Stereotyping: Nothing in these final regulations, or the way that sexual harassment is defined in § 106.30, precludes a theory of sex stereotyping from underlying unwelcome conduct on the basis of sex. | p. 557 |

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| Sexual Harassment | Conduct on the basis of sex that satisfies one or more of the following: (1) 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; (2) 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; or 2015 (3) “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). | | §106.30 |
| Supportive Measures | [N]on-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. | | §106.30 |

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| | [Supportive] measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment. | | §106.33 |
| | Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. | | §106.33 |

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| Jurisdiction | | | |
| Jurisdiction | 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. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. | | §106.44 (a) |
| Actual Knowledge | <i>See regulatory definition supra p. 1.</i> | | |
| | | Fact-Specific Inquiry: [D]etermining which employees may be officials with authority is fact-specific. | p. 311 |
| | | Designate Officials with Authority to Implement Corrective Measures: A recipient also may empower as many officials as it wishes with the requisite authority to institute corrective measures on the recipient’s behalf, and notice to these officials with authority constitutes the recipient’s actual knowledge and triggers the recipient’s response obligations. Recipients may also publicize lists of officials with authority. | p. 300 <i>See also p. 320</i> |
| | | Designating Mandatory Reporters: [N]othing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment. | p. 300 <i>See also pps. 316, 320, 604</i> |

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| | | Mandatory Reporter ≠ Employee with Authority to Implement Corrective Measures: [T]he mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. | p. 321 |
| | | No Formal Complaint Required: [A] recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment. | p. 673 |
| Sexual Harassment | <i>See regulatory definition supra p. 8.</i> | | |
| | | <i>Quid Pro Quo</i> and <i>Per Se</i> Harassment: [The] other categories (<i>quid pro quo</i> ; sexual assault and three other Clery Act/VAWA offenses) . . . do not require elements of severity, pervasiveness, or objective offensiveness. | p. 425 <i>See also</i> pps. 432, 461, 469 |
| | | Verbal Harassment: The three-pronged definition of sexual harassment in § 106.30 captures physical and verbal conduct serious enough to warrant the label “abuse[.]” | p. 476 |
| | | Evaluating Severity, Pervasiveness, and Objective Offensiveness: Elements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant. | p. 477 |
| | | No Showing of Intent Required: The <i>Davis</i> standard does not require an “intent” element; unwelcome conduct so severe, pervasive, and objectively offensive that it denies a person equal educational opportunity is actionable sexual harassment regardless of the respondent’s intent to cause harm. | pps. 515-16 |
| | | Sexual Exploitation: [S]exual exploitation constitutes sexual harassment as defined in § 106.30. | p. 559 |

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| Education Program or Activity | <i>See regulatory definition supra p. 5.</i> | | |
| | | Off Campus ≠ Outside Institution’s Education Program or Activity: “[O]ff campus” does not automatically mean that the incident occurred outside the recipient’s education program or activity. | p. 630 <i>See also p. 636</i> |
| | | Key Questions: Whether sexual harassment occurs in a recipient’s education program or activity is a fact specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred. There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection under the final regulations. | p. 654 <i>See also pps. 624, 625-26</i> |
| | | Factors to Consider: whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred | p. 625 |
| | | Factors to Consider: [N]o single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred. | p. 624 <i>See also p. 644</i> |
| | | Recognized, Off-Campus Student Organizations: [W]here a postsecondary institution has officially recognized a student organization, the recipient’s Title IX obligations apply to sexual harassment that occurs in buildings owned or controlled by such a student organization, irrespective of whether the building is on campus or off campus, and irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building. | p. 625-26 |

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| | | Recognized, Off-Campus Student Organizations: Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location <i>not</i> owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient’s Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances. | p. 627 |
| | | Cyber Harassment: “[P]rogram or activity” encompass “all of the operations of” such recipients, and such “operations” may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient. | p. 644 |
| | | Off-Campus Conduct that has Effects in Education Program or Activity: [A] recipient may be deliberately indifferent to sexual harassment that occurred outside the recipient’s control where the complainant has to interact with the respondent in the recipient’s education program or activity, or where the effects of the underlying sexual assault create a hostile environment in the complainant’s workplace or educational environment. | p. 636 <i>See also</i> p. 632 |
| | | Discretion to Levy Separate Conduct Charges for Misconduct Outside Education Program or Activity: [N]othing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient’s education program or activity. | p. 631 <i>See also</i> p. 634 |
| | | Complainant Connection to Education Program or Activity: [A] complainant must be participating in, or attempting to participate in, the recipient’s education program or activity at the time of filing a formal complaint. | p. 411 <i>See also</i> p. 708. |

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| Against a Person in the United States | | No Extraterritorial Application: Title IX does not have extraterritorial application. | p. 658 |
| | | Study Abroad: We acknowledge the concerns raised by many commenters that the final regulations would not extend Title IX protections to incidents of sexual misconduct occurring against persons outside the United States, and the impact that this jurisdictional limitation might have on the safety of students participating in study abroad programs. However, by its plain text, the Title IX statute does not have extraterritorial application. | Pps. 656-67 |
| | | Study Abroad: We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States. | p. 660 |
| Deliberate Indifference | <i>See regulatory definition supra p. 4.</i> | | |
| | | [Even in the absence of a Formal Complaint signed by the complainant], some circumstances may require a recipient (via the Title IX Coordinator) to initiate an investigation and adjudication of sexual harassment allegations in order to protect the recipient’s educational community or otherwise avoid being deliberately indifferent to known sexual harassment. | p. 389 |
| What triggers an institution’s obligations? | | | |
| General Obligations: Actual Knowledge | 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 | | §106.44(a) |

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| | is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. | | |
| Obligation to Initiate a <u>Formal</u> Grievance Process: Formal Complaint | In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45. | | §106.44 (b)(1) |
| | At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. | | §106.30 |
| | | Institutional Form Prohibited: [E]ven if a recipient desires for complainants to only use a specific form for filing formal complaints, these final regulations permit a complainant to file a formal complaint by either using the recipient-provided form (or electronic submission system such as through an online portal provided for that purpose by the recipient), or by physically or digitally signing a document and filing it as authorized (i.e., in person, by mail, or by e-mail) under these final regulations. | p. 1638 |
| | | Detailed Facts Not Required: The § 106.30 definition of “formal complaint” requires a document “alleging sexual harassment against a respondent,” but contains no requirement as to a detailed statement of facts. | p. 384 |

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| | | No Statute of Limitations: [T]here is no time limit on a complainant’s decision to file a formal complaint. | p. 385 <i>See also</i> p. 372, 689, 708 |
| | | Consolidation of Formal Complaints: [R]ecipients have discretion to consolidate formal complaints in situations that arise out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other. | pps. 968-69 |
| | | Consolidation of Formal Complaints: If there are multiple complainants and one respondent, then the recipient may consolidate the formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances, under § 106.45(b)(4). The requirement for the same facts and circumstances means that the multiple complainants’ allegations are so intertwined that their allegations directly relate to all the parties. | p. 1498 |
| | | Filing by Title IX Coordinator: When a Title IX Coordinator believes that with or without the complainant’s desire to participate in a grievance process, a non-deliberately indifferent response to the allegations requires an investigation, the Title IX Coordinator should have the discretion to initiate a grievance process. | p. 386 <i>See also</i> pps. 389 707 |
| | | Filing by Title IX Coordinator: The Title IX Coordinator may consider a variety of factors, including a pattern of alleged misconduct by a particular respondent, in deciding whether to sign a formal complaint. | p. 701 |
| | | Filing by Title IX Coordinator: [T]he Title IX Coordinator may take circumstances into account such as whether a complainant’s allegations involved violence, use of weapons, or similar factors. | p. 702 |

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| | | Filing by Title IX Coordinator (Limitations): [The decision of the Title IX Coordinator to file a Formal Complaint] should be reached thoughtfully and intentionally by the Title IX Coordinator, not as an automatic result that occurs any time a recipient has notice that a complainant was allegedly victimized by sexual harassment. | p. 387 |
| | | Filing by Title IX Coordinator (Limitations): The Title IX Coordinator’s decision to sign a formal complaint may occur only after the Title IX Coordinator has promptly contacted the complainant (i.e., the person alleged to have been victimized by sexual harassment) to discuss availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, and explain to the complainant the process for filing a formal complaint. Thus, the Title IX Coordinator’s decision to sign a formal complaint includes taking into account the complainant’s wishes regarding how the recipient should respond to the complainant’s allegations. | p. 701 |
| | | Third Parties Cannot File Formal Complaints: Other than a Title IX Coordinator, third parties cannot file formal complaints. | p. 354 |
| | | Anonymous Complaints: Where a complainant desires to initiate a grievance process, the complainant cannot remain anonymous or prevent the complainant’s identity from being disclosed to the respondent (via the written notice of allegations). | p. 394 |
| | | Anonymous Complaints: When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations in § 106.45(b)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties if known [T]he grievance process may proceed if the Title IX Coordinator | Pps. 395-96 |

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| | | determines it is necessary to sign a formal complaint, even though the written notice of allegations does not include the complainant's identity. | |
| | | Unwilling Complainant: If the Title IX Coordinator signs a formal complaint against the wishes of the complainant, then the recipient likely will have difficulty obtaining evidence from the complainant that is directly related to the allegations in a formal complaint. | p. 1477 |
| | | Unknown Respondent: A recipient must investigate a complainant's formal complaint even if the complainant does not know the respondent's identity, because an investigation might reveal the respondent's identity, at which time the recipient would be obligated to send both parties written notice. | p. 413 |
| Obligation to Provide Supportive Measures: Actual Knowledge, With or Without Formal Complaint | The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. | | §106.44(a) |
| | With or without a formal complaint, a recipient must comply with §106.44. | | §106.44(b)(1) |
| | | Examples of Supportive Measures: Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of | p. 1370 |

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| | | absence, increased security and monitoring of certain areas of the campus, and other similar measures. | |
| | | Oral or Written Notice: No written document is required to put a school on notice (i.e., convey actual knowledge) of sexual harassment triggering the recipient’s response obligations under § 106.44(a). | p. 384 |
| | | Third Party Reports: [A]ny person (including third parties) can report[.] | p. 351 <i>See also</i> pps. 605, 614 |
| | | Anonymous Reports: [T]he final regulations do not prohibit recipients from implementing anonymous (sometimes called “blind”) reporting. | p.391 |
| | | Fact-Specific Analysis: [T]he determination of appropriate supportive measures in a given situation must be based on the facts and circumstances of that situation. | p. 569 |
| | | Interactive Process: A recipient should engage in a meaningful dialogue with the complainant to determine which supportive measures may restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment. | p. 669 <i>See also</i> p. 880, 921, 1022 |
| | | Confidentiality: If a complainant desires supportive measures, the recipient can, and should, keep the complainant’s identity confidential (including from the respondent), unless disclosing the complainant’s identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms). | p. 393 <i>See also</i> p. 614, 921, 1469 |

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| | | Burden on Parties: The plain language of the § 106.30 definition does not state that a supportive measure provided to one party cannot impose <i>any</i> burden on the other party; rather, this provision specifies that the supportive measures cannot impose an <i>unreasonable</i> burden on the other party. | p. 565 |
| | | Burden on Parties: [T]he [supportive] measure cannot punish, discipline, or unreasonably burden the respondent. | p. 566 |
| | | Burden on Parties (Examples): Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is “unreasonable” does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent’s access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth. | p. 570 |
| | | Burden on Parties (Examples): [W]here both parties are athletes and sometimes practice on the same field, consideration must be given to the scope of a no-contact order that deters sexual harassment, without unreasonably burdening the other party, with the goal of restricting contact between the parties without requiring either party to forgo educational activities. It may be unreasonably burdensome to prevent respondents from attending extra-curricular activities that a recipient offers as a result of a one-way no contact order prior to being determined responsible; similarly, it may be unreasonably burdensome to | p. 578 <i>See also</i> p. 750 |

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| | | restrict a complainant from accessing campus locations in order to prevent contact with the respondent. | |
| | | Burden on Parties (Examples): A school may conclude that transferring the respondent to a different section of that class (e.g., that meets on a different day or different time than the class section in which the complainant and respondent are enrolled) is a reasonably available supportive measure that preserves the complainant’s equal access and protects the complainant’s safety or deters sexual harassment, while not constituting an unreasonable burden on the respondent (because the respondent is still able to take that same class and earn the same credits toward graduation, for instance). If, on the other hand, that class in which both parties are enrolled does not have alternative sections that meet at different times, and precluding the respondent from completing that class would delay the respondent’s progression toward graduation, then the school may determine that requiring the respondent to drop that class would constitute an unreasonable burden on the respondent and would not qualify as a supportive measure, although granting the complainant an approved withdrawal from that class with permission to take the class in the future, would of course constitute a permissible supportive measure for the recipient to offer the complainant. | p. 754 See also p. 881 |
| | | Supportive Measures Cannot Amount to Sanctions: If a recipient has listed ineligibility to play on a sports team or hold a student government position, for example, as a possible disciplinary sanction that may be imposed following a determination of responsibility, then the recipient may not take that action against a respondent without first following the § 106.45 grievance process. | p. 570-71 |

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| | | One Way No Contact Order May Be Appropriate in Limited Circumstances: §106.30 does not mean that one-way no-contact orders are never appropriate. A fact-specific inquiry is required into whether a carefully crafted no-contact order restricting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if a recipient issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no contact order may be appropriate. . . . [E]mergency removal . . . could include a no-trespass or other no-contact order issued against a respondent. | p. 577 |
| | | Title IX Coordinator Implements Supportive Measures: [T]he Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient’s own system does not fall on the student receiving the supportive measures. | p. 575 <i>See also</i> p. 880 |
| | | Documentation Required for <i>not</i> Providing Supportive Measures: [I]f a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances under §106.45(b)(10)(ii). | p. 567 <i>See also</i> pps. 598-99, 706 |
| | | Compliance Standard: A recipient will have sufficiently fulfilled its obligation to offer supportive measures as long as the offer is not clearly unreasonable in light of the known circumstances. | p. 670 |

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| Dismissal of Formal Complaint Prior to Full Resolution | | | |
| Grounds for Dismissal (Mandatory) | If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 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, then the recipient 2022 must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct. | | §106.45(b)(3)(i) |
| Grounds for Dismissal (Discretionary) | The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to | | §106.45(b)(3)(ii) |

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| | the formal complaint or allegations therein. | | |
| | | Meritless or Frivolous Allegations: Permitting a recipient to deem allegations meritless or frivolous without following the § 106.45 grievance process would defeat the Department’s purpose. | p. 688 |
| | | Discretionary Dismissals: By granting recipients the discretion to dismiss in situations where the respondent is no longer a student or employee of the recipient, the Department believes this provision appropriately permits a recipient to make a dismissal decision based on reasons that may include whether a respondent poses an ongoing risk to the recipient’s community, whether a determination regarding responsibility provides a benefit to the complainant even where the recipient lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons. The final category of discretionary dismissals addresses situations where specific circumstances prevent a recipient from meeting the recipient’s burden to collect evidence sufficient to reach a determination regarding responsibility; for example, where a complainant refuses to participate in the grievance process (but also has not decided to send written notice stating that the complainant wishes to withdraw the formal complaint), or where the respondent is not under the authority of the recipient (for instance because the respondent is a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complaint), and the recipient has no way to gather evidence sufficient to make a determination, this provision permits dismissal. | pps. 965-66 |

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| Written Notice Required for Dismissals | Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties. | | §106.45(b)(3)(iii) |
| Discretion to Proceed with Conduct Action Pursuant to Institution's Community Standards | [A] dismissal [under this section] does not preclude action under another provision of the recipient's code of conduct. | | §106.45(b)(3)(i) |
| | | Discretion to Maintain and Enforce Community Standards: [T]he three-pronged definition of sexual harassment in § 106.30 provides clear requirements for recipients to respond to sexual harassment that constitutes sex discrimination prohibited under Title IX, while leaving recipients flexibility to address other forms of misconduct to the degree, and in the manner, best suited to each recipient's unique educational environment. | p. 432 <i>See also</i> pps. 441, 457, 472, 481, 492, 496, 545 |
| | | Flexibility in Structuring Non-Title IX Proceedings: [I]f a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only | p. 482 <i>See also</i> p. 645, 687, 962, 963 |

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| | | where allegations concern sexual harassment covered by Title IX. | |
| | | Behavioral Expectations for Students and Faculty: [A] recipient’s own code of conduct that might impose behavioral expectations on students and faculty distinct from Title IX’s non-discrimination mandate.” | p. 457 |
| | | Outside Program or Activity: [N]othing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient’s education program or activity. | p. 631 <i>See also</i> p. 633, 635-36, 653 |
| | | Outside of U.S.: [N]othing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States. | p. 660 |
| General Requirements of Formal Grievance Process | | | |
| Equitable Treatment | A recipient’s response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. | | §106.44(a) |
| Equitable Treatment | Treat complainants and respondents equitably by providing remedies to a complainant where a determination of | | §106.45 (b)(1)(i) |

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| | responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. | | |
| | | Equal vs. Equitable: [W]ith respect to remedies and disciplinary sanctions, strictly equal treatment of the parties does not make sense, and to treat the parties equitably, a complainant must be provided with remedies where the outcome shows the complainant to have been victimized by sexual harassment; similarly, a respondent must be sanctioned only after a fair process has determined whether or not the respondent has perpetrated sexual harassment. | p. 793 |
| Objective Evaluation of Relevant Evidence | [O]bjective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence | | §106.45 (b)(1)(ii) |
| | | Different Evidence for Different Circumstances: [T]he type and extent of evidence available will differ based on the facts of each incident. | p. 808 |
| | | Evaluating Evidence: “The Department is confident that recipients’ desire to provide students with a safe, nondiscriminatory learning environment will lead recipients to evaluate sexual harassment incidents using common sense and taking circumstances into consideration, including the ages, disability status, positions of authority of involved parties, and other factors.” | p. 457 |

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| | | Privileged Information Excluded: [The regulations] preclude use of any information protected by a legally recognized privilege (e.g., attorney-client). | p. 811 |
| No Conflicts of Interest or Bias | [A]ny individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, [must] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. | | §106.45 (b)(1) (iii) |
| | | Evaluating Bias: Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists. | pps. 827-28 |
| | | Initiation of Formal Complaint ≠ Bias: [W]hen a Title IX Coordinator signs a formal complaint, that action does not place the Title IX Coordinator in a position adverse to the respondent; the Title IX Coordinator is initiating an investigation based on allegations of which the Title IX Coordinator has been made aware, but that does not prevent the Title IX Coordinator from being free from bias or conflict of interest with respect to any party. | p. 356 <i>See also</i> pps. 399, 400, 697, 1265 |
| | | Pursuing Investigation ≠ Bias: Deciding that allegations warrant an investigation does not necessarily show bias or | p. 399 |

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| | | prejudgment of the facts for or against the complainant or respondent. | |
| | | No <i>per se</i> Conflicts Based on Job Title: [T]he Department declines to define certain employment relationships or administrative hierarchy arrangements as <i>per se</i> prohibited conflicts of interest under § 106.45(b)(1)(iii). | p. 826 |
| | | Curing Perceived Bias Through Training: The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially. Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the | p. 827-28 |

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| | | person from obtaining the requisite training to serve impartially in a Title IX role. | |
| | | Statistics Not Determinative of Bias: [T]he mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel. | p. 829 |
| | | Trauma-Informed Approach: [Trauma]-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases. | p. 1088 |
| | | Trauma-Informed Approach: [E]xperts believe that application of [trauma-informed] practices is possible – albeit challenging – to apply in a truly impartial, nonbiased manner. | p. 842 |
| | | Trauma-Informed Approach: Being sensitive to the trauma a complainant may have experienced does not violate § 106.45(b)(1)(i) or any other provision of the grievance process, so long as what the commenter means by “being sensitive” does not lead a Title IX Coordinator, investigator, or decision-maker to lose impartiality, prejudge the facts at issue, or demonstrate bias for or against any party. | p. 842 |
| Adequate and Unbiased Training | A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process | | §106.45(b)(1)(3) |

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| | including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. | | |
| | A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. | | §106.45(b)(1)(3) |
| | A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. | | §106.45(b)(1)(3) |
| Presumption of Not Responsible | Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process | | §106.45 (b)(1)(iv) |

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| Prompt Timeframe | Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes | | §106.45 (b)(1)(v) |
| | | Institutional Discretion to Set Time Frames: [T]he recipient may select time frames under which the recipient is confident it can conclude the grievance process in most situations, knowing that case-specific complexities may be accounted for with factually justified short-term delays and extensions. | p. 890 |
| | | <i>Per se</i> Unreasonable Timeframe: Taking 45 days to respond to a request for access to records would not provide a reasonably prompt time frame for the conclusion of a grievance process. | p. 1471 |
| Prompt Timeframe (Reasons for Delay) | [The process must] allow[] for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities | | §106.45 (b)(1)(v) |

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| | | No Specified Number of Days for Delay: [T]he Department declines to specify a particular number of days that constitute “temporary” delays or “limited” extensions of time frames. | p. 900 |
| | | Example of Good Cause: [T]he reasons for a party or witness’s absence is a factor in a recipient deciding whether circumstances constitute “good cause” for a short-term delay or extension. | p. 902 |
| | | Example of Good Cause: [C]oncurrent law enforcement activity <i>may</i> constitute good cause for short-term delays. | p. 896 <i>See also</i> p. 1484 |
| | | Example of Good Cause: [T]he need for parties, witnesses, and other hearing participants to secure transportation, or for the recipient to troubleshoot technology to facilitate a virtual hearing, may constitute good cause to postpone a hearing. | pps. 1227-28 |
| | | Not Good Cause: Delays caused solely by administrative needs, for example, would be insufficient to satisfy this standard. | p. 900 |
| | | Accommodating Schedules: While recipients must attempt to accommodate the schedules of parties and witnesses throughout the grievance process in order to provide parties with a meaningful opportunity to exercise the rights granted to parties under these final regulations, it is the recipient’s obligation to meet its own designated time frames, and the final regulations provide that a grievance process can proceed to conclusion even in the absence of a party or witness. | p. 891 |
| Describe Range of Sanctions and Remedies | Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility | | §106.45(b)(1) (vi) |
| Describe Standard of Evidence | State whether the standard of evidence to be used to determine responsibility is | | §106.45(b)(1) (vii) |

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| | the preponderance of the evidence standard or the clear and convincing evidence standard | | |
| | apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment; | | §106.45(b)(1) (vii) |
| Describe Mandatory Appeals Process and Bases for Appeals | Include the procedures and permissible bases for the complainant and respondent to appeal | | §106.45(b)(1) (viii) |
| Describe Range of Supportive Measures | Describe the range of supportive measures available to complainants and respondents | | §106.45(b)(1) (ix) |
| | | Range, not List: [T]he Department is only requiring a recipient’s grievance process to describe the <i>range</i> of supportive measures available rather than a list of supportive measures available. | p. 917 |
| No Intrusion on Legally-Cognizable Privileges | [The process must] [n]ot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. | | §106.45(b)(1)(x) |

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| Pre-Hearing Investigation | | | |
| Emergency Removal | Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual 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. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act. | | §106.44 (c) |
| | | Purpose: [E]mergency removal is for the purpose of addressing imminent threats posed to any person’s physical health or safety, which might arise out of the sexual harassment allegations. | p. 727 |
| | | When Appropriate: [E]mergency removal is not appropriate in every situation where sexual harassment has been alleged, but only in situations where an individualized safety and risk | p. 728 <i>See also</i> pps. 734, 755, 759 |

