Nothing presented in this training is, or should be considered, legal advice!

Know when to consult legal counsel.

This Four Corners of Title IX training program focuses on the 2020 Title IX regulations, which are currently in effect. Proposed new Title IX regulations were released in June 2022 and are currently in the final stages of promulgation. The final regulations have been delayed twice. The date of implementation for campuses is not yet known. We will examine some of the language in the proposed new regulations at the end of this training. Remember that the proposed language will probably change (potentially in major or minor ways) in the final version.

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The Title IX Landscape

Before We Dig In Let’s Consider the “Landscape”…

- Enforcement context
- Cultural/Legal issues
- American Law Institute project—congruence

Examples of Title IX Regulatory Enforcement Under Biden

LSU
- Dept. of Ed began two investigations (for alleged Title IX and Clery Act non-compliance)
- 2021 LSU Law Firm Report (Husch Blackwell) and subsequent audit (Baker Tilly)
- NASA Review found LSU to be out of compliance with Title IX obligations (the agency funds the LSU Dept. of Physics and Astronomy through grants)
- Voluntary Resolution Agreement with NASA (March 22, 2021)
- Find more here: Title IX Review (lsu.edu)
Moreover, the Title IX Coordinator did not consistently intervene when the Complainant contacted Taft College. The evidence to date also suggests that the University did not engage in an interactive process with the Complainant or otherwise attempt to determine what adjustments would be appropriate for each of her courses based on the information she provided about her pregnancy. Although the Complainant appears to have received some pregnancy adjustments from some professors, OCR is concerned that these efforts were ad hoc and uncoordinated and dependent on each professor’s individual interpretation of the Title IX regulations regarding pregnant students who request adjustments.

San Jose State

• Resolution agreement with U.S. Dept of Justice and U.S. Attorney's Office for the Northern District of California
• Female student-athletes were abused by an athletic trainer and SJISU failed to appropriately respond to reports of the abuse
• SJISU will pay $1.6 million to victims and will reform Title IX
• SJISU’s President stepped down
• More info here: External Review of Title IX and Gender Equity Office (sjsu.edu)

Examples of Title IX Regulatory Enforcement Under Biden

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Arcadia University

• School was investigated by OCR for an alleged failure to properly address harassment complaints against a Professor
• Resolution agreement in Oct. 2023
• Arcadia violated Title IX because it failed to complete its investigation and make a determination regarding the allegations because the Professor tendered his resignation. OCR also finds that the University violated Title IX when it failed to investigate possible sexual harassment by the Professor about which the University had knowledge prior to April 2021.*

Examples of Title IX Regulatory Enforcement Under Biden

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Trojan University

The U.S. Department of Education Office for Civil Rights investigated Troy University under Title IX for potential violations relating to accommodation for a pregnant student. They entered into a resolution agreement in January 2023.

• OCR has a concern that the University did not make reasonable and responsive adjustments in response to the Complainant’s pregnancy-related requests. At the time of the incident at issue here, the University did not have a written policy regarding accommodations for pregnant students. The University also did not inform the Complainant or on its website about how students could seek adjustments related to pregnancy, and one professor interpreted OCR had not received training regarding Title IX’s application to pregnant students.*

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Examples of Title IX Regulatory Enforcement Under Biden

OCR Resource: Discrimination Based on Pregnancy and Related Conditions released in October 2022

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Title IX—Cultural and Legal Issues

Tinder Points

- LGBTQ+ [NPRM at 23 n. 4] → Pride
- Pronouns
- Transgender Athletes
- Bathrooms

The Department generally uses the term "LGBTQI+" to refer to students who are lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, or describe their sex characteristics, sexual orientation, or gender identity in another similar way.

- [AL] U.S. District Judge originally blocked the law but, after full briefing, ultimately concluded the state's ban was lawful. A divided panel of the Fourth Circuit put the law on hold pending further review. West Virginia requested the Supreme Court of the United States to lift the hold, and it granted stay pending appeal.

State legislatures enacting new laws: ex. adult cabaret bans or regulation

Title IX—Cultural and Legal Crossfire

- Efficiency
- Authenticity and mission
- Mental health
- Red blue purple affinity and travel/enrollment management
- Prevention/Prevention
- Role of alcohol and other drugs—only mentioned with amnesty, SDFSCA guidance?
- Reporting structures/ criminal justice interface
- Consumer focus: No contact and supportive measures
- Field position football fatigue
- DOE’s role in education—DeVos comments in Florida

Title IX: Some Observations on Related Litigation and Legal Issues

- Think Tanks including Manhattan Institute propose model legislation banning DEI efforts (New College of Florida)
- Expressive Freedoms—Note focus on "conduct"
- Due Process—single investigator, cross-examination—"college court?"
- Reproductive rights
- Men’s rights
- Training/costs of compliance/“reliance interest”
- Sexual violence prevention/intervention
- Transparency/FERPA
- Efficacy—Note DOE comments on supportive services

American Law Institute (ALI) Document (2022)

Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities

- This document is extraordinary and forward thinking.
- First effort by ALI to articulate principles of due process for student conduct administration in its history.
- Crafted by members of ALI, in consultation with others, the principles are likely to be influential to both jurists and educators—and indeed have been, as evidenced by newly proposed Title IX regulations that are noticeably consistent.
- All schools should review Title IX policies in consultation with this document.
- student-misconduct-ttds-black-letter.pdf (ali.org)

Title IX Updates—Court Watch

SCOTUS—Winds of change

- Faith protection—Goodridge, etc.
- “Sex”—Bostock, etc.
- Damages Limits—Cummings v. Premier Rehab Keller
- Principle Substantive Due Process—Dobbs v. Jackson Women’s Health Organization (overturning Roe)
- Limits of Regulatory Authority/End of Chevron?—State Farm, West Virginia v. Environmental Protection Agency, Lopez v. Swift Enterprises v. Ramin Goldstein (Chevron)
- True Threats/Online Harassment—Counterman v. Colorado

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Due Process

Deliberate Indifference

“A Negligent Investigation?

result in an uptick in litigation

“Gender dysphoria” now considered a disability under the ADA in Fourth Circuit in

Justice Comey Barrett now sits on the high court, author of

NOTE: Intersection of proposed Title IX regulations and

Abuse of Process

Florida “Stop WOKE” act (banning certain aspects of DEI training) declared unconstitutional

3

“P

Colorado

6

Hazing/Student Suicide

—

Plausible

22

Dimensions of Title IX-Related Litigation

• Florida “Stop WICKET” act (banning certain aspects of DEI training) declared unconstitutional

• In Honeyfund.com, Inc. v. DeSantis, Judge Walker writes:

“In the popular television series Stranger Things, the “spoil alerts” describes a possible “coincidence” of language carrying a different meaning against her will. . . . Recently, Florida has viewed as a First Amendment violation. . . .

Normally, the First Amendment bars the state from licensing speech, while private actors may ban speech narrowly. But in Florida, the First Amendment apparently bars private actors from banning speech, while the state may ban speech freely.”

• “Gender dysphoria” now considered a disability under the ADA in Fourth Circuit in Williams v. Kinzie

• Adams v. School Board of St. Johns County, Florida—Eleventh Circuit of Appeals (2014) banc ruled that public schools have the right to segregate locker rooms and bathrooms by biological sex.

Dimensions of Title IX-Related Litigation

• Athletic Equity

• Deliberate Indifference

• Due Process

• Retaliation

• Errors in Outcome

• Selective Enforcement

• Plausible Inference

• “Preventable” Sexual Assault Claims—State Negligence Claims

• Hazing/Student Suicide

• Breach of Contract

• Abuse of Process

• “Preventable” Sexual Assault Claims—State Negligence Claims

• Hazing/Student Suicide

• “Preventable” Sexual Assault Claims—State Negligence Claims

• Hazing/Student Suicide

• Negligent Investigation?

• Tortious failure to provide fair process?
Civil Action Under Title IX

• The US Supreme Court allows actions in court to pursue damages for Title IX (but with many limitations).
• Equitableness

The Supreme Court has hesitated to:  
• A definition of actionable sexual harassment
• Do what you say and say what you do.
• Promptness

Victims as “plaintiffs” face tough standards  

These were the first new regulations in a very long time.
• Reasonableness

Documentation/Privacy

Recently a court in Pennsylvania ruled Title IX investigative files  
• Risk of DOE enforcement?
• Legal challenges in court

Emotional distress damages

Potentially unfamiliar dynamics with the Department of Education  
• Do not be afraid to consult with your attorney
• Roadmap for litigation?

Cummings v. Premier Rehab Keller

Institutional response requirement

The school’s actual knowledge  
• Think “contractual fairness”
• Withdrawal of previous guidance
• Status of preexisting guidance and resolutions

We will discuss the 2020 regulations, guidance (Q&A document) issued in 2023, as well as potential future changes to Title IX regulations under the Biden Administration.

From the 2020 Regulations:

The Department believes that the Davis definition in § 106.30 provides a definition for non-quid pro quo, non-Cler Act/VAWA offense sexual harassment better aligned with the purpose of Title IX than the definition of hostile environment harassment in the 2001 Guidance or the withdrawn 2011 Dear Collegue Letter.

Litigation Pointers

• Litigation potential always exists
• Follow your own policy  
• Do what you say and say what you do.
• Do not be afraid to consult with your attorney
• Documentation/Privacy

• Recently a court in Pennsylvania ruled Title IX investigative files be protected against publication in a lawsuit involving Penn State  
• Equity, bias, impartiality
• Think “contractual fairness”  
• Peter Lake, From Discipline Codes to Contractual Respect, Chron. of Higher Educ. (Nov. 26, 2017).

A Few Initial Thoughts on the 2020 Regulations

• These were the first new regulations in a very long time.
• Institutional response requirement—Supportive measures, sanctions, remedies
• Potentially unfamiliar dynamics with the Department of Education—Guidance, commentary, blogs, YouTube videos
• Status of preexisting guidance and resolutions
• Withdrawal of previous guidance
• Legal challenges in court

• We will discuss the 2020 regulations, guidance (Q&A document) issued in 2023, as well as potential future changes to Title IX regulations under the Biden Administration.

Thoughts on the 2020 Title IX Regulations

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Some Key Features of the 2020 Regulations (and differences from prior guidance from the Obama Admin.)

- Title IX redefines sexual harassment and creates special grievance procedures for sexual harassment.
- Term “hostile environment” disappears/balancing test with it.
- Allows for recipients to offer informal resolution (mediation). Can be used in most instances if parties (complainant and respondent) consent voluntarily when a formal complaint is filed.
- “Formal complaints” and “allegations”
- “Preponderance of the evidence” or “clear and convincing”
- “Mandated reporters” supplanted “responsible employees”
- “Supportive measures” supplanted “interim measures”
- “Not a court”/ “Not a criminal justice system”
- “Supportive measures” supplants “interim measures”
- Separation of the decision-maker from other tasks
- No more single-investigator model, but single decision-maker permitted.
- Appeals required
- Training mandates
- “Mandated reporters” supplants “responsible employees”
- “Supportive measures” supplanted “interim measures”
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Our Mission Has Not Changed...

Enacted by Congress, Title IX seeks to reduce or eliminate barriers to educational opportunity caused by sex discrimination in institutions that receive federal funding. This is the unchanged mission of Title IX!

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Train, Train, Train!

