Nondiscrimination on the basis of sex in education

Cite as 34 C.F.R. 106

Sexual harassment, including sexual assault, is unlawful sex discrimination, effective 08.14.20.

34 C.F.R. §106.45 requires Title IX Coordinators, Investigators, Decision-makers, and informal resolution Facilitators receive training specified in the regulation.
Why we’re here:
Because 34 C.F.R. §106.45 requires everyone in the Title IX process be trained in these regulations and procedures!
UNDERSTAND

All of the following requirements are grafted onto your existing substantive and procedural rules and regulations.

Every school may have a different process, but every process must comply with the following requirements.
Title IX regulations recognize that sexual harassment, including sexual assault, is unlawful sex discrimination.
Title IX is not a prohibition on sexual misconduct or sexual crimes *per se.*
TITLE IX IS DIRECTED AT SCHOOLS, NOT STUDENTS, FACULTY OR EMPLOYEES.

Title IX does not punish people who commit sexual harassment... it penalizes schools that respond to sexual harassment in a way that amounts to subjecting students to sex discrimination.

The goal: **Provide individuals with effective protections against discrimination**
Compliance with new regs is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

For instance: A parent or guardian may act on behalf of a “Complainant,” “Respondent,” “Party,” or other person covered by the new regs, including but not limited to filing a formal complaint.
34 C.F.R. §106.8

You must notify applicants for admission and employment, of the name/title, office address, electronic mail address, and telephone number of the Title IX Coordinator.
You must notify APPLICANTS that your school does not discriminate on the basis of sex and that you are required by Title IX not to discriminate in such a manner.
Any person may report sex discrimination/harassment (whether or not the person reporting is the victim), in person, by mail, by telephone, or by e-mail, using the Title IX Coordinator’s contact info - or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.
34 C.F.R. §106.8

You must adopt/publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sex discrimination/harassment.
DEFINITIONS

Take note
ACTUAL KNOWLEDGE

Means notice of sexual harassment or allegations of sexual harassment to your Title IX Coordinator or any official of your school who has authority to institute corrective measures on behalf of your school.
COMPLAINANT

Means a person who is alleged to be the victim of sexual harassment or violence

34 C.F.R. §106.30
Means a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that you investigate the allegation of sexual harassment.
SEXUAL HARASSMENT

Means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee who conditions the provision of an aid, benefit, or service 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 your education program or activity; or

34 C.F.R. §106.30

VAWA – Clery Act
RESPONDENT

Means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

34 C.F.R. §106.30
Your Response to Sexual Harassment
When you have **actual knowledge** of sexual-harassment, **you must respond promptly** in a manner that is not deliberately indifferent.

You must treat Complainants and Respondents equitably by offering supportive measures to both.

Must follow grievance process of compliance with section 106.45 before the imposition of any disciplinary sanctions.
Title IX Coordinator must promptly contact the Complainant to discuss the availability of supportive measures, 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 the process for filing a formal complaint to the Complainant.
If Complainant files a Formal Complaint, you must follow a grievance process that complies with §106.45.
Emergency Removals

34 C.F.R. §106.44

Talk to your GC – ASAP

You can remove a Respondent from school on an emergency basis...If you undertake an individualized safety and risk analysis, determine that an immediate threat to the physical health or safety of any person arising from the allegations of sexual harassment justifies removal, and provide Respondent with notice and an opportunity to challenge the decision immediately following the removal.
YOUR GRIEVANCE PROCESS MUST

Treat Complainants and Respondents equitably by providing remedies to a Complainant when a determination of responsibility for sexual harassment has been made against Respondent.

And by following a grievance process that complies with regs before the imposition of any disciplinary sanctions.

34 C.F.R. §106.45
GRIEVANCE PROCESS

Must be concluded in a “Reasonably Prompt Time Frame” (No more “60 days!”)

Good cause for delays 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.