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| | | analysis determines that an immediate threat to the physical health or safety of any student or other individual justifies the removal, where the threat arises out of allegations of sexual harassment as defined in § 106.30. | |
| | | When Appropriate: [T]he recipient should not remove a respondent from the recipient’s education program or activity pursuant to § 106.44(c) unless there is more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone’s physical health or safety. | p. 758 |
| | | Examples: For example, if a respondent threatens physical violence against the complainant in response to the complainant’s allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant’s physical safety posed by the respondent may “arise from” the sexual harassment allegations. As a further example, if a respondent reacts to being accused of sexual harassment by threatening physical self-harm, an immediate threat to the respondent’s physical safety may “arise from” the allegations of sexual harassment and could justify an emergency removal. | pps. 728-29 <i>See also</i> p. 954 |
| | | Limitations: An emergency removal under § 106.44(c) does not authorize a recipient to impose an interim suspension or expulsion on a respondent <i>because</i> the respondent has been accused of sexual harassment. Rather, this provision authorizes a recipient to remove a respondent from the recipient’s education program or activity ... when an individualized safety and risk analysis determines that an imminent threat to the physical health or safety of any person, <i>arising from</i> sexual harassment allegations, justifies removal. | p. 730 |
| | | No Specific Procedures Required: We do not believe that prescribing procedures for the post-removal challenge is | p. 744 |

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| | | necessary or desirable, because this provision ensures that respondents receive the essential due process requirements of notice and opportunity to be heard while leaving recipients flexibility to use procedures that a recipient deems most appropriate. | |
| | | Length: The Department declines to put any temporal limitation on the length of a valid emergency removal[.] | p. 747 |
| | | Deference: OCR will not second guess a recipient’s removal decision based on whether OCR would have weighed the evidence of risk differently from how the recipient weighed such evidence. | p. 766 |
| Administrative Leave | Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act. | | §106.44 (d) |
| | | With or Without Pay: [T]hese final regulations do not dictate whether administrative leave during the pendency of an investigation under § 106.45 must be with pay (or benefits) or without pay (or benefits). | p. 768 |
| | | Student Employees: With respect to student-employee respondents, we explain more fully, below, that these final regulations do not necessarily prohibit a recipient from placing a student-employee respondent on administrative leave if doing so does not violate other regulatory provisions. | p. 771 <i>See also p. 773.</i> |

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| | | Student Employees: Administrative leave may jeopardize a student-employee's access to educational benefits and opportunities in a way that a non-student employee's access to education is not jeopardized. Accordingly, administrative leave is not always appropriate for student-employees. | p. 773 |
| | | Student Employees: If a recipient removes a respondent pursuant to § 106.44(c) after conducting an individualized safety and risk analysis and determining that an immediate threat to the physical health or safety of any students or other individuals justifies removal, then a recipient also may remove a student-employee respondent from any employment opportunity that is part of the recipient's education program or activity. | p. 774 |
| Notice Requirement | Written notice required | | §106.45(b)(2) |
| Contents of Notice | Notice of the recipient's grievance process that complies with this section, including any informal resolution process | | §106.45(b)(2)(A) |
| | Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. | | §106.45(b)(2)(B) |

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| | | Exception: The Department notes that the final regulations do not prevent a recipient from questioning an employee-respondent about sexual harassment allegations without disclosing the complainant’s identity, provided that the recipient does not take disciplinary action against the respondent without first applying the § 106.45 grievance process (or unless emergency removal is warranted under § 106.44(c), or administrative leave is permitted under §106.44(d)). | pps. 956-57 |
| | [S]tatement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process | | §106.45(b)(2)(B) |
| | The written notice must inform the parties that they may have an advisor of their choice, who may be an attorney | | §106.45(b)(2)(B) |
| | The written notice must inform the parties that they may inspect and review evidence | | §106.45(b)(2)(B) |
| | The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process | | §106.45(b)(2)(B) |

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| | Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate | | §106.45(b)(5)(v) |
| Duty to Supplement Notice | If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known. | | §106.45(b)(2)(ii) |
| Consolidation of Formal Complaints | A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular “party,” “complainant,” or “respondent” include the plural, as applicable. | | §106.45(b)(4) |

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| | | Consolidation of Formal Complaints: [R]ecipients have discretion to consolidate formal complaints in situations that arise out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other. | Pps. 968-69 |
| | | Consolidation of Formal Complaints: If there are multiple complainants and one respondent, then the recipient may consolidate the formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances, under § 106.45(b)(4). The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties. | p. 1498 |
| Gathering Evidence (Burden Rests with Recipient) | Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties. | | §106.45(b)(5)(i) |
| | | Trauma-Informed Investigations: [N]othing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45. | p. 591 |
| | | Trauma-Informed Investigations: Because cross-examination occurs only after the recipient has conducted a thorough investigation, trauma-informed questioning can occur by a recipient's investigator giving the parties opportunity to make statements under trauma-informed approaches prior to being cross-examined by the opposing party's advisor. | p. 1087 |

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| Gathering Evidence (Restrictions re: Medical Records) | The recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent | | §106.45(b)(5)(i) |
| Gathering Evidence (Equal Opportunity) | Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. | | §106.45(b)(5)(ii) |
| | | Recipient Can Also Present Evidence: [T]he Department recognizes that the recipient is not a party to the proceeding, but this does not prevent the recipient from presenting evidence to the decision-maker, who must then objectively evaluate relevant evidence (both inculpatory and exculpatory) and reach a determination regarding responsibility. | p. 971 |
| | | Gathering Evidence (Limitations): [P]arties to a Title IX grievance process are not granted the right to depose parties or witnesses, nor to invoke a court system's subpoena powers to compel parties or witnesses to appear at hearings, which are common features of procedural rules governing litigation and criminal proceedings. | pps. 1026-27 |
| Gathering Evidence (No Gag Orders) | Recipient must [n]Not restrict the ability of either party to discuss the | | §106.45(b)(5)(iii) |

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| | allegations under investigation or to gather and present relevant evidence. | | |
| | | Prior Restraints: [A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization. | p. 986 |
| | | Witness Tampering: As to witness intimidation, such conduct is prohibited under § 106.71(a). As to whether a party approaching or speaking to a witness could constitute "tampering," the Department believes that generally, a party's communication with a witness or potential witness must be considered part of a party's right to meaningfully participate in furthering the party's interests in the case, and not an "interference" with the investigation. However, where a party's conduct toward a witness might constitute "tampering" (for instance, by attempting to alter or prevent a witness's testimony), such conduct also is prohibited under § 106.71(a). | p. 989-90 |
| | | Intersection with Retaliation: [T]his provision in no way immunizes a party from abusing the right to "discuss the allegations under investigation" by, for example, discussing those allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation. | p. 987 <i>See also</i> p. 991 |
| Right to an Advisor of Choice | Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their | | §106.45 (b)(3) (iv) |

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| | choice, who may be, but is not required to be, an attorney. | | |
| | | “Representation” of Parties: A recipient may, but is not required to, allow advisors to “represent” parties during the entire live hearing. | p. 1155 |
| | | Advisor of Choice ≠ Right to Effective Representation: [P]roviding parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation. | p. 992 <i>See also</i> p. 1147, 1483-84 |
| | | Correspondence with Advisors: The Department appreciates commenters’ request that advisors be copied on all correspondence between recipients and the parties, but declines to impose such a rule. | p. 1005 |
| | The recipient may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding | | §106.45 (b)(3) (iv) |
| | The recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties. | | §106.45 (b)(3) (iv) |
| | | Rules of Decorum: [T]he final regulations do not preclude a recipient from adopting and applying codes of conduct and rules of decorum to ensure that parties and advisors, including assigned advisors, conduct cross-examination questioning in a respectful and non-abusive manner, and the decision-maker remains obligated to ensure that only relevant questions are posed during cross-examination. | pps. 1149-50 <i>See also</i> pps. 1114, 1114-15, 1145, 1150 |
| | | Rules of Decorum: To meet this obligation a recipient also cannot forbid a party from conferring with the party’s advisor, | p. 1145 |

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| | | although a recipient has discretion to adopt rules governing the conduct of hearings that could, for example, include rules about the timing and length of breaks requested by parties or advisors and rules forbidding participants from disturbing the hearing by loudly conferring with each other. | |
| | | Misbehaving Advisors: [T]he final regulations do not preclude a recipient from enforcing rules of decorum that ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing. If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor. | p. 1075 |
| | | Misbehaving Advisors: If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may provide that party with an advisor to conduct cross-examination on behalf of that party. If a provided advisor refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party. | p. 1155 |
| | | Examples of Restrictions on Advisor Participation: Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to §106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties) would, for example, permit a recipient to require parties personally to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements the | p. 997 |

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| | | recipient allows at a live hearing, so long as such rules apply equally to both parties. We do not believe that specifying what restrictions on advisor participation may be appropriate is necessary, and we decline to remove the discretion of a recipient to restrict an advisor’s participation so as not to unnecessarily limit a recipient’s flexibility to conduct a grievance process. | |
| Right to Inspect and Review (and Respond to) Evidence | Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source. | | §106.45 (b)(3)(vi) |
| | | Directly Related: The Department declines to define certain terms in this provision such as ...“evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning. | p. 1017 |
| | | Institutional Discretion: [T]he school has some discretion to determine what evidence is directly related to the allegations in a formal complaint. | p. 1471 <i>See also</i> p. 1492 |
| | | Directly Related ≠ Relevant: “[D]irectly related” may sometimes encompass a broader universe of evidence than evidence that is “relevant.” | p. 1017 <i>See also</i> p. 1041 |

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| | | Directly Related ≠ Relevant: [T]he universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant. | p. 1018 |
| | | Illegally Obtained Evidence: If a recipient knows that a recording is unlawfully created under State law, then the recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained. | p. 1465-66 |
| | | Redactions: [A] recipient may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party’s treatment records if the party has not given written consent). | p. 1019 <i>See also</i> p. 1473 |
| | | Obligation to Summarize Relevant Evidence: The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant). | p. 980 |
| | | Determining Relevance: [A] layperson’s determination that a question is not relevant is made by applying logic and common sense, but not against a backdrop of legal expertise. | p. 1159 |

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| | | Not Relevant: information protected by a legally recognized privilege; evidence about a complainant’s prior sexual history; any party’s medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross examination at a live hearing. | p. 980 |
| | | NDAs Permitted: [R]ecipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate any of the evidence subject to inspection and review. | p. 1019 <i>See also</i> pps. 1449, 1483 , 1496 |
| | Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. | | §106.45 (b)(3)(vi) |
| | | Hard or Electronic <i>Copy</i> Required: We believe it is important for the parties to receive a copy of the evidence subject to inspection and review. | p. 1025 |
| | | Corrections: [T]he parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility. | p. 1023 <i>See also</i> p. 1015 |
| | | Corrections: [I]f relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker | p. 1003 |

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| | | can take that into account in assessing the credibility of parties, and the weight of evidence in the case. | |
| | The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination. | | §106.45 (b)(3)(vi) |
| The Investigative Report | Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response. | | §106.45 (b)(3)(vii) |
| | | Relevant Evidence Only: [A]ll evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant." | p. 1017 <i>See also</i> p. 815 |
| | | Redactions: [A] recipient may permit or require the investigator to redact from the investigative report information that is not relevant. | p. 1020 |
| | | May Include Facts and Interview Statements: A recipient may include facts and interview statements in the investigative report. | p. 1498 |
| | | May Include Recommended Findings or Conclusions: The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an | p. 1031 |

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| | | independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report. | |
| | | May Include Credibility Assessment but not Determination: If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator. Section 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility. If an investigator’s determination regarding credibility is actually a determination regarding responsibility, then § 106.45(b)(7)(i) would prohibit it. | p. 1498 |
| | | Consolidated Complaints: In the context of a grievance process that involves multiple complainants, multiple respondents, or both, a recipient may issue a single investigative report. | p. 1038 |
| | | Corrections: The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator’s determination about relevance, the party can make that argument in the party’s written response to the investigative report under §106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence). | p. 815 <i>See also</i> p. 1041 |
| The Live Hearing | | | |
| Live Hearing Required | For postsecondary institutions only, the recipient’s grievance process must provide for a live hearing. | | §106.45 (b)(6)(i) |

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| | | Single Investigator Model Prohibited: [T]he final regulations . . . foreclose[es] recipients from utilizing a “single investigator” or “investigator-only” model for Title IX grievance processes. | p. 1247 |
| | | Hearing <i>Boards</i> Not Required: [T]he final regulations do not require hearing boards (as opposed to a single individual acting as the decision-maker)[.] | p. 813 |
| | | Students in Title IX Roles: [T]he final regulations do not preclude a recipient from allowing student leaders to serve in Title IX roles. | p. 829 |
| Live Hearing (may be Virtual) | Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. | | §106.45(b)(6)(i) |
| Live Hearing (Recording or Transcript Required) | Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. | | §106.45(b)(6)(i) |
| Questioning of Parties and Witnesses by Advisor | At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. | | §106.45 (b)(6) (i) |
| | | Direct Examination: Whether advisors also may conduct direct examination is left to a recipient’s discretion. | p. 1154 |

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| | | “Representation” of Parties: A recipient may, but is not required to, allow advisors to “represent” parties during the entire live hearing. | p. 1155 |
| | | Rules of Decorum: A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant. | p. 812 |
| | | Rules of Procedure: [A] recipient may, for instance, adopt rules that . . . decide whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, place reasonable time limitations on a hearing, and so forth. | p. 1226 |
| | | “Rules of Evidence”: [A] recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. | p. 812 |
| | | “Rules of Evidence”: The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant. | p. 1136 <i>See also</i> pps. 1114, 1227 |
| | | “Rules of Evidence”: [W]here a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker’s evaluation treats both parties equally. | p. 1137 |
| | | “Rules of Evidence”: The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing. | p. 1159 |

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| | | “Rules of Evidence”: [T]he recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing. | p. 1159 |
| | | “Rules of Evidence”: [A] decision-maker [is not required] to give a lengthy or complicated explanation [of a relevancy determination]; it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations. | p. 1161 |
| | | Revising Relevancy Determination: [N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker’s explanation that was provided during the hearing. | p. 1160 |
| | | No Subpoena Power: [R]ecipients have no ability to compel a party or witness to participate. | p. 1083 <i>See also</i> pps. 1176, 1178, 1330 |
| Cross-Examination (Direct, in Real Time) | Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. | | §106.45 (b)(6) (i) |

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| | | Rules of Decorum: [R]ecipients retain discretion under the final regulations to educate a recipient’s community about what cross examination during a Title IX grievance process will look like, including developing rules and practices (that apply equally to both parties) to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive. | Pps. 1062-63 <i>See also</i> pps. 1054, 1059-60, 1065, 1072, 1074, 1075, 1226 |
| | | Rules of Decorum: The Department reiterates that recipients retain the discretion to control the live hearing environment to ensure that no party is “yelled” at or asked questions in an abusive or intimidating manner. | p. 1089 |
| | | Abusive Questioning (Caution): The Department appreciates commenters who described experiences being questioned by party advisors as feeling like the advisor asked questions in a disempowering, blaming, and condescending way; however, the Department notes that such questioning may feel that way to the person being questioned by virtue of the fact that cross-examination is intended to promote the perspective of the opposing party, and this does not necessarily mean that the questioning was irrelevant or abusive. | p. 1075 |
| | | Rules of Procedure (No Waiver of Questions): [T]he Department declines to allow a party or witness to “waive” a question. | p. 1183 |
| | | Faulty Memory ≠ Lying: [C]ross examination that may reveal faulty memory, mistaken beliefs, or inaccurate facts about allegations does <i>not</i> mean that the party answering questions is necessarily lying or making intentionally false statements. | p. 1053 |
| Cross-Examination (Relevancy Requirement) | Only relevant cross-examination and other questions may be asked of a party or witness. | | §106.45 (b)(6) (i) |
| | | Determining Relevance: [A] layperson’s determination that a question is not relevant is made by applying logic | p. 1159 |

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| | | and common sense, but not against a backdrop of legal expertise. | |
| | | Not Relevant: information protected by a legally recognized privilege; evidence about a complainant’s prior sexual history; any party’s medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross examination at a live hearing. | p. 980 |
| | | Not Relevant: [T]he rape shield language deems irrelevant <i>all</i> questions or evidence of a complainant’s sexual behavior <i>unless</i> [otherwise allowed by these regulations]. | p. 1200 |
| | | Other Questions: [A] recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice. | pps. 980-81 |
| Cross-Examination (On-the-Spot Evidentiary Rulings) | Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. | | §106.45 (b)(6) (i) |
| | | No Prior Submission of Written Questions: [S]ubmission of written questions [for the purposes of ascertaining relevance], even during a live hearing, is not compliant with § 106.45(b)(6)(i). | p. 1132 |
| | | Training on Relevancy Required: In response to commenters’ concerns about how to determine “relevance” in the context | p. 810 |

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| | | of these final regulations, we have revised § 106.45(b)(1)(iii) specifically to require training on issues of relevance (including application of the “rape shield” protections in § 106.45(b)(6)). | |
| Cross-Examination: (Conducted by Advisor Only) | If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. | | §106.45 (b)(6) (i) |
| | | Personal Representation Prohibited: The Department has revised § 106.45(b)(6)(i) to expressly preclude a party from conducting cross-examination personally; the only method for conducting cross-examination is by a party’s advisor. | p. 1132 |
| | | Attorney Advisor Not Required: [A] recipient may fulfill its obligation to provide an advisor for a party to conduct cross-examination at a hearing without hiring an attorney to be that party’s advisor, and that remains true regardless of whether the other party has hired a lawyer as an advisor of choice. | p. 1150 |
| | | Parameters: [A]dvisors conducting cross-examination will be either professionals (e.g., attorneys or experienced advocates) or at least adults capable of understanding the purpose and scope of cross-examination. | p. 1109 |
| | | Equal Competency Not Required: The Department understands commenters’ desire that both parties have advisors of equal competency during a hearing. However, the Department does not wish to impose burdens and costs on recipients beyond what is necessary to achieve a Title IX grievance process. | p. 1150 |
| | | No Fee or Charge Permitted: [W]here a recipient must provide a party with an advisor to conduct cross-examination at a live hearing that advisor may be of the recipient’s choice, must be | p. 1120 |

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| | | provided without fee or charge to the party, and may be, but is not required to be, an attorney. | |
| | | Advance Notification Permitted: The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing. | p. 1154 |
| | | Advisor “No Shows”: [I]f a party . . . appears at a hearing without an advisor the recipient would need to stop the hearing as necessary to permit the recipient to assign an advisor to that party to conduct cross-examination. | p. 1154 <i>See also</i> p. 1171 |
| Cross-Examination (Rape Shield Protections Apply) | Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. | | §106.45 (b)(6) (i) |
| | | Only Applies to Complainants: The Department declines to extend the rape shield language to respondents. | p. 1191 |
| | | Only Applies to Complainants (Caution): [S]ome situations will involve counter-claims made between two parties, such that a respondent is also a complainant. | p. 1191 |
| | | Application: [T]he rape shield language deems irrelevant <i>all</i> questions or evidence of a complainant’s sexual behavior <i>unless</i> offered to prove consent (and it concerns specific instances of | p. 1200 |

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| | | sexual behavior with the respondent); thus, if “consent” is not at issue – for example, where the allegations concern solely unwelcome conduct under the first or second prong of the § 106.30 definition – then that exception does not even apply, and the rape shield protections would then bar <i>all</i> questions and evidence about a complainant’s sexual behavior, with no need to engage in a balancing test of whether the value of the evidence is outweighed by harm or prejudice. | |
| Cross-Examination (Refusal to Submit to Cross) | 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; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. | | §106.45 (b)(6) (i) |
| | | General: [O]nly statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility. | p. 1168 |
| | | Hearsay Generally: The Department disagrees that this provision needs to be modified so that a party’s statements to family or friends would still be relied upon even when the party does not submit to cross-examination. Even if the family member or friend did appear and submit to cross-examination, where the family member’s or friend’s testimony consists of recounting the statement of the party, and where the party does not submit to cross-examination, it would be unfair and | Pps. 1172-73 |

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| | | potentially lead to an erroneous outcome to rely on statements untested via cross-examination. | |
| | | Statements Against a Party’s Interest: The Department declines to add exceptions to this provision, such as permitting reliance on statements against a party’s interest. | p. 1168 |
| | | Death or Disability of Party or Witness: [W]ritten statements cannot be relied upon unless the witness submits to cross-examination, and whether a witness’s statement is reliable must be determined in light of the credibility-testing function of cross-examination, even where nonappearance is due to death or post-investigation disability. | p. 1177 |
| | | Police or SANE Reports: [P]olice reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination. | p. 1181 |
| | | Text Messages and Emails: This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or e-mail thread) and one party refuses to submit to cross-examination and the other does submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on. | p. 1182 |
| | | Video Evidence: [W]here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination. | p. 1106 <i>See also</i> p. 1169 |
| | | Video Evidence that Includes Statements: [I]f the case does not depend on party’s or witness’s statements but rather on other evidence (e.g., video evidence that does not consist of “statements” or to the extent that the video contains non-statement evidence) the decision-maker can still consider that other evidence and reach a determination, and must do so | p. 1169 |

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| | | without drawing any inference about the determination based on lack of party or witness testimony. | |
| | | Statements of Parties who Decline to Participate: Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process remains under no obligation to then participate in the grievance process, and the Department does not believe that exclusion of the complainant’s statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant’s equal access to education. | p. 1172 |
| Standard of Evidence | preponderance of the evidence or clear and convincing evidence | | §106.45(b)(1)(vii) |
| | | General: [T]he standard of evidence reflects the “degree of confidence” that a decision-maker has in correctness of the factual conclusions reached. | p. 1306 |
| | | Preponderance of the Evidence: [A determination] based on facts that are more likely true than not | p. 1314 |
| | | Clear and Convincing: having confidence that a conclusion is based on facts that are highly probable to be true | p. 1314 |
| | | >50% Required for Showing of Preponderance: Where the evidence in a case is “equal” or “level” or “in equipoise,” the preponderance of the evidence standard results in a finding that the respondent is not responsible. | p. 1298 |
| | | Choosing Standard of Evidence: The Department expects that recipients will select a standard of evidence based on the recipient’s belief about which standard best serves the interests of the recipient’s educational community, or because State law requires the recipient to apply one or the other standard, or | p. 1320 |

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| | | because the recipient has already bargained with unionized employees for a particular standard of evidence in misconduct proceedings. | |
| Standard of Evidence (Same for Student and Employee Respondents) | Recipient must “apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.” | | §106.45(b)(1)(vii) |
| Decision Maker | The decision-maker(s) . . . cannot be the same person(s) as the Title IX Coordinator or the investigator(s). | | §106.45 (b)(7) |
| | | Title IX Coordinator as Investigator: Section 106.45(b)(7)(i) does not prevent the Title IX Coordinator from serving as the investigator; rather, this provision only prohibits the decision-maker from being the same person as either the Title IX Coordinator or the investigator. | p. 1257 <i>See also</i> pps. 1265, 1266 |
| | | Separate Decision Maker: [T]he decision-maker must not only be a separate person from any investigator but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report. | p. 1056 <i>See also</i> p. 1063 |

