The Four Corners of Title IX Regulatory Compliance

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Peter Lake
Professor of Law, Charles A. Dana Chair, Director of the Center for Excellence in Higher Education Law and Policy
Stetson University College of Law
Senior Higher Education Consulting Attorney
Steptoe & Johnson, PLLC

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

Know when to consult legal counsel.

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This *Four Corners of Title IX* training program focuses on the 2020 Title IX regulations, which are currently in effect in the Commonwealth of Virginia.

New Title IX regulations were released by the Department of Education in April 2024 and go into effect on August 1, 2024. However, these regulations are currently enjoined in a number of states, including the Commonwealth of Virginia.

The state of implementation of the 2024 Title IX regulations is fluid at the current time.

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The Title IX Landscape

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Before We Dig in Let's Consider the "Landscape"…

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

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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)

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Examples of Title IX Regulatory Enforcement Under Biden

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 SJSU failed to appropriately respond to reports of the abuse
- SJSU will pay $1.6 million to victims and will reform Title IX system
- SJSU's President stepped down
- More info here: External Reviews | Title IX and Gender Equity Office (sjsu.edu)

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Examples of Title IX Regulatory Enforcement Under Biden

Montgomery College

- OCR investigation
- Professor required female students to wear only sports bras in class
- OCR found the college complied with investigation requirements under Title IX, "However, OCR is concerned that the College did not provide the Student, Student A, or any of the other students in the class with notification that the College had completed the investigation, confirmed the existence of a hostile environment, and taken steps designed to end that hostile environment for affected students." Montgomery College (PDF) (ed.gov)

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Examples of Title IX Regulatory Enforcement Under Biden

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."
- Arcadia University (PDF) (ed.gov)
- A good read: A College Stopped Investigating a Professor's Alleged Misconduct When He Quit. That's Illegal, U.S. Says. (chronicle.com)

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Examples of Title IX Regulatory Enforcement Under Biden

Taft College

- Transgender female student complainant alleged that several professors subjected her to repeated harassment when they repeatedly misgendered her.
- The college did not take appropriate steps despite receiving reports.
- OCR found the college violated Title IX because the school did nothing to remedy the situation, thus subjecting the student to a hostile environment.
- OCR also found that the Taft College community was not appropriately informed of how to make a Title IX report or the Title IX coordinator contact information.
- Taft College (PDF) (ed.gov)

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Examples of Title IX Regulatory Enforcement Under Biden

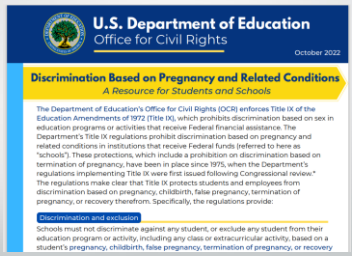
Troy University

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 incidents at issue here, the University provided pregnant students no information, either in its 2020- 2021 Student Handbook or on its website about how students could seek adjustments related to pregnancy, and one professor interviewed by OCR had not received training regarding Title IX's application to pregnant students."
- "Moreover, the Title IX Coordinator did not consistently intervene when the Complainant contacted him about issues with certain classes and, when he did so, he was not always prompt."
- "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 Coordinator's . . . email."
- "Although the University has updated its Title IX webpage to include policies and information for pregnant students, it is unclear whether the University has provided faculty and staff training concerning its obligations under the Title IX regulations regarding pregnant students who request adjustments." Troy University (PDF) (ed.gov)

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


U.S. Department of Education
Office for Civil Rights
October 2022

Discrimination Based on Pregnancy and Related Conditions
A Resource for Students and Schools

The Department of Education's Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination based on sex in education programs or activities that receive Federal financial assistance. The Department's Title IX regulations prohibit discrimination based on pregnancy and related conditions in institutions that receive Federal funds (referred to here as "schools"). These protections, which include a prohibition on discrimination based on termination of pregnancy, have been in place since 1975, when the Department's regulations implementing Title IX were first issued following Congressional review.* The regulations make clear that Title IX protects students and employees from discrimination based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. Specifically, the regulations provide:

Discrimination and exclusion

Schools must not discriminate against any student, or exclude any student from their education program or activity, including any class or extracurricular activity, based on a student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery

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Title IX— Cultural and Legal Issues

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.

Tinder Points

- LGBTQI+ [NPRM at 23 n. 4] →
- Pronouns
- Transgender Athletes/ Bathrooms
- State legislatures enacting new laws: ex. adult cabaret bans or regulation


LOCAL
ETSU removes references that Title IX law protects LGBTQ students at lawmaker's behest

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Title IX— Cultural 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

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Title IX— Cultural and Legal Crossfire

- Efficiency
- Authenticity and mission
- Mental health
- Red blue purple affinity…and travel/enrollment management
- Prevention/*Pro*vention
- 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

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Title IX:
Some Observations on Related Litigation and Legal Issues

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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-td1-black-letter.pdf (ali.org)

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Title IX Updates—Court Watch

SCOTUS—Winds of change

- Faith protection—*Guadalupe, etc.*
- "Sex"—*Bostock, etc.*
- Damages Limits—*Cummings v. Premier Rehab Keller*
- Privacy/ Substantive Due Process—*Dobbs v. Jackson Women's Health Organization* (overturning *Roe*)
- Limits of Regulatory Authority/End of Chevron—*Loper Bright Enterprises v. Raimondo* (fishermen, Chevron); *Corner Post*
- True Threats/Online Harassment—*Counterman v. Colorado*

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A Closer Look

Counterman v. Colorado, 599 U.S. 66 (2023).

- Billy Counterman was convicted of stalking under Colorado law in 2016 after he sent hundreds of messages via Facebook to a female singer/songwriter named Coles Whalen. Several of these messages foretold of her impending death and indicated he was following her movements.
- The Colorado law made it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." Colo. Rev. Stat. §18–3–602(1)(c).
- The Colorado Court of Appeals upheld his conviction and the Colorado Supreme Court denied review.
- Colorado courts applied an objective "reasonable person standard" to determine what could be constituted as a "true threat."

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A Closer Look Cont'd

Counterman v. Colorado, 599 U.S. 66 (2023).

- In a 7-2 decision, the U.S. Supreme Court vacated Counterman's conviction holding that "the State must prove in true-threats cases that the defendant had some subjective understanding of his statements' threatening nature, but the First Amendment requires no more demanding a showing than recklessness."
- "A recklessness standard—i.e., a showing that a person 'consciously disregard[ed] a substantial [and unjustifiable] risk that [his] conduct will cause harm to another,' . . . —is the appropriate *mens rea*. Requiring purpose or knowledge would make it harder for States to counter true threats—with diminished returns for protected expression."
- "Counterman . . . was prosecuted in accordance with an objective standard. . . . The State had to show only that a reasonable person would understand his statements as threats. It did not have to show any awareness on his part that the statements could be understood that way. . . . [T]hat is a violation of the First Amendment."

22-138 Counterman v. Colorado (06/27/2023) (supremecourt.gov)

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Title IX Updates—Court Watch
SCOTUS Cont'd

- Athletes—*NCAA v. Alston*
- First Amendment and "harassment"—Clues from *Mahoney (Fenves)/Counterman/ Elonis*
- No major Title IX focus as such on the docket but…
  - Injunction
  - Justice Comey Barrett now sits on the high court, author of *Purdue* in a 7th *Circuit case* in 2019— focus on due process and a relaxed standard to plead sex discrimination—a prognosticator?
  - NOTE: Intersection of proposed Title IX regulations and *Dobbs* Democrats ask for extra guidance on pregnant students and Title IX (constitutionalnet.com)
    "… Title IX covers discrimination based on medical conditions related to or caused by pregnancy, childbirth, **termination of pregnancy**, or lactation . . ." (NPRM at 461).
    -- A group of 60 Congressional Democrats has asked for clarification on Title IX protections for students who are pregnant, parenting, or seeking an abortion.
  - 2022- allowed cases to proceed such as *Fairfax County*: "The U.S. Supreme Court . . . turned away bids by a public school district in Virginia and the University of Toledo in Ohio to avoid sexual harassment lawsuits brought by female students under a law that prohibits sex discrimination at schools that receive federal funds." U.S. Supreme Court lets sexual harassment suits proceed against schools | Courts

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Title IX Updates—Court Watch

Judicial activism in lower federal courts and state courts on due process and compliance error// inactivism of SCOTUS

Examples

- 6th Circuit in *Baum*
- 7th Circuit in *Purdue*
- Colorado Court of Appeals in *Doe v. University of Denver*
- 3rd Circuit in *University of Sciences*
  - "Plausible allegations supporting the reasonable inference that USciences discriminated against him [plaintiff] on account of his sex." (Male plaintiff drank alcohol at levels similar to female complainants but only male plaintiff's actions were investigated.)
  - "USciences's contractual promises of 'fair' and 'equitable' treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers."

Billion Dollar Exposure; e.g., Univ. of Southern California—$852 million settlement in case regarding abuse by campus gynecologist

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Dimensions of Title IX-Related Litigation

- Florida "Stop WOKE" 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 "upside down" describes a parallel dimension containing a distorted version of our world. . . . Recently, Florida has seemed like a First Amendment upside down. Normally, the First Amendment bars the state from burdening speech, while private actors may burden speech freely. But in Florida, the First Amendment apparently bars private actors from burdening speech, while the state may burden speech freely."