Training Mandates Specific to the 2020 Regulations

Schools must ensure that Title IX personnel (Title IX Coordinator, any investigator, any decision-maker, and any person who facilitates an informal resolution, such as mediation) receive training as follows:

1. On Title IX’s definition of “sexual harassment”
2. On the scope of the school’s education program or activity
3. On how to conduct an investigation and grievance process
4. On how to serve impartially, including avoiding prejudgment of the facts at issue
5. On how to avoid conflicts of interest and bias
6. Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance to sexual harassment, including when questions and evidence about a complainant’s sexual predisposition or prior sexual behavior are not relevant
7. Investigators must receive training on issues of relevance to create an investigatory report that fairly summarizes relevant evidence


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Must be maintained by the school for at least 7 years.

Foubert, J.D., Clark

Training on technology usage for live hearings on your campus.

There is not one universal policy for sex discrimination; differences exist in

Scope, definitions, procedures, etc.

Lisak D, Miller PM. Repeat rape and multiple offending among

Must promote impartial investigations and adjudications of formal complaints

Must maintain a website the school must hold the training materials available

upon request for inspection by members of the public.

*Schools must publish training materials that are up to date and reflect the latest

training provided to Title IX personnel.*

*If a school’s current training materials are copyrighted or otherwise protected

as proprietary business information (for example, by an outside consultant), the

school still must comply with the Title IX Rule.

It’s always good to hear from multiple voices!

Further training required...

• Training specific to your institution’s policies.

• There is not one universal policy for sex discrimination; differences exist in

procedures, definitions, etc. from campus to campus.

• Your campus policies may be in transition now.

• Scope, definitions, procedures, etc.

• Training on technology usage for live hearings on your campus.

• Especially important for decision-makers.

• Additional and continued training on bias.

• Additional investigator and decision-maker training.

• Training on informal resolution for those implementing that process.

• Continuing education at regular intervals.

• REMEMBER—It’s always good to hear from multiple voices!

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Watch YouTube for Videos from OCR

The First Amendment and Title IX: An OCR Short Webinar (July 29, 2020)

OCR Short Webinar on How to Report Sexual Harassment under Title IX

(July 27, 2020)

Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar

(July 23, 2020)

OCR Webinar on Due Process Protections under the New Title IX

Regulations (July 21, 2020)

OCR Webinar on New Title IX Protections Against Sexual Assault (July 7, 2020)

OCR Webinar: Title IX Regulations Addressing Sexual Harassment (May 8, 2020)

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The Controversial Science of Sexual Predation

• Lisak D, Miller PM. Repeat rape and multiple offending among


doi:10.1891/vivx.17.1.73.33638

• Swartout KM, Koss MP, White JW, Thompson MP, Abbey A, Bellis AL.

Trajectory Analysis of the Campus Serial Rapist Assumption. JAMA


• Johnson & Taylor, The Campus Rape Frenzy: The Attack on Due Process at

America’s Universities (Encounter Books, 2017).


primarily a serial or single time problem? Evidence from a multi-campus

Trauma-Based Approaches

Avoid or Use?
- Some schools and training entities have moved away from using trauma-informed techniques for fear of appearing victim-leaning.
- Trauma can impact anyone in a grievance process or seeking supportive measures: Use research without stereotypes or gender bias.
- Credibility v. Reliability
- Read DOE's thoughts on trauma carefully...

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Trauma Cont’d

The Department understands from anecdotal evidence and research studies that sexual violence is a traumatic experience for survivors. The Department is aware that the neurobiology of trauma and the impact of trauma on a survivor’s neurological functioning is a developing field of study with application to the way in which investigators of sexual violence offenses interact with victims in criminal justice systems and campus sexual misconduct proceedings. The final regulations require impartiality in investigations and emphasize the truth-seeking function of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking.

Id. at 30069 (internal citation omitted).

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“Victim”/“Survivor” or “Perpetrator”

When the Department uses the term “victim” (or “survivor”) or “perpetrator” to discuss these final regulations, the Department assumes that a reliable process, namely the grievance process described in § 106.45, has resulted in a determination of responsibility, meaning the recipient has found a respondent responsible for perpetrating sexual harassment against a complainant.

Id. at 30071 (emphasis added).

Legal Foundations of Title IX

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Title IX: FINAL RULE

34 CFR Part 106 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, must respond to allegations of sexual harassment consistent with Title IX’s prohibition against sex discrimination. These regulations are intended to effectuate Title IX’s prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities.

What is Title IX? What is its mission?

- Enacted by Congress, Title IX seeks to reduce or eliminate barriers to educational opportunity caused by sex discrimination in institutions that receive federal funding. This is the mission of Title IX.
- Other federal laws also address sex discrimination. There are complex interactions with other federal laws, such as the Clery Act, the Family Educational Rights and Privacy Act (FERPA), and the Violence Against Women Act (VAWA).
- Title IX is concerned with institutional response to discrimination.

Legal Foundations: How did we get here?

- Before: Campuses focused on equality in sports, admissions, etc.
- April 2011 (Obama Administration): Dear Colleague Letter released as a “reminder” that Title IX covers sexual harassment
- Yale Investigation: The awakening of the Dept. of Education (DOE)
- After April 2011:
  - Numerous investigations/Substantial guidance
  - April 2012 FAQ document and White House Task Force to Protect Students from Sexual Assault report Not Alone
  - April 2015 guidance on the role of the Title IX Coordinator

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<th>Title IX and the Trump Administration</th>
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<tr>
<td>• Education Secretary Betsy DeVos</td>
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<td>• Recision of Obama-Era Guidance in 2017 (and more recissions in 2020)</td>
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<tr>
<td>• Instituted “interim” and “substantial” guidance in September 2017</td>
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<tr>
<td>• Focus on respondents’ rights/procedural protections/due process/bias and conflicts of interest</td>
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<tr>
<td>• Notice and comment period on the 2020 regulations ended with a record-breaking number of comments (over 120,000)</td>
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<td>• Complex implications for protection from discrimination based on sexual orientation, or appearance thereof.</td>
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<th>Court Activity</th>
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<td>• Judicial activism and inactivism</td>
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<td>• Lower courts and SCOTUS</td>
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<tr>
<td>• 6th Circuit in Baum</td>
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<td>• 7th Circuit in Purdue</td>
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<td>• 3rd Circuit in University of Sciences</td>
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<tr>
<td>• Univ. of Southern California – $1852 million settlement in case regarding abuse by campus gynecologist</td>
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<tr>
<td>• Bostock</td>
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<td>• Lady of Guadalupe</td>
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<tr>
<td>• NCAA v. Alston et al (See April 4, 2011) Press release from the University of Sciences and Arts of Lake, Pottawattamie County, Iowa (Jan. 19, 2001)</td>
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<th>Legal Mandates, Etc. Under Title IX — Where Is the Law?</th>
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<tr>
<td>• Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1062 et seq.</td>
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<tr>
<td>• Implementing Regulations, 34 C.F.R. Part 106</td>
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<tr>
<td>• Notice and Comment</td>
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<td>• Rule-making/Negotiated rule-making</td>
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<td>• Commentary/ Blogs from the Dept. of Education</td>
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<td>• Guidance</td>
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<td>• Resolution Letters and Agreements</td>
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<td>• Other Sources—Speeches, Website, Participation with the Field</td>
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<tr>
<td>• State Law Mandates—Virginia Laws</td>
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<th>Virginia State Laws</th>
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<td>• VA Code § 33.1-805. Violence prevention committee; threat assessment team.</td>
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<tr>
<td>• Requires campuses to establish threat assessment teams</td>
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<tr>
<td>• VA Code § 55.1-806. Reporting of acts of sexual violence.</td>
</tr>
<tr>
<td>• Requires responsible employees to report</td>
</tr>
<tr>
<td>• Requires a “Review Committee” and mandates certain functions of this committee</td>
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<tr>
<td>• VA Code § 23.1-807. Sexual assault; memorandum of understanding, policies.</td>
</tr>
<tr>
<td>• Requires MOUs with local sexual assault crisis centers and law enforcement</td>
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<tr>
<td>• VA Code § 23.1-808. Sexual violence; policy review; disciplinary immunity for certain individuals who make reports.</td>
</tr>
<tr>
<td>• Requires institutions to review sexual violence policies and update them as appropriate</td>
</tr>
<tr>
<td>• Requires institutions to have an “amnesty policy” for reporters</td>
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Virginia State Laws Cont’d

• VA Code § 23.1-900. Academic transcripts; suspension, permanent dismissal, or withdrawal from institution.
  • Requires a transcript notation for a student who has been suspended for, or withdrawn from, the institution prior to an investigation for an offense involving sexual violence and requires institutions to adopt policies for the expungement of such notations.

• VA Code § 23.1-412. Non-academic student codes of conduct.
  • Requires each public institution of higher education to adopt non-academic student codes of conduct. Students and student organizations that participate in the non-academic student codes of conduct process as a complainant or respondent shall have the responsibilities and rights afforded to them by the institution’s codes of conduct and related policies and procedures.

  • Establishes the Virginia sexual assault forensic examiner coordination program within the Department of Criminal Justice Services.

Federal Regulators:
Two Key Players

Department of Education
Enforcement through Office for Civil Rights (regional offices)
Historical K-12 focus

Department of Justice
Largely dormant in higher ed for years
“Crime fighters” dealing with violence, drugs, weapons, etc.
[DOJ does not seem to have played a large role in the 2020 Title IX regulations.]

Litigation in the lower courts has multiplied. Institutions must seek advice of counsel on the implications for Title IX compliance on their campuses.

Know when to talk with counsel.

Whose View of Title IX Wins in the End?

Showdowns are coming!

CONGRESS

COURTS

REGULATORS

Court cases are already testing some issues

“Sex”
Is "sex" defined in the 2020 regulations?

The word "sex" is undefined in the Title IX statute. The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations. The focus of these regulations remains prohibited conduct.

Title IX: Does "sex" include actual or perceived sexual orientation?

2005 Guidance pg. 3:
"Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school’s program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance. For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.

2018 OCR Statement

"All students can experience sex-based harassment, including male and female students, LGBT students, students with disabilities, and students of different races, national origins, and ages. Title IX protects all students from sex-based harassment, regardless of the sex of the parties, including when they are members of the same sex."

"Title IX also prohibits gender-based harassment, which is unwelcome conduct based on a student’s sex, harassing conduct based on a student’s failure to conform to sex stereotypes."
Bostock and the New Dept. of Education Position on LGBTQ Protections

"The Supreme Court has upheld the right for LGBTQ+ people to live and work without fear of harassment, exclusion, and discrimination — and our LGBTQ+ students have the same rights and deserve the same protections. I'm proud to have directed the Office for Civil Rights to enforce Title IX to protect all students from all forms of sex discrimination.

Today, the Department makes clear that all students — including LGBTQ+ students — deserve the opportunity to learn and thrive in schools that are free from discrimination."

U.S. Secretary of Education Miguel Cardona

U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity [Press release]

JUNE 16, 2021

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SCOTUS decision in Our Lady of Guadalupe School v. Morrissey-Berru (July 8, 2020)

- "Ministerial exception": application to Title VII and Title IX.
- Employees vs. Students
- "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."
- Nonsectarian "tenets" or "teachers"? Viewpoint discrimination?
- What may be next for students?

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The New Dept. of Education Position on LGBTQ Protections visible before June 23, 2022

"The Supreme Court has upheld the right for LGBTQ+ people to live and work without fear of harassment, exclusion, and discrimination — and our LGBTQ+ students have the same rights and deserve the same protections. I'm proud to have directed the Office for Civil Rights to enforce Title IX to protect all students from all forms of sex discrimination.

Today, the Department makes clear that all students — including LGBTQ+ students — deserve the opportunity to learn and thrive in schools that are free from discrimination."

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Implications of Bostock for Title IX?