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| | | Role of the Decision Maker: [T]he decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker's own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspectives about the evidence. | p. 1114 |
| | | Hearing Officer vs. Decision Maker: With respect to the roles of a hearing officer and decisionmaker, the final regulations leave recipients discretion to decide whether to have a hearing officer (presumably to oversee or conduct a hearing) separate and apart from a decision-maker, and the final regulations do not prevent the same individual serving in both roles. | p. 1266 |
| Determination of Responsibility | Written determination required | | §106.45 (b)(7)(i) |
| Determination of Responsibility (Content) | Identification of the allegations potentially constituting sexual harassment | | §106.45 (b)(7)(ii) |
| | A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held | | §106.45 (b)(7)(ii) |
| | Findings of fact supporting the determination | | §106.45 (b)(7)(ii) |

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| | | Not Required: We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, “all evidence” presented at a hearing, or how credibility assessments were reached. | p. 1326 |
| | | Weighing Credibility: [A]dmissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker. | p. 981 <i>See also</i> p. 1114, 1137 |
| | | Weighing Credibility: [T]he degree to which any inaccuracy, inconsistency, or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the decision-maker, after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party. | p. 1053 |
| | | Weighing Credibility: [C]redibility determinations are not based solely on observing demeanor, but also are based on other factors (e.g., specific details, inherent plausibility, internal consistency, corroborative evidence). Cross-examination brings those important factors to a decision-maker’s attention. | p. 1081 |
| | | Weighing Credibility: [A] party’s answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress while trying to answer questions. Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory. | p. 1089 |

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| | | Corroborating Evidence Not Required: [N]either the preponderance of the evidence standard, nor the clear and convincing evidence standard, requires corroborating evidence. | p. 1295 <i>See also</i> p. 1306 |
| | Conclusions regarding the application of the recipient’s code of conduct to the facts | | §106.45 (b)(7)(ii) |
| | | [D]ecisionmakers [must] lay out the evidentiary basis for conclusions reached in the case, in a written determination regarding responsibility. | p. 814 |
| | A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant | | §106.45 (b)(7)(ii) |
| | | Description of Remedies <i>not</i> Included: [T]he nature of remedies provided does not appear in the written determination. | p. 1334 <i>See also</i> p. 1341 |
| | The recipient’s procedures and permissible bases for the complainant and respondent to appeal. | | §106.45 (b)(7)(ii) |
| Determination of Responsibility (Simultaneous Notification) | Simultaneous notification of parties required | | §106.45 (b)(7)(iii) |
| | | Finality: [T]he written determination becomes “final” only after the time period to file an appeal has expired, or if a party does | p. 1338 |

| Topic | Final Regulation | Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i> | Regulation Section or Preamble Page No. |
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| | | file an appeal, after the appeal decision has been sent to the parties. | |
| Determination of Responsibility (Agency Deference) | The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence. | | §106.44(b)(2) |
| | | Deference: [T]he Department will refrain from second guessing a recipient's determination regarding responsibility based solely on whether the Department would have <i>weighed</i> the evidence differently. | p. 713 <i>See also</i> pps. 714, 716, 1138, 1339-40 |
| Sanctions | | Specific Sanctions Not Required: The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment. | p. 1344 <i>See also</i> pps. 908, 1346, 1428 |
| | | Specific Sanctions Not Required: The Department declines to adopt a rule that would mandate suspension or expulsion as the only appropriate sanction following a determination of responsibility against a respondent; recipients deserve flexibility to design sanctions that best reflect the needs and values of the recipient's educational mission and community. | p. 1392 |
| | | Proportionality: [T]hese final regulations do not impose a standard of proportionality on disciplinary sanctions. | p. 908 |
| | | Mitigating Considerations: [A] respondent's lack of comprehension that conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a | p. 434 |

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| | | victim does not excuse the misconduct, though genuine lack of understanding may (in a recipient’s discretion) factor into the sanction decision. | |
| | | Zero Tolerance Policies: [N]othing in these final regulations precludes a recipient from adopting a zero tolerance policy. | p. 1302 |
| | | Sanctioning Pedagogy: Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an “educational purpose” that may differ from the purpose for which a recipient imposes employee discipline. | p. 1285 |
| | | Restorative Justice as Sanction: [A] recipient could use a restorative justice model <i>after</i> a determination of responsibility finds a respondent responsible; nothing in the final regulations dictates the form of disciplinary sanction a recipient may or must impose on a respondent. | p. 1388 |
| | | Transcript Notations: The Department intentionally did not take a position in the NPRM on transcript notations or the range of possible sanctions for a respondent who is found responsible for sexual harassment. | p. 1344 <i>See also</i> p. 1428 |
| | | Transfers: The Department does not regulate what information schools must share when a student transfers to a different school and declines to do so here. | p. 1476 |
| | | Effective Date of Sanction: [T]he final regulations obligate the recipient to offer supportive measures throughout the grievance process (unless failing to do so would not be clearly unreasonable) thus maintaining a status quo through the grievance process that may continue a short time longer while an appeal is being resolved. The Department believes that in order for an appeal, by either party, to be fully effective, the recipient must wait to act on the determination regarding responsibility while maintaining the status quo between the | p. 1338-39 |

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| | | parties through supportive measures designed to ensure equal access to education. | |
| Remedies | Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made. | | §106.45(b)(1)(i) |
| | Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. | | §106.45(b)(1)(i) |
| | | Remedies Evaluated Against Deliberate Indifference Standard: [A] recipient’s selection and implementation of remedies will be evaluated by what is not clearly unreasonable in light of the known circumstances. | p. 800 |
| | | No Specific Remedies Required: The Department declines to require remedies for respondents in situations where a complainant is found to have brought a false allegation. | p. 804 |
| | | Types of Remedies: [R]emedies may consist of the same individualized services listed illustratively in § 106.30 as “supportive measures” but remedies need not meet the limitations of supportive measures (i.e., unlike supportive measures, remedies may in fact burden the respondent, or be punitive or disciplinary in nature). | p. 799 <i>See also</i> p. 909 |
| | | Types of Remedies: [R]emedies may include the same individualized services described in § 106.30 as “supportive | p. 1333 |

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| | | measures” but that remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. Beyond this, the Department believes recipients should have the flexibility to offer such remedies as they deem appropriate to the individual facts and circumstances of each case, bearing in mind that the purpose of remedies is to restore or preserve the complainant’s equal access to education. | |
| | | Types of Remedies: Whether or not the commenter’s understanding of prevention and community education programming would be part of an appropriate remedy for a complainant, designed to restore or preserve the complainant’s equal access to education, is a fact-specific matter to be considered by the recipient. | p. 600 |
| | | Title IX Coordinator Implements Remedies: [The] Title IX Coordinator is responsible for effective implementation of remedies. | p. 914 <i>See also</i> p. 1334 |
| | | Title IX Coordinator Implements Remedies: [W]here the final determination has indicated that remedies will be provided, the complainant can then communicate separately with the Title IX Coordinator to discuss what remedies are appropriately designed to preserve or restore the complainant’s equal access to education. | p. 1334 <i>See also</i> p. 1341 |
| | | Disclosure of Remedies to Respondent Prohibited: That remedy (which does not directly affect the respondent) must not be disclosed to the respondent. | p. 1459 |
| Appeals | | | |
| Mandatory Appeals | A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s | | §106.45 (b)(8) |

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| | dismissal of a formal complaint or any allegations therein | | |
| Grounds for Appeal | (A) Procedural irregularity that affected the outcome of the matter (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter. | | §106.45 (b)(8) |
| | | Procedural Irregularity: [P]rocedural irregularity ... could include a recipient's failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence. | P. 815 |
| | | Erroneous Relevancy Determinations: [P]arties may appeal erroneous relevance determinations, if they affected the outcome. | p. 1159 |
| Grounds for Appeal | A recipient may offer an appeal equally to both parties on additional bases. | | §106.45(b)(8) |

| Topic | Final Regulation | Selected Preamble Excerpts <i>Note: Preamble does not have legal or regulatory force</i> | Regulation Section or Preamble Page No. |
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| Requirements for the Appeals Process | Requirements for Appeals: (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator; (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section; (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome; (E) Issue a written decision describing the result of the appeal and the rationale for the result; and (F) Provide the written decision simultaneously to both parties. | | §106.45(b)(8) |

Informal Resolution

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| <p>Informal Resolutions Permitted</p> | <p>[T]he recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication [under the circumstances described in the regulations]</p> | | <p>§106.45 (b)(9)</p> |
| | | <p>Discretionary: [N]othing in the final regulations requires recipients to offer an informal resolution process.</p> | <p>p. 1382</p> |
| | | <p>Formal Complaint Required: [R]ecipients may not offer informal resolution unless a formal complaint has been filed.</p> | <p>p. 1367 <i>See also</i> pps. 1371, 1388, 1391</p> |
| | | <p><i>Voluntary and Appropriate:</i> [A] recipient <i>may</i> choose to offer the parties an informal process that resolves the formal complaint without completing the investigation and adjudication, but such a result depends on whether the recipient determines that informal resolution may be appropriate and whether both parties voluntarily agree to attempt informal resolution.</p> | <p>p. 13667</p> |
| | | <p><i>Advisor Input:</i> [W]e decline to mandate that the parties confer with an advisor before entering an informal resolution process, or to mandate that recipients provide the parties with advisors before entering an informal resolution process.</p> | <p>p. 1374</p> |
| | | <p><i>Kinds of Informal Resolution:</i> Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities.</p> | <p>p. 1370</p> |

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| | | Kinds of Informal Resolution (Administrative Disposition): Commenters’ descriptions of an administrative disposition model, or a proposed voluntary resolution agreement, are permissible under the final regulations if applied as part of an informal resolution process in conformity with §106.45(b)(9), which requires both parties’ written, voluntary consent to the informal process. | p. 1224 |
| | | Kinds of Informal Resolution (Cannot Waive Hearing): The Department declines to authorize one or both parties, or the recipient, simply to “waive” a live hearing [as part of an informal resolution]. | p. 1224 |
| | | Outcome: [I]nformal resolutions . . . may result in disciplinary measures designed to punish the respondent. | p. 1370 |
| | | Withdrawal: [W]e have revised § 106.45(b)(9) to expressly allow either party to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. | p. 1376 <i>See also</i> pps. 1384, 1391 |
| | | Finality: The Department expects informal resolution agreements to be treated as contracts; the parties remain free to negotiate the terms of the agreement and, once entered into, it may become binding according to its terms. | p. 1384 |
| | | Confidentiality: [A] recipient may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report, or may determine that the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved. | p. 1379 <i>See also</i> p. 1372 |
| | | Participants as Fact Witnesses in Later Proceeding: With respect to informal resolution facilitators potentially serving as witnesses in subsequent formal grievance processes, we leave this possibility open to recipients. | p. 1367 |
| | | Liability Exposure: With respect to recipients’ potential legal liability where the respondent acknowledges commission of | p. 1391-92 |

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| | | Title IX sexual harassment (or other violation of recipient's policy) during an informal resolution process, yet the agreement reached allows the respondent to remain on campus and the respondent commits Title IX sexual harassment (or violates the recipient's policy) again, the Department believes that recipients should have the flexibility and discretion to determine under what circumstances respondents should be suspended or expelled from campus as a disciplinary sanction, whether that follows from an informal resolution or after a determination of responsibility under the formal grievance process. Recipients may take into account legal obligations unrelated to Title IX, and relevant Title IX case law under which Federal courts have considered a recipient's duty not to be deliberately indifferent by exposing potential victims to repeat misconduct of a respondent, when considering what sanctions to impose against a particular respondent. | |
| Informal Resolutions (Limitations) | A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints. . . Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.” | | §106.45 (b)(9) |
| Informal Resolution (Written Notice Requirement) | To proceed with informal resolution, the recipient must provide the parties with “written | | §106.45 (b)(9) |

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| | notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.” | | |
| Informal Resolution (Voluntary, Written Consent Required) | To proceed with informal resolution, the recipient must “[o]btain[] the parties’ voluntary, written consent to the informal resolution process.” | | §106.45 (b)(9) |
| Informal Resolution (Prohibition) | [Recipients may not use] informal resolution to resolve allegations that an employee sexually harassed a student. | | §106.45 (b)(9) |
| Retaliation | | | |
| Retaliation Prohibited | No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with | | §106.71 |

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| | any right or privilege secured by title IX or this part, 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 under this part. | | |
| <i>Per se</i> Retaliation | Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. | | §106.71 |
| | | “For the Purpose of Interfering with any Right or Privilege”: [I]f a recipient punishes a complainant or respondent for underage drinking, arising out of the same facts or circumstances as the report or formal complaint of sexual harassment, then such punishment constitutes retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations. If a recipient always takes a zero tolerance approach to underage drinking in its code of conduct and always imposes the same punishment for underage drinking, irrespective of the circumstances, then imposing such a punishment would | Pps. 1876-77 |

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| | | not be “for the purpose of interfering with any right or privilege secured by” Title IX or these final regulations and thus would not constitute retaliation under these final regulations. | |
| | | Actual Knowledge Not Applicable: [T]he actual knowledge requirement in these regulations applies to sexual harassment and does not apply to a claim of retaliation. | p. 1878 |
| | | <i>Per Se</i> Retaliation (Witness Intimidation): If a respondent reacts to a written notice of allegations by intimidating witnesses, such conduct is prohibited as retaliation. | p. 932 <i>See also</i> p. 1223 |
| | | Examples (Threatening Visa Status): [T]hreatening to take retaliatory immigration action for the purpose of interfering with any right or privileged secured by Title IX or its implementing regulations may constitute retaliation. | p. 1875 |
| | | Responding to Retaliation: A recipient’s ability to respond to retaliation will depend, in part, on the relationship between the recipient and the individual who commits the retaliation. | p. 1875 |
| <i>Per Se</i> Retaliation— Exception | 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 under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith. | | §106.71 |
| | | Example (False Statements): [I]t could constitute retaliation to punish a party for false statements if that conclusion is reached solely based on the determination regarding responsibility. | p. 928 |

Application to Employees

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| Application to Employees | | General: [T]he Department’s final regulations apply to employees. | p. 1519 <i>See also</i> pps. 1510, 1536, 1556 |
| | | Regulations Apply to All Classes of Employees: The Department believes that irrespective of position, tenure, part-time status, or at-will status, no employee should be subjected to sexual harassment or be deprived of employment as a result of allegations of sexual harassment without the protections and the process that these final regulations provide. | p. 1531 |
| | | Employees vs. Independent Contractors: The Department defers to State law with respect to employees, and State law will govern whether a person is an employee as opposed to an independent contractor. | p. 1533 |
| | | Volunteers: These final regulations also may apply to volunteers, if the volunteers are persons in the United States who experience discrimination on the basis of sex under any education program or activity receiving Federal financial assistance. | p. 1544 |
| | | Employee Only Allegations: The Department disagrees that the formal complaint process would be unworkable for cases involving only non-students. | p. 1539 |
| | | Employees Entitled to Same Benefits and Protections: Employees should receive the same benefits and due process protections that students receive under these final regulations, and these final regulations, including the due process protections in § 106.45, apply to employees. | p. 1519 |
| | | Independent Obligations to Comply with Title IX and Title VII: The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both | p. 1514 <i>See also</i> pps. 1515, 1520, 1523, 1524, 1547, 1548, 1551 |

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| | | Title VII and Title IX will need to comply with both sets of obligations. | |
| | | Parallel Title VII Process: Nothing in these final regulations precludes a recipient-employer from addressing conduct that it is severe or pervasive, and § 106.45(b)(3)(i) provides that a mandatory dismissal under these final regulations does not preclude action under another provision of the recipient’s code of conduct. Thus, a recipient employer may address conduct that is severe or pervasive under a code of conduct for employees to satisfy its Title VII obligations. | p. 1524 <i>See also</i> pps. 1516, 1547, 1548 |
| | | Union Contracts and Faculty Handbooks: These final regulations do not preclude a recipients’ obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations. | p. 1520 |
| | | Union Contracts and Faculty Handbooks: [S]ome collective bargaining agreements may need to be renegotiated for a recipient to comply with these final regulations[.] | p. 1527 |
| | | Academic Medical Center Employees: The Department understands that academic medical centers are unique entities, but Congress did not exempt academic medical centers that receive Federal financial assistance from Title IX. | p. 1537 |

Recordkeeping

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| Record Keeping (Investigations and Determination) | Maintain for 7 Years: Each sexual harassment investigation including any determination regarding responsibility | | §106.45 (b)(10) |
| Record Keeping (Recordings and Transcripts) | Maintain for 7 Years: and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section | | §106.45 (b)(10) |

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| | | No Copy Required: [T]he parties have equal opportunity to inspect and review the recording or transcript of a live hearing, but that inspection and review right does not obligate the recipient to send the parties a copy of the recording or transcript. | p. 1335 |
| Record Keeping (Sanctions) | Maintain for 7 Years: any disciplinary sanctions imposed on the respondent | | §106.45 (b)(10) |
| Record Keeping (Remedies) | Maintain for 7 Years: any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity | | §106.45 (b)(10) |
| Record Keeping (Appeals) | Maintain for 7 Years: Any appeal and the result | | §106.45 (b)(10) |
| Record Keeping (Informal Resolution) | Maintain for 7 Years: Any informal resolution and the result therefrom | | §106.45 (b)(10) |
| Record Keeping (Training Materials) | Maintain for 7 Years: All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. | | §106.45 (b)(10) |

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| <p>Record Keeping (Supportive Measures)</p> | <p>Maintain for 7 Years: For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.</p> | | <p>§106.45 (b)(11)</p> |
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| | | Maintenance ≠ Party Access: In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties. | p. 1406 |
| Start of Retention Period | | [T]he date of the record's creation begins the seven year retention period. | p. 1406 |
| Preemption and Intersection with Other Laws | | | |
| Preemption | To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law. | | §106.6(h) |
| Intersection with Other Laws (First Amendment) | Nothing in this [regulation] requires a recipient to. . . [r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution | | §106.6(d)(1) |
| | | Pure Speech may be Harassment: [E]xpressive speech, and not just physical conduct, may be restricted or punished as harassment. | p. 426 |
| | | Pure Speech may be Harassment: [T]he § 106.30 definition of sexual harassment is designed to capture non-speech conduct broadly (based on an assumption of the education-denying effects of such conduct), while applying the <i>Davis</i> standard to verbal conduct so that the critical purposes of both Title IX and the First Amendment can be met. | p. 507 |

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| | | Overbreadth: [S]everity and pervasiveness are needed elements to ensure that Title IX’s non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom. | p. 471 |
| | | Prior Restraints: [A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students’ and employees’ ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization. | p. 986 |
| Intersection with Other Laws (Due Process) | Nothing in this [regulation] requires a recipient to. . . [d]eprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution | | §106.6(d)(2) |
| Intersection with Other Laws (U.S. Constitution) | Nothing in this [regulation] requires a recipient to. . . Restrict any other rights guaranteed against government action by the U.S. Constitution. | | §106.6(d)(3) |
| | | 5 th Amendment and Self-Incrimination: To make clear that respondents may remain silent in circumstances in which answering a question might implicate a respondent’s constitutional right to avoid self incrimination, and to protect other rights of the parties, § 106.6(d)(2) states that nothing in Title IX requires a recipient to deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments. | p. 957 |

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| | | 5 th Amendment and Self-Incrimination: [T]hese regulations do not require a recipient to restrict any rights that would otherwise be protected from government action under the U.S. Constitution, which includes the Fifth Amendment right against self-incrimination. | Pps. 883-84 |
| Intersection with Other Laws (Title VII) | Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or any regulations promulgated thereunder. | | §106.6(f) |
| | | There may be incidents of sexual harassment that implicate both Title VII and Title IX, and this Department will continue to administer Title IX and its implementing regulations and to defer to the EEOC to administer Title VII and its implementing regulations. Nothing in these final regulations precludes the Department from giving due weight to the EEOC's determination regarding Title VII under 28 CFR 42.610(a). The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX. | p. 719 <i>See also</i> pps. 1514, 1515, 1520, 1523, 1524, 1547, 1548, 1551 |

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| <p>Intersection with Other Laws (FERPA)</p> | <p>The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.</p> | | <p>§106.6(e)</p> |
| | | <p>Directly Related (as Defined in FERPA and Applied to Title IX Proceedings): The Department previously stated: “Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning.” The Department made this statement in response to comments regarding impairing due process in student discipline cases in its notice-and-comment rulemaking to promulgate regulations to implement FERPA. The evidence and investigative report that is being shared under these final regulations directly relate to the allegations in a complaint and, thus, directly relate to both the complainant and respondent.</p> | <p>p. 1488</p> |
| | | <p>Direct Conflict: [I]f there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.</p> | <p>p. 1456 <i>See also</i> p. 1455, 1461</p> |

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| | | Enforcement: As the Department administers both FERPA and Title IX, the Department will not interpret compliance with its regulations under Title IX to violate requirements in its regulations under FERPA. | p. 1468 |
| Intersection with Other Laws (Clery Act) | | The Department does not perceive a conflict between a recipient's obligation to comply with reporting obligations under the Clery Act and response obligations under Title IX. | p. 662 |
| Intersection with State Laws (Anonymous Reporting) | | Recipients who are obligated under State laws to offer anonymous reporting options may not face any conflict with obligations under the final regulations. | p. 393 |
| Intersection with State Laws (Consent) | | The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies. | p. 363 <i>See also</i> p. 1197 |
| Intersection with State Laws (Emergency Removal) | | State or local law may present other considerations or impose other requirements before an emergency removal can occur. To the extent that other applicable laws establish additional relevant standards for emergency removals, recipients should also heed such standards. | p. 731 <i>See also</i> p. 771 |
| Intersection with State Laws (Sexual Harassment) | | The Department does not view a difference between how "sexual harassment" is defined under these final regulations and a different or broader definition of sexual harassment under various State laws as creating undue confusion for recipients or a conflict as to how recipients must comply with Title IX and other laws. While Federal Title IX regulations require a recipient to respond to sexual harassment as defined in §106.30, a recipient may also need to respond to misconduct that does not meet that definition, pursuant to a State law. | p. 442 |

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| | | [I]f a recipient is required under State law or the recipient’s own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. | p. 481-82 |
| Intersection with State Laws (Mandatory Reporters) | | The final regulations do not contravene or alter any Federal, State, or local requirements regarding other mandatory reporting obligations that school employees have. | p. 606 |
| Intersection with Accrediting Bodies and other Non-Legal Authorities (NCAA Guidelines) | | The Department is not under an obligation to conform these final regulations with NCAA compliance guidelines and declines to do so. Any recipient may give coaches and trainers authority to institute corrective measures on behalf of the recipient such that notice to coaches and trainers conveys actual knowledge to the recipient as defined in § 106.30. Additionally, or alternatively, any recipient may train coaches and athletic trainers to report notice of sexual harassment to the recipient’s Title IX Coordinator. | p. 330 |
| Conflicts with Union Contracts | | [I]n the event of an actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect. | p. 994 |

Notifications

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| <p>Designation of a Title IX Coordinator</p> | <p>Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph.</p> | | <p>§106.8(a)</p> |
| | | <p>[A] recipient has discretion to designate more than one employee as a Title IX Coordinator if needed in order to fulfill the recipient’s Title IX obligations.</p> | <p>p. 574</p> |

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| Title IX Coordinator Contact Info | (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook 2011 or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section. | | §106.8(b)(2) |
| Dissemination of Policy | Notification of policy. Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both. | | §106.8(b)(1) |

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| <p>Publication of Grievance Procedures</p> | <p>Adoption of grievance procedures. A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient’s grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.</p> | | <p>§106.8(c)</p> |
| <p>Training Materials</p> | <p>A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.</p> | | <p>§106.45(b)(10)</p> |
| | | <p>Keep Up to Date: [T]his provision requires the recipient to publish training materials which are up to date and reflect the latest training provided to Title IX personnel.</p> | <p>p. 1408</p> |

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| | | <p>Obtain Permission to Post Proprietary Information: To the extent that commenters' concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.</p> | <p>p. 1409</p> |
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Training

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| <p>Title IX Coordinators, Investigators, Decision-Makers, and Facilitators of an Informal Resolution Process</p> | <p>A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.</p> | | <p>§106.45(b)(1)(iii)</p> |
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| | <p>Definition of Consent: This includes “how to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.”</p> | <p>p. 365</p> |
| | <p>Curing Perceived Bias Through Training: The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially. Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.</p> | <p>p. 827-28</p> |

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| Decision Makers | A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. | | §106.45(b)(1)(iii) |
| Investigators | A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. | | |
| Frequency | | No Frequency Requirement: [T]he final regulations do not impose an annual or other frequency condition on the mandatory training required in § 106.45(b)(1)(iii). | p. 833 |
| Neutrality of Materials | Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment. | | § 106.45(b)(1)(iii) |

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| <p>Make Training Materials Publicly Available on Website</p> | <p>A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.</p> | | <p>§106.45(b)(10)</p> |
| | | <p>Keep Up to Date: [T]his provision requires the recipient to publish training materials which are up to date and reflect the latest training provided to Title IX personnel.</p> | <p>p. 1408</p> |
| | | <p>Obtain Permission to Post Proprietary Information: To the extent that commenters' concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.</p> | <p>p. 1409</p> |
| <p>Exemptions</p> | | | |
| <p>Religious Exemption</p> | <p>An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization.</p> | | <p>§106.12(b)</p> |

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| | <p>An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.</p> | | §106.12(b) |
| | | <p>Asserting the Exemption: When the Department notifies a recipient that it is under investigation for noncompliance with this part or a particular section of this part, the recipient identifies the provisions of this part which conflict with a specific tent of the religious organization.</p> | p. 1660 |
| | | <p>Burden on Recipient Institution to Show Entitlement to and Scope of Exemption: [R]ecipients are not entitled to any type of formal deference when invoking eligibility for a religious exemption, and recipients have the duty to establish their eligibility for an exemption, as well as the scope of any exemption.</p> | p. 1661 |

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| | | Limitation: [T]his does not prevent OCR from investigating or making a finding against a recipient if its religious tenets do not address the conduct at issue. In those cases, OCR will proceed to investigate, and if necessary, make a finding on the merits. | p. 1653 <i>See also</i> p. 1660 |
| Effective Date | | | |
| Effective Date | | Effective Date: [T]he final regulations are effective August 14, 2020. | p. 1869 |
| Prospective Application | | Prospective Application: These final regulations will apply prospectively to give recipients adequate notice of the standards that apply to them. | p. 1345 <i>See also</i> p. 1348 |

Prepared by NACUA, May 17, 2020.