- "Gender dysphoria" now considered a disability under the ADA in Fourth Circuit in *Williams v. Kincaid* Fourth Circuit Holds Gender Dysphoria as an ADA Disability (natlawreview.com)
- *Adams v. School Board of St. Johns County, Florida* – Eleventh Circuit of Appeals (7-4 en banc)ruled that public schools have the right to segregate locker rooms and bathrooms by biological sex.

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Dimensions of Title IX-Related Litigation

- Athletic Equity
- Deliberate Indifference
- Due Process
- Retaliation
- Erroneous Outcome
- Selective Enforcement
- Plausible Inference
- "Preventable" Sexual Assault Claims – State Negligence Claims
- Hazing/Student Suicide
- Defamation
- Breach of Contract
- Abuse of Process (*see Debra McCarthy et al v. Raul Jauregui et al*: "Pennsylvania magistrate judge held that Title IX disciplinary proceedings are 'quasi-judicial' and 'if abused, gives rise to an abuse of process claim'—and may result in an uptick in litigation brought against either party to a Title IX dispute." Is Abuse of Title IX a New Legal Strategy for Sexual Assault Victims? | The Legal Intelligencer (law.com)
- Negligent Investigation?
- Tortious failure to provide fair process?

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Civil Action Under Title IX

- The US Supreme Court allows actions in court to pursue damages for Title IX (but with many limitations).
  - *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998).
  - *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999).
    - *"[S]chool administrators will continue to enjoy the flexibility they require in making disciplinary decisions so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."*
    - *See Fairfax County, supra.*
  - *Cummings v. Premier Rehab Keller*
- Victims as "plaintiffs" face tough standards
  - Knowledge (Reporting)
  - Pattern
  - Objective
  - Deliberate indifference
  - Emotional distress damages
- The Supreme Court has hesitated to:
  - Apply Title IX to a "single act"
  - Broadly protect LGBTQ rights, but see the recent *Bostock* Title VII decision (more to come on this…)

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"*Gebser/Davis* Framework" for Evaluating Institutional Compliance (with Some Twists)

3-Part Framework

1. *A definition of actionable sexual harassment*
2. *The school's actual knowledge*
3. *The school's* ***deliberate indifference***

4. **Promptness**
5. **Equitableness**
6. **Reasonableness**

Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30030 (numeration and emphasis added).

- 2020 regs re: grievance procedures well beyond *Gebser*
- Roadmap for litigation?
- Risk of DOE enforcement?

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From the 2020 Regulations:

The Department believes that the Davis definition in § 106.30 provides a definition for non-quid pro quo, non-Clery 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 Colleague Letter.

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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

Federal Court Grants Penn State's Motion to Protect Title IX Documents, Sacks Student Athlete's Call for Unfettered Disclosure - Lexology

- Equity, bias, impartiality
- Think "contractual fairness"
  - Peter Lake, *From Discipline Codes to Contractual Respect*, Chron. of Higher Educ. (Nov. 26, 2017).

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Thoughts on the 2020 Title IX Regulations

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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
  - Withdrawals of previous guidance
- Legal challenges in court

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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.
  - Informal resolution **cannot** be used when a student alleges sexual harassment by an employee
- "Formal complaints" and "allegations"
- Live hearing with cross-examination by advisors
  - **We will discuss an important change regarding cross examination!**

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Some Key Features of the 2020 Regulations

- Choice in evidentiary standard preserved
  - "Preponderance of the evidence" or "clear and convincing"
- "Mandated reporters" supplants "responsible employees"
- Changes in jurisdiction and scope of Title IX
  - Off campus; study abroad
- Emphasis on "impartial'" processes free from bias and conflicts of interest
- "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
- "Not a court"/ "Not a criminal justice system"

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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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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 ***obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims****.*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30026.

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Train, Train, Train!

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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 facilities an informal resolution (such as mediation)] receive training as follows:

- On Title IX's definition of "sexual harassment"
- On the scope of the school's education program or activity
- On how to conduct an investigation and grievance process
- On how to serve impartially, including by avoiding prejudgment of the facts at issue
- On how to avoid conflicts of interest and bias
- Decision-makers must 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 a complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence"

U.S. Dept. of Educ. Office for Civil Rights, Blog (May 18, 2020), https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html (emphasis added).

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Posting Training Materials to Your Website

"All materials used to train Title IX personnel:

- Must not rely on sex stereotypes,
- Must promote impartial investigations and adjudications of formal complaints of sexual harassment,
- Must be maintained by the school for at least 7 years,
- Must be publicly available on the school's website; if the school does not maintain a website the school must make 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. **This may mean that the school has to secure permission from the copyright holder to publish the training materials on the school's website**."

U.S. Dept. of Educ. Office for Civil Rights, Blog (May 18, 2020), https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html (emphasis added).

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TRAINING MATERIALS

Each institution will be given permission to post training materials (PowerPoint slide handouts) to their website. We will provide the exact version of the slides that may be posted via email.

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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 transit 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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Trauma and Sexual Predation

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The Controversial Science of Sexual Predation

- Lisak D, Miller PM. Repeat rape and multiple offending among undetected rapists. *Violence Vict.* 2002;17(1):73-84. doi:10.1891/vivi.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 Pediatr.* 2015;169(12):1148–1154. doi:10.1001/jamapediatrics.2015.0707
- Johnson & Taylor, *The Campus Rape Frenzy: The Attack on Due Process at America's Universities* (Encounter Books, 2017).
- Foubert, J.D., Clark-Taylor, A., & Wall, A. (2019). "Is campus rape primarily a serial or single time problem? Evidence from a multi-campus study." Violence Against Women. DOI: 10.1177/1077801219833820.

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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

*The Department is sensitive to the effects of **trauma on sexual harassment victims** and appreciates that choosing to make a report, file a formal complaint, communicate with a Title IX Coordinator to arrange supportive measures, or participate in a grievance process are often difficult steps to navigate in the wake of victimization.*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30064 (emphasis added).

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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 neurobiological 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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Trauma Cont'd

Further, the final regulations contain provisions specifically intended to take into account that complainants may be suffering results of trauma; for instance, § 106.44(a) has been revised to require that recipients promptly offer supportive measures in response to each complainant and inform each complainant of the availability of supportive measures with or without filing a formal complaint. To protect traumatized complainants from facing the respondent in person, cross-examination in live hearings held by postsecondary institutions must never involve parties personally questioning each other, and at a party's request, the live hearing must occur with the parties in separate rooms with technology enabling participants to see and hear each other.

Id. (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 30031 (emphasis added).

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Legal Foundations of Title IX

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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.

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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, (hereinafter collectively referred to as "recipients" or "schools"), ***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.*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30026 (emphasis added).

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Title IX: FINAL RULE

The final regulations obligate recipients to ***respond*** *promptly and supportively to persons alleged to be victimized by sexual harassment,* ***resolve*** *allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and* ***effectively implement*** *remedies for victims.*

Id. (emphasis added).

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Title IX: FINAL RULE

The final regulations also clarify and modify Title IX regulatory requirements regarding remedies the Department may impose on recipients for Title IX violations, the intersection between Title IX, Constitutional protections, and other laws, the designation by each recipient of a Title IX Coordinator to address sex discrimination including sexual harassment, the dissemination of a recipient's non-discrimination policy and contact information for a Title IX Coordinator, the adoption by recipients of grievance procedures and a grievance process, how a recipient may claim a religious exemption, and prohibition of retaliation for exercise of rights under Title IX.

Id.

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Legal Foundations: How did we get here?

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Title IX Before and After April 2011

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 2014 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

The rise of vendors, experts, etc.

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Title IX and the Trump Administration

- Education Secretary Betsy DeVos
- Rescission of Obama-Era Guidance in 2017 (and more recissions in 2020)
- Instituted "interim" and "substantial" guidance in September 2017
- Focus on respondents' rights/procedural protections/due process/bias and conflicts of interest
- Notice and comment period on the 2020 regulations ended with a record-breaking number of comments (over 120,000)
- Complex implications for protection from discrimination based on sexual orientation, or appearance thereof.

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Title IX: Former Guidance

- *Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties*, 62 FR 12034 (Mar. 13, 1997)
- *Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001)
- *Dear Colleague Letter: Sexual Violence* (April 4, 2011)
- *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014)
- *Resources for Title IX Coordinators, including the Dear Colleague Letter, and the Title IX Resource Guide* (April 2015)
- *Q&A on Campus Sexual Misconduct* (Sept. 22, 2017)
- *Dear Colleague Letter* (Sept. 22, 2017)

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Court Activity

- Judicial activism and inactivism
  - Lower courts and SCOTUS
  - 6th Circuit in *Baum*
  - 7th Circuit in *Purdue*
  - 3rd Circuit in *University of Sciences*
  - Univ. of Southern California --$852 million settlement in case regarding abuse by campus gynecologist
  - *Bostock*
  - *Lady of Guadalupe*
  - *NCAA v. Alston et al* (See Jeremy Bauer-Wolf, *Constitutional Due Process at Private Institutions?* Inside Higher Ed (June 25 2019).

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Litigation Risk

- Have the 2020 regulations cause an increased risk of litigation?
  - "[I]f recipients comply with these final regulations, these final regulations may have the effect of decreasing litigation because recipients with actual knowledge would be able to demonstrate that they were not deliberately indifferent in responding to a report of sexual harassment." *Id.* at 30115.
- Actual cases are rising in number even before the regulations. Courts are referring to the 2020 regulations already.
- Fee shifting? Will colleges have to pay for attorney's fees of plaintiffs?