- Why did the Department of Education not define "sex" in the 2020 Title IX regulations?
- Title IX’s Title VII?
- LGBTQ rights and Bostock — note the Court’s emphasis on the specific issues raised: "On the basis of sex" ("Because of sex")
- Spending Commerce clause — the "notice issue"?
- How is Title IX different from Title VII — Primary
- Title IX regulations and DOE enforcement in light of Bostock
- How can campuses define "sex" going forward?
- How are religious institutions impacted? Consider Title IX’s "not be consistent with religious tenets" exception... More on this on the next slide...
- A good article to read.

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Bostock Pushback

- 21 State Attorneys General pushed back in a letter to Pres. Biden
- 20 States Sue Biden Administration
- Tennessee et al. v. United States Department of Education et al., Tennessee Eastern District Court, Case No. 3:21-cv-00308
- On July 15, 2022, plaintiff’s motion for injunction was granted and defendants motion to dismiss was denied.
- Potential legal knock on, Dept IX guidance for tran students (thedailybeast.com)
- Law temporarily halts Biden enforcing LGBTQ protections under Title IX (ginsug.com)

FL House Bill 7 "Stop WOKE" sought to ban certain aspects of DEI training; was recently declared unconstitutional by a Florida judge

- Florida Passes Stop WOKE Bill Prohibiting Diversity Training [nashreview.com]

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Due Process

- "Due Process" - a complex and multidimensional concept
- More than dialectic between "complainants" and "respondents"
- The college as bystander or neutral
- Is this the way to create college court?
- What about resource imbalances between institutions or complainants/respondents?

Due Process Cont’d*

*The final regulations prescribe a grievance process grounded in principles of due process for the benefit of both complainants and respondents, seeking justice in each sexual harassment situation that arises in a recipient’s education program or activity. Id. at 34.

Once it is determined that due process applies, the question remains what process is due. (See supra.)

Procedural due process of law requires at a minimum notice and a meaningful opportunity to be heard. (See supra.)

Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. (Morrissey, 408 U.S. at 481 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

Instead, due process is flexible and calls for such procedural protections as the particular situation demands. (Morrissey, 408 U.S. at 481 (quoting Armstrong v. M Walker Miller, 406 U.S. 397, 413 (1972)).

The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ (Morrissey, 408 U.S. at 481 (quoting Armstrong v. M Walker Miller, 406 U.S. 397, 413 (1972)).

*See generally Id. at 30093-93.

The Department of Education reiterates that colleges are not courts prosecuting crimes.

*Schools, colleges, and universities are educational institutions and not courts of law. The § 106.45 grievance process does not attempt to transform schools into courts, rather, the prescribed framework provides a structure by which schools may reach factually determinative need to discern when victims of sexual harassment are entitled to remedies. The Department declines to import into § 106.45 comprehensive rules of evidence, rules of civil or criminal procedure, or constitutional protections available to criminal defendants. The Department recognizes that schools are neither civil nor criminal courts, and acknowledges that the purpose of the § 106.45 grievance process is to resolve formal complaints of sexual harassment in an education program or activity, which is a different purpose carried out in a different forum from private lawsuits in civil courts or criminal charges prosecuted by the government in criminal courts. Id. at 30093.

The Department is not regulating sex crimes, per se, but rather is addressing a type of discrimination based on sex.

What is a “court?”

A court is any person or institution other as a government institution with the authority to adjudicate legal disputes between parties and carry out the administrative justice in civil, criminal, and administrative matters in accordance with the rules of law.

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A Review of the 2020 Regulations

§106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

§106.8(a) Designation of coordinator.
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. 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), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

§106.8(b) Dissemination of policy.
(a) 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(c) Adoption of grievance procedures.
(a) 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)(ii) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section. A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

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.
§106.8(d) Application outside the United States.

The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

“Severability” Throughout the Regulations

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

§106.12(b) Assurance of Exemption.

Assurance of exemption. 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. 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.

§106.30(a) 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, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. 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. “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in §106.8(a).
“Complainant”
Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

What is “alleged?”

“Respondent”
Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

More on Complainants/Respondents
• A person may be a complainant, or a respondent, even where no formal complaint has been filed and no grievance process is pending. Id at 30071.
• References . . . to a complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent or guardian has the legal right to act on behalf of the individual.
• [T]he definitions of “complainant” and “respondent” do not restrict either party to being a student or employee, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student. Id. at 30071-72 (internal citations omitted).

“Consent”
The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

How does “consent” fit into the new framework for “sexual harassment?”

“Formal Complaint”
Formal complaint means 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. 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. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. (emphasis added)

“Formal Complaint” Cont’d
As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including §§ 106.45(b)(1)(i) and 106.45(b)(1)(ii).
“Sexual Harassment” [Three-Prong Test]

Sexual harassment means 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 the person equal access to the recipient's education program or activity; or

First Amendment and the Second Prong

Protection of free speech and academic freedom was weakened by the Department’s use of wording that differed from the Davis definition of what constitutes actionable sexual harassment under Title IX . . . these final regulations return to the Davis definition verbatim, while also protecting against even single instances of quid pro quo harassment and Clery/ VAWA offenses, which are not entitled to First Amendment protection. Id. at 30155 n.680.

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“Supportive Measures”

Supportive measures means non-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. Such 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.

“Supportive Measures” Cont’d

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. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

§106.44(a) General response to sexual harassment.

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. For the purposes of this section, §§ 106.30, and 106.45; “education 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.

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§106.44(a) Cont’d

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. 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(c) Emergency removal.

Nothing in this subpart 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) Emergency removal.

Nothing in this subpart 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.

§106.45 Grievance process for formal complaints of sexual harassment.

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.
§ 106.45(a) Discrimination on the basis of sex.

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

§ 106.45(b) Grievance process.

For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

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§ 106.45(b)(1)(i)

(i) Basic requirements for grievance process. A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of 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. 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)(ii)

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness

§ 106.45(b)(1)(iii)

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decisionmaker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

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§ 106.45(b)(1)(ii) Cont'd

(i) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.

§ 106.45(b)(1)(iii) Cont'd

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decisionmaker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

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. . . .

(Bullets added)
§ 106.45 (b)(1)(ii) Cont’d

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.

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)(vi) of this section.

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)(iv)

(iv) 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)(v)

(v) 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, a process that allows 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)(vi)

(vi) 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)(vii)

(vii) State whether the standard of evidence to be used to determine responsibility is 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)(viii)

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;
§ 106.45(b)(1)(ix)

(ix) Describe the range of supportive measures available to complainants and respondents; and

§ 106.45(b)(1)(x)

(x) Not 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)(2)(i)

(2) Notice of allegations—

(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

§ 106.45(b)(2)(i)(A)

(A) Notice of the recipient’s grievance process that complies with this section, including any informal resolution process.

§ 106.45(b)(2)(ii)

(ii) 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)(3)(i)

(i) The recipient must investigate the allegations in a formal complaint. 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 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)(iii)

(iii) 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) thereof simultaneously to the parties.

§ 106.45(b)(4)

(iv) 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)(5)(i)

(i) 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 provided that 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 to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR 99.3); in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3.

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§ 106.45(b)(ii)
(i) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

§ 106.45(b)(iii)
(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

§ 106.45(b)(iv)
(iv) 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, who may be, but is not required to be, an attorney, and not limit the choice or presence of advice for either the complainant or respondent in any meeting or grievance proceeding; however, 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)(v)
(v) 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)(vii)
(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) 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.

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At the request of either party, the recipient must provide for the live hearing by their advisor may participate in the proceedings. Questions and evidence about the complainant's sexual predisposition or relevant questions and follow-up questions, including those challenging credibility. 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. 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. 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 attorney, to conduct cross-examination on behalf of that party.

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. 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.

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. 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.

Three individuals and four organizations challenged the 2020 Title IX regulations. The court found a provision (prohibition on statements not subject to cross-examination) in §106.45(b)(6)(i) "arbitrary and capricious."
DOE Letter RE: Victim Rights Law Center et al. v. Cardona

In accordance with the court’s order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.

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

Challenges to Victim Rights Law Center et al. v. Cardona

"On September 27, 2021, the State of Texas successfully intervened in the lawsuit and filed an appeal to the U.S. Court of Appeals for the First Circuit. Other potential interveners are waiting for court approval so that they may also appeal. This means that the First Circuit will be issuing a decision at this case, but the timing for that is not yet known."

Variations to Victim Rights Law Center et al. v. Cardona

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§ 106.45(b)(7)(i)

(7) Determination regarding responsibility.

(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

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§ 106.45(b)(7)(ii)(C)

(C) Findings of fact supporting the determination;

§ 106.45(b)(7)(ii)(D)

(D) Conclusions regarding the application of the recipient’s code of conduct to the facts;

§ 106.45(b)(7)(ii)(E)

(E) 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; and

§ 106.45(b)(7)(ii)(F)

(F) The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.
§ 106.45(b)(8)(i)

(B) Appeals.

(i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:

• (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)(i)(A-C)

(ii) A recipient may offer an appeal equally to both parties on additional bases.

§ 106.45(b)(9)

(g) Informal resolution. 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 of sexual harassment consistent with this section. 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. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written 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;
§ 106.45(b)(9)(ii-iii)

(ii) Obtains the parties’ voluntary, written consent to the informal resolution process; and
(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

§ 106.45(b)(10)(i)(A)

(a) Recordkeeping.
(i) A recipient must maintain for a period of seven years records of—
(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(9)(ii) of this section, any disciplinary sanctions imposed on the respondent, and 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)(i)(B-D)

(B) Any appeal and the result therefrom;
(C) Any informal resolution and the result therefrom; and
(D) All materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process. 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.

§ 106.45(b)(10)(ii)

(ii) 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.

§ 106.71 (a)

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or 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. 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(a) Cont’d

The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

§ 106.71(b)(1)

(b) Specific circumstances.

(i) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(ii) 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.

§ 106.71(b)(2)

(2) 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.

July 2021 Q&A Document

Reminded us that 2020 regulations are enforceable.

July 2021 Q&A Cont’d

• Document clearly states the Q&A and Preamble to regulations do not have the force of law
  • Preamble references: Please note that where appropriate, this Q&A refers to the preamble to the 2020 amendments, which clarifies OCR’s interpretation of Title IX and the regulations. You can find citations to specific preamble sections in the endnotes of this Q&A. The preamble itself does not have the force and effect of law. (Dept. of Education, Office for Civil Rights, Guidance and Precedent on the Title IX Regulations on Sexual Harassment (July 2021)).
  • This Q&A resource does not have the force and effect of law and is not meant to bind the public or regulated entities in any way. This document is intended only to provide clarity to the public regarding OCR’s interpretation of existing legally binding statutory and regulatory requirements. As always, OCR’s enforcement of Title IX stems from Title IX and its implementing regulations, not this or other guidance documents.

• Mini Glossary of Terms
  • Define “allegation” and subtly redefine “complainant” and “respondent”
  • Allegation: “An assertion that someone has engaged in sexual harassment.”