The content should not be considered to be or used as legal advice. Legal questions should be directed to institutional legal counsel.



Title IX Coordinator Training Online Course

Class Six: Athletics Equity and Applying the August 2020 Regulations

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NCAA

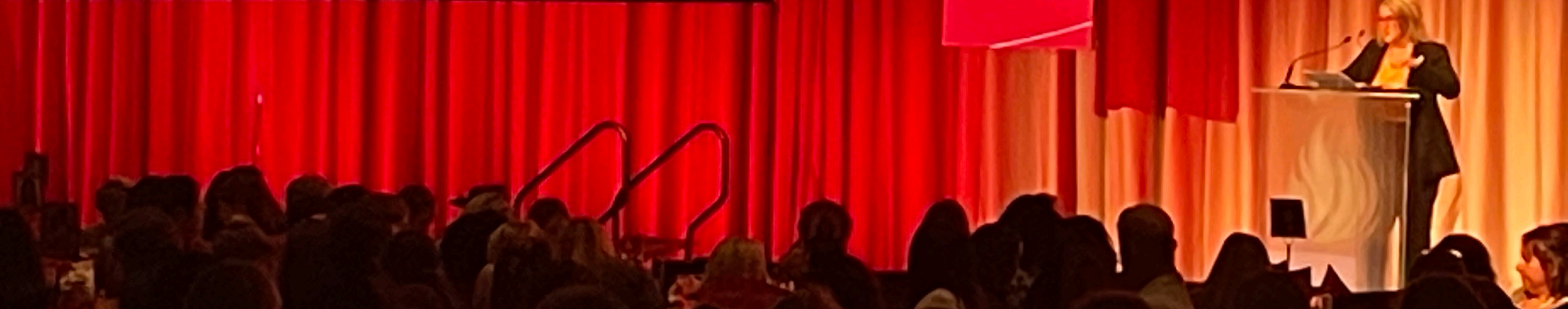
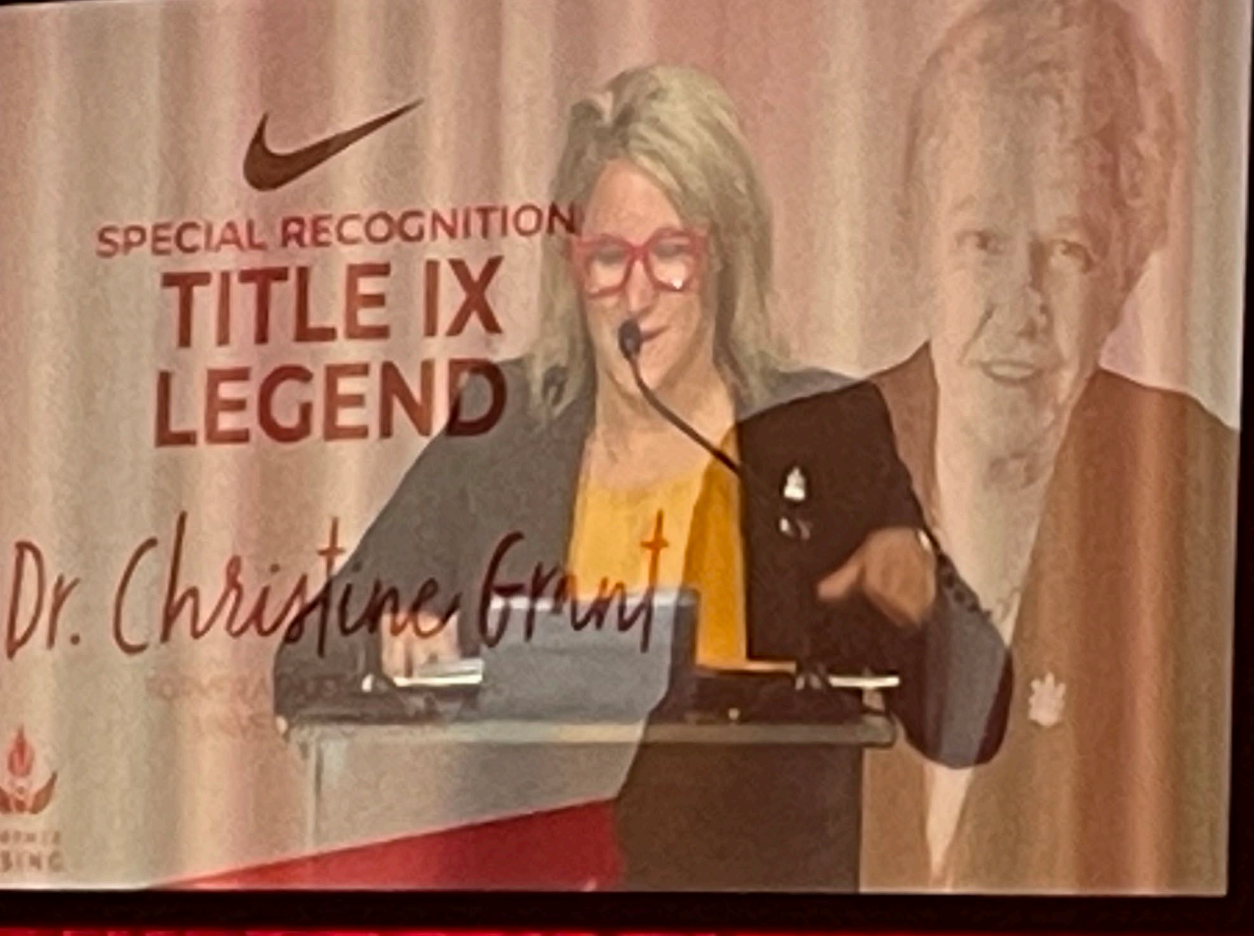
June 6, 2023

PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.



Class Overview

- Athletic Equity
- Pay Equity
- The Regs
- Trans Athlete Participation
- NCAA Board of Governor's Policy on Campus Sexual Violence



Role of the NCAA

- Support the membership as established by the [NCAA Constitution](#) (2022)
- [Four membership DEI committees](#)
 - Committee to Promote Cultural Diversity and Equity
 - Committee on Women’s Athletics
 - Gender Equity Task Force
 - Minority Opportunities and Interests Committee
- [NCAA Inclusion Statement](#)
 - “The NCAA will provide or enable programming and education . . .”
 - [Annual Inclusion Forum](#): annually held in April
- Division I Legislated [DEI Review](#)—due Nov. 3, 2023.

Overarching Principles:

Intercollegiate athletics programs should utilize their platform to serve as leaders on campus through engagement in and collaboration on efforts to support campus-wide sexual and interpersonal violence prevention initiatives.

This includes involving student-athletes in prevention efforts in meaningful ways across the campus, including encouraging use of leadership roles on campus to support such efforts.



The Updated Elements of the NCAA's Sexual Violence Policy and Attestation

The NCAA requires school's President/CEO, Director of Athletics, and TIX Coordinator to attest to the following annually:

- All Student-Athletes and Athletics Staff have been trained around Title IX sexual misconduct annually.
- All incoming, continuing and transfer student-athletes have completed an annual disclosure related to their conduct that resulted in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.*
- All transfer student-athletes have disclosed whether a Title IX proceeding was incomplete at the time of transfer.
- Institutions have taken reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence.
- In a manner consistent with federal and state law, the school has shared relevant discipline information and incomplete Title IX proceedings as a result of transfer with other member institutions when a student-athlete attempts to enroll in a new college or university.
- The school has a written procedure that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the student left the institution with an incomplete Title IX proceeding, was disciplined through a Title IX proceeding or has a criminal conviction for sexual, interpersonal or other acts of violence.

NCAA Policy: Add'l Considerations

- **Covered Conduct:**
 - Discipline through a Title IX proceeding or a criminal conviction, regardless of the degree, and whether the result of a plea or court determination, of either of the following:
 - **Interpersonal Violence:** Violence that is predominantly caused due to the relationship between the victim and the perpetrator, including dating and domestic violence.
 - **Sexual Violence:** Both forcible and non forcible sex offenses, ranging from sexual battery to rape.
 - **Other Acts of Violence:** Murder, manslaughter, aggravated assault or any assault that employs the use of a deadly weapon or causes serious bodily injury.
- Schools that do not submit the required attestations will be prohibited from hosting any NCAA championship competitions for the next applicable academic year.
- International member schools and schools that do not receive federal funding, or are otherwise exempt from Title IX, must submit an annual attestation from the President, AD and Title IX coordinator or institutional staff member with comparable responsibilities.

Attestation: Prez, AD, TIX



- Requires annual attestations signed by the Director of Athletics, Title IX Coordinator, and President (CEO).
- BOG revisions to the Policy expanded its reach and attestation content, effective Fall 2023.
- [FAQ](#) was updated May 23, 2023
- How are schools approaching this?
 - Discussions with Title IX, General Counsel, and others on campus.
 - Explore compliance position.
 - Check state law.
 - Consider intersection with the 2020 Regs around Permissive Dismissals and Confidentiality.
 - What about the NPRM?



The tools you need for Equity in Athletics analysis

Get Data for One School

Search for a school to view general information and EADA statistical data for the most recent year.

Compare Data for Multiple Schools

Select up to four schools to see a side-by-side comparison of data for the most recent year.

Download Custom Data

Select the EADA statistical data you are interested in for one or more years and download data for a customized group of schools.

Generate Trend Data

Select a subject area and a question that you are interested in, and then see the answer for a selected year, build a table, and see a graph that shows the trend over time. You can customize your results by various institutional characteristics such as athletic sanctioning body, public or private, and state.

Download Data

Download the complete data file for all institutions from a single data collection. Files will include all data submitted by all institutions in the selected survey year.

PART 1: ATHLETIC EQUITY: EADA v Title IX

Athletic Equity Compliance: Three Separate and Independent Areas of Compliance



Participation



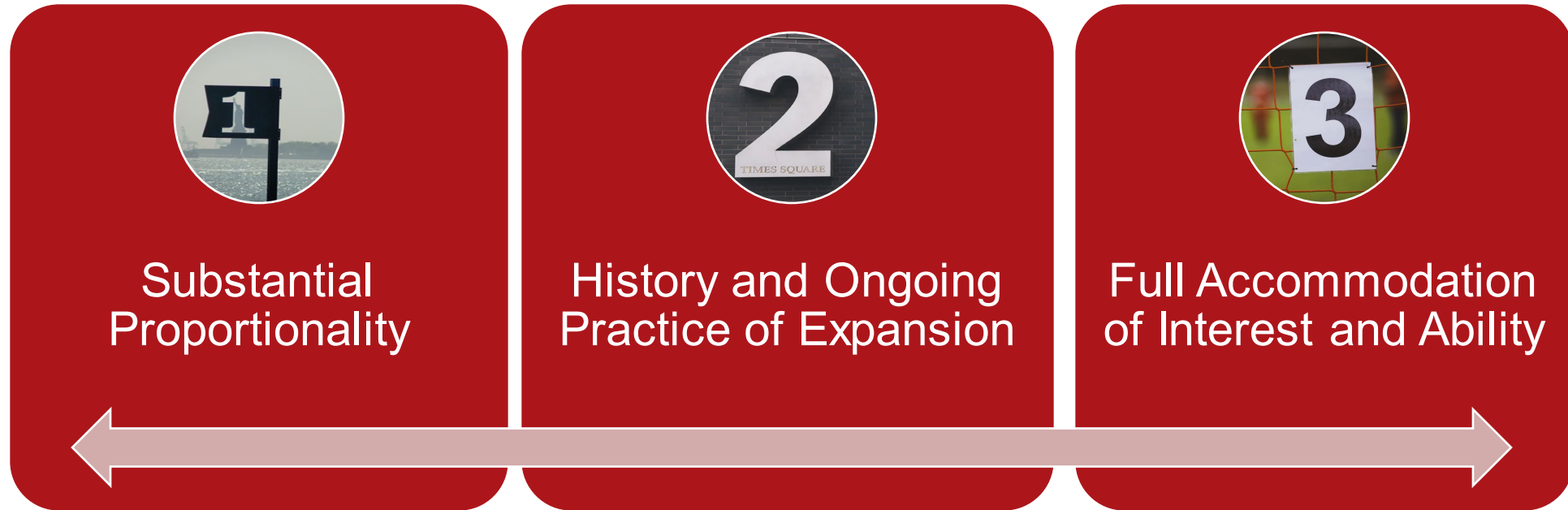
Financial Aid



Treatment



Equitable Participation: The Three Part Test



Prong 1.

Male and female intercollegiate participation is provided in numbers substantially proportionate to their respective full-time undergraduate enrollment, or

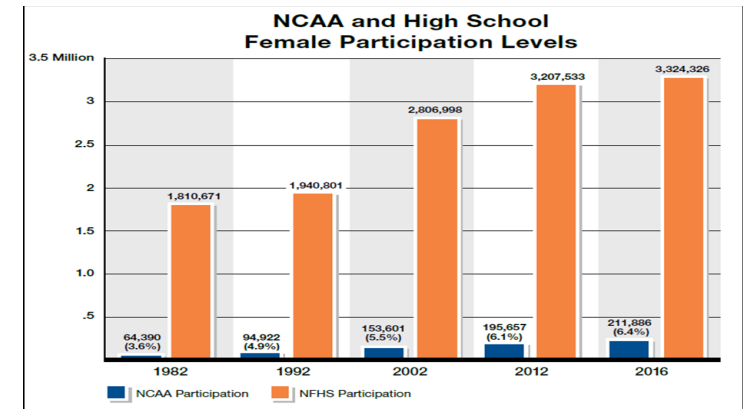
Prong 2.

The institution has a history and continuing practice of program expansion responsive to the developing interests and abilities of the members of the underrepresented gender, or

Prong 3.

The interests and abilities of the members of the underrepresented gender are fully and effectively accommodated by the present program.

Sport Cuts that Involve the Underrepresented Sex: Typically Require Prong 1 Compliance Post Program Elimination



ENFORCEMENT —

OCR: Investigation. Letter of Findings. 302 Resolution Agreement. Referral to DOJ.

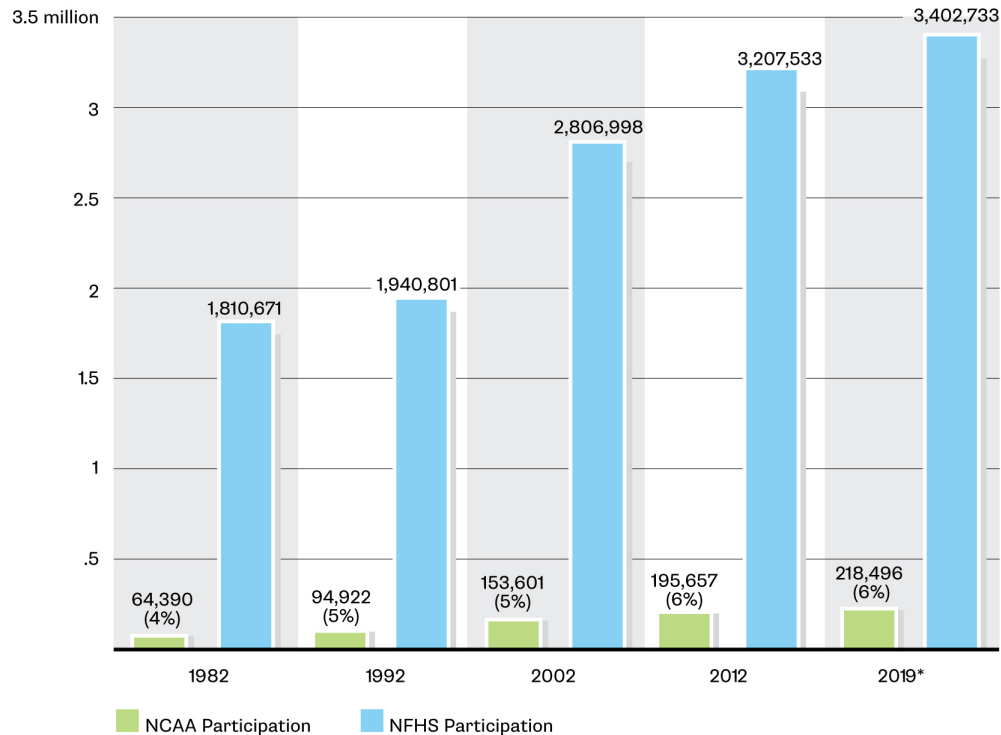
Court: Injunctive Relief. Class Actions. Attorneys' Fees, No Administrative Exhaustion. No Cap on Damages.

OCR Substantial Proportionality

- Amicus Brief (United States) in the Michigan State University (MSU) Case:
 - OCR “has not specified a magic number at which substantial proportionality is achieved.” *Equity In Athletics, Inc. v. Department of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011), cert. denied 565 U.S. 1111 (2012); see also *Biediger*, 691 F.3d at 106 (explaining that the Second Circuit did not “understand the 1996 Clarification to create a statistical safe harbor at [2%] or any other percentage”).
 - What matters *** is whether the participation gap is large enough to sustain a *viable* team. As the 1996 Clarification explains, where “it is likely that a viable sport could be added,” an institution will not satisfy the first prong. (1996 Clarification).
 - Here, the district court failed to conduct the necessary fact-intensive inquiry to determine whether a participation gap of at least 15 athletes (if not more) could sustain a *viable* women’s team.
 - **If [the school] can field a viable team of eight female tennis players, for example, it will not have satisfied [the substantial proportionality standard].**

Prong 3: Accommodating Interest & Abilities

NCAA and High School Participation Levels on Women's Teams



Do the current sport offerings for the underrepresented sex effectively accommodate their athletic interests and abilities?

All of the following must be present to require continued expansion:

- unmet interest in a particular sport;
- sufficient ability to sustain a team in the sport; and
- a reasonable expectation of competition in the normal competitive area?

How much interest/ability/competition is enough?


What is the relevant pool to be assessed?

Final Participation Question: Are there Equitable Levels of Competition?

The competitive schedules for men's and women's teams, on a program-wide basis, afford proportionately similar numbers of male and female athletes equivalently advanced competitive opportunities;

OR

There exists a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

A profile photograph of Chris Mosier, a man with short dark hair and a goatee, looking off to the right. He is wearing a green and blue patterned tank top. The background is blurred.

**I AM GOING TO PUT
MYSELF OUT THERE
TO BE WHO I
NEEDED WHEN
I WAS YOUNGER.**

CHRIS MOSIER

TITLE IX / [TRANSATHLETE.COM](https://www.transathlete.com) / NCAA

NCAA Transgender Student-Athlete Participation

- **NCAA Summit on Gender Identity and Student-Athlete Participation (Oct. 2020)**
 - Improving inclusion and well-being of trans and gender nonconforming collegiate student-athletes: foundational concepts from the National Collegiate Athletic Association Summit on Gender Identity and Student-Athlete Participation | British Journal of Sports Medicine (bmj.com)
- **NCAA Policy Updated and Approved by Board of Governors in January 2022**

2022 Update to NCAA Policy

Alignment with Olympic Movement to balance fairness, inclusion and safety.

January 2022: NCAA Board of Governors (BOG) adopts policy as recommended by the Committee on Competitive Safeguards and Medical Aspects of Sport (CSMAS).

1. Trans student-athletes must continue to meet 2010 NCAA policy; and
2. Meet sport-specific policies that are reviewed and approved by CSMAS, in each case to be informed by national governing body policy (or international federation policy or 2015 IOC policy).

PLEASE NOTE: NCAA Policy to be implemented over three phases. Phase 2 in place through the 2023-2024 academic year.

2022 Update to NCAA Policy

CSMAS recommendation to Board of Governors

1

Meet 2010 policy.

Trans Men

Medical exception for testosterone.

Trans Women

Hormone suppression \geq 1 year.

2

Meet sport-specific eligibility requirements **reviewed and approved** by CSMAS and informed by NGB policy (IF policy/2015 IOC policy).

Includes testosterone thresholds and other elements.

3

Phased implementation.

1. 2022 W/S Championships

2. 2022-23 Academic Year

3. 2023-24 Academic Year

Delay Phase Three?

- Phase Three considers all elements of sport-governing policies.
 - Administrative challenges.
 - Value alignment.
- Emerging info / policy trends / Title IX.
- Need for simplification?



BOG APPROVED

Extend Phase
Two through
2023-24
academic year.



Proposed Regulations

- If a [school] adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:
 - be substantially related to the achievement of an important educational objective, and
 - minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.