34 C.F.R. §106.45
Requires 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
Requires that the Title IX Coordinator, investigator, Decision-Maker, or any person designated to facilitate an informal resolution process, not have a conflict of interest or bias for or against Complainants or Respondents or current parties.
34 C.F.R. §106.45

Requires that ALL persons involved in the Title IX process affirmatively avoid prejudgment of the facts at issue, conflicts of interest, and bias.
Investigators must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

All parties in the process must presume that the Respondent is NOT responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
34 C.F.R. §106.45

Investigators must understand issues of relevance to create an investigative report that fairly summarizes relevant evidence.
Investigators must be trained to seek and develop both inculpatory and exculpatory evidence.
LET'S TAKE A BREAK
Decision-makers MUST be impartial; must be trained on issues of relevance; on admissibility of evidence, including when questions and evidence about the Complainant’s sexual predisposition or prior sexual behavior are irrelevant.
Decision-makers must presume that the Respondent is NOT responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
Decision-makers must be trained to 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.
34 C.F.R. §106.45

You must determine and publish what standard of proof will be used to determine responsibility: “preponderance of the evidence standard” or the “clear and convincing evidence standard”

Must apply the same standard of evidence for formal/informal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment
You must publish the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that you may implement following any determination of responsibility.
You must publish procedures and permissible bases for Complainant and Respondent to appeal
Once you receive a formal complaint:
YOU MUST PROVIDE THE WRITTEN NOTICE TO THE PARTIES WHICH CONTAINS:

- Description of your grievance process including any informal resolution process
- The allegations of behavior that potentially constitute sexual harassment.
- Sufficient details known at the time
- Sufficient time to prepare a response before any initial interview
- A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made only at the conclusion of the grievance process
The parties may have an advisor of their choice.

Right to inspect and review evidence.

Any provision in the school code of conduct that prohibits lying during the grievance process.
34 C.F.R. §106.45

If the investigation reveals that the conduct alleged in the formal complaint would not constitute sexual harassment OR did not occur in the school’s education program or activity OR did not occur against a person in the United States, then you must dismiss the formal complaint.
The Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or,

If the Respondent is no longer enrolled in or employed by you
WHAT ABOUT NEW ALLEGATIONS NOT LISTED IN THE ORIGINAL NOTICE?

You must provide notice of the additional allegations to the parties whose identities are known.
The Investigator
THE INVESTIGATOR MUST

Ensure that the burden of proof and the burden of gathering evidence rests on you and not on the parties!

You 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.

Unless you obtain that party’s voluntary, **written consent** to do so for the grievance process.

34 C.F.R. §106.45
THE INVESTIGATOR MUST

34 C.F.R. §106.45

Give parties equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
SET TIMELINES & BENCHMARKS FOR:

• Interviewing parties
• Interviewing witnesses
• Compiling statements
• Verifying statements
• Gathering/obtaining documentation
• Testing medical evidence
• Research
• Drafting the report
INITIAL CONTACT WITH COMPLAINANT

Confidentiality important, but not guaranteed

Identify the team and explain its mission

Explain the investigatory process; the steps to be taken; timing

Complainant is entitled to be fully involved and informed regarding the process
COMPLAINANT INTERVIEW

Create a comfortable, safe, and blame-free environment.

Complainant comfortable, unpressured and at own pace.
Suggest Complainant use a handwritten journal book or word-processed document to note things as events are remembered.

Allow for sleep cycles to assist Complainant to remember key events, places and persons involved.

Understand dynamic memory process.
Interviews not constrained by artificial timelines.

Some interviews may be conducted over the course of several days.

**RESPONDENT INTERVIEW**

Interviews are strategically timed and planned

Open-ended questions when appropriate

Build trust; avoid leading, argumentative, or *accusatory* questions
Investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.
THROUGHOUT THE PROCESS

The parties have equal opportunities to have others present (the advisor of their choice) during any grievance proceeding, or you 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.
NOTICE FOR ALL HEARINGS

You must provide written notice of the date, time, location, participants, and purpose of all hearings, or other meetings, to all parties, with sufficient time for each party to prepare to participate.

34 C.F.R. §106.45
INVESTIGATOR MUST

34 C.F.R. §106.45

Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation directly related to a formal complaint, including inculpatory or exculpatory evidence from any source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. (This includes evidence that you don’t intend to offer at the hearing.)