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July 2021 Q&A Cont’d

• Question #43—The preamble says that an advisor’s cross-examination role “is satisfied where the advisor poses questions on a party’s behalf, which means that an assigned advisor could relay a party’s own questions to the other party or witness.” Thus, for example, a postsecondary school could limit the role of advisors to relaying questions drafted by their party. *See supra notes.*

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Outsourcing/Requiring Legally Trained Title IX Operatives

The Department notes that nothing in the final regulations precludes a recipient from carrying out its responsibilities under § 106.45 by outsourcing such responsibilities to professionally trained investigators and adjudicators outside the recipient’s own operations. The Department declines to impose a requirement that Title IX Coordinators, investigators, or decision-makers be licensed attorneys (or otherwise to specify the qualifications or experience needed for a recipient to fill such positions), because leaving recipients as much flexibility as possible to fulfill the obligations that must be performed by such individuals will make it more likely that all recipients reasonably can meet their Title IX responsibilities. *Id. at 3005.*

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Personnel Decisions

• Should we appoint deputy Title IX coordinators?
  • (The recipient may instead designate multiple employees as Title IX Coordinators or designate a Title IX Coordinator and additional staff to serve as deputy Title IX Coordinators, as noted.)
  • Should the Title IX coordinator take on the role of investigator, as permitted in the 2020 regulations? *(see supra notes.)*
  • How many decision makers? *[2020 regulations suggest training at least two so one can be the appellate officer.]*
  • Single decision-maker or a panel?
  • What should we outsource? Advantages/disadvantages?
  • Budgetary concerns/limited staff on very small campuses
  • Bias
  • Conflicts of interest?
  • Appropriate relationships between Title IX coordinator and other functions.
  • Role of counsel?

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Training

- "Best practices," "Experts," Certification
- Impartiality of Title IX operators
- No bias
- No conflicts of interest
- No sexual stereotypes in training materials
- Training on the institution's specific policies, procedures and processes
- Training on "relevance" of evidence for investigations and hearings
- Training on technology used in hearings on behalf of the recipient
- We assume that all recipients will need to train their Title IX Coordinators, an investigator, any person designated by a recipient to facilitate an informal resolution process (e.g., a mediator), and two decision-makers (assuming an additional decision-maker for appeals). We assume this training will take approximately eight hours for all staff at the . . . HIE level. Id. at 30106.
Third party report ("bystander" reporting)

Conflicts in research?

How much time do you have to notify folks of the change?

Should IHE’s designate a large cadre of “mandatory reporters” even if they are permitted to?

Pros/cons?

Conflicts in research?

How much time to you have to notify folks of the change?

Does it make sense to stay the course – for this first year, and wait and see if a change is needed?

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Notice results whenever . . . Title IX Coordinator, or any official with authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means. These final regulations emphasize that any person may always trigger a recipient’s response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient’s website.

The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by “any person” who believes that sexual harassment may have occurred and requires a recipient’s response.

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Anonymous Reports

The Department does not take a position in the NPRM or these final regulations on whether recipients should encourage anonymous reports of sexual harassment ...

[1] If a recipient cannot identify any of the parties involved in the alleged sexual harassment based on the anonymous report, then a response that is not clearly unreasonable under light of these known circumstances will differ from a response under circumstances where the recipient knows the identity of the parties involved in the alleged harassment, and the recipient may not be able to meet its obligation to, for instance, offer supportive measures to the unknown complainant.

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Title IX Grievance, Discipline and Mediation

Not Merely “Checking Off Boxes”
Recipients, including universities, will not be able to simply check off boxes without doing anything. Recipients will need to engage in the detailed and thoughtful work of informing a complainant of options, offering supportive measures to complainants through an interactive process described in revised § 106.44(a), and providing a formal complaint process with robust due process protections beneficial to both parties as described in § 106.45.

Id. at 30045.

Operationalizing the 2020 Title IX regulations requires making certain choices.

“Tuning” is important.

Regulations Intend to Provide “Flexibility”
[These final regulations leave recipients the flexibility to choose to follow best practices and recommendations contained in the Department’s guidance or, similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social science scholars, victim advocacy organizations, civil libertarians and due process advocates, and other experts.]

Id. at 30031 (emphasis added).

[These final regulations leave recipients legitimate and necessary flexibility to make decisions regarding the supportive measures, remedies, and discipline that best address each sexual harassment incident.

Id. at 30044.

“Flexibility” Cont’d
Within the standardized § 106.45 grievance process, recipients retain significant flexibility and discretion, including decisions to:
- designate the reasonable time frames that will apply to the grievance process;
- use a recipient's own employees as investigators and decisionmakers or outsource those functions to contractors;
- determine whether a party's advisor of choice may actively participate in the grievance process;
- select the standard of evidence to apply in reaching determinations regarding responsibility;
- use an individual decision-maker or a panel of decision-makers;
- offer informal resolution options;
- impose disciplinary sanctions against a respondent following a determination of responsibility; and
- select procedures to use for appeals.

Id. at 30093 (bullets added).
Policy Basics

What Should be Included?

• Single policy or multiple policies?
• Title IX Student Conduct (reference each other)
• Title IX HR
• Consensual relations policies (do you have these?)
• Terminology/Language
  * “Complainant” not “Victim”/“Survivor”
  * “Respondent” not “Perpetrator”
  * “Day” (Business day, calendar day, “school” day?)

Policy Basics

- Introduction
- Scope
- Support services, supportive measures, and how to access
- Title IX Coordinator’s contact information (and deputy coordinators) and how to report
- “Mandated reporters”
- Definitions of key terms, such as sexual harassment and consent
- Timeframes, both for reporting and for resolution

Policy Elements

• Definitions of Offenses to Be Included in Policies
  1. Sexual harassment
  2. Sexual assault
  3. Non-consensual sexual contact, and
  4. Non-consensual sexual intercourse
  5. Domestic violence
  6. Dating violence
  7. Sexual exploitation*
  8. Stalking*
  9. Retaliation*
  10. Actual Knowledge

Definitions of Offenses to Be Included in Policies

1. Sexual harassment
2. Sexual assault
3. Non-consensual sexual contact, and
4. Non-consensual sexual intercourse
5. Domestic violence
6. Dating violence
7. Sexual exploitation*
8. Stalking*
9. Retaliation*
10. Actual Knowledge

“Sexual Harassment” [Three-Prong Test]

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
(a) 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;
(b) 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

Policy Elements Cont’d

• Confidentiality of information generally
• Requests for confidentiality
• Opportunity to provide/access to information
• Prohibition against retaliation
• Sanction and remedies, and how they will be determined
• Formal complaints*
• Grievance process
• Evidentiary standard
• Notification of outcome
• Appeal process

State law considerations!
**“Consent”—Not Defined in 2020 Regulations**

- What will your definition be?
- Affirmative consent?
- Will distribute across multiple offenses

**Elements**

- Consent is a voluntary agreement to engage in sexual activity;
- Someone who is incapacitated cannot consent;
- Consent is not implied by silence or an absence of resistance;
- Consent can be withdrawn at any time; and
- Coercion, force, or threat of either invalidates consent.

**“Stalking” (Clery Act Definition)**

**Stalking.** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- Fear for the person’s safety or the safety of others; or
- Suffer substantial emotional distress.

- For the purposes of this definition—
  - Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveills, threatens, or communicates to or about a person, or interferes with a person’s property.
  - Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.
  - Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

**“Domestic Violence” (Clery Act Definition)**

**Domestic violence.** (i) A felony or misdemeanor crime of violence committed—

- By a current or former spouse or intimate partner of the victim;
- By a person with whom the victim shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
- By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or
- By any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

**Dativing Violence.** Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

- The existence of such a relationship shall be determined based on the reporting party’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

**“Dating Violence” (Clery Act Definition)**

**Dating violence.** Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

- The existence of such a relationship shall be determined based on the reporting party’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

**Notice of Non-Discrimination and Title IX Coordinator Information on:**

- Website
- Handbooks
- Catalogs

**For**

- Applicants for admission and employment
- Students
- Employees

**Title IX Coordinator Information (§106.8)**

- Name or Title
- Office address
- Email address
- Telephone number

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Similarly, nothing in these final regulations prevents a recipient from addressing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the alleged misconduct did not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct.

* Similarly, nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department’s jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient’s education program or activity, or occurring against a person who is not located in the United States. Id. at 30065 (emphasis added).

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"Staying in Your Lane"

§ 106.45 may not be circumvented...

... by processing sexual harassment complaints under non-Title IX provisions of a recipient's code of conduct. The definition of "sexual harassment" in § 106.30 constitutes the conduct that these final regulations, implementing Title IX, address. ... (W)here a formal complaint alleges conduct that meets the Title IX definition of "sexual harassment," a recipient must comply with § 106.45.

Id. at 30095.

Program or activity: § 106.44(a) General response to sexual harassment.

... For the purposes of this section, §§ 106.30, and 106.45, "education 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.

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§ 106.8(d) Application outside the United States.

The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

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Addressing Sexual Assualts Outside of a University's Obligations Under Title IX

Nothing in the final regulations precludes a recipient from applying the § 106.45 grievance process to address sexual assaults that the recipient is not required to address under Title IX.

Id. at 30015 (emphasis added).

[A] recipient may choose to address conduct outside of or not in its "education program or activity," even though Title IX does not require a recipient to do so.

Id at 30022 (emphasis added).

[E]ven if alleged sexual harassment did not occur in the recipient's education program or activity, dismissal of a formal complaint for Title IX purposes does not preclude the recipient from addressing that alleged sexual harassment under the recipient's own code of conduct. Recipients may also choose to provide supportive measures to any complainant, regardless of whether the alleged sexual harassment is covered under Title IX.

Id. at 30053 (emphasis added).
“Non-sexual Harassment Sex Discrimination”

... § 106.45 applies to formal complaints alleging sexual harassment under Title IX, but not to complaints alleging sex discrimination that does not constitute sexual harassment (“non-sexual harassment sex discrimination”). Complaints of non-sexual harassment sex discrimination may be filed with a recipient’s Title IX Coordinator for handling under the “prompt and equitable” grievance procedures that recipients must adopt and publish pursuant to § 106.8(c).

Id. at § 106.8(c).

“Statute of Limitations”

The Department does not wish to impose a statute of limitations for filing a formal complaint of sexual harassment under Title IX...

... [A] complaintant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed as provided in the revised definition of “formal complaint” in § 106.45(c)(7), this provision relates to the recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipient's education program or activity. That recipient may not be required to investigate and adjudicate allegations where the complainant no longer has any involvement with the recipient while recognizing that... complaints may be affiliated with a recipient over the course of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident. The Department believes that applying a statute of limitations may result in arbitrarily denying remedies to sexual harassment victims.

Id. at § 106.8(b-3)(i) (emphasis added).

“Statute of Limitations” and Dismissal of Complaint

[The § 106.45 grievance process contains procedures designed to take into account the effect of passage of time on a recipient's ability to resolve allegations of sexual harassment. For example, if a formal complaint of sexual harassment is made several years after the sexual harassment allegedly occurred, § 106.45(b)(3)(ii) provides that...

* [If the respondent is no longer enrolled or employed by the recipient, or

* if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein,

... then the recipient has the discretion to dismiss the formal complaint or any allegations therein.

Id. at § 106.8(b-3)(i) (bullets added).

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Scope/Off-Campus Jurisdiction

While such situations may be fact specific, recipients must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment (i.e., not a dorm room provided by the recipient) is a situation over which the recipient exercised substantial control, if so, the recipient must respond to notice of sexual harassment that occurred there.

Will colleges eliminate RSO recognition?

Will RSOs choose to leave?

Relationship Agreements

Study Abroad?

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No Reasonable Cause Threshold

The Department declines to add a reasonable cause threshold into § 106.45. The very purpose of the § 106.45 grievance process is to ensure that accurate determinations regarding responsibility are reached, impartially and based on an objective evaluation of relevant evidence; the Department believes that goal could be impeded if a recipient's administrators were to pass judgment on the sufficiency of evidence to decide if reasonable or probable cause justifies completing an investigation.