Next Steps

- 250,000 comments sent to the government.
- Projected publication date now is 10/2023
- Summary:
 - No blanket bans, e.g., Alabama
 - Burden on school if excluding
 - Exclusions must be related to Education, Fairness, Safety
- NCAA Policy mentioned but not expressly adopted.
- Pragmatic Impact



Athletics-Based Financial Aid/Scholarship Equity



1%

“If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the “substantially proportionate” requirement.

Dear Colleague Letter – [Bowling Green](#) (July 23, 1998)

| TREATMENT AREAS | MEN | >/</= | WOMEN |
|--|-----|-------|-------|
| Equipment and Supplies: Apparel and Sports-Specific Equipment | | | |
| Scheduling and Access to Facilities: Practice, Competition | | | |
| Travel: Mode, Housing, Food | | | |
| Academics: Personnel, Services, Tutors, Tutor Compensation | | | |
| Coaches: Quantity, Quality, Compensation* | | | |
| Facilities: Practice, Competition, Locker Room, Meeting Spaces | | | |
| Medical: Staff, Experience, Availability, Facilities | | | |
| Housing & Dining: Athletics-Specific On-Campus Support | | | |
| Publicity/Communications: Sports Information & Marketing | | | |
| Support Services: Administrative, Sport-Specific Staff, Office Space | | | |
| Recruiting: Financial & Other Support | | | |



Sources of Funding

It's not a dollar-to-dollar analysis. Focus on goods and services. Where differences exist, OCR may focus on funding.

Private donations are institutional dollars and goods and services provided through private funding still count. In other words, those goods and services are included in the equity analysis.

See, e.g., Chalenor v. Univ. of North Dakota, 142 F. Supp. 2d 1154 (D.N.D. 2000)



How Do Sport Budgets Factor In?

- Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance.
- The Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

An athletic program is gender equitable when the men's sports program would be pleased to accept for its own the overall participation, opportunities and resources currently allocated to the women's program and vice versa.



Discrimination?

- Sex based differences in benefits or services that have a **negative impact** on athletes of one sex when compared with benefits or services available to athletes of the other sex.
- Disparity must be **so substantial** as to deny equal opportunity to athletes of one sex.
- Disparities are evaluated case-by-case.
- Non-discriminatory justifications

Retaliation Prohibited

- Retaliation is intentional discrimination on the basis of sex.
- Those who witness and raise concerns about discrimination are protected from adverse action they encounter because of the complaints.
- Recognition that coaches, teachers, administrators and students are in the best position to witness and alert schools

See, e.g., Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005)





Compensation & Pay Equity

- **Title IX Program Review Focus:**
Coaches of women's sports as compared to coaches of men's sports, and usually only when coaching inequities are otherwise identified.
- **Title IX Employment/EPA Focus:**
Female coaches' salaries compared to male coaches' salaries.
 - Equal Pay for Equal Work
 - Non-Discriminatory Justifications
- **OFCCP Audits/Title VII/State Law**
- **Documenting & Auditing Compensation Systems/Approaches**

The 2020 Title IX Regulations

Application (per the preamble):

- “[T]he Department declines to address other topics . . . such as pregnancy, parenting, or athletics under Title IX, coverage of Title IX to fraternities and sororities, whether speech codes discriminate based on sex, funding intended to protect women or young adults on campus, funding cuts to girls’ programs by recipients, or forms of harassment other than sexual harassment.”
- These complaints “may be referred” to the recipient’s Title IX Coordinator to review under the grievance procedures required by these Regulations.
- “[T]he handling of non-sexual harassment sex discrimination complaints brought by students and employees (for instance, complaints of sex-based different treatment in athletics . . .) remains the same as under current regulations (*i.e.*, recipients must have in place grievance procedures providing for prompt and equitable resolution of such complaints).”

See Title IX Regulations, 85 FR 30026 at <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

Notice:

- Reporting in Athletics
 - Title IX Coordinator in Athletics?
 - Officials with Authority to address Sexual Harassment?
 - Who else is required to report?
 - Confidential? By licensure?
 - Limited confidentiality? Why?



Athletics:

Supportive Measures

- Cannot punish, discipline, or unreasonably burden the respondent without a finding of responsibility.
- Denials of supportive measures requests must be documented.



Emergency Removals

- A school may remove an individual from one or more education programs or activities in situations where the person poses an immediate threat to the physical health and safety of any individual before an investigation into sexual harassment allegations concludes (or where no grievance process is pending).
 - The school makes an **individualized assessment** that “an imminent threat to the physical health or safety of any person, *arising from* sexual harassment allegations, justifies removal,” **and**
 - The school provides an **opportunity to challenge** decision.
- An emergency removal cannot be imposed simply *because* an individual has been accused of sexual harassment.
- The Regulations do not prohibit a school from addressing violations of a school’s code of conduct, policies, or laws, **provided the conduct does not constitute Title IX sexual harassment or is not “arising from” Title IX misconduct allegations.**

What are the Potential Roles of the Title IX Office Around Athletics?



- Oversight for Title IX
- Oversight for NCAA Policy
- Policy Oversight, Training, and Attestation
- Outside Title IX Speaker Review and Approval
- Evaluation of Equity and Sexual Misconduct Complaints
- Support and Emergency Removals
- EADA Report Review
- Equity Committee Membership

Infusing Equity: Consider a Supplemental Policy

Sample Language:

This policy supplements the overall school policy prohibiting sexual harassment, [insert link to institution policy] which also applies to all members of the athletics department, both staff and student-athletes.

School U. values the educational aspect of athletics and as such offers opportunities to compete in a [NAIA/NCAA] Division [I, II or III] varsity athletics program and is a member of the [name] conference[s], club level and intramural programs. School U. believes that its student-athletes should be provided gender equitable participation opportunities, receive gender equitable athletic scholarships, and be afforded gender equitable treatment overall.

To report an athletics gender equity concern or to a request for varsity status for an athletic team not currently offered at the varsity level, please contact School U's Title IX Coordinator, titleix@schoolu.edu, Office 405, University Hall, 8-4490.

No Retaliation Policy:

Employees and/or students who ask questions, seek advice or report a suspected violation of this policy are protected by School U's no retaliation policy. Retaliation will not be tolerated. If you suspect that you or another employee may be the victim of retaliation, you should contact the TIX Coordinator, titleix@schoolu.edu, immediately. Those who violate the No Retaliation policy are subject to discipline.

IMPORTANT: Consider how complaints would be managed and findings would be implemented.

Questions?



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Title IX Coordinator Training Online Course

Class One: Definitions, Jurisdiction and Preliminary Matters

Marjory Fisher

Associate Vice President & Title IX Coordinator, Columbia University

Melinda Grier

Melinda Grier Consulting

Janet P. Judge

Education & Sports Law Group

April 11, 2023

Training Course Does Not Constitute Legal Advice

Class Overview

- Title IX Updates
- Definitions
- Jurisdiction
- Formal Complaints
- Supportive Measures
- Dismissals
- Informal Resolution



What's Next?

When?

Biden Administration Initial Steps

- April 6, 2021 – OCR letter to stakeholders announcing a comprehensive review of ED’s existing Title IX regulations, orders, guidance, policies, etc.
- May 20, 2021 – Notice of virtual public hearing June 7–11, 2021
- July 20, 2021 – Questions and Answers on the Title IX Regulations on Sexual Harassment, including policy examples
- August 24, 2021 – ED announces it will no longer enforce the requirement that “prohibits a decisionmaker from relying on statements that are not subject to cross examination.”

What Comes Next from ED

- In December, 2021, The Department anticipated issuing the Title IX notice of proposed rulemaking by April 2022
- June 23, 2022, Title IX's 50th Anniversary, Department issued NPRM
- September, 2022, Notice and Comment period concluded
- 224,000 Comments posted, unclear how long it will take DOE to respond (Department will then have to summarize and respond to comments received and issue the resulting final regulations, which will include an effective date.)
- February 2023, OCR issues athletic resource guide, "Title IX and Athletic Opportunities in Colleges and Universities"
- April 6, 2023, OCR issues proposed rule related to eligibility standards for male and female teams.



In the meantime,

- The existing rules control, and any college receiving federal funds must obey them.
- In addition, the NPRM is just that – proposed rulemaking.
- The administration must address all of the comments, recommendations, and concerns submitted.
- In so doing, the final regulations may be very different.



What's In the Proposed New Rules?



April 6, 2023 “Colleges Could Keep Transgender Students Off Some Athletic Teams Under Title IX Proposal,” Chronicle of Higher Education

- **May 2020 regulations:**
 - Narrowed definition of "hostile environment sexual harassment"
 - Must respond only to severe, pervasive and objectively offensive behavior
 - Narrowed definition of "hostile environment sexual harassment" and
 - Required schools to focus their Title IX procedures on on-campus or program-related conduct that fit within that definition
- **Proposed regulations in NPR:** Restore the definition to that which was implemented by Obama Administration, which is more likely to require investigations of a broader category of unwelcome conduct of a sexual nature.
 - **April 6 2023 Proposed regulations:** Establish guidance for limiting participation on athletic teams.
 - Permits eligibility standards related to achieving an “important educational interest.”
 - Must “minimize harms” to students whose participation would be affected by their gender identity
 - Restrictions on eligibility would be permitted only after consideration of the circumstances of individual sport, level of competition and educational level.

What's next? Procedural Changes...

- Possibility of “single investigator model” returns
- Allows for continuation of live hearings, but no longer required.
- Eliminates the requirement of cross-examination.
- Allows instead for the investigator to test credibility of parties or witnesses at “individual meetings.”
- Allows schools to provide access to evidence or investigative report, but no longer required to provide both.

Biden's Title IX reforms would roll back Trump-era rules, expand victim protections (Dustin Jones)

Updated June 23, 2022:40 PM ET



Education Secretary Miguel Cardona speaks at the White House on April 27. The Biden administration proposed a dramatic rewrite of campus sexual assault rules on Thursday, moving to expand protections for LGBTQ students, bolster the rights of victims and widen colleges' responsibilities in addressing sexual misconduct. *Susan Walsh/AP*

Litigation Challenges

EDUCATION

Biden vows 'quick end' to DeVos' sexual misconduct rule

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.



- **Three Challenges to Current Rule Unsuccessful**

- Know Your IX, et al. v. DeVos, filed May 14, 2020 in D. Md.
- New York v. U.S. Department of Education, filed June 4 in S.D.N.Y.
- Pennsylvania, et al. v. DeVos, filed June 4 in D.D.C.

- **One Challenge Altered Application of a Provision**

- Victim Rights Law Center, et al. v. DeVos, filed June 10 in D. Mass.
 - Court vacated the provision prohibiting use of testimony from persons who did not submit to cross-examination but upheld all other challenged provisions of the rule.
 - Dept. of Education announced it would not enforce the provision the Court vacated. August 2021

- **Challenge to DOE Guidance Upheld**

- State of Tenn., et al. v. U.S. Dep't of Educ., July 2022
 - Department of Education enjoined from enforcing the part of the Title IX Anniversary Letter that includes gender orientation and gender identity discrimination as sex discrimination against the 20 states that participated as plaintiffs in this lawsuit.

- **Challenge to State Ban on "Boys" Participation in Girls Sports**

- West Virginia v. By Jackson, April 6, 2023
 - U.S. Supreme Court let stand Appeals Court temporary injunction, against enforcing the ban.
 - As written, law defines "boys" based on "individual's form... at birth."

Definitions

Definition of Sexual Harassment

Sexual Harassment includes one or more of the following:

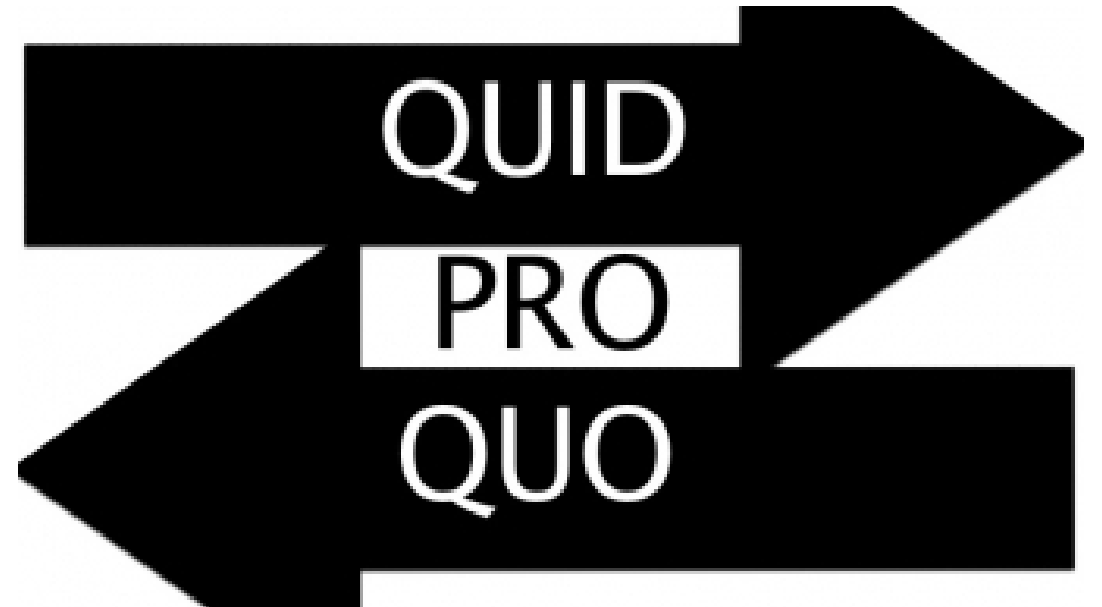
1. Quid Pro Quo
2. Hostile Environment
3. Clery Definitions

§106.30(a)



Quid Pro Quo

- Conditioning provision of an aid, benefit or service on participation in unwelcome sexual conduct
- Carried out by an employee



Hostile Environment

- Unwelcome sexual conduct
- “So severe, pervasive, *and* objectively offensive”
- “Effectively denies equal access”
- “Determined by a reasonable person”
 - “[S]tanding in the shoes of the complainant.” (Preamble, p. 514)



Clery Definitions

- **Sexual Assault** – a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute) including NIBRS
 - Forcible -- Any sexual act “directed against another person without the consent of the victim including if the victim is incapable of giving consent.”
 - Focus on proscribed actions rather than terms
- **Dating Violence** – violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- **Domestic Violence** – violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- **Stalking** – fear for safety or safety of others or suffer substantial emotional distress

Complainant & Respondent

- Complainant – an individual who is alleged to be the victim of conduct that could be sexual harassment
- Respondent – an individual who has been reported to be the perpetrator of conduct that could be sexual harassment



Actual Knowledge

- Institution has actual notice of sexual harassment or allegations when reported to the:
 - Title IX Coordinator(s), OR
 - An Official With Authority to Take Corrective Actions (OWA)
- Not when reported to a respondent
- Not when reported to others, even if the school has decided that they may or must report
 - (But ... other causes of action may exist created by the existence of a policy or contractual provision requiring reports by certain non-OWA employees)



Jurisdiction

Education Program or Activity



- Locations, events, or circumstances over which IHE exercises substantial control over *both* the respondent and the context in which the sexual harassment occurred, **or**
- Any building owned or controlled by a recognized student organization, **and**
- Against a person in the United States.

Filing a Formal Compliant

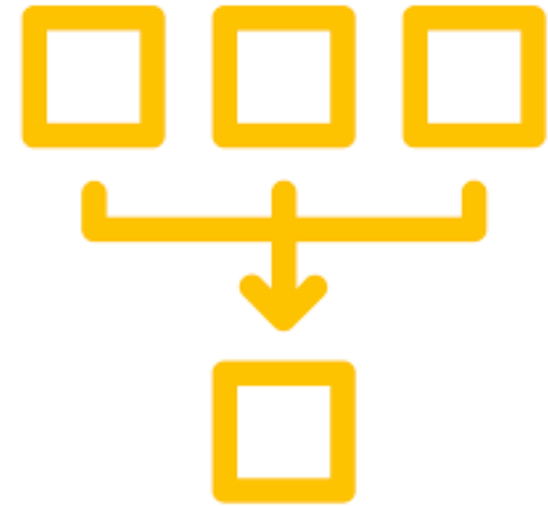
Filing a Formal Complaint

- In person, by mail, email or approved method.
- Requests that the IHE investigate the allegations of sexual harassment.
- Filed by the Complainant participating in or attempting to participate in the IHE's education program or activity or signed by the Title IX Coordinator.
- Title IX Coordinator may file even if the Complainant is not associated in any way to protect other students.



The Formal Complaint: More Than One Respondent

- *May* consolidate formal complaints against more than one respondent, or by one party against the other party
 - Allegations arise out of the same facts or circumstances.
- Complaints may be filed and sanction imposed *only* against individuals, not groups



Written Notice of Allegations

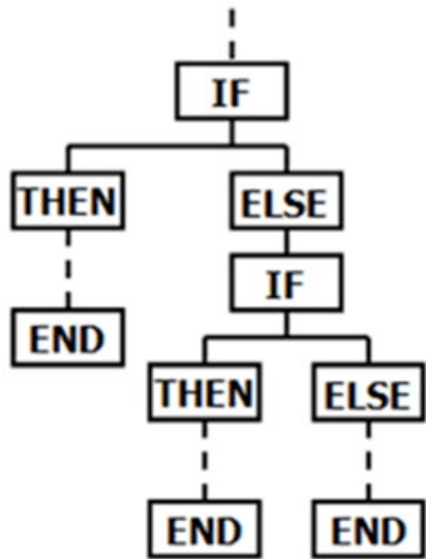
- Notice of the grievance process.
- Notice of the allegations, including sufficient details and time to prepare a response *before* the initial interview.
- Statement that the Respondent is presumed not responsible.
- Right to advisor of choice.
- Right to inspect and review evidence.
- Any prohibition of false statements or information.

Provide updated notice with any later discovered additional allegations.



**IMPORTANT
NOTICE**

Dismissals



Mandatory/Discretionary Dismissals



Mandatory if:

- Conduct alleged would not constitute sexual harassment even if proved;
- Conduct alleged did not occur in the IHE's education program or activity; or
- Conduct alleged did not occur in the U.S.



Discretionary If:

- Complainant notifies the Title IX Coordinator in writing of a wish to withdraw complaint or any allegations in it;
- Respondent is no longer enrolled or employed; or
- Specific circumstances prevent sufficient gathering of evidence to reach a determination.

Dismissal Results





If a formal complaint is dismissed, school must:

- Provide written notice of dismissal and reasons to both parties.
- Provide an appeal process.
- The matter *may* proceed under another provision, policy or code.

Supportive Measures

Response to a Report

- Offer *supportive measures* promptly to the Complainant. 
- Explain the process for filing a formal complaint.
- Consider the Complainant's wishes as to supportive measures. 
- Follow a grievance process that complies with the regulations *before* imposing any disciplinary sanctions or other actions that are not supportive measures against the Respondent.



Supportive Measures



- Available to complainant and respondent
- Non-disciplinary and non-punitive
- Treat complainant and respondent equitably
- No fee/charge to either party
- Restore or preserve equal access without *unreasonably* burdening the other party
- Confidential to the extent possible

Informal Resolution

Informal Resolution Requirements



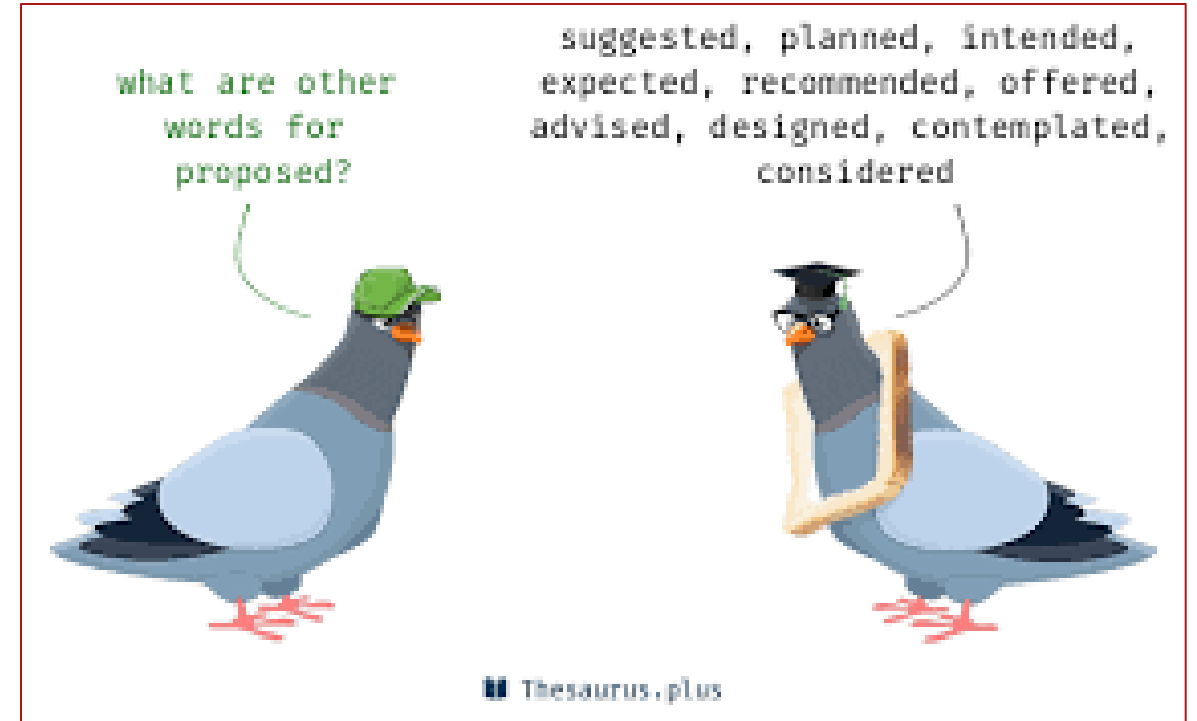
- At any point in the formal process
 - BUT only after a formal complaint is filed
 - May return to formal process if informal resolution does not resolve the matter
- May address all forms of sexual harassment:
 - *EXCEPT* – Allegations of employee against student harassment
 - *ONLY* – When the institution deems it appropriate
- Process must be facilitated by trained individuals with no conflict of interest or bias
- Written, voluntary consent by the parties, which requires ...

Informal Resolution Process

- Parties must be given written notice of:
 - The allegations and the requirements of the informal resolution process;
 - The right to withdraw from the informal procedure at any time prior to agreeing to a resolution;
 - The circumstances precluding parties from resuming the formal complaint arising from the same allegations; and
 - Any consequences associated with informal resolution, including records that will be maintained or could be shared.

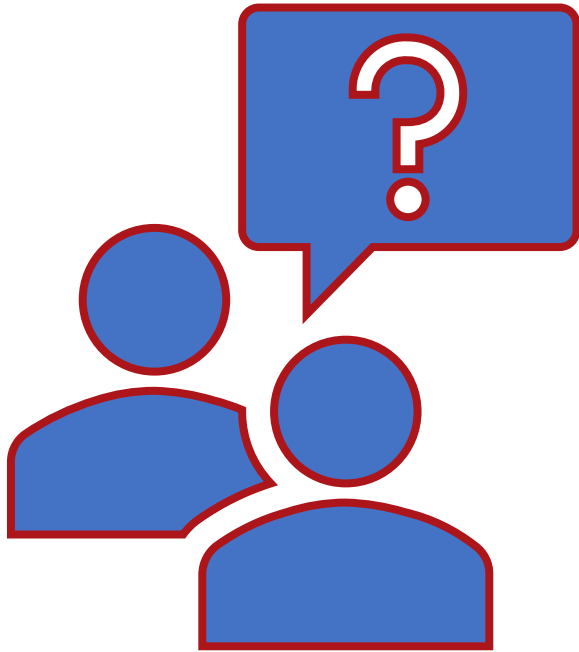


What are some of the Proposed Changes?