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Legal Mandates, Etc. Under Title IX — Where Is the Law?

- Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*
- Implementing Regulations, 34 C.F.R. Part 106
- Notice and Comment
- Rule-making/Negotiated rule-making
- Commentary/Blogs from the Dept. of Education
- Guidance
- Resolution Letters and Agreements
- Other Sources—Speeches, Website, Participation with the Field
- State Law Mandates—Virginia Laws

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Virginia State Laws

- VA Code § 23.1-805. Violence prevention committee; threat assessment team.
  - Requires campuses to establish these two groups
- VA Code § 23.1-806. Reporting of acts of sexual violence.
  - Requires responsible employees to report
  - Requires a "Review Committee" and mandates certain functions of this committee
- VA Code § 23.1-807. Sexual assault; memoranda of understanding; policies.
  - MOUs with local sexual assault crisis centers and law enforcement
- VA Code § 23.1-808. Sexual violence; policy review; disciplinary immunity for certain individuals who make reports.
  - Requires institutions to review sexual violence policies and updated it as appropriate
  - Requires institutions to have an "amnesty policy" for reporters

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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, has been permanently dismissed for, or withdraws from the institution while under investigation for an offense involving sexual violence and requires institutions to adopt policies for the expungement of such notation.
- 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.
- VA Code § 9.1-191. Virginia sexual assault forensic examiner coordination program.
  - Establishes the Virginia sexual assault forensic examiner coordination program within the Department of Criminal Justice Services.

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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.]

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Important Note!

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.

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The Courts v. The Regulators

The Regulators

- Threat of loss of federal funding
- An act of violence is a crime, is against campus policy, and is a form of discrimination.

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Whose View of Title IX Wins in the End?

Showdowns are coming!

CONGRESS

COURTS REGULATORS

→ Court cases are already testing some issues

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"Sex"

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What is "sex" for Title IX purposes?

The modern concept of "sex" has evolved and represents a cultural shift. In past generations, "sex" usually meant the male/female assignment at birth based on biological or anatomical factors. "Sex" for Title IX purposes includes:

- Gender based on biological or anatomical factors
- Actual or perceived gender identity

Sometimes individuals do not conform to stereotypical notions of masculinity or femininity.

Helpful Resource
UC Davis, *LGBTQIA Resource Center Glossary*,
https://lgbtqia.ucdavis.edu/educated/glossary

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

2001 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.

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The 2001 guidance position is complicated by OCR statements and the 2020 amendments and recent litigation.

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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."

U.S. Dept. of Educ. Office for Civil Rights, *Sex-based Harassment*, https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-ssq.html (last visited March 10, 2018) (emphasis added).

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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.*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30577 (emphasis added).

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SCOTUS/*Bostock* and Implications for Title IX

Bostock v. Clayton County (June 15, 2020)

A consolidation of three cases of employment discrimination under **Title VII**.

Holding: Employees are protected from discrimination due to their sexual orientation or gender identity under Title VII of the Civil Rights Act of 1964.

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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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Bostock and the New Dept. of Education Position on LGBTQ Protections Cont'd

"OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Notice of Interpretation addressing Title IX's coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below.

In 2020, the Supreme Court in Bostock v. Clayton County, 140 S. Ct. 1731, 590 U.S. ___ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Notice of Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity . . ."

U.S. Dept. of Education, Office for Civil Rights, *The Department's Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, June 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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Implications of Bostock for Title IX?

- Why did the Department of Education not define "sex" in the 2020 Title IX regulations?
- Title VII = Title IX?
- LGBTQIA rights and *Bostock*…note the Court's emphasis on the specific issues raised. "On the basis of sex" //"Because of… sex"
- Spending v. Commerce clause…the "notice issue"
- How is Title IX different from Title VII—Primacy?
- Title IX regulations and DOE enforcement in light of *Bostock*?
- How will 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:
  - Michael T. Raupp, *Is Change Ahead for Title IX?* Inside Higher Ed (April 20, 2017).

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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."

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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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.
    - Federal judge blocks Ed. Dept Title IX guidance for trans students (insidehighered.com)
    - Court temporarily halts Ed Dept from enforcing LGBTQ protections under Title IX | Higher Ed Dive
- 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 (natlawreview.com)

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"Due Process"

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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?

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Due Process

[T]he evolution of the American concept of due process of law has revolved around recognition that for justice to be done, procedural protections must be offered to those accused of even the most heinous offenses – precisely because only through a fair process can a just conclusion of responsibility be made. Further, the § 106.45 grievance process grants procedural rights to complainants and respondents so that both parties benefit from strong, clear due process protections.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30095 (emphasis added).

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Due Process Cont'd*

[T]he 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 86.

'Once it is determined that due process applies, the question remains what process is due.' *Goss v. Lopez*, 419 U.S. 565, 577 (1975) (quoting *Morrissey*, 408 U.S. at 481)

Procedural due process of law requires at a minimum notice and a meaningful opportunity to be heard. *Goss*, 419 U.S. at 580

Due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.' *Mathews*, 424 U.S. at 334 (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.' *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)

The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

**See generally id.* at 30050-53.

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More Due Process

- *Chevron*/EPA/Article II
- Protected Interests
- *Matthews* Balancing Test
- *Citizens United* → Associational Rights
- Originalism/Textualism/ Historicism
- Efficacy/Fairness to those not represented in a "hearing"
- New Fairness Issues Created by "College Court"
- *Horowitz/Ewing* and Academic Freedom
- Substantive Due Process
- Slippery Slope
  - Tenure for Students
  - Ghost of Hugo Black in *Tinker*

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

[S]chools, 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 reach the factual determinations needed 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 30097.

The Department is not regulating sex crimes, per se, but rather is addressing a type of discrimination based on sex. Id. at 30099.

What is a "court?"

A **court** is any person or institution, often as a government institution, with the authority to adjudicate legal disputes between parties and carry out the administration of justice in civil, criminal, and administrative matters in accordance with the rule of law. David Walker, *The Oxford Companion to Law*, Oxford University Press (1980), at 301.

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A Review of the 2020 Regulations

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

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§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.*

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§106.8(b) *Dissemination of policy.*

1) 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.

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§106.8(b) *Dissemination of policy.*

(2) Publications.

(i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

(ii) 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.

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§106.8(c) *Adoption of grievance procedures.*

A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

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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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"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.

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§ 106.12 *Educational institutions controlled by religious organizations.*

93

§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.

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§ 106.30(a) *Definitions.*

95

"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).

96

"Complainant"

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

What is "alleged?"

97

"Respondent"

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

Allege = "report?"

98

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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 30030.
- *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.* *Id.*
- ***[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).

99

"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.

This has been a central issue in fairness/consistency.

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

100

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"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)

101

"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).

102

"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; or*

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

103

First Amendment and the Second Prong

[P]rotection 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.

104

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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.

105

"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

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§ 106.44 *Recipient's response to sexual harassment.*

107

§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.***

108

§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.

109

§106.44(a) Cont'd

The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

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§106.44(b) *Response to a formal complaint.*

(1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

111

§106.44(c) *Emergency removal.*

Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

112

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§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.

113

§ 106.45 *Grievance process for formal complaints of sexual harassment.*

114

§ 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.

115

§ 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)

(1) 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;

117

§ 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;

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§ 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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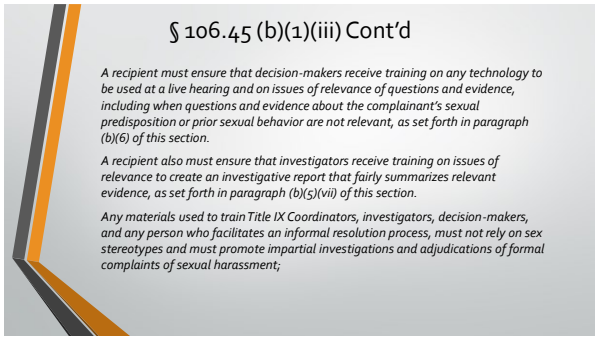
§ 106.45(b)(1)(iii) Cont'd

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

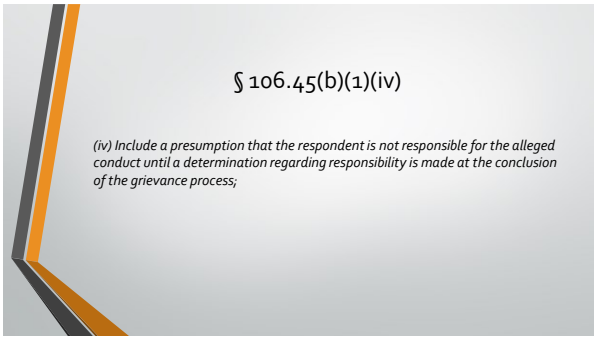
- *the definition of sexual harassment in § 106.30,*
- *the scope of the recipient's education program or activity,*
- *how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and*
- *how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. . . .*

(bullets added)