Title IX Coordinator/Gatekeeping

Title IX Coordinators have always had to consider whether a report satisfies the criteria in the recipient's policy, and these final regulations are not creating new obstacles in that regard. The criteria that the Title IX Coordinator must consider are statutory criteria under Title IX or criteria under case law interpreting Title IX's non-discrimination mandate with respect to discrimination on the basis of sex in the recipient's education program or activity against a person in the United States, tailored for administrative enforcement. Additionally, these final regulations do not preclude action under another provision of the recipient's code of conduct, as clearly stated in revised § 106.45(b)(10)(i)(D), if the conduct alleged does not meet the definition of Title IX sexual harassment.

Classroom Behavior

Nothing in the final regulations reduces or limits the ability of a teacher to respond to classroom behavior. If the in-class behavior constitutes Title IX sexual harassment, the school is responsible for responding promptly without deliberate inaction, including offering appropriate supportive measures to the complainant, which may include separating the complainant from the respondent, counseling the respondent about appropriate behavior, and taking other actions that meet the § 106.30 definition of "supportive measures" while a grievance process resolves any factual issues about the sexual harassment incident. If the in-class behavior does not constitute Title IX sexual harassment (for example, because the conduct is not severe, or not pervasive), the final regulations do not apply and do not affect a decision made by the teacher as to how best to discipline the offending student or keep order in the classroom.

Chilling effect?

The Department does not believe that evaluating verbal harassment situations for severity, pervasiveness, and objective offensiveness will chill reporting of unwelcome conduct, because recipients retain discretion to respond to reported situations not covered under Title IX. Thus, recipients may encourage students (and employees) to report any unwanted conduct and determine whether a recipient must respond under Title IX, or chooses to respond under a non-Title IX policy.
Trigger Warnings?
These final regulations neither require nor prohibit a recipient from providing a trigger warning prior to a classroom discussion about sexual harassment including sexual assault, § 106.6(d)(1) does assure students, employees (including teachers and professors), and recipients that ensuring non-discrimination on the basis of sex under Title IX does not require restricting rights of speech, expression, and academic freedom guaranteed by the First Amendment. Whether the recipient would like to provide such a trigger warning and offer alternate opportunities for those students fearing renewed trauma from participating in such a classroom discussion is within the recipient’s discretion. See § 106.600 (emphasis added).

Policy should reflect practice and practice should reflect policy.

Prompt, Equitable, Reasonable

Prompt Responses
The final regulations require recipients to respond promptly by:
* offering supportive measures to every complainant (i.e., an individual who is alleged to be the victim of sexual harassment);
* refraining from imposing disciplinary sanctions on a respondent without first following a prescribed grievance process;
* investigating every formal complaint filed by a complainant or signed by a Title IX Coordinator; and
* effectively implementing remedies designed to restore or preserve a complainant’s equal educational access any time a respondent is found responsible for sexual harassment.

Promont Timeframes
* No 60-day rule
* What is “prompt”?  
* What timeframes should we set?  
* Examples of possible delays?
  * 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

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Equitable Responses

The recipient’s response must treat complainants and respondents equitably, meaning that for a complainant, the recipient must offer supportive measures, and for a respondent, the recipient must follow a grievance process that complies with § 106.45 before imposing disciplinary sanctions.

Reasonable/Clearly Unreasonable

In addition to the specific requirements imposed by these final regulations, all other aspects of a recipient’s response to sexual harassment are evaluated by what was not clearly unreasonable in light of the known circumstances. Recipients must also document their reasons why each response to sexual harassment was not deliberately indifferent.

Section §106.44(b)(ii)(A) (providing that recipient responses to sexual harassment must be non-deliberately indifferent, meaning clearly unreasonable in light of the known circumstances . . .

If a recipient does not provide supportive measures as part of its response to sexual harassment, the recipient specifically must document why that response was not clearly unreasonable in light of the known circumstances (for example, perhaps the complainant did not want any supportive measures).

Concurrent Law Enforcement Activity

Section §106.45(b)(1)(ii) provides that the recipient’s designated reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for good cause, which may include concurrent law enforcement activity. Section §106.45(b)(6)(A)(i) provides that the decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party’s failure to appear at or answer cross-examination questions at a hearing; this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal procedure. Further, subject to the requirements in §106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, incriminatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a §106.45 grievance process.

Law Enforcement Cannot Be Used to Skirt

Section §106.45(b)(10)(ii)(D) provides that the recipient’s designated reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for good cause, which may include concurrent law enforcement activity. Section §106.45(b)(6)(A)(i) provides that the decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party’s failure to appear at or answer cross-examination questions at a hearing; this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal procedure. Further, subject to the requirements in §106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, incriminatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a §106.45 grievance process.

Law Enforcement Activity/

This guidance takes a similar position: “In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.”

Police Investigations

The 2001 Guidance takes a similar position: “In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. Police investigations or reports may be useful in terms of fact gathering. However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.”

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Confidentiality and FERPA Protections

Section 106.30 requires recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.36(b) states that exercise of rights protected by the First Amendment is not retaliation. Section 106.39 defining "supportive measures" instructs recipients to keep confidential the provision of supportive measures except as necessary to provide the supportive measures. These provisions are intended to protect the confidentiality of complainants, respondents, and witnesses during a Title IX process, subject to the recipient’s ability to meet its Title IX obligations consistent with constitutional protections.

Confidentiality

“Gag orders” are not permitted, but

...abuses of a party’s ability to discuss the allegations can be addressed through tort law and retaliation prohibitions. Id. at §106.45(b)(5)(iii).

§106.45(b)(5)(iii) applies only to discussion of “the allegations under investigation,” which means that where a complainant reports sexual harassment but no formal complaint is filed, §106.45(b)(5)(iii) does not apply, leaving recipients discretion to impose non-disclosure or confidentiality requirements on complainants and respondents. Id.

Non-disclosure Agreements?

Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint. Id. at §106.44(a) (emphasis added).

Complainant Autonomy

A complainant may only want supportive measures, may wish to go through an informal process, or may want to file a formal complaint. The Department revised §106.44(a) to clarify that an equitable response for a complainant means offering supportive measures irrespective of whether the complainant also chooses to file a formal complaint. Additionally, a recipient may choose to offer an informal resolution process under §106.45(b)(9) (except as to allegations that an employee sexually harassed a student). These final regulations thus respect a complainant’s autonomy in determining how the complainant would like to proceed after a recipient becomes aware (through the complainant’s own report, or any third party reporting the complainant’s alleged victimization) that a complainant has allegedly suffered from sexual harassment.

Complainant Autonomy/Desire to Move Forward in a Formal Process

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Formal Complaints and the Complainant’s Wishes

These final regulations obligate a recipient to initiate a grievance process when a complainant files, or a Title IX Coordinator signs, a formal complaint, so that the Title IX Coordinator takes into account the wishes of a complainant and only initiates a grievance process against the complainant’s wishes if doing so is not clearly unreasonable in light of the known circumstances.

Id. at 30045 (emphasis added).

Formal Complaints and the Complainant’s Wishes Cont’d

[A] complainant’s desire not to be involved in a grievance process or desire to keep the complainant’s identity undisclosed to the respondent will be overridden only by a trained individual (i.e., the Title IX Coordinator) and only when specific circumstances justify that action. These final regulations clarify that the recipient’s decision not to investigate when the complainant does not wish to file a formal complaint will be evaluated by the Department under the deliberate indifference standard, that is, whether that decision was clearly unreasonable in light of the known circumstances.

Id. at 30045 (emphasis added).

Moving Forward Against the Wishes of a Complainant

• Cross complaints
• Proceeding with a reluctant participant?
• Trauma?
• Triggers?
• In transit withdrawals

Emergency Removal/Administrative Leave

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) Emergency removal.

[T]these final regulations expressly authorize recipients to remove a respondent from the recipient’s education programs or activities on an emergency basis, with or without a grievance process pending, as long as post-deprivation notice and opportunity to challenge the removal is given to the respondent. A recipient’s decision to initiate an emergency removal will also be evaluated under the deliberate indifference standard.

Id. at 30046 (internal citation omitted).
§106.44(d) 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.

A Closer Look at Formal Complaints

§106.30(a) “Formal Complaint”

A “formal complaint” is a document that initiates a recipient’s grievance process, but a formal complaint is not required in order for a recipient to have actual knowledge of sexual harassment, or allegations of sexual harassment, that activates the recipient’s legal obligation to respond promptly, including by offering supportive measures to a complainant. A formal complaint means 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. 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. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under §106.8(a), and by any additional method designated by the recipient. (emphasis added)

“Formal Complaint” Cont’d

As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under §106.45, and must comply with the requirements of this part, including §106.45(b)(1)(iii).
§ 106.45(b)(3)(i)

(i) Dismissal of a formal complaint—

(ii) The recipient must investigate the allegations in a formal complaint. 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 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)(ii)

(i) 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 the formal complaint or allegations therein.

§ 106.45(b)(3)(iii)

(ii) 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.

Dismissal of Complaint

(i) If a respondent is no longer enrolled or employed by a recipient, or if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein, then the recipient may dismiss the formal complaint or any allegations therein.

Id. at 30087.

(ii) If a recipient dismisses a formal complaint or any allegations in the formal complaint, the complainant should know why any of the complainant’s allegations were dismissed and should also be able to challenge such a dismissal by appealing on certain grounds.

Id. at 30053.

§ 106.45(b)(4)

(4) 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.

Formal Complaint Examples

You may file your formal complaint by emailing it to ODR@harvard.edu.

Please remember that your formal complaint must be in writing. In addition:

- It should state the name of the alleged harasser if known.
- It should describe with reasonable specificity the incident(s) of alleged harassment, including the date and place of such incidents.
- It must be to the Complainants or Respondent’s own words, and may not be authorized by others, including family members, advisors, or attorneys.
- It should have an attached list of any sources of information: for example, witnesses, correspondence, records, etc. that the Complainant or Respondent believes may be relevant to the investigation. However, a complaint should not be delayed if such sources of information are unknown or unavailable.

https://files.berkley.edu/
Thoughts on Formal Complaints

- Signed?
- Digital?
- Verified?
- Notary?
- Attestation or oath?
- Privileges?
- How to handle false reports?
- Provision for false reports/providing false information in code/policy?

§ 106.45(b)(2)(i)(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.

§ 106.71(b)(2)

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.
Special Issues in Investigation
- Definitions Under the 2020 Regulations
- Familiarity with Specific Campus Policies
- The Investigation Process Itself
- Relevance and Rape Shield Rules
- The Minimum and Maximum Role of the Investigator
- The Tie to the Adjudication Process
- Who should serve as an investigator?

Who Should Serve as an Investigator?
- Attorneys?
- Outside Investigator?
- Campus Safety/Security?
- Student Conduct Officers?
- Title IX Coordinator/Deputy Title IX Coordinator?
- Human Resources?
- Co-investigators?

Job Description
- Required Competencies
- Reporting Structure
- Full Time vs. Part Time
  - Time Requirements
- Potential Conflicts of Interest
- Soft skills

Requirements
- No conflict of interest or bias; undue institutional interference.
- No sexual stereotypes
- Detail oriented
- Ability to write a quality investigative report
- Documentation is everything
- Organized
- Analytical skills
- Time to devote to investigation
- Listening skills
- Understand basics of Title IX evidence rules

Requirements (cont'd)
- Comfortable with subject matter
- Able to apply policies and think critically
- Comfortable with conflict
- Ability to build rapport
- Collaborative
- Ability to remain objective and neutral

"Adversarial in Nature"

In the context of sexual harassment that process is often inescapably adversarial in nature where contested allegations of serious misconduct carry high stakes for all participants.