Proposed Changes

- Quid Pro Quo Harassment
 - Expanded definition
- Hostile Environment
 - “Denies *or Limits*” access
- Specific Offenses
 - Defines Clery Offenses
- Complainant & Respondent
 - Applies in all sex discrimination
- Respond to any sex discrimination
- Respond to sex discrimination in a program or activity
 - “Off campus” if disciplinary authority
 - Even if outside of US
- Complaint
 - Any oral or written request to initiate the grievance process
- Dismissal
 - Permissive in some circumstances
- Supportive Measures
 - May burden R during pendency of process
 - Opportunity for C or R to request modification
 - Review by impartial party with authority to change
- Informal Resolution
 - Available at any time with required notice



Questions?

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**Title IX Coordinator Training
Online Course: Fundamentals of
the August 2020 Regulatory
Requirements**

**Module 1: Jurisdiction and Other
Threshold Topics**

Amy C. Foerster, Partner, Troutman Pepper Hamilton
Sanders LLP
Melinda Grier, Melinda Grier Consulting PC
Janet P. Judge, Partner, Holland & Knight LLP

Course Overview

- Jurisdiction and Other Threshold Topics
- Formal Complaints, Investigations, and Grievance Procedures
- Policy and Training Obligations



Title IX Final Regulation

- Effective August 14, 2020
- Where to Begin
 - Inventory
 - Implementation Plan



PLAN & DOCUMENT YOUR EFFORTS

- Inventory
 - Current Title IX Procedures
 - Clery Act Policies & Compliance
 - Student Conduct Code
 - HR Policies & Agreements
 - State or Local Laws or Regulations
- Implementation Plan
 - What?
 - Who?
 - When?

**Jurisdiction: What,
Who, Where, When,
How?**

WHAT?

DEFINITION OF SEXUAL HARASSMENT

§106.30(a): Sexual Harassment to include one or more of the following:

1. Quid Pro Quo
2. Hostile Environment
3. Clery Definitions

QUID PRO QUO

1. Conditioning provision of an aid, benefit, or service on participation in unwelcome sexual conduct
2. Carried out by an employee

HOSTILE ENVIRONMENT

- Unwelcome sexual conduct
- “So severe, pervasive, *and* objectively offensive” (2020)
 - Pattern or practice or sustained and non-trivial (2001)
- “Effectively denies equal access”
 - Denies or limits a student’s ability to participate in or benefit from (2001)
 - Interferes with or limits a student’s ability to participate or benefit from (2011)
- “Determined by a reasonable person”
 - “[S]tanding in the shoes of the complainant.” (Preamble, p. 514)

CLERY DEFINITIONS

- Sexual Assault – a forcible or non-forcible sex offense under the FBI UCRS (as defined by the Clery statute)
 - Rape, attempted rape, sodomy, fondling, statutory rape
- Dating Violence – violence by a person who is or has been in a romantic or intimate relationship (Clery statute)
- Domestic Violence – violence by a current or former spouse or intimate partner, co-parent, living partner, youth or other under state law
- Stalking – fear for safety or safety of other or suffer substantial emotional distress

COMPARE TO

- Institution Conduct Code
- Court standards
- Title VII
- State law

WHO?

IN ADDITION TO STUDENTS...APPLIES TO EMPLOYEES

§106.51 Employment

- “No person shall, on the basis of sex, be excluded from participation in, or denied benefits of, or be subjected to discrimination in employment...”
- Remains unchanged by current amendments

WHAT'S NEW THEN...

- 2011 Guidance directed at student-on-student sexual violence
- Courts and OCR have relied on Title VII when considering employees' complaints alleging sexual harassment even under Title IX.
- OCR acknowledges differences, expects institutions of higher education (IHEs) to comply with both Title IX and Title VII requirements.
 - OCR will try to “avoid an actual conflict” regarding employer's obligations. (Preamble p. 1511.)

OTHER CHANGES

- Requires IHEs to handle allegations by employees, including at-will employees, using the same procedures it uses for students
- Independent contractors and volunteers are *not* considered employees who may create *quid pro quo* Title IX liability.
- Actions by non-employees may create liability for other types of sexual harassment. (Preamble p. 448)
- Volunteers who experience discrimination *may* be covered. (Preamble p. 1544)

TITLE VII – SEXUAL HARASSMENT DEFINITION

- Conduct
 - Unwelcome sexual advances
 - Requests for sexual favors
 - Other verbal or physical conduct of a sexual nature
- Viewed by a reasonable person in the Complainant’s position

WHEN...

- Submission becomes a term or condition of employment
- Rejection is used as the basis for an employment decision
- The conduct unreasonably interferes with work performance or creates a hostile, intimidating or offensive environment

EMPLOYEE-EMPLOYEE HARASSMENT

- Employer’s knowledge
 - Knew or should have known
- Immediate and appropriate corrective action
 - Reasonably calculated to end the harassment and prevent recurrence
- Actions by third parties

SUPERVISOR LIABILITY

- Tangible Employment Action
 - Strict liability
- No tangible employment action
 - Employer takes reasonable care to prevent and correct promptly
 - and*
 - Employee unreasonably failed to use employer's preventive or corrective options

INSTITUTIONAL REQUIREMENTS

- Contractual Obligations
 - Collective bargaining agreements
 - Employee handbooks
 - Individual employee contracts



OTHER LEGAL REQUIREMENTS

- Conflicting state requirements
 - State laws
 - State administrative rules and regulations
- Choice of IHE to accept federal funding

OTHER ISSUES

- Procedures
 - Serial or parallel
 - Clearly identify what applies to employees
- Student employees
- Clergy obligations to employees
- Notification to all employees and applicants (§106.8)

WHERE?

JURISDICTION

- No distinction between on- or off-campus
 - If in a location, at an event, or in circumstances that meet the definition
- Only in the United States
 - Harassment must occur against a person *in the United States*
 - Study abroad & foreign employment

BUT DON'T FORGET...

- May apply other institutional conduct standards and procedures
- Clery applies to students and employees regardless of location.
- Title VII applies to U.S. citizens working for U.S. corporations abroad.

EDUCATION PROGRAM OR ACTIVITY

- §106.44(a): Locations, events, or circumstances over which IHE exercises substantial control over *both* the respondent and the context in which the sexual harassment occurred
- Any building owned or controlled by a recognized student organization
- Training on the scope of the institution program or activity

WHEN?

ACTUAL KNOWLEDGE

- §106.30 (a): Notice to Title IX Coordinator or *any official who has authority to institute corrective measures*
- Sexual harassment or allegations of sexual harassment
- No vicarious liability, constructive notice or “should have known”

OFFICIAL WITH AUTHORITY

- Authority to institute corrective measures
- Not an official with authority (OWA)
 - An official with only the ability or obligation to report
 - An official with only the ability or obligation to inform student about how to report
 - An official having been trained to report or inform students how to report
- Respondents are not OWAs

IMPLEMENTATION ISSUES

- Institutions determine who is OWA
 - Institutions decide who must, may or may only with a student’s consent report sexual harassment.
 - Make a list of who has authority
 - Need not give notice of all OWAs only Title IX Coordinator information
- Responsible employees
 - No longer in regulations
 - Institutions now may want to re-conceptualize if or how they will designate.
 - May require employees to inform IHE
 - Resident Assistants

RETALIATION §106.71(a)

- No retaliation by any person to interfere with any right “secured by Title IX”
- No retaliation for
 - Making a report or complaint
 - Participating or refusing to participate
- Filing charges regarding conduct that arises out of the “same facts or circumstances” but does not involve sex discrimination

CONFIDENTIALITY

- IHEs must keep confidential the identity of any individual
 - Who has made a report or filed a complaint
 - Who has been reported as a perpetrator
 - Who has been a witness
- Exceptions
 - FERPA
 - Legal obligations
 - Carry out the purposes of these regulations

RETALIATION AGAINST EMPLOYEES

- Future employment decisions
- Employment references
- Licensing Boards

HOW?

THE INITIAL REPORT

- Anyone may report
 - Not automatically a formal complaint
- Institution response to notice
 - Offer of supportive measures
 - Explanation of formal complaint process
 - Compare to Clery

MAKING REPORTS

- Who
 - Any individual
 - alleged to be the victim of conduct that could be sexual harassment
 - Distinguish from Formal Complaint
- Against Whom
 - Any individual
 - Reported as perpetrator of conduct that could be sexual harassment
 - Distinguish from Formal Complaint

INSTITUTION RESPONSE

- Promptly contact the Complainant to discuss the availability of supportive measures
 - Consider complainant's wishes
 - Make clear available with or without formal complaint
- Explain the process for filing a formal complaint
- Treat complainants and respondents equitably
- Consider Clery obligations

SUPPORTIVE MEASURES §106.30(a)

- Non-disciplinary, non-punitive individualized services
 - Impose actions that are disciplinary sanction or not supportive measure only *after* a grievance process
- Appropriate, reasonably available, free to complainant or respondent
- Restore equal access without unreasonably burdening the other party
- Confidential, if possible

EMERGENCY REMOVALS §106.44(c)

May remove respondent from *education program or activity* if:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal,
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.

BUT...



- This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the American with Disabilities Act.
- Review disability policies regarding danger to self or others

EMERGENCY REMOVALS

Other Points to Consider:

- Not limited to instances of sexual assault
- Who will conduct the assessment and make the decision?
- Beyond verbalized threats, what information will be considered?
- Institution can determine the scope of removal.
- No specific timeframes – may (not required to) reassess
- What will respondent’s ability to challenge it look like?
- Separate from non-student employee Administrative Leave

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Title IX Coordinator Training Online Course

Class Three: The Grievance Process – Hearings & Appeals

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April 25, 2023

PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

Class Overview



- Due Process / Fundamental Fairness
- Credibility Determinations
- Advisors
- The Written Determination
- Appeals

Due Process (Fundamental Fairness)

The Process That Is Due

A Fair Process:

- that follows the law,
- is implemented without bias, stereotypes or pre-judgment, and
- provides an equal opportunity for parties to be heard and present evidence,
- allows the decision-maker(s) to reach a determination consistent with the standard of evidence.

Title IX Sexual Harassment Grievance Process: Elements of “Due Process”



- Notice to the Respondent of the allegations
 - Opportunity to respond
 - Adequate opportunity to prepare before responding
- Notice to the Parties of the process that will be used, including appeals
- Opportunity to present evidence and witnesses
- Cross-examination, including questioning of witnesses
- Live hearing (in separate spaces upon request and as appropriate)
- Opportunity to have advisors of choice

State the Standard of Evidence



Same standard of evidence for all.

Either:

- *Preponderance of the evidence, i.e., more likely than not; **or***
- *Clear and convincing evidence, i.e., substantially more likely to be true than not.*

And Not:

- *Beyond a reasonable doubt (no other reasonable explanation possible – criminal cases).*

Relevance & Credibility Determinations



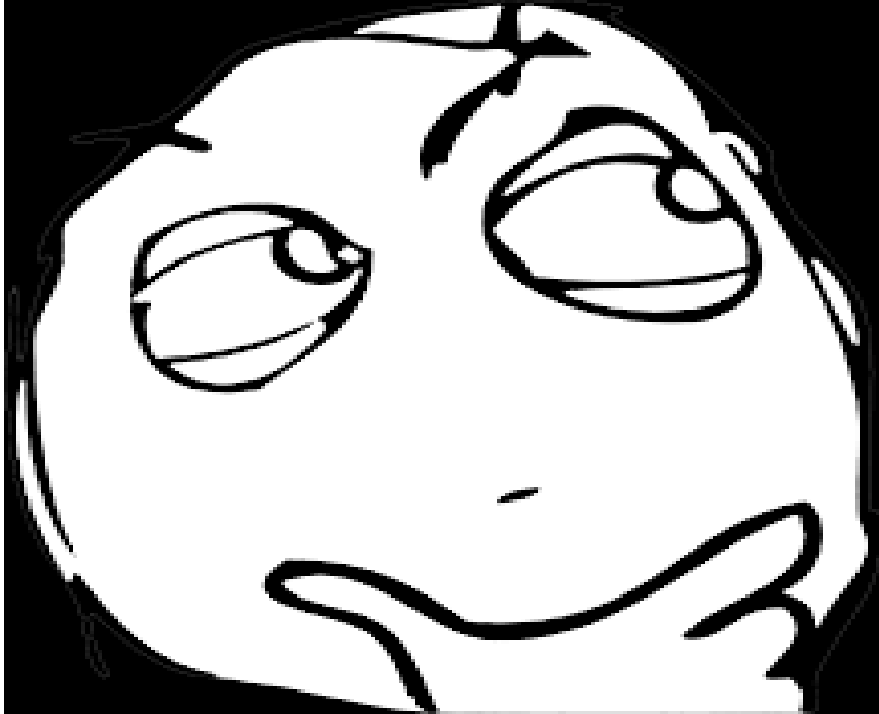
In Hearings:

- Decision-maker must evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility – and must do so “objectively”
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- Make It Easy: “Not probative of any material fact.”

Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of evidence.
- A school can adopt rules around weighing of evidence so long as they do not conflict with the regulations and they apply equally to both parties.
 - For example: A school may adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.

Credibility Considerations



- What evidence is most believable?
- Corroborating evidence
 - Other testimony
 - Physical evidence
- Consider faulty memories
- Explore reasons for inconsistencies
- There are no “perfect” witnesses, complainants or respondents

Factors to Weigh

- Consider each material fact separately.
- Credibility as to the facts:
 - Credibility on one fact doesn't make all of that person's testimony credible, and
 - Lack of credibility on one point doesn't make all of that person's testimony non-credible.
- Does the testimony feel rehearsed or memorized?
- Is the testimony exactly the same as another witness?
- Does the testimony make sense?
- Is the testimony detailed, specific & convincing? If not, is there a reason?
- Is it a statement against interest?
- Less credible witness isn't necessarily being dishonest.

Caution



- Eyewitness accounts
- Bias/Assumptions about witness credibility that may not take account of cultural norms or may stereotype.
- Assumptions about memory that may not reflect witness experiences.
- Failure of decision-maker to explain credibility determinations.

The Decision- Maker (Hearing Officer)

Getting Ready

- Self-identify any conflict of interest or bias.
- Prepare, prepare, prepare.
- Read the report carefully and repeatedly, but don't prejudge.
- Understand the conduct at issue and the elements of the alleged violations.
- Identify areas of agreement and disagreement.
- Determine if there are areas that require further inquiry, e.g., did the investigator explore & consider all the relevant evidence?

Hearing Decorum

- Points to Consider:** May have rules that:
- Require advisors be respectful and prohibit abusive/intimidating questioning.
 - Deem repetition of the same question irrelevant.
 - Allow for removal of advisors.
 - Specify any objection process.
 - Govern the timing and length of breaks to confer, and prohibit disruption.
 - Require that *parties* make any openings and closings.
 - Who will enforce the rules of decorum?
 - How will you train decision-makers?

Advisors

Advisors



- Parties must have the opportunity to have an advisor present during any grievance proceeding (hearing or related meeting).
- A party may choose not to have an advisor.
 - However, the institution must provide an advisor to question and cross-examine witnesses if the party isn't accompanied by one.
 - Institutions may require parties to provide advance notice of their advisor's attendance.
 - What if they are a no-show?
- Advisor provided by institution need not be an attorney.
 - Need not be of "equal competency."
- May establish guidelines for advisors.
 - Role of advisors in hearings and meetings.
 - Use of non-disclosure Agreements.

More on the Advisor's Role



- Provide support and advice to the party.
- Understand the allegations and the process.
- Understand the purpose and scope of questioning and cross-examination.
- Ask questions that elicit relevant information.
- Wait for relevancy determinations after asking a question.
- Adhere to rules of decorum and encourage the party to do the same.
- NOTE: Institutions may remove disruptive advisors ... *carefully*.

Working with the Parties' Attorneys

Advisor or Legal Representative

- Clarify procedures and role in advance.
- Distinguish between advisor and legal representative.
- Emphasize the “ground rules” - provide any rules of decorum.
- Establish lines of communication and points of contact.



Written Determination

Written Determination

- Identification of allegations potentially constituting sexual harassment
- Description of the procedural steps
- Findings of fact supporting the determination
- Conclusions regarding the application of the code of conduct/policy to the facts
- Statement of and rationale for the result as to each allegation, including sanctions and whether remedies will be provided
- Appeal procedures and grounds

Appeals

Appeals

Must provide an appeal from a determination of responsibility and dismissal of a formal complaint, based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- Inappropriate or impermissible dismissal of any formal complaint or allegation.
- May include other grounds, equally available to both parties.

Appeal Process



- Notify other party upon receipt of appeal.
- Appeal decision-maker can't be Title IX Coordinator, investigator or hearing decision-maker.
- Opportunity for both parties to submit written statement.
- Written decision with the result and rationale simultaneously to both parties.

NPRM:

REMEMBER: NOT IN PLAY NOW



Proposed Changes



- Notice of allegations may be delayed in response to legitimate safety concerns
- Live hearing permitted, not required, for hearings involving students
 - In a live hearing, parties must be permitted to participate from separate locations
 - Must provide both parties a reasonable opportunity to review and respond to evidence before the live hearing. It may provide the same opportunity during the live hearing
 - In live hearings, allow each party's advisor, never the party, to ask all relevant and otherwise permissible questions
- Provide a process that allows decision-maker to assess the credibility of the parties and witnesses to the extent credibility is relevant and in dispute
 - Decision-maker may not rely on statements of a party if the party does not respond to questions related to the party's credibility, but also may not draw an inference about whether sex-based harassment occurred based on that refusal
- Relevance is defined (!!!)
- Take reasonable steps to address unauthorized disclosure of evidence and information
- Decision-maker must determine if each question is permissible prior to the question being posed and explain the decision to exclude any question
- Use a preponderance of the evidence as the standard of proof unless the school uses a clear and convincing standard of proof for in comparable proceedings, e.g. considering other complaints of prohibited discrimination.
- No imposition of sanctions for false statements based solely on whether sexual harassment occurred
- Requirement to describe range of supportive measures and potential disciplinary sanctions applies only in response to sex-based harassment
- Title IX Coordinator is responsible for implementing remedies on a finding that sex discrimination occurred

Questions?

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Title IX Coordinator Training Online Course

Class Four: Anatomy of an OCR Investigation

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PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

Class Overview



- Demystifying the OCR's Multi-Phase Process
- Understanding different aspects of OCR's Case Processing Manual
- Practical Points to Consider in Working with OCR
- Summary

Why is this Important to You?

- OCR is the primary enforcement agency regarding Title IX, which may make your department more likely to interact with them
- OCR's process is its own, meaning that responding to OCR often looks different from responding to litigation or even responding to other civil rights enforcement agencies
- Most importantly, understanding OCR's perspectives and the way that it approaches its role can help you maintain policies, files, and other materials in a way that is helpful to you and eases the burden of an OCR review

What Complaints Does OCR Handle?

- OCR enforces several laws, including:
 - Title VI
 - Title IX
 - Section 504 of the Rehabilitation Act and Title II of the ADA
 - Age Discrimination Act
- DOJ, HUD, and EEOC may also conduct investigations that overlap into these areas, *e.g.*, DOJ reviews disability issues under Title III of the ADA, sexual misconduct issues under VAWA; HUD may take service animal/emotional support animal cases in housing
- OCR may refer complaints to DOJ for enforcement and DOJ occasionally transfers cases to OCR for investigation

Demystifying the OCR Process

- The main phases of an OCR complaint investigation:*
 - Notification to the Institution
 - Early Resolution Options
 - Data Requests
 - Investigation
 - Negotiation and Monitoring of Resolution Agreements (if necessary)

***Note that OCR can also conduct broad, agency-instituted compliance reviews, but they typically follow these same phases**

OCR Investigations: Resources

- OCR Complaint Processing Manual (July 2022)
- Dear Colleague Letters and Enforcement Guidance by Statute
- Prior OCR/DOJ Resolution Letters by Statute
 - Understand that OCR does not publish all letters
- Case law can be helpful, but OCR does not always recognize court precedent unless it is directly on point and typically only federal cases (but see state cases in CA that require certain process)

Phase I: Evaluating the Complaint

OCR evaluates the complaint to determine whether it can investigate:

- Does the complaint allege a violation of law enforced by OCR?
- Was the complaint filed within 180 days of last act which complainant alleges to be discriminatory?
- OCR may:
 - Contact complainant for clarification
 - Waive 180 day filing requirement at its discretion
 - Do all of this without the institution knowing it's happening!

Phase I: Evaluating the Complaint

OCR may administratively close/dismiss the Complaint if, *e.g.*:

- Complaint does not state a violation of a law OCR enforces
- Complaint is not filed timely
- Complaint is unclear/incomplete and complainant did not provide OCR with clarifying information
- Complaint has been investigated by another federal, state, or local civil rights agency and resolution meets OCR regulatory standards
- Same allegations have been filed by same complainant against same school in state or federal court

Phase I: Strategies

- There's not much an institution can do to advocate with OCR when it has advance notice that a complaint is headed to OCR
 - OCR uses this period to determine whether it has jurisdiction and sufficient facts to investigate
 - OCR typically does not appreciate outside opinions at this early stage of the process; any efforts to intercede should be very delicate and only in appropriate scenarios
- When should an institution intercede?
 - A fundamental premise is inaccurate that might lead to dismissal
 - The matter in question is currently being heard internally at the institution and the process is not completed, or it has been filed in court or with another agency

Phase II: Notification of Investigation

- OCR sends “**Letter of Notification**” to the institution and the complainant if it determines it will open the complaint for investigation. This letter typically includes:
 - OCR’s jurisdiction
 - A brief factual description and allegations to be investigated
 - A statement that OCR is a neutral party
- OCR may refuse to disclose the identity of the student/group bringing the complaint
- OCR may consolidate multiple similar complaints into a single investigation
- OCR may convert a complaint into a broader compliance review

Phase II: Notification of Investigation

- Notification letters are not typically detail heavy
- OCR will typically provide Case Processing Manual link and the complaint, but some offices only provide the complaint upon request and/or with heavy redactions
- **Make FOIA request**
 - Simple to do and usually costs nothing; cost only if it is overly large
 - OCR is required to respond; but may deny the request until the investigation is concluded
 - Complaint should be made available per OCR policy, but may request additional information, *e.g.*, documents submitted by complainant or prior complaints against the institution

Phase II: Strategies

- Review regulatory provisions cited by OCR for insight into what OCR will investigate, *e.g.*, facts may cloud the fact that OCR is only focused on the publication of a policy or whether a certain notice is provided.
- OCR will remind the institution that it may not retaliate against any complainant or any person who participates in OCR investigation; make sure that is understood by relevant community members who may interact with the complainant.

Early Resolution Options

- Rapid Resolution Process: Cases chosen by OCR because resolution seems more straight forward or timing is an issue. Often precedes the notification letter and could obviate a finding of any sort.
- Mediation: An OCR-facilitated process:
 - Available only where OCR deems “appropriate.”
 - Both parties must agree to mediate; if unsuccessful the case goes back to investigation. (Different OCR staff mediate v. investigate.)
 - Ultimate agreement not typically monitored by OCR unless a breach is alleged and, even then, OCR typically will revert to investigating the original allegations and not the breach.