120

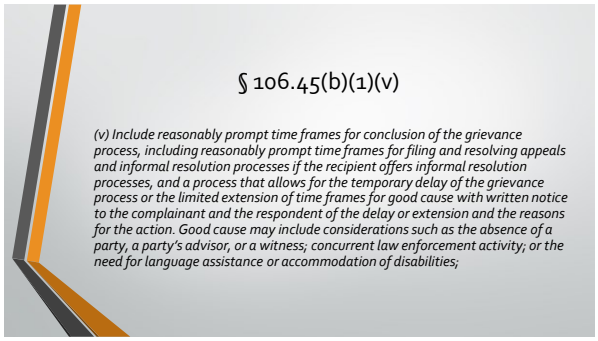


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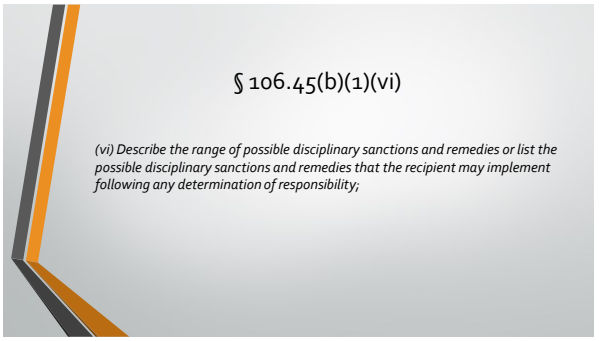


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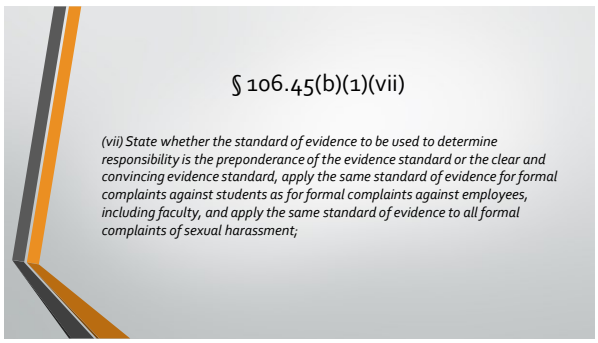


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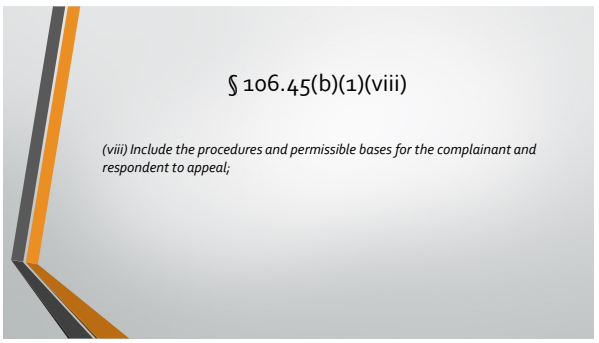


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126

§ 106.45(b)(1)(ix)

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

127

§ 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.

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§ 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:

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§ 106.45(b)(2)(i)(A)

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

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§ 106.45(b)(2)(i)(B)

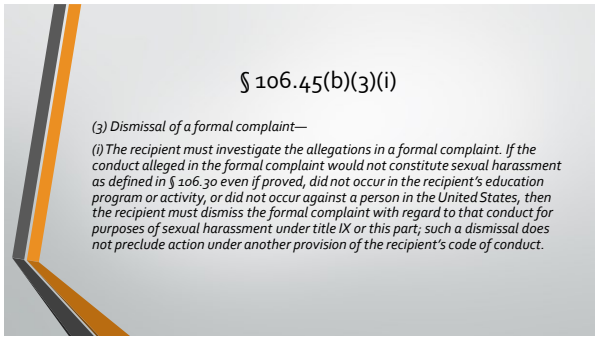
(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. 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.

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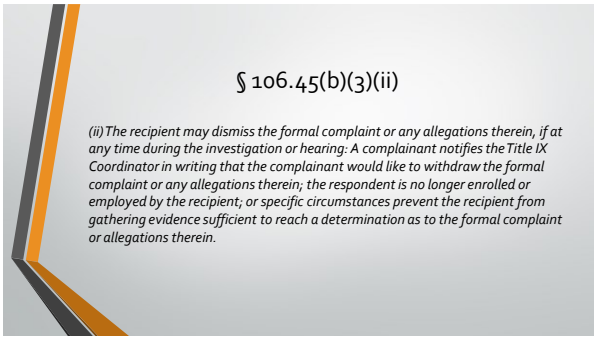
§ 106.45(b)(2)(ii)

(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.

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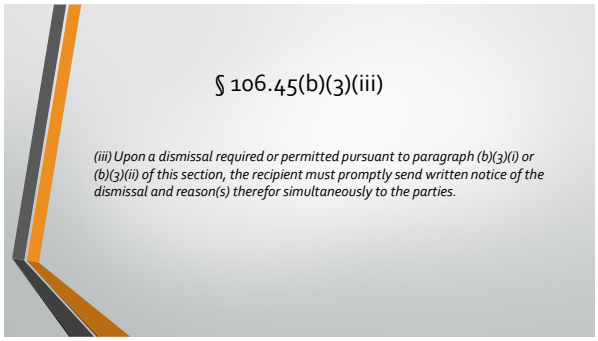


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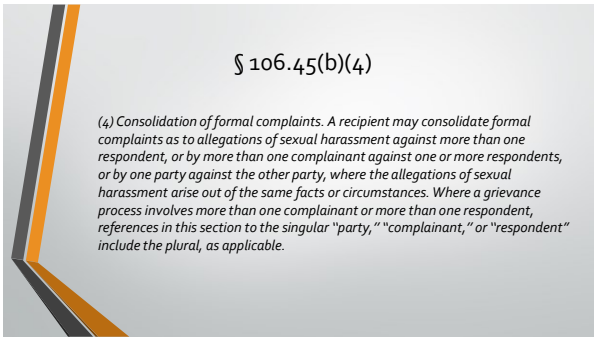


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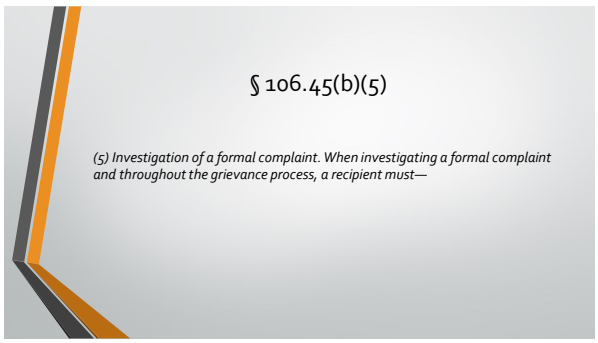


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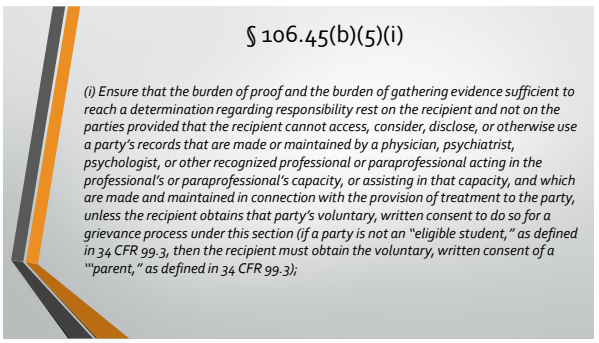


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§ 106.45(b)(5)(ii)

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

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§ 106.45(b)(5)(iii)

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

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§ 106.45(b)(5)(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 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;

141

§ 106.45(b)(5)(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;

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§ 106.45(b)(5)(vi)

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

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§ 106.45(b)(5)(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.

144

§ 106.45(b)(6)(i)—partially vacated

(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. 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.

145

§ 106.45(b)(6)(i) cont'd—partially vacated

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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§ 106.45(b)(6)(i) cont'd—partially vacated

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.

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§ 106.45(b)(6)(i) cont'd—partially vacated

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.

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Aspect of Title IX Regulations (34 CFR § 106.45(b)(6)(i)) relating to cross-examination Vacated

Victim Rights Law Center, et al. v. Cardona, 20-11104-WGY, 2021 WL 3185743 (D. Mass. July 28, 2021).

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Victim Rights Law Center, et al. v. Cardona, 20-11104-WGY, 2021 WL 3185743 (D. Mass. July 28, 2021).

-Three individuals and four organizations challenged the 2020 Title IX regulations.
-Plaintiffs alleged several of the provisions in the regulations violate the Administrative Procedure Act and/or the Equal Protection Clause of the Fifth Amendment.
-The court found a provision (prohibition on statements not subject to cross-examination) in § 106.45(b)(6)(i) "arbitrary and capricious."

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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.

U.S. Dept. of Education, Office for Civil Rights, *Letter re Victim Rights Law Center et al. v. Cardona* (Aug. 24, 2021) at 1.

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Victim Rights Law Center et al. v. Cardona

For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.

Id. at 1-2.

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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 intervenors 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."