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The Investigation Process Itself

- Planning
- Interviewing
- Report Writing
- Tie to the hearing process

The Minimum and Maximum Role of the Title IX Investigator

- Campuses are no longer permitted to have a "single" or "pure" investigator model under Title IX.
- A separate decision-maker (or panel of decision-makers) must make a final determination of responsibility.
- This will be a shift in the function of the investigator on some campuses.
- What, then, is the scope of the investigative report?
- Purpose? Tone? Format?
- Will the investigator become a witness in the hearing or play other roles?

The Minimum and Maximum Role of the Investigator Cont’d

- Gather all relevant information regarding an allegation of sexual harassment.
- Interview all relevant parties
- Collect and organize relevant evidence
- Credibility Assessments?
- Weighing Evidence?
- Write a detailed investigative report
- Make recommendations for supportive measures or accommodations?
- Drawing conclusions/findings of responsibility?????

The Department emphasizes that the 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. Id. at 10314.

Evidence and Relevance

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Overview

- Credibility
- Relevance
- Evidentiary Standard
- Probative Evidence
- Prejudice
- Inculpatory Evidence
- Exculpatory Evidence
- Hearsay
- Expert Testimony

[A] recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

50.01% likelihood or 50% and a feather

Which side do you fall on?

Contrast this with “clear and convincing” and “beyond a reasonable doubt.”

Overview

[A] recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

Inculpatory Evidence

Evidence showing or tending to show one’s involvement in a crime or wrong.


Exculpatory Evidence

Evidence tending to establish a defendant’s innocence.


Evidentiary Standard

Using a preponderance of the evidence standard, and considering relevant definitions in the Policy, the hearing panel weighs the evidence to determine whether the Respondent violated the Policy.

50.01% likelihood or 50% and a feather

Which side do you fall on?

Contrast this with “clear and convincing” and “beyond a reasonable doubt.”

Relevance

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

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Definition of “Relevant”

Having significant and demonstrable bearing on the matter at hand.
Affording evidence tending to prove or disprove the matter at issue or under discussion.

Relevance Cont’d

The 2020 Title IX regulations specifically …

… require investigators and decision-makers to be trained on issues of relevance, including how to apply the rape shield provisions (which deem questions and evidence about a complainant’s prior sexual history to be irrelevant with two limited exceptions). Id. at 3025 (emphasis added).

Prior Sexual History/Sexual Predisposition

Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from questions or evidence about the complainant’s prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal courts.

Rape Shield Language

[T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant’s sexual predisposition (with no exceptions) and about a complainant’s prior sexual behavior subject to two exceptions:

1) If offered to prove that someone other than the respondent committed the alleged sexual harassment, or
2) If the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove consent.

Consent and Rape Shield Language

[A] recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process. The scope of the questions or evidence permitted and excluded under the rape shield language in § 106.45(b)(6)(i)-(ii) will depend in part on the recipient’s definition of consent, but, whatever that definition is, the recipient must apply it consistently and equally to both parties, thereby avoiding the ambiguity feared by the commenter. Id. at 3025.
Look out for attempts to derail the hearing, deflect away from questions, and/or questions and evidence about a complainant’s prior sexual behavior are irrelevant unless they meet one of the two exceptions:

- and questions and evidence about a respondent’s sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.

Avoid expectations or assumptions about behaviors or responses by either the alleged victim for access to those records)

In cases where medical or mental health records exist and panel members consider all questions and evidence of a complainant’s sexual behavior are irrelevant unless they meet one of the two exceptions;

- Credibility Determinations
- Credibility Determinations Cont’d
- Advisors and Hearings

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, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding, however, 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;
Complainants and respondents can have any advisor of their choosing. Effective representation?

Some will choose a lawyer as an advisor. Some will want a lawyer but will not be able to afford one. Equitable treatment issues?

Some may have a family member, a friend, or another trusted person serve as their advisor. If a party does not have an advisor, the school must provide one.

While the final regulations do not require the recipient to pay for parties’ advisors, if a party does not have an advisor, the school must provide one. Should not be viewed as practicing law, but rather “as providing advocacy services to a recipient’s grievance process.”

The Department acknowledges commenters’ concerns that if the final regulations restrict parties’ selection of advisors by allowing advisors to be witnesses in their own behalf, it would preclude a party from selecting an advisor who may also be a witness. The Department believes it would be inappropriate to restrict the parties’ right to select an advisor of choice, and nothing precludes a party from choosing a friend to serve as that advisor of choice.

### Must You Allow a Complainant to Bring a Support Person to the Initial Meeting with the Title IX Coordinator?

Although these final regulations do not expressly require recipients to allow complainants to bring a supportive friend to an initial meeting with the Title IX Coordinator, nothing in these final regulations prohibits complainants from doing so. Indeed, many people bring a friend or family member to doctors’ visits for extra support, whether to assist a person with a disability or for emotional support, and the same would be true for a complainant reporting to a Title IX Coordinator. Once a grievance process has been initiated, these final regulations require recipients to provide the parties with written notice of each party’s right to select an advisor of choice, and nothing precludes a party from choosing a friend to serve as that advisor of choice.

### “Advisors”

- Complainants and respondents can have any advisor of their choosing.
- Some will choose a lawyer as an advisor. Some will want a lawyer but will not be able to afford one. Equitable treatment issues?
- Some may have a family member, a friend, or another trusted person serve as their advisor.
- If a party does not have an advisor, the school must provide one.
- Effective representation?
  - Some believe the regulations do not require the recipient to pay for parties’ advisors, nothing the in the final regulations precludes a recipient from choosing to do so. Id. at 30299.
  - Effective representation?
    - Should not be viewed as practicing law, but rather “as providing advocacy services to a complainant or respondent.” Id. at 30299.

### “Witnesses” as “Advisors”

The Department acknowledges commenters’ concerns that advisors may also serve as witnesses in Title IX proceedings, or may not wish to conduct cross-examination for a party whom the advisor would otherwise be willing to advise, or may be unavailable to attend all hearings and meetings. Notwithstanding these potential complications that could arise in particular cases, the Department believes it would be inappropriate to restrict the parties’ right to select an advisor of choice, and nothing precludes a party from selecting an advisor who may also be a witness.

### “Advisors” Cont’d

How can should advisors participate in the process?

Section 106.45(b)(iv) (evidence subject to inspection and review must be sent electronically or in hard copy to each party and the party’s advisor of choice). Id. at 30298 n. 1468.

Section 106.45(b)(v) (a copy of the investigative report must be sent electronically or in hard copy to each party and the party’s advisor of choice). Id. at 30298 n. 1469.

The final regulations make one exception to the provision in § 106.45(b)(iv) that recipients have discretion to restrict the extent to which party advisors may actively participate in the grievance process: where a postsecondary institution must hold a live hearing with cross-examination, such cross-examination must be conducted by party advisors. Id. at 30298 n. 1469.

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### “Advisors” Cont’d

How can should advisors participate in the process?

Section 106.45(b)(iv) (evidence subject to inspection and review must be sent electronically or in hard copy to each party and the party’s advisor of choice). Id. at 30298 n. 1468.

Section 106.45(b)(v) (a copy of the investigative report must be sent electronically or in hard copy to each party and the party’s advisor of choice). Id. at 30298 n. 1469.

The final regulations make one exception to the provision in § 106.45(b)(iv) that recipients have discretion to restrict the extent to which party advisors may actively participate in the grievance process: where a postsecondary institution must hold a live hearing with cross-examination, such cross-examination must be conducted by party advisors. Id. at 30298 n. 1469.
§ 106.45(b)(6)(i) Cont’d

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. 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. 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.

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Adopting Rules Outside of § 106.45(b)

§ 106.45(b) expressly allows recipients to adopt rules that apply to the recipient's grievance process, other than those required under § 106.45, so long as such additional rules apply equally to both parties. For example, a postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings. Id. at 30292. 2023

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Hearings

• What is a “hearing”?
• Single decision-maker vs. a panel of decision makers?
• Rules of evidence?
• Should all hearings be online (currently)
• What are the differences?
• Online hearings
  • Platforms?
  • Security?
• Do you record?
• Cross-examination
• Hearing rules?

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More on § 106.45

§ 106.45 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 recipient allows at a live hearing, so long as such rules apply equally to both parties. Id. at 30294. While nothing in the final regulations discourages parties from speaking for themselves during the proceedings, the Department believes it is important that each party have the right to receive advice and assistance navigating the grievance process. Id. at 30294.

Recipients may not...

• ... adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45.
• ... adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice.
• ... adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege).

Id. at 30294. (internal citations omitted).

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Rules for Evaluating Evidence

... the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties. Id. at 30294. (emphasis added).

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Rules Regarding Weight and Credibility

A recipient may, for example, 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 such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents. Because a recipient’s investigators and decision-makers must be trained specifically with respect to “issues of relevance,” any rules adopted by a recipient in this regard should be reflected in the recipient's training materials, which must be publicly available.

Prior Sexual History

Section 106.45(b)(10)(i)(D) protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal courts.

Cross-Examination

• Advisors may cross examine but not the witnesses/complainants/respondents themselves
• Objections and evidence issues
• Inculpatory/Exculpatory evidence

The Department understands commenters’ concerns that a blanket rule against reliance on party and witness statements made by a person who does not submit to cross-examination is a broader exclusionary rule than found in the Federal Rules of Evidence, under which certain hearsay exceptions permit consideration of statements made by persons who do not testify in court and have not been cross-examined. Id. at 30348.

Standard of Evidence to Determine Responsibility

A recipient's grievance process must—

(vii) State whether the standard of evidence to be used to determine responsibility is 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.
"Standard of Evidence"

- Which should we choose?
  - Clear and convincing? Preponderance of the evidence?
  - How do we choose?
  - Pros and cons of each?
  - What do you have now (for students)?
  - What do you have now (for employees, including faculty)?
  - Do changes to the employee/faculty component need to go through a governance group for approval?

Sanctions and Remedies

Disciplinary Decisions/Sanctions Must Themselves Not Be Discriminatory

The Department notes that while Title IX does not give the Department a basis to impose a Federal standard of fairness or proportionality onto disciplinary decisions, Title IX does, of course, require that actions taken by a recipient must not constitute sex discrimination. Title IX’s non-discrimination mandate applies as much to a recipient’s disciplinary actions as to any other action taken by a recipient with respect to its education programs or activities.

Sanctions

The Department does not require particular sanctions—i.e., or therapeutic interventions— for respondents who are found responsible for sexual harassment, and leaves those decisions in the sound discretion of State and local educators. Id. at 30104 (emphasis added).

The Department does not require disciplinary sanctions after a determination of responsibility, and does not prescribe any particular form of sanctions.

The Department acknowledges that this approach departs from the 2001 Guidance, which stated that where a school has determined that sexual harassment occurred, effective corrective action "tailored to the specific situation" may include particular sanctions against the respondent, such as counseling, warning, disciplinary action, or escalating consequences. . . . For reasons described throughout this preamble, the final regulations modify this approach to focus on remedies for the complainant who was victimized rather than on second guessing the recipient’s disciplinary sanctions decisions with respect to the respondent. However, the final regulations are consistent with the 2001 Guidance’s approach in much as § 106.45(b)(1)(i) clarifies that "remedies" may consist of individualized services similar to those described in § 106.30 as "supportive measures" except that remedies need not avoid disciplining or burdening the respondent.

Disciplinary Decisions/Sanctions Must Themselves Not Be Discriminatory

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Sanctions

- If a respondent is found responsible in a grievance process for sexual harassment what is an appropriate sanction?
- Is anything less than expulsion okay?
- Schools maintain discretion and flexibility in imposing sanctions AFTER a respondent has been found responsible.
- Make sure to outline the possible RANGE of sanctions clearly in your policy.
- Can include a continuation of supportive measures.