Voluntary Resolution

- Institutions may seek to affirmatively resolve complaint before conclusion of the investigation by initiating negotiations for a Resolution Agreement (a/k/a “302 Agreement,” because it’s defined under CPM Section 302)
- Appropriate when the institution agrees to forego the investigation and enter a compliance agreement on some or all issues
- OCR reserves the right to include any fact learned to date in the Resolution Letter, which may create a strategic advantage in requesting a Voluntary Resolution early if you know that is where it may be headed
- Typically, 30 days to negotiate any resolution; OCR “may” pause the investigation during this period, negotiations may continue – OCR retains significant discretion

Phase III: Data Request

- OCR will include a Data Request with Notification letter:
 - Requests documents, policies, practices, data and explanations
 - Offers opportunity for the institution to provide additional information at its discretion
 - OCR is exempt from FERPA, but there are FOIA issues to consider
- Must respond within date on letter, usually 10-30 days
 - Brief extensions may be granted on request; not limitless
 - Keep in mind OCR has an internal clock for case processing and that clock runs from date OCR receives complaint; seek to understand pressure points and consider rolling production

Phase III: Strategies

- Maintain updated and comprehensive records of trainings
- Maintain accessibility and consistency of policies
- Begin gathering information *promptly* upon receipt of Notification Letter; clearly communicate delays with OCR staff
- PROVIDE A NARRATIVE: This is an opportunity to educate OCR staff; can also propose relevant witnesses
- OCR does not have authority to compel production in a specific form or require the creation of materials; obligation can be satisfied by permitting OCR to come onsite and permit access

Phase IV: Onsite Visit

Types of Activities:

- **Interview employees**, including Title IX Coordinator and Deputies; Director of Student Conduct; Dean of Students; Resident Directors; Athletics Director; coaches; etc.
- **Interview students**, including those trained to respond to reports of sexual misconduct; member(s) of the judiciary/hearing board; members of student organizations; students involved in the grievance process
- **Focus group meetings**, involving community members (including students) who wish to meet with OCR to share their perception of climate on campus regarding presence and effects of sexual harassment
- **File review**, if not already completed (May ask OCR to only review certain sensitive material on campus so it does not end up in the government file.)

Phase IV: Strategies

- Be involved: The process can take clumps of days over an extended period of time. Be judicious in choosing battles
- Identify/suggest relevant witnesses to OCR
- Prepare witnesses
 - Demystify OCR staff by explaining types of questions and reasons OCR may be interested in certain policies/issues
 - Provide witnesses with relevant policies/procedures
 - Evidentiary rules don't apply; explain this to witnesses
 - Listen carefully to questions, but do not be untruthful
 - Share OCR "Rights of Witnesses" document

Phase IV: Strategies

- Determine appropriate role of counsel:
 - Will counsel sit in on interviews? Will counsel be able to ask limited questions? DO NOT assume that an OCR interview will be akin to a deposition or a trial proceeding
 - Certain lower level employees may have right to refuse to have anyone present during interview and to refuse to reveal interview content
- This is an opportunity to:
 - Demonstrate ongoing compliance efforts to OCR
 - Supplement data response as new information becomes apparent
 - Develop a relationship with OCR staff who will be critical in remaining phases of the case

Phase V: Compliance Determination

If OCR determines the institution is out of compliance with a legal requirement, it will issue a Resolution Letter and a Resolution Agreement:

- Resolution Letters are fact-intensive summaries that apply the law to OCR's factual findings, but OCR makes clear that they are not formal statements of OCR policy
- The Resolution Agreement then sets forth the agreed upon steps the institution will take to correct the compliance concern
- Resolution Agreements typically include specific monitoring requirements that often involve continued oversight by OCR

Phase V: Compliance Determination

- OCR may end Resolution Agreement negotiations at any time if there is an “impasse” or if 90 calendar day period expires. Letter provides OCR will issue findings within 10 days if resolution is not reached
- If institution and OCR are still unwilling or unable to negotiate, OCR will issue a Letter of Impending Enforcement Action
- After that, OCR will initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance, or refer to DOJ for litigation
- OCR may also move to defer any new or additional Federal financial assistance to school

Resolution Examples

Typical requirements in resolution agreements:

- Mandatory training, with OCR potentially reviewing and approving training content. Occasionally, OCR must approve trainer(s).
- Revision of policies and submission of policies to OCR for approval within a specific period.
- Climate surveys or other assessments in the area of concern.

Phase V: Strategies

Seek details on findings to understand how to narrow agreement terms to findings:

- Discuss proposed terms and how they align with legal/factual concerns
- Review and be prepared to discuss OCR recent resolution letters addressing the same statute and similar facts

Focus on flexibility for the institution

- What is a realistic time period for compliance?
- Have a candid conversation to try to determine OCR's internal flexibility (or inflexibility – often not driven by regional office) on certain issues, *e.g.*, timing

In Summary ...

- An OCR investigation requires significant internal resources to address data requests and onsite visits
- Be an active participant, as appropriate, in each stage of the process
- Identify and begin taking steps to remedy possible vulnerabilities upon notice of complaint
- Organize files and processes as part of school's regular operations – not just if there is an OCR investigation

Questions?

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Title IX Coordinator Training Online Course

Class Two: Conducting a Title IX Investigation

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April 18, 2023

Class Overview:



- Case Study – Review of Class I Concepts
- Investigations
 - Impartiality/Conflicts of Interest
 - Investigations Involving Employees
 - Investigating a Formal Complaint
- Understanding Relevance
- Investigative Report
- Violations of Other Policies
- NPRM Changes

Case Study

Part I: Reviewing Class 1 Concepts.

Anna Smith,
the Title IX Coordinator
at NACUA University,
woke to the following
email in her inbox.

To: TitleIX@nacua.edu
From: Prof. Jones, Dean, College of Arts & Sciences
Date: Wednesday, October 21, 2022

This morning, a student named Jordan Jones told me that they were sexually assaulted over the weekend and couldn't finish a paper in time. I spoke with Jordan at length about what happened and Jordan gave me permission to share this information with you. This isn't the first time I've learned of something like this. I need to know what I'm supposed to do. Heads up – the perp is in another class of mine.



Initial Outreach to Jordan Jones

Ms. Smith receives the following email that same day:

Is this a formal complaint, triggering an investigation under your school's Title IX policy?

To: TitleIX@nacua.edu
From: Jordan Jones
Date: October 21, 2022

Thank you for reaching out. On the way home from a party downtown Saturday night, I went with Riley Krill to his room at the ABC Fraternity house. That's where Riley raped me. At this point, I really just want Riley to have to meet with you and me, so that we can both tell him what Riley did was wrong. If Riley apologizes, I don't want to take this any further. I can meet tomorrow, at the time you suggested.

Jordan meets with Ms. Smith and decides to file a formal complaint.

Before calling Riley in for an interview, Ms. Smith needs to send a Notice of Allegations to Riley and Jordan. This is what it contains:

Is anything missing?

NOTICE

- Access to the Title IX-compliant policy.
- Notice of the allegations that may constitute the prohibited conduct, with sufficient detail for Riley to prepare a response before any initial interview.
- Notice of the Parties' entitlement to an Advisor of choice.
- The identity of the Investigator – Jean McDonald.
- Notice that the Parties may inspect and review evidence gathered during the investigation.
- Notice that the University's policies prohibit knowingly making false statements or knowingly submitting false information.

The day after she issues the notice of allegations, Ms. Smith receives the following email:

What should Ms. Smith do?

To: TitleIX@nacua.edu
From: Amanda Law
Date: October 24, 2022

I represent the Krill family. I have learned that Riley Krill is being falsely accused of rape, and I am writing to have the unfounded charges dismissed immediately. Riley's parents and I will not permit Riley's education to be disrupted by a vindictive college student with an ulterior motive. Jordan Jones is bitter because Riley didn't reciprocate Jordan's feelings after they had a fully consensual sexual encounter. If the University insists on pursuing this matter, the Krills will take all legal measures available to them.

Investigations

Impartiality, Bias, Prejudgment & Conflict of Interest



Investigations Involving Employees

The Basics:

- The regulations also apply to employee complainants and respondents in matters involving allegations of Title IX sexual harassment.
- Investigations of formal complaints of conduct potentially constituting Title IX sexual harassment involving employees must comply with the regulations.
- Institutions must use the same procedures and standard of proof to address employee and student allegations of Title IX sexual harassment.

However:

- Title VII also applies.
- The Title VII and Title IX requirements are not completely aligned. For instance, Title VII may provide for broader remedies than Title IX.
- Collective bargaining and other contractual obligations may also apply.
- OCR expects institutions to comply with *all* requirements.

Title VII



- Standards
 - Submission becomes a term or condition
 - Unreasonably interferes with work performance or creates a hostile environment
 - Employer knew or should have known
- Immediate and appropriate corrective action
 - End the harassment and prevent recurrence

Special Considerations

- Administrative leave
- Title IX
 - “Reasonably prompt timelines,” and
 - Supportive measures must be non-punitive and non-disciplinary until the process is complete
 - Administrative leave for non-student employees as well as emergency removal.
- Title VII
 - “Immediate and appropriate corrective action”



Investigating a Formal Complaint

Conducting an Investigation



- Don't restrict the ability of either party to discuss allegations or gather evidence.
- Provide parties written notice sufficient to prepare.
- Allow parties an equal opportunity to identify witnesses, as well as inculpatory and exculpatory evidence.
- Allow parties to have advisors.
- Don't access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without the party's voluntary, *written* consent.

Interviews



Consider whether interviews will be:

- Recorded or not recorded.
- Followed with written statements or summaries.

What does your policy say?

When interviewing, the investigator must:

- Be free of conflicts of interest.
- Be prepared.
- Be objective, unbiased, and free from stereotypes.
- Avoid prejudging parties or responsibility.
- Demonstrate respect for all parties and witnesses.
- Take the lead in seeking evidence (inculpatory and exculpatory) – it is not the parties' responsibility to investigate.
- Be alert to/consider carefully non-verbal communications.

Evidence: Directly Related vs. Relevant

Investigation vs. Hearings:

- **Investigations:** Directly Related to the Allegations
- **Investigation Report:** Relevant Evidence
- **Hearings:** Relevant Evidence
- “The Department acknowledges that the evidence gathered during an investigation may be broader than what is ultimately deemed relevant and relied upon in making a determination regarding responsibility, but the procedures in § 106.45 are deliberately selected to ensure that all evidence directly related to the allegations is reviewed and inspected by the parties, that the investigative report summarizes only relevant evidence, and that the determination regarding responsibility relies on relevant evidence.”

Understanding Relevance

How is Relevance Defined?



- The Department declines to define certain terms in this provision such as “upon request,” “relevant,” or “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- The Regs do not adopt the Federal Rules of Evidence.

September 4, 2020 Guidance from OCR

So What Is the Ordinary Meaning of the term?

- Evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence; *and*
 - The fact is of consequence in proving or disproving the allegations.
- In other words: Does the evidence tend to prove or disprove the allegations?
- A determination regarding relevancy can rely on logic, experience or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/rules/fre/rule_401

BUT YOU JUST SAID ...



Should All Relevant Evidence Be Considered?

- Schools are not permitted to adopt rules that would exclude relevant evidence, e.g., that may be deemed to be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A school may not exclude relevant evidence (e.g., lie detector test results, or rape kits) unless the evidence is identified as “NOT RELEVANT” under the Regulations.

What Evidence is “NOT RELEVANT” Under the Regulations?

- A party’s treatment records, without the party’s prior written consent [§106.45(b)(5)(i)];
- Information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
- Questions or evidence about a complainant’s sexual predisposition, and questions or evidence about a complainant’s prior sexual behavior unless offered to prove
 - that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. [§ 106.45(b)(6)(i)-(ii)];

AND (as we will address with hearings)...

- Although the regulations provide that a decision-maker may not rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)], this provision is *not enforced by OCR but may apply under state law or law in some federal circuits.*
- A school's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the school should be detailed in its Title IX training materials.



Weighing of Relevant Evidence

Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of evidence.
- A school may adopt rules around weighing of evidence so long as they do not conflict with the regulations and they apply equally to both parties.
 - For example: A school may adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.

Completing the Investigative Report

Review of Evidence

10

- Parties must have equal opportunity to inspect and review *all* evidence directly related to the allegations.
- Schools must:
 - Provide access to evidence to both parties and their advisors.
 - Allow the parties at least 10 days prior to inspect, review and respond to the evidence prior to completion of the investigative report.
 - Consider parties' written response before completing report.

Evidence Review - What do parties get to see?

- **Any evidence that is *directly related* to the allegations raised in the Title IX formal complaint.**
- This includes evidence that is:
 - (1) relevant,
 - and/or*
 - (2) directly related.
- Only relevant evidence is included in the Investigative Report.

Investigative Report



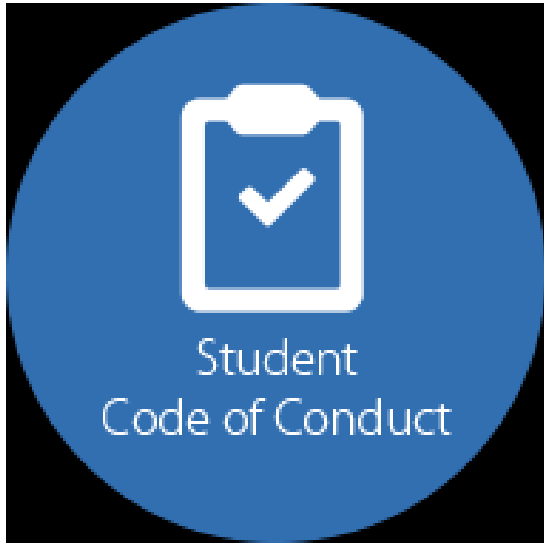
- Must fairly summarize the relevant evidence.
- Must provide the report to parties and their advisors for review and response at least 10 days before hearing.
- Either electronic or hard copy

Recommendations Regarding Responsibility

- Investigative Reports MAY include a recommendation regarding responsibility and related analysis.
- **However:** “The decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.” [Preamble, Fed. Reg. Vol. 85, No. 97, May 19, 2020, p. 30308]
- Decision-makers must make independent decisions based on:
 - Investigative report and related evidence, and
 - Information presented at hearing, including information resulting from cross-examination.

Violations of Other Policies

Violations of Other Policies



- Knowingly making false statements or submitting false information
 - Being alert to potential claims of retaliation
- Sexual Harassment not covered in the regulations but violating campus policies
 - Violations occurring in programs or at locations outside the current definition
 - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards

Remember to update notice with later-discovered allegations.

NPRM:

REMEMBER: NOT IN PLAY NOW



Proposed Changes

7/22 and 4/23



- Handling complaints
 - All allegations of sex discrimination, including sexual harassment, must be handled using procedures required by the regulation.
 - The single investigator model is permitted with provisions prohibiting bias or conflicts of interest in addressing all complaints of sex discrimination.
- Title IX Coordinator
 - May investigate and/or decide Title IX grievances.
 - Must monitor for barriers to reporting and take steps to address
- **NEW** - Eligibility Criteria for Male and Female Athletic Teams
 - Sets limits on the criteria that that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity.
- Investigations
 - Burden is on the institution to gather evidence
- Relevance is defined (!!!)
- Institutions must provide parties a description of the relevant evidence
- Requirements that apply only to sexual harassment complaints involving students at post-secondary institutions
- Require all, except confidential, employees to notify the Title IX Coordinator of possible sex discrimination
- Clarify obligations to students and employees who are pregnant or experiencing pregnancy-related conditions

Questions?

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Title IX Coordinator Training Online Course

Class Five: Title IX Training & Policies

Marjory Fisher

Associate Vice President and Title IX Coordinator, Columbia University

Melinda Grier

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Education and Sports Law Group

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Vice President for the Office for Institutional Equity, Duke University

May 31, 2023

PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

Class Overview



- Audiences To Be Trained
- Elements of a Good Training Program
- Benefits and Perils of Trauma-Informed Training
- Auditing Training Materials
- Developing and Revisiting Policies
- Records Retention and Posting

Who Do You Train?

The Regulations (Title IX Personnel)

- Title IX Coordinators
- Investigators
- Decision-makers
- Anyone who facilitates an informal resolution process



Consider Training Others, even though not Required by the Regulations

- Title IX staff who are not identified by the regulations
- Officials With Authority to take corrective measures
- Other individuals with the responsibility to report sexual harassment – former Responsible Employees
- Campus Safety Authorities (CSAs)
- The Campus Community
- Confidential employees

And Athletics!



- NCAA Board of Governor's Policy:
https://ncaaorg.s3.amazonaws.com/ssi/violence/NCAA_CampusSexualViolencePolicy.pdf
- [NCAA Sexual Violence Prevention Tool Kit](#)
- [Task Force Recommended Timeline](#) (PDF)
- [Task Force Recommended Checklist](#) (PDF)
- [Administrator FAQ](#)
- [Student-Athlete FAQ](#)

Access Sample Policies and Procedures:

- Select the “Membership” tab on [ncaa.org](https://www.ncaa.org).
- Select “My Apps” from the dropdown menu and log in using your affiliated credentials. *Note: If you do not have access to MyApps please contact your NCAA Applications Administrator at your school or conference to gain access.*
- Select the “Membership Secure Resources” icon.
- Review the legal disclaimer and view the current sample policies and procedures documents that are available.

Annual Attestation Process Resources

NCAA Policy & Principles

- 2014 NCAA Board of Governors resolution – addressing sexual violence is integral to responsible intercollegiate athletic programs
- 2017 Association Policy adopted. Multiple updates/revisions
- Overarching Policies
 - Athletic Department integrated into overall campus policies & processes addressing sexual and interpersonal violence.
 - Ongoing, comprehensive education for student-athletes, coaches and athletic administrators using the NCAA Sexual Violence Prevention Toolkit as a guide.
 - Athletic programs should serve as leaders to support campus-wide sexual and interpersonal violence prevention initiative, including involvement of student-athletes in meaningful ways.

Required Annual Attestation Re: Training to be signed by University Chancellor/President, AD and Title IX Coordinator

1. The athletics department is informed on, integrated in, and compliant with institutional policies and processes regarding sexual violence prevention and proper adjudication and resolution of acts of sexual and interpersonal violence.
2. The institutional policies and processes regarding sexual violence prevention and adjudication, and the name and contact information for the campus Title IX coordinator*, are readily available within the department of athletics, and are provided to student- athletes.
3. All student-athletes, coaches and staff have been educated each year on sexual violence prevention, intervention and response, to the extent allowable by state law and collective bargaining agreements.

NCAA Policy Update in the Next Class – For this Year

4. All incoming, continuing, and transfer student-athletes must complete an annual disclosure related to discipline or criminal conviction for sexual, interpersonal or other acts of violence.
5. Institutions have taken reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined or criminally convicted of sexual, interpersonal or other acts of violence.
6. Institutions recruiting an incoming or accepting a transfer student-athlete must have a written policy directing staff to gather information from former institution about whether student-athlete left under threat of discipline, was disciplined, or was criminally convicted for sexual, interpersonal, or other acts of violence.

Elements of a Good Training Program

Planning & Preparation

- Who must or will be trained and on what topics?
- Who will conduct training?
- What are the *most effective* and efficient methods of training?
 - In person, hybrid or virtual
 - Combination or by constituent groups
 - Timing
- What training resources are available, including internal?
- What are campus priorities with respect to training/education?
- How will you address issues of bias and avoid stereotypes?

Required Training

A school must ensure that Title IX Personnel receive training on:

- the definition of sexual harassment;
- the scope of the institution's education program or activity;
- how to conduct an investigation and the grievance process including hearings, appeals and informal resolution processes, as applicable; and
- how to serve impartially

Required Training

Title IX Personnel training continued:

- Avoiding prejudgment of the facts at issue, conflicts of interest and bias.
- The impact of intersections of identity: sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic.
- Implicit bias.

Required for Investigators



- Conducting a fair and thorough investigation.
- Determining relevance in order to prepare an investigative report that fairly summarizes relevant evidence.

Required for Informal Resolution Facilitators



- How to conduct informal resolution processes. (85 FR 30405)
- Document or make public?

Required for Decision-makers:



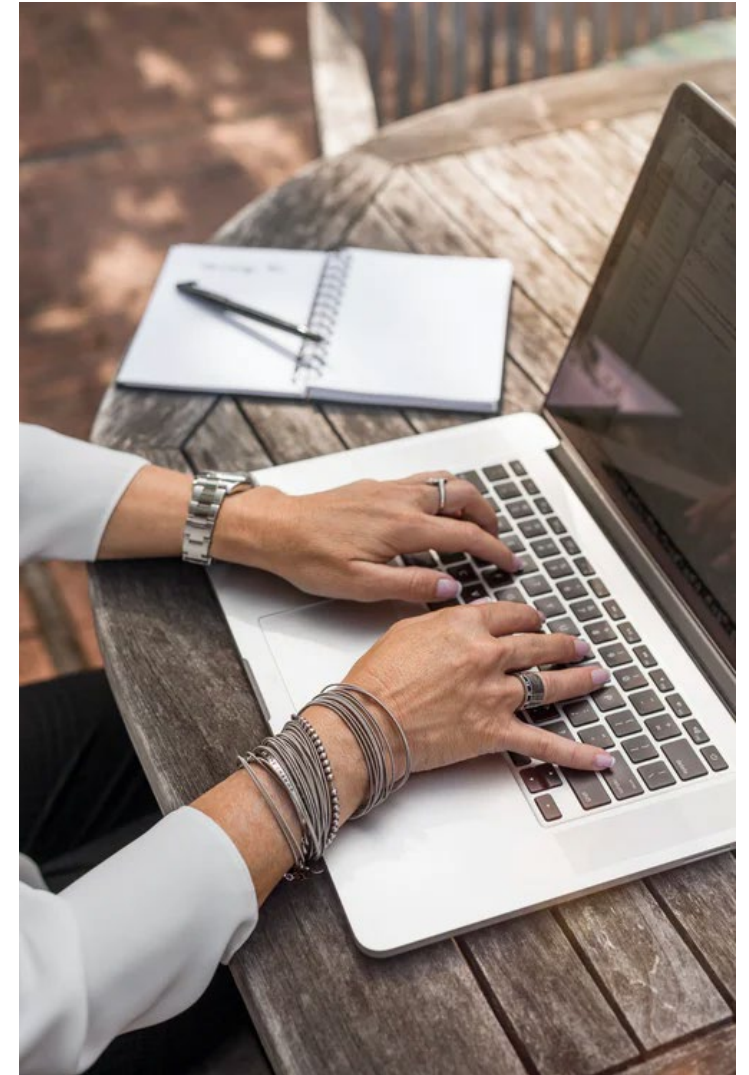
- Training on any technology to be used at a live hearing.
- Training on issues of relevance, including how to rule on evidence during a hearing and how to apply the rape shield protections provided only for complainants.
- Include training around the presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

Other Training Topics

| Investigator | Decision-maker |
|--|---|
| <ul style="list-style-type: none">• Questioning• Institutional policies• Responsibility for proposed findings and conclusions• Redacting privileged information• Coordinating investigation with supportive measures | <ul style="list-style-type: none">• Managing the process• Hearing protocol• Institutional policies• Questioning• Preparing findings and conclusions |

Training Transparency

- Post all training materials for Title IX personnel on publicly available website. (If no website, then make materials available for members of the public to inspect.)
- Ensure the materials posted are up-to-date, reflecting the most current training provided.



And Athletics!