Victim Rights Law Center Title IX case appealed, Dear Colleague Letter stands for now | Bricker & Eckler LLP - JDSupra

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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)(A)

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

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§ 106.45(b)(7)(ii)(B)

(B) 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;

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§ 106.45(b)(7)(ii)(C)

(C) Findings of fact supporting the determination;

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§ 106.45(b)(7)(ii)(D)

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

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§ 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

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§ 106.45(b)(7)(ii)(F)

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

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§ 106.45(b)(7)(iii)

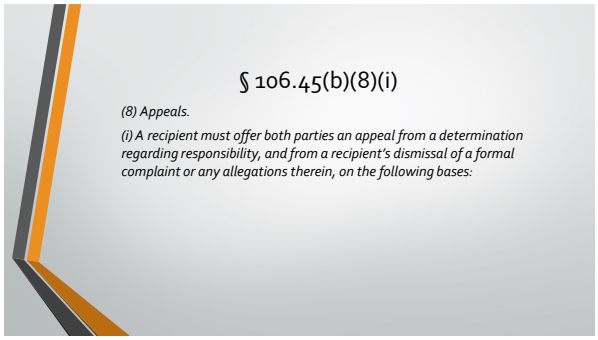
(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal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

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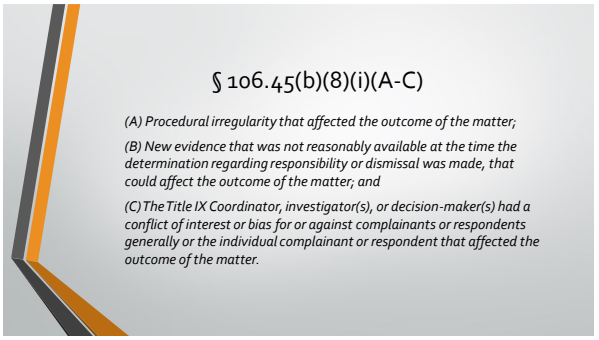
§ 106.45(b)(7)(iv)

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

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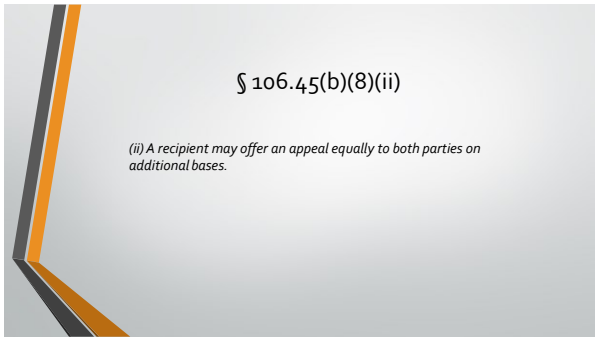


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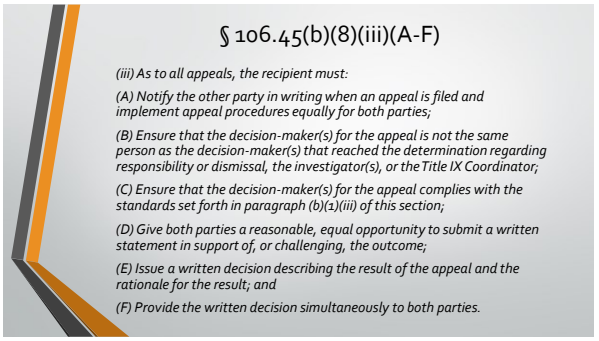


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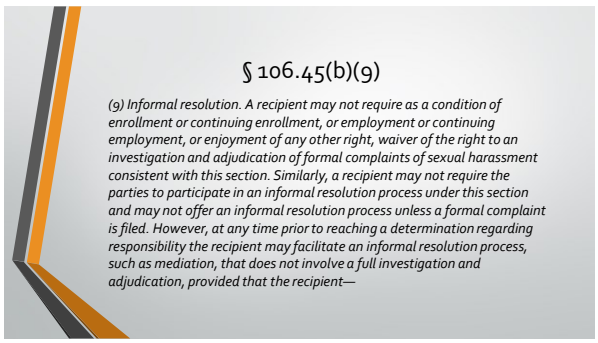


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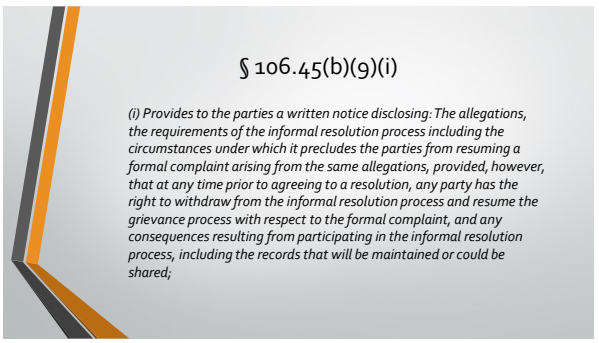


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§ 106.45(b)(9)(ii-iii)

(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.

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§ 106.45(b)(10)(i)(A)

(10) 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)(6)(i) 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;

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§ 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.

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§ 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.

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§ 106.71 *Retaliation.*

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§ 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.

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§ 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).

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§ 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.

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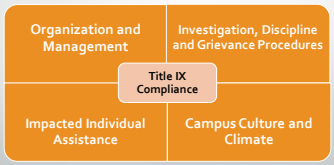
§ 106.71(b)(2)

(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.

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Four Corners Model

Lake's Four Corners of Title IX Regulatory Compliance



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Organization and Management: Tuning Your Systems to the 2020 Mandates

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Title IX Personnel

- Title IX coordinator
  - Every institution must designate one
- Title IX investigator
  - Can be the Title IX coordinator, cannot be a decision-maker or appellate officer (thus no single-investigator model)
- Title IX decision-maker
  - Cannot be the investigator (thus no single-investigator model) or Title IX coordinator
- Appellate officer
  - Cannot be the decision-maker or investigator
- Anyone implementing an informal process such a mediation
- What about case management, records management, etc.?



Budgetary and operational concerns?

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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 30105.

181

Personnel Decisions

- Should we appoint deputy Title IX coordinators?
  - *[T]he recipient may need to or wish to designate multiple employees as Title IX Coordinators or designate a Title IX Coordinator and additional staff to serve as deputy Title IX Coordinators.* Id. at 30117.
- Should the Title IX coordinator take on the role of investigator, as permitted in the 2020 regulations? (*See id.* 30135 n.596.)
- 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 operatives
- 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
- *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 . . . IHE level.* Id. at 30567.

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"Actual Knowledge," Notice, "Mandatory Reporters"

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"Actual Knowledge" §106.30(a)

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).*

185

"Officials with Authority"

- Who is an official with authority—authority to redress?
  - Title IX coordinator
  - CSAs?
  - Who else?

Determining whether an individual is an "official with authority" is a legal determination that depends on the specific facts relating to a recipient's administrative structure and the roles and duties held by officials in the recipient's own operations. The Supreme Court viewed this category of officials as the equivalent of what 20 U.S.C. 1682 calls an "appropriate person" for purposes of the Department's resolution of Title IX violations with a recipient. Id. at 30039.

Postsecondary institutions ultimately decide which officials to authorize to institute corrective measures on behalf of the recipient. *The Title IX Coordinator and officials with authority to institute corrective measures on behalf of the recipient fall into the same category as employees whom guidance described as having "authority to redress the sexual harassment." Id.* (emphasis added).

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Actual Knowledge/Employees

For all recipients, ***notice to the recipient's Title IX Coordinator or to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient" (referred to herein as "officials with authority") conveys actual knowledge to the recipient and triggers the recipient's response obligations.*** *Id.* at 30039 (emphasis added).

NOTE: The Department of Education has discontinued use of the term and previous structure of "responsible employees," i.e. "mandated reporters."

Rather than using the phrase "responsible employees," these final regulations describe the pool of employees to whom notice triggers the recipient's response obligations. *Id.*

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Limiting Mandatory Reporters
A Rejection of "Responsible Employees"

Triggering a recipient's response obligations only when the Title IX Coordinator or an official with authority has notice ***respects the autonomy of a complainant in a postsecondary institution better than the responsible employee rubric in guidance****. . . .* *Id.* at 30040 (emphasis added).

[T]he approach in these final regulations ***allows postsecondary institutions to decide which of their employees must, may, or must only with a student's consent, report sexual harassment to the recipient's Title IX Coordinator*** *(a report to whom always triggers the recipient's response obligations, no matter who makes the report).* *Id.* (emphasis added).

We believe that the best way to avoid reports "falling through the cracks" or successfully being "swept under the rug" by postsecondary institutions, is not to continue (as Department guidance did) to insist that all postsecondary institutions must have universal or near-universal mandatory reporting. . . . ***whether universal mandatory reporting for postsecondary institutions benefits victims or harms victims is a complicated issue as to which research is conflicting****.* *Id.* at 30106 n.482 (emphasis added).

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"Universal mandatory reporting"

[N]othing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment **[i.e. a "universal mandatory reporting policy"].** *Id.* at 30107 (emphasis added).

189

"Mandatory Reporters"

- 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"

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.***

Id. at 30040 (emphasis added, internal citations omitted).

191

Actual Knowledge Can Be Triggered By…

- Report from the complainant
- Third party report ("bystander" reporting)
- Anonymous report (by the complainant or by a third party)

See id. at 30087.

192

Anonymous Reports

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

Id. at 30087.

[I]f 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.

Id. at 30087.

193

Notice Cont'd

[N]otice of sexual harassment or allegations of sexual harassment to the recipient's Title IX Coordinator or to an official with authority to institute corrective measures on behalf of the recipient (herein, "officials with authority") will trigger the recipient's obligation to respond. *Postsecondary institution students have a clear channel through the Title IX Coordinator to report sexual harassment, and § 106.8(a) requires recipients to notify all students and employees (and others) of the Title IX Coordinator's contact information, so that "any person" may report sexual harassment in person, by mail, telephone, or e-mail (or by any other means that* ***results in the Title IX Coordinator receiving the person's verbal or written report****), and specifies that a report may be made at any time (including during non-business hours) by mail to the Title IX Coordinator's office address or by using the listed telephone number or e-mail address.*

Id. at 30106 (emphasis added).