§ 106.45(b)(1)(i)

(a) Basic requirements for grievance process. A recipient’s grievance process must—

(1) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of 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. 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.
Where a respondent is found responsible for sexual harassment as defined in §106.30, the recipient must provide remedies to the complainant designed to restore or preserve the complainant’s equal access to education.

Id. at 30083 (emphasis added).

Remedies

Examples of remedies for an individual complainant
- Can be a continuation of supportive measures (such as a no-contact order)
- Academic accommodations/academic support services
- Counseling services
- Residence accommodations
- What about remedies for the broader community?
- Again, issuing sanctions after a respondent is found responsible is not enough. The 2020 regulations turn on “remedies for the complainant” not just sanctions against the respondent.
- Are there academic remedies based on the impact the event had?

Remedies

• Examples of remedies for an individual complainant
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• What about remedies for the broader community?
• Again, issuing sanctions after a respondent is found responsible is not enough. The 2020 regulations turn on “remedies for the complainant” not just sanctions against the respondent.
• Are there academic remedies based on the impact the event had?

Appeals

(8) Appeals.
(i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:

§ 106.45(b)(8)(i)

(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)(ii)

(i) A recipient may offer an appeal equally to both parties on additional bases.
§ 106.45(b)(8)(iii)(A-F)

(iii) As to all appeals, the recipient must:
(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)(vi) 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.

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Points on Appeals

* What choices do we need to make?
* Procedures?
* Who can hear appeals?
* What "additional basis" could exist?

Points on Informal Resolution

* The 2020 regulations don’t require it, but informal resolution is allowed.
* A formal complaint must be filed before any informal resolution process can begin.
* Both parties must voluntarily agree to informal resolution (written consent required). (No coercion or undue influence.)
* Parties do not have to be in the same room…often, they are not.
* Equitable implementation by trained personnel
* Should you offer it?
  * Rest:Care 
  * Increased Complainant autonomy
* Who should implement?
* What type of training is needed?
  * Restorative? Adversarial? Restorative justice?
* When can’t we use informal resolution?
  * When the allegation is that an employee sexually harassed a student.
* Does this option provide for more opportunities for “educational’ interventions?

Ending an Informal Process

(A) In an informal resolution process, in which the parties voluntarily participate, may end in an agreement under which the respondent agrees to a disciplinary sanction or other adverse consequence, without the recipient completing a grievance process, under § 106.45(b)(9).

§ 106.45(b)(9)(i) (Written Notice)

Parties must be provided written notice that outlines
* 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
* any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

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A Closer Look at Retaliation

§ 106.71(a)
(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or 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. 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(a) Cont’d
The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

§ 106.71(b)(1)
(b) Specific circumstances.
(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

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.

Retaliation
- Against complainant, respondent, witnesses, advisors
- Against employees
- Vigilantism—Digital or otherwise

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Bias/Impartiality, Conflicts of Interest, Sex Stereotypes

Some complainants, including or especially girls of color, face school-level responses to their reports of sexual harassment infected by bias, prejudice, or stereotypes.

§ 106.45(b)(ii)(iii) (prohibits) Title IX Coordinators, investigators, and decision-makers, and persons who facilitate informal resolution processes from having conflicts of interest or bias against complainants or respondents generally, or against an individual complainant or respondent, (and requires) training that also includes “how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”

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“Bias” in Ikpeazu v. University of Nebraska

With respect to the claim of bias, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven. . . The allegations Ikpeazu makes in support of his bias claim are generally insufficient to show the kind of actual bias from which we could conclude that the committee members acted unlawfully.

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Does DOE require “Implicit Bias” training?

The Department declines to specify that training of Title IX personnel must include implicit bias training; the nature of the training required under § 106.45(b)(i)(ii)(iii) is left to the recipient’s discretion so long as it achieves the provision’s directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes.

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Conflict of Interest
A conflict between the private interests and the official responsibilities of a person in a position of trust.

Impartial
Not partial or biased; treating or affecting all equally

Prejudgment
A judgment reached before the evidence is available

Prejudice
An opinion or judgment formed without due examination; prejudgment; a leaning toward one side of a question from other considerations than those belonging to it; and unreasonable predilection for, or objection against, anything; especially an opinion or leaning adverse to anything, without just grounds, or before sufficient knowledge.

Stereotype
something conforming to a fixed or general pattern; a standardized mental picture that is held in common by members of a group and that represents an oversimplified opinion, prejudiced attitude, or uncritical judgment.

“Sex Stereotypes”
• What is a sex stereotype? What does DOE mean by this term?
• What are some examples of sex stereotypes?
• An example of a scholarly paper on stereotypes:
• Sex stereotypes are to be avoided in training and in actual practice.
• Be especially careful when doing case studies of any kind.
• Anyone can be a complainant or respondent, and all are individuals!
All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid
- prejudgment of facts
- prejudice
- conflicts of interest
- bias
- sex stereotypes

Whose side are you on as a Title IX operative?

You have no “side” other than the integrity of the process.

Supportive Measures

§ 106.30(a) "Supportive Measures"  Cont’d

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.

The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

§106.44(a) Cont’d

. . . 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 . . .
More on Supportive Measures...

[A] recipient must offer supportive measures to a complainant, regardless of whether the complainant decides to file, or if the Title IX Coordinator decides to sign, a formal complaint.

Supportive measures must be offered not only in an “interim” period during an investigation, but regardless of whether an investigation is pending or ever occurs.

Complainants must be offered supportive measures, and respondents may receive supportive measures, whether or not a formal complaint has been filed or a determination regarding responsibility has been made.

[A] recipient must offer supportive measures to any person alleged to be the victim, even if the complainant is not the person who made the report of sexual harassment.

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Thoughts on Supportive Measures

• Moving classes?
• Housing changes?
• Two students in the same student organization, club, or team?
• Burden on one party but not the other?
• No-contact orders

[A] These final regulations allow for mutual restrictions on contact between the parties as stated in § 106.30, and § 106.30 does not expressly prohibit other types of no-contact orders such as a one-way no-contact order.

Id. at 106.30.

One-Way No-Contact Orders

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.

Id. at 106.30.

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Title IX Coordinator

• Must offer and implement supportive measures.
• Implementation may require coordination with others on campus.

Campus Culture and Climate

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Education

* Education is the great hope in overcoming violence.
* We can do Title IX compliance better! Use educational tools to promote the goals of Title IX.
* Years ago, RFK discussed the challenges of the “Mindless menace of violence”

Robert F. Kennedy, Cleveland, Ohio, 1968

“...What we need in the United States is not violence or lawlessness; but love and wisdom, and compassion toward one another, and a feeling of justice toward those who still suffer within our country...”

Robert F. Kennedy, Indianapolis, Indiana, 1968

Education

* Identify core educational challenges and opportunities
* Utilize academic departments focused on related issues: (Health studies, gender studies, etc.)
* Manage “trigger” issues in the classroom
* Train staff, faculty and students on Title IX, including sexual violence and other forms of sexual harassment

The Law

* The law recognizes its own limits in regards to sex discrimination
* Resist “Legalese”

The Title IX System Itself

* Make your Title IX efforts known to the community
* Look to schools that have been through an investigation for clues
* Utilize the wisdom and experience of campus constituencies to help assess systems
* Effective response to Title IX incidents helps to foster a healthy culture!

Integration

* Integrate Title IX with other public health and wellness initiatives, such as alcohol and other drug prevention
* Interface Title IX into your institution’s mission statement and enterprise risk management (ERM) system

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Sensitivity

- Sonar
- Multicultural Initiatives
- LGBTQIA
- Choose your words

Prevention

- Sexual assault prevention and awareness programs are required under the Clery Act
- Use evidence-based strategies (still developing) – Centers for Disease Control and Prevention, Division of Violence Prevention, Preventing Sexual Violence on College Campuses: Lessons from Research and Practice (April 2014)
- Use a comprehensive strategy
  - Consider the following model from the CDC, Preventing Sexual Violence on College Campuses: Lessons from Research and Practice (April 2014)

Figure 1. Example of a Comprehensive Campus-Based Primary Prevention Strategy for Sexual Violence Perpetration

Individual
Peer/Partner
Organization
Community

- Build bystander intervention and healthy relationship skills and establish support structures for survivors.
- Coach-implemented interventions for male athletes addressing alcohol use and sexual assault risk.
- Engage campus leadership to promote culture of safety and support planning and implementing strategies to address norms related to sexual violence.
- Implement campus-wide programs that promote healthy relationships.
- Community outreach and implementation of evidence-based strategies and approaches.

Consistent Messages Across Campus Policies and Programs

Prevention and Intervention

- Virginia Tech, Be an Active Bystander, http://www.stopabuse.vt.edu/bystander.php

Primary prevention is legally required:
VAWA Regs 34 CFR 668.46 (j)

“Programs to prevent dating violence, domestic violence, sexual assault, and stalking. As required by paragraph (b)(11) of this section, an institution must include in its annual security report a statement of policy that addresses the institution’s programs to prevent dating violence, domestic violence, sexual assault, and stalking.”
June 10, 2021 Letter to Dept. of Education, Spearheaded by the American Council on Education (ACE)

Signed by:

- American Association of Collegiate Registrars and Admissions Officers
- American Association of Colleges for Teacher Education
- American Association of Community Colleges
- American Association of State Colleges and Universities
- American College Personnel Association
- American Council on Education
- American Dental Education Association
- American Indian Higher Education Consortium
- APPA, “Leadership in Educational Facilities”
- Association of American Colleges and Universities

June 10, 2021 Letter to Dept. of Education

Quotes Cont’d

- The Regulations fail to recognize the myriad other federal, state and local laws, judicial precedent, institutional commitments and values regarding the handling of sexual harassment with which campuses must also comply.
- The Regulations also provide insufficient flexibility to allow campuses to choose between using a "preponderance of evidence" or "clear and convincing" evidentiary standard.
- We appreciate that the Regulations allow campuses to use informal resolution processes when both parties are fully informed of this option and voluntarily consent.
- ...the Regulations require colleges and universities to adopt a new Title IX-specific definition of "sexual harassment" that is inconsistent with Title VII’s definition, and also with definitions contained in campus sexual misconduct policies. The Regulations also raise questions about precisely what conduct will be considered to have occurred within a "program or activity."
- The Regulations have driven up the costs and burden of compliance ... .
- When considering revising the Regulations, we urge OCR to keep the "long game" in mind, and look for solutions that are broadly supported by stakeholders.

Some Key Features of Proposed Title IX Regulations:

- Sex stereotypes, Pregnancy, Sexual orientation, Gender identity are covered under Title IX

The Department’s proposed regulations clarify that Title IX’s prohibition of discrimination based on sex includes protections against discrimination based on sex stereotypes and pregnancy. The Department is also clarifying that Title IX’s protections against discrimination based on sex apply to sexual orientation and gender identity. This clarification is necessary to fulfill Title IX’s nondiscrimination mandate.

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**Proposed Title IX Regulations:**

**Hostile Environment Sexual Harassment**

The proposed regulations will restore vital protections for students against all forms of sex-based harassment. Under the previous Administration’s regulations, some forms of sex-based harassment were not considered to be a violation of Title IX, denying equal educational opportunity. The proposed regulations would cover all forms of sex-based harassment, including unwelcome sex-based conduct that creates a hostile environment by denying or limiting a person’s ability to participate in or benefit from a school’s education program or activity.