Benefits and Perils of Trauma- Informed Training

How to Be Fair to All

| Benefits | Perils |
|--|---|
| <ul style="list-style-type: none">• May help those interviewed retrieve memories• May help those interviewed stick with the process• May prevent re-traumatizing witnesses | <ul style="list-style-type: none">• May be perceived to favor Complainants• May be perceived as less intense questioning or cross-examination of witnesses• May be misused by untrained questioners |

Auditing Training Materials

When & What to Audit

- Who was trained
- Was training effective
 - Measured outcomes
 - Observed outcomes
- How often to monitor
- Documenting monitoring



**Policies:
Management,
Notice, and
Some
Reminders**

Managing the Policies

| Developing policies | Monitoring policies |
|---|---|
| <ul style="list-style-type: none">• Existing institutional policies• Existing laws, agreements & practices• Identify conflicts and concurrences and harmonize or change• <i>Include stakeholders</i> | <ul style="list-style-type: none">• Changes in law, regulations, guidance or institutional needs• Changes in related laws or guidance, e.g. FERPA, state APA• Effectiveness• <i>Include stakeholders</i> |

Notification and Dissemination

- Title IX Coordinator contact info must be distributed and prominently displayed on the institution website, and in each handbook or catalog made available to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations with CBAs.
- Nondiscrimination Policy, stating:
 - that the institution does not discriminate on the basis of sex in education programs or activities it operates.
 - That the institution is required by Title IX not to discriminate.
 - That the institution's nondiscrimination policy extends to admission and employment.
 - That inquiries about the application of Title IX may be referred to the school's Title IX Coordinator, to OCR, or to both.

Adopt & Publish

- Adopt and publish:
 - grievance procedures that provide for the prompt and equitable resolution of student *and* *employee* complaints alleging *any* action prohibited under Title IX.
 - a grievance process that complies with 106.45 for formal complaints as defined in 106.30.

Notice

WHAT: Notice of the school's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school will respond.

TO WHOM: applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school.

Policy Decision Point: Framework

All-in-One Policy:

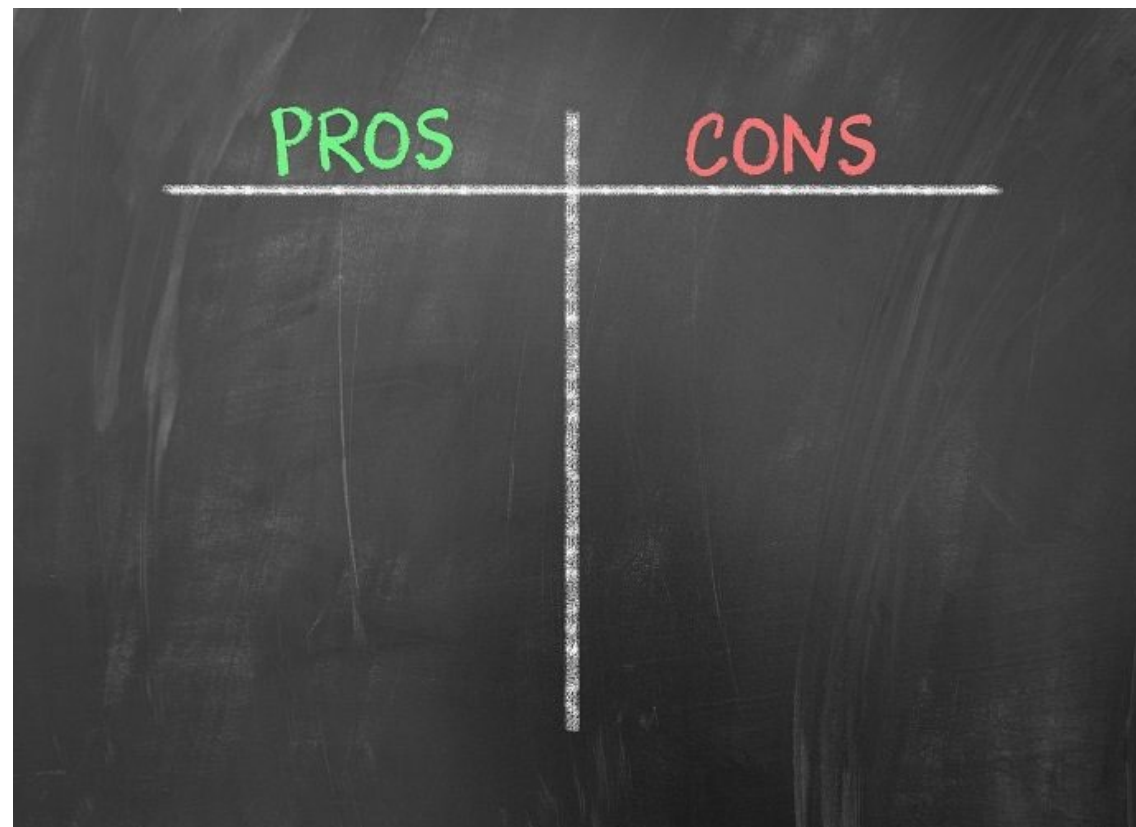
1. Treat all the Same; or
2. Decision Trees

Two Policies: If not TIX, then ...

1. Title IX Regulation+
2. Everything Else

Three plus:

1. TIX Regulation Conduct
2. Other Sexual Misconduct
3. Other Prohibited Conduct





Policy Definitions (examples)

Plus, Clery Annual Security Report Policies

- Title IX Coordinator
- Officials with Authority
- Other Reporters, if any.
- Confidential Resources
- Knowledge
- Complainant/Respondent
- Supportive Measures
- Formal Complaint
- Prohibited Conduct
 - Sexual Harassment
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking
- Consent
- Informal Resolution
- Evidence
 - Directly Related
 - Relevant
 - Weight
- Standard of Review
 - Deliberate Indifference
 - Education Program or Activity
 - Emergency Removal

FOCUS

Please Note:

Where there is a conflict between State or local law and Title IX regulations, Title IX regulations win.

Record Retention 7 Years



- **For formal complaints:**
 - Investigation
 - Determination of responsibility
 - Transcripts or recordings of hearings
 - Sanctions and/or Remedies, if any
 - Appeal, if any, and result
 - Informal resolution and result, if any
- **For all reports, regardless of whether there is a formal complaint:**
 - Actions taken and supportive measures, if any, provided in response to a formal complaint.
 - Basis for a determination that the institution was not deliberately indifferent.
 - Measures to restore or preserve equal access or reasons why not providing support was not clearly unreasonable under the circumstances.
- **All training materials for Title IX personnel**

And Athletics!



Accommodating Pregnant & Parenting Students

- Shall not discriminate based on pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery unless the student voluntarily requests to participate in a separate program or activity.
- Consider for pregnant & parenting students
 - Individualized academic plans
 - Programs and services designed to maintain educational progress
- Proposed regulations
 - Title IX Coordinator arrange reasonable accommodation





Proposed Changes

Required to train all employees

- When they must notify the Title IX Coordinator about sex discrimination
- How students can report sex discrimination
- The scope of conduct that constitutes sex discrimination

Title IX Coordinator required to monitor for barriers to reporting

Title IX Coordinator responsible for accommodations for pregnant & parenting students.

Training for employees who have responsibility related to grievance procedures or supportive measures:

- Specific topics & institution obligations
- Grievance procedures
- Serving impartially
- Relevance

Training related to informal resolution for facilitators

Identify and train all confidential employees

Questions?

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**Title IX Coordinator Training
Online Course: Fundamentals of
the August 2020 Regulatory
Requirements**

**Module 3: Policy and Training
Obligations**

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LLP
Melinda Grier, Melinda Grier Consulting PC
Janet P. Judge, Partner, Holland & Knight LLP


Disclaimer: Update of the information for the purposes of the course. Does not constitute legal advice.

Title IX Coordinator(s) §106.8

Designation:

- Regulations refer to Title IX Coordinator in multiple ways, suggesting that it may be one or more persons.
 - “At least one employee”
- Must be referred to as the Title IX Coordinator.
- Notification provisions apply to all personnel with this responsibility.

Any person may report sex discrimination, including sexual harassment to the Title IX Coordinator(s) at any time, day or night, in person, by mail, by email, by phone, or by any other means that results in notice (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual discrimination or sexual harassment).





**Policy versus
Grievance Process
versus Grievance
Procedures**

Dissemination of Policy §106.8

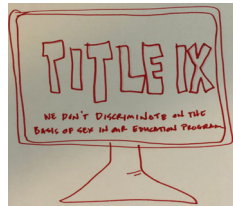
- Title IX Coordinator(s) contact info:
 - Name or Title, Office Address, Email, Telephone Number.
- Website.
- Handbook or Catalog.
- School must not use or distribute a publication stating that the school treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX.

| Required Notification Recipients |
|---|
| Applicants: Admission & Employment Students Employees Unions Professional Orgs with CBA/PAs |
| <u>Discuss: Parents/Legal Guardians*</u> |

Dissemination of Policy §106.8

Notification of Policy: Elements

- School does not discriminate on the basis of sex in its education program or activity.
- School is required by Title IX not to discriminate.
- School's nondiscrimination policy extends to admission and employment.
- Inquiries may be directed to the Title IX Coordinator, to the Assistant Secretary, or both.
- How to file a complaint language.*



Adoption of Grievance Procedures §106.8

- Adopt and publish:
 - grievance procedures that provide for the prompt and equitable resolution of student *and* employee complaints alleging *any* action prohibited under Title IX.
 - a grievance process that complies with §106.45 for formal complaints as defined in §106.30.

| Notice |
|--|
| WHAT: Notice of the school's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school will respond. |
| TO WHOM: applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school. |

Policy Decision Point: Framework

All-in-One Policy

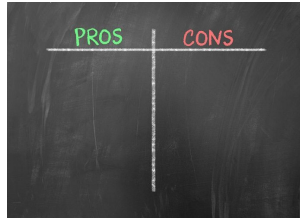
1. Treat all the Same; or
2. Decision Trees

Two Policies: If not TIX, then ...

1. Title IX Regulation+
2. Everything Else

Three plus:

1. TIX Regulation Conduct
2. Other Sexual Misconduct
3. Other Prohibited Conduct



Please Note:

“Nothing in this part may be read in derogation of any individual’s rights under Title VII of the Civil Rights Act of 1964”

Where there is a conflict between State or local law and Title IX regulations, Title IX regulations win.



Definitions (Suggestions):

- Actual Knowledge
- Complainant/Respondent
- Advisor
- Consent
- Formal Complaint
- Prohibited Conduct
 - Sexual Harassment
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking
- Supportive Measures/Remedial Measures
- Disciplinary Measures
- Title IX Coordinator
- Officials with Authority/Required Reporters
- Confidential Resources
- Evidence
 - Standard of Evidence
 - Directly Related
 - Relevant
- Deliberate Indifference
- Education Program or Activity
- Informal Resolution
- Emergency Removal

Policy Elements:

- Non-Discrimination Policy Language
- Filing a Complaint:
 - Title IX Coordinator: Office Address, Email Address, Telephone Number
- Response:
 - Supportive Measures, including Confidentiality (§106.30), as distinguished from Remedies.
- Emergency Removals: §106.44(c)



Grievance Process: Formal Complaints

- Equitable
- Formal Complaint/Actual Knowledge
- Jurisdictional Issues:
 - Dismissal of a Formal Complaint
 - Written Notice/Appeal
 - Option for Other Proceedings
 - Consolidation of a Formal Complaint
 - Investigations of a Formal Complaint
- Emergency Removals
- Notice of Allegations
- Supportive Measures
- Advisor of Choice/Guidelines



Grievance Process: Formal Complaints

- Informal Resolution Options
- No Conflict Provisions
- Range of Equitable Supportive Measures
- Investigations
 - Burden of Proof
 - Evidence/Rape Shield
 - Notice
 - Access to Evidence
 - Access to Investigative Report
- Confidentiality Provision



Grievance Process: Formal Complaints

- Hearings
 - Venue: Same or Separate Rooms
 - Decorum Provisions
 - Access to Evidence
 - Relevance Determinations
 - Standard of Evidence
 - Cross Examination Guidelines
 - Expert Witnesses
 - Recording
- Determinations of Responsibility/Notice
- Determination of Remedies/Sanctions, where appropriate
- Appeals



Grievance Process: Formal Complaints

- Possible Remedies/Sanctions
- Non-Retaliation
- Confidentiality/First Amendment
- Reasonably Prompt Timeframes
 - Short-Term, Good Cause Delays
 - Extensions of Time
- Recordkeeping
- Materially False Statements
- Training



TRAINING

Title IX Personnel



Training

A school must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:

- the definition of sexual harassment,
- the scope of the recipient's education program or activity,
- how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable.

Title IX Personnel:

- How to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest and bias.
- Including: sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic.

**Implicit bias training not required.

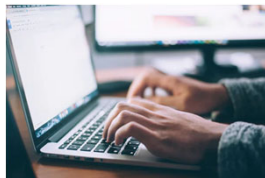
Training



Decision-Makers:

- Training on any technology to be used at a live hearing.
- Training on issues of relevance, including how to apply the rape shield protections provided only for complainants.
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

Training



Training



Investigators:

Training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Training:

- Must not rely on sex stereotypes
- Must promote impartial investigations and adjudications
- Must be maintained for 7 years.
- Must be posted on website, if any, or Available for members of the public to inspect.
- All Up-to-Date Training Materials



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**Title IX Coordinator
Training Online Course:
Fundamentals of the August 2020
Regulatory Requirements**

**Module 2: Formal Complaints,
Investigations & Grievance Procedures**

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Janet P. Judge, Partner, Holland & Knight LLP

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**THE FORMAL
COMPLAINT PROCESS**

2

The Formal Complaint

- Filed by the Complainant or signed by the Title IX Coordinator.
 - Title IX Coordinator ≠ Complainant
- Filed in person, by mail, by email or another approved method.
- Includes allegations of Title IX sexual harassment and requests that the IHE investigate those allegations.
- Complainant must be participating in or attempting to participate in the IHE's education program or activity at the time of filing.

§106.30(a)



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The Formal Complaint – Consolidation

- **May** consolidate formal complaints if sexual harassment allegations:
 - Are against more than one respondent, or
 - Are by more than one complainant against one or more respondents, or
 - Are by one party against the other party (*i.e.*, “counterclaim”).
- **As long as** the allegations of sexual harassment arise out of the same facts or circumstances and are so intertwined that the allegations directly relate to all of the parties.

§106.45(b)(4)



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Written Notice of Allegations

Written notice of the allegations to the parties must include:

- Notice of the grievance process.
- Notice of the allegations that may constitute Title IX sexual harassment, including sufficient details and time for the respondent to prepare a response before an initial interview.
- A statement that the respondent is presumed not responsible unless and until a determination of responsibility is reached at the conclusion of the process.

§106.45(b)(2)

Written Notice of Allegations (cont.)

Written notice of the allegations to the parties must also include:

- Notice of the parties' right to an advisor of choice at any meeting, interview or other proceeding related to the formal complaint.
- Notice of the parties' (and their advisor's) right to inspect and review evidence gathered during the investigation.
- The institution's prohibition against false statements.

NOTE: IHE must provide notice of additional allegations as they arise and are subject to investigation, if applicable.

§106.45(b)(2)

Mandatory Dismissal of a Formal Complaint



If the conduct alleged:

- Would not constitute Title IX sexual harassment even if proved,
- Did not occur in the IHE's education program or activity, or
- Did not occur in the United States.

§106.45(b)(3)(i)

Discretionary Dismissal of a Formal Complaint

If:

- Complainant notifies the Title IX Coordinator in writing of their wish to withdraw the complaint or any allegations in it,
- Respondent is no longer enrolled or employed by the IHE, *or*
- Specific circumstances prevent sufficient gathering of evidence to reach a determination.

§106.45(b)(3)(ii)

Upon Dismissal ...

- Provide written notice of and the reasons for dismissal to both parties.
- Party may appeal dismissal.
- Dismissal does not preclude investigation and adjudication under another provision or policy.

Advisors

- IHE must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.
- Advisor may be, *but is not required to be*, an attorney.
- IHE may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding.
- IHE may establish advisor guidelines (*e.g.*, Rules of Decorum).
- NOTE: IHE must provide an advisor at no cost for purposes of cross-examination at the hearing, if the party does not have one.

§106.45(b)(5)(v)

Informal Resolution

- Only an option *after* the formal complaint is filed.
- IHE **may** informally resolve allegations of Title IX sexual harassment at any time prior to reaching a determination regarding responsibility, provided that:
 - Allegations do not involve an employee engaging in sexual harassment of a student;
 - Informal resolution is facilitated by trained individuals with no conflict of interest; and
 - IHE obtains parties' voluntary, written consent to the informal resolution process.

§106.45(b)(9)

Informal Resolution (cont.)

- IHE must provide parties involved in the process with written notice of:
 - The allegations and the requirements of the informal resolution process.
 - Circumstances precluding parties from resuming formal complaint process/same allegations.
 - The right to withdraw and resume the formal complaint grievance process any time prior to agreeing to a resolution.
 - Any consequences associated with informal resolution, including records that will be maintained or could be shared.

§106.45(b)(9)



INVESTIGATIONS & GRIEVANCE PROCEDURES

13

Investigation

- IHE cannot access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without the voluntary, written consent of that party.
- Each party must have an equal opportunity to present witnesses (fact and expert), and to identify inculpatory and exculpatory evidence.
- IHE cannot restrict a party's ability to discuss allegations or gather evidence.

§106.45(b)(5)

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Investigation (cont.)

- Parties must have sufficient written notice of all hearings, interviews and other meetings to sufficiently allow them to prepare.
- IHE must provide the parties (and their advisors) all evidence directly related to the allegations at least 10 days before the investigator completes the investigative report, so that the parties may review and respond.
 - Directly Related ≠ Relevant
 - IHE must make that evidence available at the hearing

§106.45(b)(5)

Investigative Report

- Must fairly summarize relevant evidence.
- IHE must send the investigative report to the parties (and their advisors) at least 10 days before the hearing for their review and written response.

§106.45(b)(5)(vii)

Live Hearing

- Decision-maker cannot be the Title IX Coordinator or the investigator.
§106.45(b)(7)
- Either party may request that the parties be in separate rooms, but IHE must provide technology allowing the decision-maker and parties to simultaneously see and hear the party or the witness providing information.
- Must record or create a transcript.
§106.45(b)(6)

Cross-Examination / Advisors

Cross-examination must be conducted by each party's advisor – directly, orally and in real time.

- Allow all relevant questions and follow-up questions, including those challenging credibility.
- Cross-examination **cannot** be conducted by a party – if the party does not have an advisor, the IHE must provide one at no cost.

IHE can establish rules of decorum governing hearing, including cross-examination.

§106.45(b)(6)(i)

Relevancy Determinations

- Before a party or witness answers a question, the decision-maker must determine whether it is relevant and explain any decision to exclude the question as not relevant.
- Questions and evidence about complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent, are not relevant.

§106.45(b)(6)(i)



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Relevancy Determinations (cont.)

Preamble:

- It is enough for the decision-maker to say the question is not probative of any material fact.
- The decision-maker may not require questions in writing in advance of hearing.
- IHE may have rules precluding the parties (or advisors) from challenging relevancy decisions during the hearing.
- May only exclude questions based on relevance.
 - Not because they are unduly prejudicial, concern prior bad acts or seek character evidence.
 - Questions may be deemed not relevant when they are duplicative of other evidence already in the record.
 - But, the decision-maker must exclude (a) medical, etc. records if the party has not consented in writing; and (b) statements when the party/witness is not subject to cross.



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Excluding Statements from Consideration

If a party or witness is not subject to cross-examination, the decision-maker may not rely on their statement in determining responsibility.

- But, the decision-maker may not draw any inferences as to responsibility as a result of individuals not subjecting themselves to cross-examination.

§106.45(b)(6)(i)



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Hearing Decorum

May have rules that, *e.g.*:

- Require advisors be respectful and prohibit abusive/intimidating questioning.
- Limit or prohibit objections to relevancy determinations.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that *parties* make openings and closings, if any, and set time limits.



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Standard of Evidence

May use preponderance of the evidence or clear and convincing standard, but must use the same standard for formal complaints of sexual harassment against students as for formal complaints against employees, including faculty.

§106.45(b)(1)(vii)

Hearing Outcome / Written Determination

Written determination must include:

- Identification of allegations potentially constituting sexual harassment.
- Description of the procedural steps from the filing of the formal complaint through the determination.
- Findings of fact supporting the determination.
- Conclusions regarding the application of the policy to the facts.
- Statement of and rationale for the result as to each allegation.
- Sanctions and whether remedies will be provided.
- Appeal instructions.

§106.45(b)(7)

Hearing Outcome / Written Determination (cont.)

The determination becomes final on the date the IHE provides the parties with the written determination of the appeal, if any, or the date on which an appeal would no longer be timely, if there is no appeal.

§106.45(b)(7)

Appeals

Must allow for appeals based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- May include other grounds, equally available to both parties.

§106.45(b)(8)

Recordkeeping

Records regarding the following must be maintained for 7 years:

- Investigation, including the determination regarding responsibility, the hearing recording or transcript, sanctions and remedies
- Appeal and outcome
- Informal resolution and result
- Supportive measures
- Training

§106.45(b)(10)

Note

The content of this presentation is to provide news and information on legal issues and all content is provided for informational purposes only and should not be considered legal advice.

The transmission of information in this presentation does not establish an attorney-client relationship with the recipient. The recipient should not act on the information contained in this presentation without first consulting retained legal counsel.

If you desire legal advice for a particular situation, you should consult an attorney.



Title IX Coordinator Training: Fundamentals of the August 2020 Regulatory Requirements

Resources List

Required Reading

[Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance](#) (Title IX Regulations Addressing Sexual Harassment, 34 CFR Part 106; pages 30572 - 30579) (May 19, 2020)

[Summary of Major Provisions of the Department of Education's Title IX Final Rule](#) (U.S. Department of Education, Office for Civil Rights, May 6, 2020)

Other Resources

[Title IX of the Education Amendments of 1972](#). 20 U.S.C. § 1681

[Title IX Final Regulations Grid with Preamble](#) (NACUA, May 17, 2020) (Please access this document via the "Title IX Final Regulations Grid" section on the course's home page.)

[Title IX Final Rule Overview](#) (U.S. Department of Education, Office for Civil Rights, May 6, 2020)

[Summary of Major Provisions of the Department of Education's Title IX Final Rule and Comparison to the NPRM](#) (U.S. Department of Education, Office for Civil Rights, May 6, 2020)

[Title IX Regulations Addressing Sexual Harassment](#) (Webinar) (U.S. Department of Education, Office for Civil Rights, May 6, 2020)

[Schools Must Post Important Information Regarding Title IX on School Websites Under the New Title IX Rule](#) (U.S. Department of Education, Office for Civil Rights Blog, May 18, 2020)

[The New Title IX Rule: Excluding Reliance on a Party's "Statements" When the Sexual Harassment at Issue Consists of Verbal Conduct](#) (U.S. Department of Education, Office for Civil Rights Blog, May 22, 2020)

[The Title IX Rule Is Effective on August 14, 2020, and Is Not Retroactive](#) (U.S. Department of Education, Office for Civil Rights Blog, August 5, 2020)

[Questions and Answers Regarding the Department's Final Title IX Rule](#) (U.S. Department of Education, Office for Civil Rights, September 4, 2020)



[U.S. Department of Education Title IX Website](#) (Online hub for information and resources related to the Title IX Rule)