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Title IX Grievance, Discipline and Mediation

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A Word on Accountability…

Recipients cannot be guarantors that sexual harassment will never occur in education programs or activities*, but recipients can and will, under these final regulations, be held accountable for responding to sexual harassment in ways designed to ensure complainants' equal access to education without depriving any party of educational access without due process or fundamental fairness.*

Id. at 30046 (internal citations omitted, emphasis added).

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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 30091.

197

Operationalizing the 2020 Title IX regulations requires making certain choices.

"Tuning" is important.

198

Regulations Intend to Provide "Flexibility"

[T]hese 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 30030 (emphasis added).

[T]hese 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.

199

"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 30097 (bullets added).

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Policy Basics: What Should be Included?

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Policy Basics

- Single policy or multiple policies?
- Who creates policy? You? Your TIX Team? Conduct? Committee? Counsel?
- 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"
  - What is a "day?" (Business day, calendar day, "school" day?)

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Policy Elements

- 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

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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

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Definitions of Offenses to Be Included in Policies

i. Sexual harassment
ii. Sexual assault
  1. Non-consensual sexual contact, and
  2. Non-consensual sexual intercourse
iii. Domestic violence
iv. Dating violence
v. Sexual exploitation*
vi. Stalking
vii. Retaliation*
viii. Intimidation*
ix. Actual Knowledge

State law considerations!

205

"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; or*

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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"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;
    - (such as due to the use of drugs or alcohol, when a person is asleep or unconscious, or because of an intellectual or other disability that prevents the student from having the capacity to give consent)
  - past consent does not imply future consent;
  - silence or an absence of resistance does not imply consent;
  - consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
  - consent can be withdrawn at any time; and
  - coercion, force, or threat of either invalidates consent.

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"Stalking" (Clery Act Definition)

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

(A) Fear for the person's safety or the safety of others; or

(B) Suffer substantial emotional distress.

(ii) For the purposes of this definition—

(A) *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, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

(B) *Reasonable person* means a reasonable person under similar circumstances and with similar identities to the victim.

(C) *Substantial emotional distress* means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

34 C.F.R § 668.46(a)

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"Domestic Violence" (Clery Act Definition)

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

(A) By a current or former spouse or intimate partner of the victim;

(B) By a person with whom the victim shares a child in common;

(C) By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;

(D) 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

(E) 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.

34 C.F.R § 668.46(a)

209

"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.

(i) 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.

(ii) For the purposes of this definition—

(A) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

(B) Dating violence does not include acts covered under the definition of domestic violence.

34 C.F.R § 668.46(a)

210

Title IX Coordinator Information (§106.8)

Recipients must notify….

- Applicants for admission and employment
- Students
- Employees
- All unions or professional organizations holding collective bargaining or professional agreements with the recipient

…of the contact information for the Title IX Coordinator(s):

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

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Dissemination of Information §106.8(b)

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

- Website
- Handbooks
- Catalogs

For

- Applicants for admission and employment
- Students
- Employees
- All unions or professional organizations holding collective bargaining or professional agreements with the recipient

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Scope

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Tuning

- Recipients may continue to address harassing 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 allegations do 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.** *Id.* at 46 (emphasis added).
- **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 46 n.108 (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.

215

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.***

216

§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.

217

Addressing Sexual Assaults 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 30065 (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 30091 (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 30093 (emphasis added).

Tuning? Traps?

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"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 30095.

219

Conduct That Does Not Meet Sexual Harassment Definition

Allegations of conduct that do not meet the definition of "sexual harassment" in § 106.30 may be addressed by the recipient under other provisions of the recipient's code of conduct . . . *Id.* at 30095.

Recipients may continue to address harassing 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 allegations do 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.*** *Id.* at 30037-38 (emphasis added).

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 30038 n.108 (emphasis added).

Tuning? Traps?

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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.

Id. at 30093.

Will colleges eliminate RSO recognition?
Will RSO's choose to leave?
Relationship Agreements
Study Abroad?

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"Involvement in an education program or activity"

. . . [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 as provided in the revised definition of "formal complaint" in § 106.30; this provision tethers a 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 so that recipients are not required to investigate and adjudicate allegations where the complainant no longer has any involvement with the recipient while recognizing that complainants 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. . . .

Id. at 30086-87.

222

"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] 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 as provided in the revised definition of "formal complaint" in § 106.30; this provision tethers a 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** so that recipients are not required to investigate and adjudicate allegations where the complainant no longer has any involvement with the recipient while recognizing that complainants 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 30086-87 (emphasis added).

223

"Statute of Limitations" and Dismissal of Complaint

[T]he § 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 30087 (bullets added).

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RSO's/Greek Life

*[T]here is no exemption from Title IX coverage for fraternities and sororities, and in fact these final regulations specify in § 106.44(a) that **the education program or activity of a postsecondary institution includes any building owned or controlled by a student organization officially recognized by the postsecondary institution**.*

Id. at 30061 (emphasis added).

225

Organizational Responsibility Under Title IX

*The § 106.45 grievance process . . . contemplates a proceeding against an individual respondent to determine responsibility for sexual harassment. **The Department declines to require recipients to apply § 106.45 to groups or organizations against whom a recipient wishes to impose sanctions** arising from a group member being accused of sexual harassment because such potential sanctions by the recipient against the group do not involve determining responsibility for perpetrating Title IX sexual harassment but rather involve determination of whether the group violated the recipient's code of conduct.*

Id. at 30096 (emphasis added).

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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 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.

Id. at 30105.

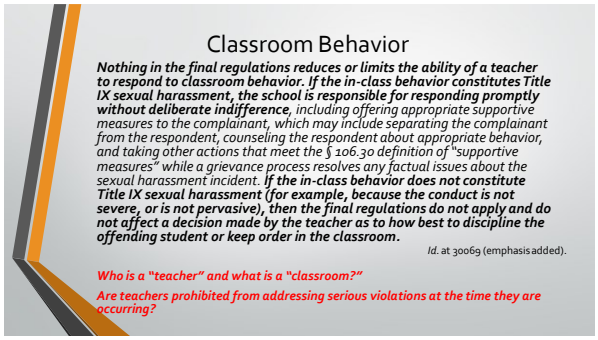
227

Title IX Coordinator/Gatekeeping

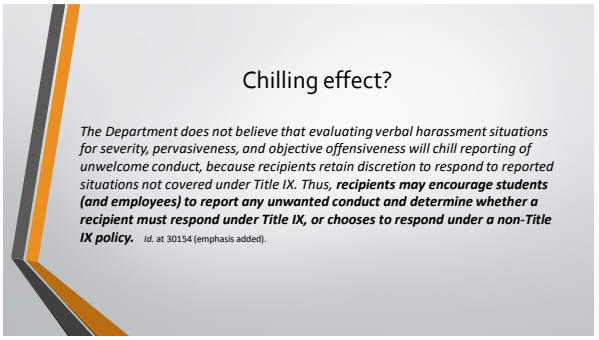
Title IX Coordinators have always had to consider whether a report satisfies the criteria in the recipient's policy, and these final regulations are not creating new obstacles in that regard. The criteria that the Title IX Coordinator must consider are statutory criteria under Title IX or criteria under 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)(3)(i), if the conduct alleged does not meet the definition of Title IX sexual harassment.

Id. at 30090 (internal citation omitted, emphasis added).

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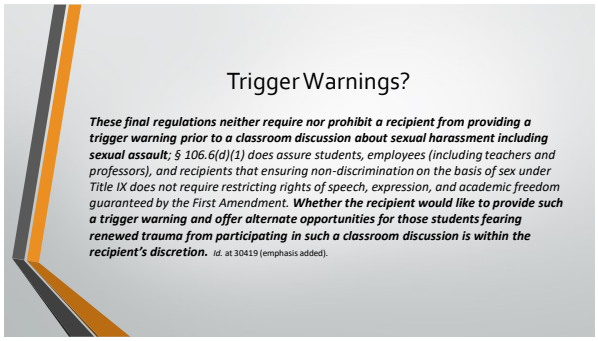


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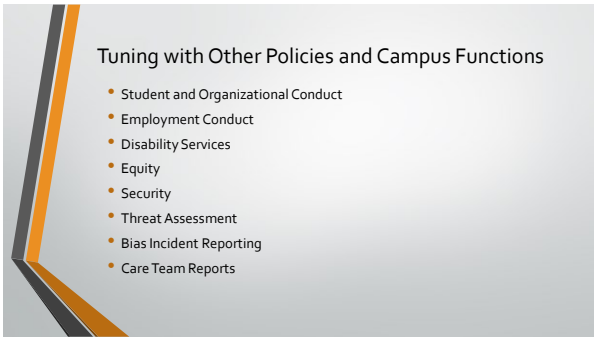


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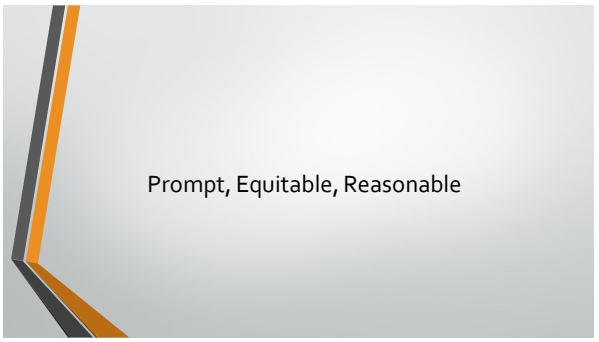


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Prompt Responses

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.*

Id. at 30034 n.60 (bullets added).