FACT SHEET U.S. Department of Education’s 2022 Proposed Amendments to its Title IX Regulations

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**Obama-Era Definition of Hostile Environment**

In determining whether this denial or limitation (to access to educational benefits) has occurred, the United States examines all the relevant circumstances from an objective and subjective perspective, including:

1. The type of harassment (e.g., whether it was verbal or physical);
2. The frequency and severity of the conduct;
3. The age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student);
4. The setting and context in which the harassment occurred;
5. Whether other violations have occurred at the college or university;
6. and other relevant factors

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**Trump-Era Definition “Sexual Harassment” [Three-Prong Test]**

Sexual harassment means 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;

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**Biden-Era Definition of Sex-Based Harassment**

Sex-based harassment prohibited by this part means sex-based harassment, harassment on the bases described in § 106.45(a), and other conduct on the basis of sex that:

1. Quid pro quo harassment. An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient’s education program or activity explicitly or implicitly conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct;
2. Hostile environment harassment. Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity;
3. The conduct of the alleged harassment has been a fact-specific inquiry that includes consideration of the following:
   - The type of conduct the complainant alleged;
   - The frequency, type, and duration of the conduct;
   - The parties’ ages, roles within the recipient’s education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct.
4. The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the conduct.

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**A Note on “Unwelcome Conduct”**

The Department proposes retaining the requirement that the conduct in categories one and two of the definition of “sex-based harassment” must be unwelcome. Although the Department does not propose retaining the requirement, the Department understands it is important to provide recipients with adequate clarity on how to analyze whether conduct is unwelcome under the proposed regulations.

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**Proposed Title IX Regulations:**

**Emphasis on Pregnancy and Parenting Students**

The proposed rules would update existing protections for students, applicants, and employees against discrimination because of pregnancy or related conditions. The proposed regulations would strengthen requirements that schools provide reasonable accommodations for pregnant students, reasonable break time for pregnant employees, and lactation space.

FACT SHEET U.S. Department of Education’s 2022 Proposed Amendments to its Title IX Regulations

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U.S. Department of Education’s Office for Civil Rights Announces Resolution of Pregnancy Discrimination Investigation of Salt Lake Community College

OCR determined that the college violated both Title IX of the Education Amendments of 1972 (Title IX) and Section 504 of the Rehabilitation Act of 1973 (Section 504) after investigating allegations that Salt Lake Community College encouraged a pregnant student to drop a course because she was pregnant, did not engage in an interactive process to provide her with academic adjustments or necessary services during her pregnancy, and did not excuse her pregnancy-related absences or allow her later to submit work following those absences.

OCR found that the college violated Title IX and its implementing regulations by failing: (1) to respond promptly and equitably to the student’s complaint of pregnancy discrimination, (2) to engage in an interactive process with the student to determine the appropriate special services and/or academic adjustments to provide in light of her pregnancy, and (3) to excuse her absences related to pregnancy, provide her the opportunity to make up missed work due to these pregnancy-related absences, or provide her with alternatives to making up missed work at a later date.

The school’s decisionmakers must objectively evaluate each party’s evidence and respond to the relevant evidence of other parties.

All schools must treat complainants and respondents equitably.

Note:

"Employee with responsibility for administrative leadership, teaching, or advising"

It is the Department’s current understanding that employees with responsibility for administrative leadership would include, among others, presidents, pro vice-chancellors, and vice-presidents; and employees with a similar level of responsibility, such as those who hold positions as assistant or associate deans or directors of programs or activities. The Department anticipates that employees with teaching responsibilities would include, among others, academic advisors, as well as employees who serve as advisors for clubs, fraternities and sororities, and other programs or activities offered in support of students by the recipient.

The Department also notes that employees with responsibility for administrative leadership, teaching, or advising is a fact-specific determination to be made by the recipient taking into account the types of fact sets just discussed, and any others that may be relevant in the recipient’s educational environment.

Proposed Title IX Regulations:

Outlines Key Grievance Procedure Requirements

• All schools must treat complainants and respondents equitably.
• Schools have the option to offer informal resolution for resolving sex discrimination complaints.
• Title IX Coordinators, investigators, decisionmakers, and facilitators of 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.
• A school’s grievance procedures must give the parties an equal opportunity to present relevant evidence and respond to the relevant evidence of other parties.
• The school’s decisionmakers must objectively evaluate each party’s evidence.

FACT SHEET: U.S. Department of Education’s Announces Proposed Amendments to its Title IX Regulations

Proposed Title IX Regulations: Broadens Mandated Reporters on Campus

The proposed regulations would promote accountability and fulfill Title IX’s nondiscrimination mandate by requiring schools to act promptly and effectively in response to information and complaints about sex discrimination in their education programs or activities. And they would promote accountability and fulfill Title IX’s nondiscrimination mandate by requiring schools to act promptly and effectively in response to information and complaints about sex discrimination in their education programs or activities. (b)(10)(i)(D).

FACT SHEET: U.S. Department of Education’s Office for Civil Rights Announces Resolution of Pregnancy Discrimination Investigation of Salt Lake Community College

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Another aspect of impartiality is the avoidance of financial or other forms of self-interest in the adjudication: an impartial adjudicator is one who does not have a financial interest in the outcome.

A third sense of impartiality means that the person has not prejudged the facts and is not likely to have difficulty maintaining an open mind and deciding based on the evidence presented.

Prior involvement in or knowledge of the facts at issue may create the appearance or reality of bias.

Still another sense of impartiality is decisionmakers’ freedom to decide without fearing repercussions from the influence of mob passions.

One source of potential bias may arise when a decisionmaker has a preexisting financial interest in the outcome.

With respect to the claim of bias, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven.

To ensure that the grievance procedures are equitable, a recipient must ensure that the decisionmaker is fair and reliable process is met should always rest on a sound evidentiary basis.

Proposed Title IX Regulations:

Outlines Key Grievance Procedure Requirements

- The proposed regulations would not require a live hearing for evaluating evidence, meaning that if a school determines that its fair and reliable process will be best accomplished with a single-investigator model, it can use that model.
- A school must have a process for a decisionmaker to assess the credibility of parties and witnesses through live questions by the decisionmaker. The proposed regulations would not require cross-examination by the parties for this purpose but would permit a postsecondary institution to use cross-examination if it so chooses or is required to by law.

NOTE: Standard of Proof Alignment with ALI

The Department notes that the American Law Institute (ALI) membership, at its May 2023 Annual Meeting, approved the following principle as part of its project on procedural frameworks for resolving campus sexual misconduct cases in postsecondary institutions:

§ 6.8. Standard of Proof

Colleges and universities should adopt the same standard of proof for resolving disciplinary claims of sexual misconduct by students as they use in resolving other comparably serious disciplinary complaints against students. Standards that require proof either by a “preponderance of the evidence” or by “clear and convincing evidence” can satisfy the requirements of procedural due process and fair treatment. Whatever standard of proof is adopted, decisions that the standard of proof is met should always rest on a sound evidentiary basis.

The Department’s proposed regulations would align with the ALI position, providing that for sex discrimination complaints a recipient can use either the preponderance of evidence or the clear and convincing evidence standard of proof but must not use a higher standard of proof for evaluating evidence of sex discrimination than for other forms of discrimination in comparable proceedings.

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NOTE: Discipline v. Punishment

While punishment focuses on making a child suffer for breaking the rules, discipline is about teaching him how to make a better choice next time.

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Proposed Title IX Regulations:  Supportive Measures for Any Sex Discrimination

Proposed Title IX Regulations:  Retaliation

What's next for the proposed regulations?

- 60-day notice and comment period has long ended.
- Last notice and comment period garnered nearly 125,000 comments.
- This go around the proposed regs garnered over 350,000.  
- New regulations have not yet been sent to the Office of Management and Budget, where it will undergo further review (up to 90 days) before final release.
- After two delays, it is possible the new regulations will be released in spring 2024, and will go into effect later in 2024, perhaps August.
- There will be a separate process for student athletes/transgender issues. (Proposed rule released in April 2023: FACT SHEET: U.S. Department of Education’s 2022 Proposed Amendments to its Title IX Regulations)
- Expect more on informal resolutions, Clery and FERPA interpretation to come.

Where is Title IX headed?

What does the future hold for Title IX? Take-aways....

- LGBT+ protections: transgender athletes’ rights issues
- Several states have laws that prevent transgenders from playing on female sports teams
- March 2023, class action lawsuit filed against the Dept. of Education in Oregon federal court by 333+GBTQ+ plaintiffs from 30 institutions. In January, a judge dismissed the lawsuit. Plaintiffs considering an appeal.

- New Clery manual?
- Proposed rule released in April 2023: FACT SHEET: U.S. Department of Education’s 2022 Proposed Amendments to its Title IX Regulations
- Federal court by 33 LGBTQI+ plaintiffs from 30 institutions
- Title IX protection of LGBTQI+
- May 2023, federal court by 33 LGBTQI+ plaintiffs from 30 institutions
- Federal court by 33 LGBTQI+ plaintiffs from 30 institutions
- Is the religious exemption in Title IX constitutional?
- Speech First, Inc. vs. Fenves; Speech First, Inc. vs. Cartwright  
- Speech First, Inc. v Timothy Sands, No. 20-2061 (4th Cir. 2023)
- Bias Response Team Policy at Virginia Tech
- State law pushbacks
- Rewrite Codes....again? And when? Notice and comment likely to change proposed rules
- Apply Title IX practices to other conduct codes?
- Time for preventative audits: lessons from LSU, USC.
- Nuclear weapons??? and Reproductive Rights—Title IX makes significant pivot...
- SCOTUS overturns Rie v. Wade in Dobbs

- Political landscape 2024 → SCOTUS
- End game for Title IX and detailed grievance regulation…what is ultimately sustainable?  Will what we know of Title IX today devolve to state variances, subject to federal court oversight?
- Reporting and reporters...do we want this much flexibility?
- Training means assessment, especially on reporting and definitions.
- Culture intervention—rise, or return, of “remedies”
- New Clery manual—prevention and reporting on it.
- ALI and “mission sensitivity.”
- SCOTUS ➔ limits of federal regulatory power
- Lawyers and legalisms...Student conduct dominated by law, lawyers and legalisms?  Law as competitor?
What does the future hold for Title IX? Take-aways....

- Does education culture have better solutions? Can we be, must we be, impartial in relation to our own mission? What are the limits of rooting out bias? Are the legal rules themselves a Title IX problem? Fenves ::: NPRM on bias/// "Defamation by Litigation":...FERPA restrictions
- Budgets and industry challenges. DOE cost estimates are perhaps "aspirational."
- College court becomes more like family court—supportive services and review.
- Protections for Title IX operatives....2015 guidance.
- The Transparency Dilemma::: a revise FERPA or b) create more detailed hearing and notice procedures....(DOE goes with b.)
- "Edu-pocalypse" and business issues
- OCR case management?
  - OCR received the most complaints in history in FY22
- Third party. Standards the Most Civil Rights Complaints in History Last Year (sweetbriar.org)

What does the future hold for Title IX? Take-aways....

- Title IX and the "new tenure"... mid-twentieth century deference over? ALI project signals a bleed over effect....? The pursuit of happiness as a protected interest?
- Trifurcation?
- Congressional action in light of SCOTUS rulings.....Title IX implications
- Vectoring...where are we headed?
- Culture impact...how do we explain the proposed regulations to our stakeholders and "shapeholders": Active monitoring required...
- Courts are inventing many new ways to hold colleges accountable for decisions on sexual misconduct? Compliance in the process of attempting compliance---meta-compliance issues dominate.
- The single investigator model as lightning rod.
- Arbitration and no cause dismissal?
- Flexibility---Title IX looks different across the country
- Updated training will be required after the final regulations are published.

Final thoughts...

THANK YOU!