Parties must be given least 10 days to submit a written response to the evidence, which the investigator will consider prior to completion of the investigative report.
INVESTIGATOR MUST ENSURE THESE STEPS ARE TAKEN:

Report must fairly summarize relevant evidence

At least 10 days before the hearing, must send each party (and the party’s advisor) a copy of the investigative report for review and written response
IMPARTIALITY IS KEY

The report must also summarize the relevant exculpatory evidence, thus underscoring the need for impartiality.
ROLE PLAY
“Formal” means a live, evidentiary hearing with a presiding decision maker; presentation of testimony and evidence; cross-examination of witnesses, results in a written decision.

“Informal” means something like mediation.

You can’t require waiver of the right to an investigation and adjudication of formal complaints of sexual harassment.

“Formal” vs “Informal” Resolutions
At any time before final determination, you may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that you provide 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)

Any party has the right to withdraw from the informal resolution process and resume the formal grievance process at any time

You must obtain the parties’ voluntary, written consent to an informal resolution process
NO INFORMAL RESOLUTION IF:

Complaint contains allegations that an employee sexually harassed a student
THE HEARING
You must provide for a live hearing.

The Decision-Maker must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
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. Questions must elicit relevant information.

If either party asks, you 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.
You must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

You must keep records of investigation and hearing for 7 years.
A WORD ABOUT REPRESENTATION

Parties may have their own advisors.

You must provide a FREE advisor of your choice, to conduct cross-examination on behalf of that party (Hint: call the law school!)
The Decision-Maker cannot be the same person as the Title IX Coordinator or the Investigator.
SUCCESS STARTS WITH THE DECISION MAKER

Rules on the admissibility of evidence
Understands the meaning of legal relevance
Considers inculpatory as well as exculpatory evidence
Applies the rape shield law and the exception thereto
SUCCESS STARTS WITH THE DECISION MAKER

Applies a **presumption of innocence**

Oversees cross-examination

Controls the hearing - particularly in the presence of experienced, **aggressive Respondent’s counsel**

Applies either the “preponderance” or the “clear and convincing” standards of proof. Note: must use same standard for students as for faculty and staff respondents.
The Decision Maker makes highly-detailed, written *findings of fact* based upon testimony and evidence adduced during the hearing.
DECISION MAKER

AFTER THE HEARING ISSUES A WRITTEN DECISION REGARDING RESPONSIBILITY

34 C.F.R. §106.45
A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
Findings of fact supporting the determination

Conclusions regarding the application of your code of conduct to the facts

A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions you impose on the Respondent, and whether remedies designed to restore or preserve equal access to your education program or activity will be provided by you to the Complainant
Your procedures and permissible bases for the Complainant and Respondent to appeal.

You must provide the written determination to the parties simultaneously.

The determination regarding responsibility becomes final either on the date that you provide 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.
YOU MUST OFFER BOTH PARTIES AN APPEAL FROM A DETERMINATION REGARDING RESPONSIBILITY AND FROM YOUR DISMISSAL OF A FORMAL COMPLAINT OR ANY ALLEGATIONS THEREIN, ON THE FOLLOWING BASES:

- Procedural irregularity that affected the outcome of the matter
- 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;
- The Title IX Coordinator, investigator(s), or decision-maker(s) conflict of interest or bias for or against any party
- You may offer an appeal equally to both parties on additional bases.
MORE ABOUT APPEALS

Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.

Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker or the investigator(s), or the Title IX Coordinator.

Ensure that the decision-maker for the appeal complies with 34 C.F.R. §106.45.

Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

Issue a written decision describing the result of the appeal and the rationale for the result; and

Provide the written decision simultaneously to both parties.
AVOIDING LAWSUITS

Courts will review university student conduct hearings (much as they analyze the administrative decisions of any other agency) on the “abuse of discretion” standard.
AVOIDING LAWSUITS

Courts give **great deference** to the actions your university takes, if your decisions are supported by professionally-drafted, superbly-detailed findings of fact with citations to the evidentiary record.

If you can establish that your student conduct decisions were based on “**substantial evidence**” obtained during the hearing, courts unlikely to find your results were “**arbitrary or capricious**” or violative of Title IX.
Neither your nor any 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.
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 provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.
QUESTIONS?