235

Prompt 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* §106.45(b)(1)(v)

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Equitable Responses

[T]he 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.

Id. at 30044.

237

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.*

Id. at 30046 (internal citations omitted, emphasis added).

*Section 106.44(b)(2) (providing that recipient responses to sexual harassment must be non-deliberately indifferent, meaning not clearly **unreasonable** in light of the known circumstances . . .* *Id.* at 30046 n.182 (emphasis added).

*[I]f 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).*

Id. at 30046 n.183 (emphasis added).

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Law Enforcement Activity/ Criminal Proceedings

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Concurrent Law Enforcement Activity

*Section 106.45(b)(1)(v) 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)(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 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 proceeding. 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, inculpatory and exculpatory, **nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process.** § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party or other source" which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 106.45(b)(1)(ii).*

Id. at 30099 n.466 (emphasis added).

240

Law Enforcement Cannot Be Used to Skirt Title IX Process

*[**A] recipient cannot discharge its legal obligation to provide education programs or activities free from sex discrimination by referring Title IX sexual harassment allegations to law enforcement** (or requiring or advising complainants to do so), because the purpose of law enforcement differs from the purpose of a recipient offering education programs or activities free from sex discrimination. Whether or not particular allegations of Title IX sexual harassment also meet definitions of criminal offenses, the recipient's obligation is to respond supportively to the complainant and provide remedies where appropriate, to ensure that sex discrimination does not deny any person equal access to educational opportunities. Nothing in the final regulations prohibits or discourages a complainant from pursuing criminal charges in addition to a § 106.45 grievance process.*

Id. at 30099 (internal citation omitted).

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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."

Id. at 30099 n. 467.

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Confidentiality

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Confidentiality and FERPA Protections

*Section 106.71(a) 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 § 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation. Section 106.30 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.*

Id. at 30071 (emphasis added).

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"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 30296.

[§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.*

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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 30304 (emphasis added).

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Complainant Autonomy/
Desire to Move Forward in a Formal Process

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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.

Id. at 30086.

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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).

249

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).

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Moving Forward Against the Wishes of a Complainant

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

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Emergency Removal/
Administrative Leave

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§106.44(c) *Emergency removal.*

Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

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Emergency Removal of Respondent

[T]hese 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).

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§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.

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Thoughts on Emergency Removal and Administrative Leave

- How should we make this clear in our policies?
- Will IHE's be at risk if they use this process?
- Litigation risk/TRO?
- Bias? *De novo* review by hearing?

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A Closer Look at Formal Complaints

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§ 106.30(a) "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)

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"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).

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"Formal Complaint" Cont'd

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.*

Id. at 30030 (emphasis added).

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§ 106.45(b)(3)(i)

(3) Dismissal of a formal complaint—

(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.

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§ 106.45(b)(3)(ii)

(ii) 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.

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§ 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) therefor simultaneously to the parties.

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Dismissal of Complaint

[I]f 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.

[I]f 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.

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§ 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.

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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 incident(s)
- It must be in the Complainant's or Reporter's own words, and may not be authored 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 Reporter believes may be relevant to the investigation. However, a complaint should not be delayed if such sources of information are unknown or unavailable.

https://flowchart.odr.harvard.edu/

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http://www.aum.edu/docs/default-source/human-resources/title-ix-complaint-form---final.pdf?sfvrsn=4

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http://www.aum.edu/docs/default-source/human-resources/title-ix-complaint-form---final.pdf?sfvrsn=4

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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?

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§ 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.

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§ 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.*

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A Closer Look at Investigations

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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?

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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?

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Job Description

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

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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

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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

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"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.

Id. at 30097.

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The Investigation Process Itself

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

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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?

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The *Minimum* and *Maximum* Role of the Investigator Cont'd

- Gather <u>all</u> *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?????

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The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report. *Id.* at 30308.

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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 30314.

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Evidence and Relevance

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Overview

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

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[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.

Id. at 30337.

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Inculpatory Evidence

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

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 676.

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Exculpatory Evidence

Evidence tending to establish a defendant's innocence.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 675.

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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."

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Relevance

The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied. *Id.* at 30247 n. 1018.

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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.

merriam-webster.com

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[R]elevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons discussed above, while the final regulations do not address "hearsay evidence" as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

Id. at 30354.

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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 30125 (emphasis added).

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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.*

Id. at 30103 (emphasis added).

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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****.*

Id. at 30336 n. 1308 (emphasis added).

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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 30125.

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Rape Shield Language

[T]he rape shield language in this provision:

- *considers all questions and evidence of a complainant's sexual predisposition irrelevant, with no exceptions;*
- *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.***

Id. at 30352 (emphasis added).

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Rape Shield Protections and the Investigative Report

[T]he investigative report must summarize "relevant" evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence. *Id.* at 30353-54.

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Credibility Determinations

- Credibility vs. Reliability
- Often these cases are "word against word," so what exists to corroborate claims?
- Reports to law enforcement, medical assistance, contemporaneous reports or conversations, journal entries, witness accounts, etc. can be viewed as corroborating (if medical or mental health reports exist you can ask the alleged victim for access to those records)
- In cases where medical or mental health records exist and panel members gain access, it's a good idea to enlist the help of medical/mental health experts to interpret.
- Avoid expectations or assumptions about behaviors or responses by either complainant or respondent. Avoid stereotypes; prevent bias, implicit or otherwise

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Credibility Determinations Cont'd

- Assess demeanor: Does the person appear credible? Look at body language, eye contact, level of nervousness, defensiveness, evasiveness, etc.
- Is the person's account inherently believable? Plausible? What is his or her potential bias?
- Does the person have a motive to be untruthful?
- Are there past acts that could be relevant (although past acts are not determinative of the issue before you they can be relevant for some purposes).
- Pay attention to inconsistencies, but remember that in cases of trauma, inconsistencies can be normal. Inconsistencies alone should not determine credibility or lack thereof.
- Look out for attempts to derail the hearing, deflect away from questions, and/or bog down the hearing with irrelevant information or minutia.
- Check your own bias at the door. Do not pre-judge your findings until all relevant information is heard. Working with "theories of the case" are not bias, but remain open to revising those theories based on fact. Do not be lured towards confirmations bias.

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Advisors and Hearings

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§ 106.45(b)(5)(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 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;

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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.*

See id. at 30109 (emphasis added).

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"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.
  - *[W]hile the final 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 30297.
- Effective representation?
  - *[P]roviding parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation. Id.* at 30297.
  - Should not be viewed as practicing law, but rather "as providing advocacy services to a complainant or respondent." *Id.* at 30299.

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"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' selection of advisors by** requiring advisors to be chosen by the recipient, or by **precluding a party from selecting an advisor who may also be a witness**.*

Id. at 30299.

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"Witnesses" as "Advisors" Cont'd

The Department notes that the § 106.45(b)(1)(iii) prohibition of Title IX personnel having conflicts of interest or bias does not apply to party advisors (including advisors provided to a party by a postsecondary institution as required under § 106.45(b)(6)(i)), and thus, the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statement as a witness does not violate the final regulations. Rather, the perceived "conflict of interest" created under that situation would be taken into account by the decision-maker in weighing the credibility and persuasiveness of the advisor-witness's testimony.

Id. at 30299.

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"Advisors" Cont'd

How can/should advisors participate in the process?

Section 106.45(b)(5)(vi) (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. 1168.

Section 106.45(b)(5)(vii) (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. 1169.

[T]he final regulations make one exception to the provision in § 106.45(b)(5)(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. 1167.

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§ 106.45(b)(6)(i)

(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. ***At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. 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.*

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§ 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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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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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 30293 n. 1148.

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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 30298.

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 30298.

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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.*

Id. at 30294 (emphasis added).

315

Prior Sexual History

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.*

Id. at 30103 (emphasis added).

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Cross-Examination

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

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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.

Remember Vacated Part of 2020 Regs

318

Standard of Evidence to Determine Responsibility

319

§ 106.45(b)(1)(vii)

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;

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"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?

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Sanctions and Remedies

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Sanctions

*The Department **does not require particular sanctions** – 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 30063 (emphasis added).

*The Department **does not require disciplinary sanctions after a determination of responsibility**, and does not prescribe any particular form of sanctions.*
Id. at 30096 (emphasis added).

*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 sanction decisions with respect to the respondent. However, the final regulations are consistent with the 2001 Guidance's approach inasmuch 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.*
Id. at 30096 n.456 (emphasis added).

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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.

Id. at 30104.

324

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.

325

§ 106.45(b)(1)(i)

(1)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;***

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Remedies

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).

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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?

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Appeals

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§ 106.45(b)(8)(i)

(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:

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§ 106.45(b)(8)(i)(A-C)

(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.

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§ 106.45(b)(8)(ii)

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

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§ 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)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

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

(F) Provide the written decision simultaneously to both parties.

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Points on Appeals

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

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Informal Resolution

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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?
  - Pros/Cons
  - Increased complainant autonomy
- Who should implement?
- What type of training is needed?
  - Mediation? Arbitration? 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?

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§ 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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Ending an Informal Process

[A]n 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).

Id. at 30059 n.286.

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A Closer Look at Retaliation

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§ 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.

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§ 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).

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§ 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.

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§ 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.

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Retaliation

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

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Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

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Bias/Prejudice/Stereotypes/Prejudgment/Conflicts of Interest

[S]ome complainants, including or especially girls of color, face school-level responses to their reports of sexual harassment infected by bias, prejudice, or stereotypes. *Id.* at 30084.

§ 106.45(b)(1)(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." *Id.*

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Bias/Conflicts of Interest

Section 106.45(b)(1)(iii) requires Title IX Coordinators, investigators, decision-makers, and individuals who facilitate any informal resolution process to ***be free of bias or conflicts of interest for or against complainants or respondents*** *and to be* ***trained on how to serve impartially****.*

Id. at 30103 (emphasis added).

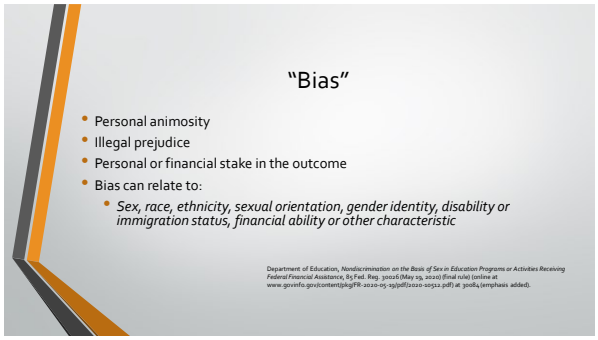
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"Bias" in *Ikpeazu v. University of Nebraska*

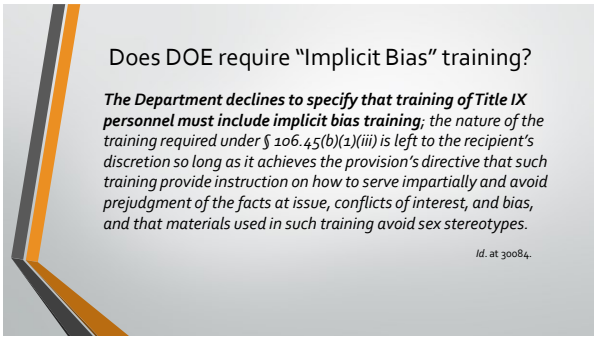
With respect to the claim of bias, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as ***personal animosity, illegal prejudice, or a personal or financial stake in the outcome*** *can be proven. . . . The allegations Ikpeazu makes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

Ikpeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985) (internal citations omitted).

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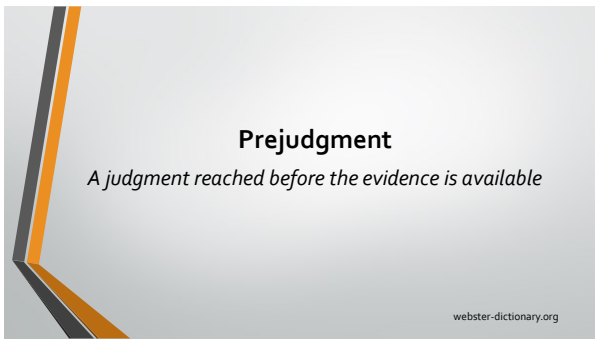


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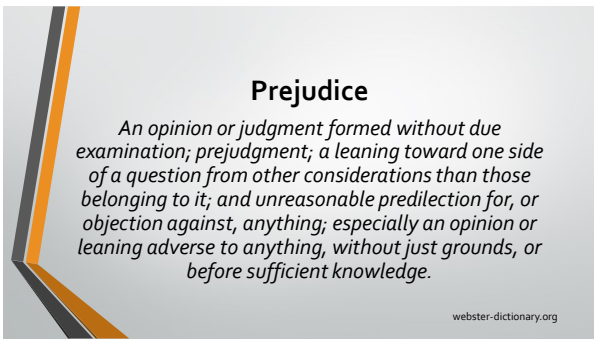


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Stereotype

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.

merriam-webster.com

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"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:
  - S. Kanahara, *A Review of the Definitions of Stereotype and a Proposal for a Progressive Model*, Individual Differences Research. Vol. 4 Issue 5 (Dec. 2006).
- 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!

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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*

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Whose side are you on as a Title IX operative?

You have no "side" other than the integrity of the process.

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Supportive Measures

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§ 106.30(a) "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.

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§ 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.

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§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 . . .

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More on Supportive Measures...

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

Id. at 30046 (emphasis added).

[S]upportive measures must be offered not only in an "interim" period during an investigation, but regardless of whether an investigation is pending or ever occurs.

Id. (emphasis added).

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***.

Id. at 30064 (emphasis added).

[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***.

Id. at 30069-70 (emphasis added).

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Supportive Measures and Respondents

The Department does not equate the trauma experienced by a sexual harassment victim with the experience of a perpetrator of sexual harassment or the experience of a person accused of sexual harassment. Nonetheless, the Department acknowledges that a grievance process may be difficult and stressful for both parties. Further, supportive measures may be offered to complainants and respondents (see § 106.30 defining "supportive measures"), and §106.45(b)(5)(iv) requires recipients to provide both parties the same opportunity to select an advisor of the party's choice. These provisions recognize that the stress of participating in a grievance process affects both complainants and respondents and may necessitate support and assistance for both parties. Id. at 30103 n.477.

Under § 106.30, a supportive measure must not be punitive or disciplinary, but may burden a respondent as long as the burden is not unreasonable. Id. at 30231.

The Department does not intend, and the final regulations do not require, to impose a requirement of equality or parity with respect to supportive measures provided to complainants and respondents. Id. at 30277.

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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
  - *[T]hese 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 30521.

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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 30184.

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Title IX Coordinator

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

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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

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"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

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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

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The Law

- The law recognizes its own limits in regards to sex discrimination
- Resist "Legalese"

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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!

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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

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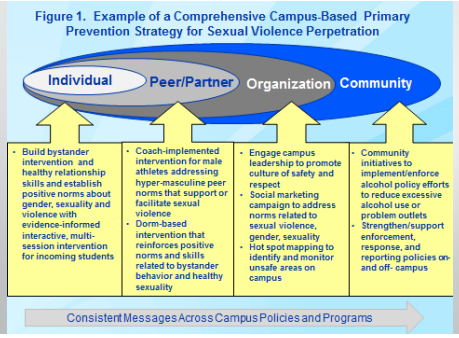
Prevention

- **Sexual assault prevention and awareness programs are <u>required</u> under the Clery Act**
- **Use <u>evidence-based</u> 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 <u>comprehensive</u> strategy**

Consider the following model from the CDC, *Preventing Sexual Violence on College Campuses: Lessons from Research and Practice* (April 2014)

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Prevention

- Alcohol and drug prevention
- Social norming on violence
- Enlist everyone in prevention efforts → Men Can Stop Rape, No More Campaign
- Community efficacy work (Chicago Project, Dr. Felton Earls)
- Bystander intervention training:
  - NotAlone.gov – Bystander intervention factsheet: *Bystander-Focused Prevention of Sexual Violence*

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Prevention and Intervention

- **The University of New Hampshire, *Bringing in the Bystander*,** http://www.unh.edu/preventioninnovations/index.cfm?ID=BCD02554-0F88-5F7E-706E28CD98893C6D
- **Virginia Tech, *Be an Active Bystander*,** http://www.stopabuse.vt.edu/bystander.php
- **The University of Arizona, *Step Up Program*,** http://www.stepupprogram.org/
- ***The Green Dot Program*,** http://www.livethegreendot.com/
- ***The Red Flag Campaign*,** http://www.theredflagcampaign.org/

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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."

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VAWA Regs 34 CFR 668.46 (j)

- Description of primary prevention and awareness programs for all incoming students and employees
  - A statement that the institution prohibits the crimes of dating violence, domestic violence, sexual assault, and stalking
  - The definitions of the terms above
  - The definition of consent
  - Description of safe bystander intervention options
  - Information on risk reduction
- Description of the institution's ongoing prevention and awareness campaigns for students and employees

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Where is Title IX headed?

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

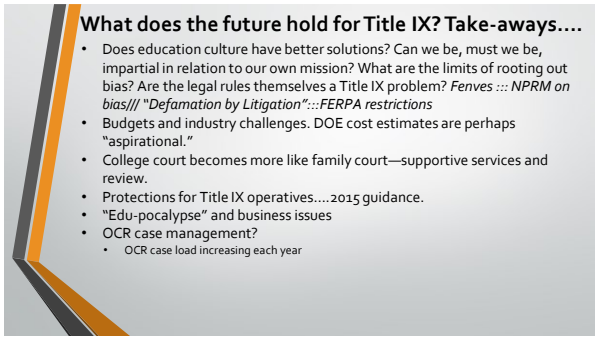
- LGBTQI+ protections: transgender athletes' rights issues
  - Several states have laws that prevent transgender individuals from playing on female sports teams
  - Is the religious exemption in Title IX constitutional?
- *Speech First, Inc. vs. Fenves; Speech First, Inc. vs. Cartwright*
  - *Speech First, Inc. v. Timothy Sands*, No. 21-2061 (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 *Roe v. Wade* in *Dobbs*

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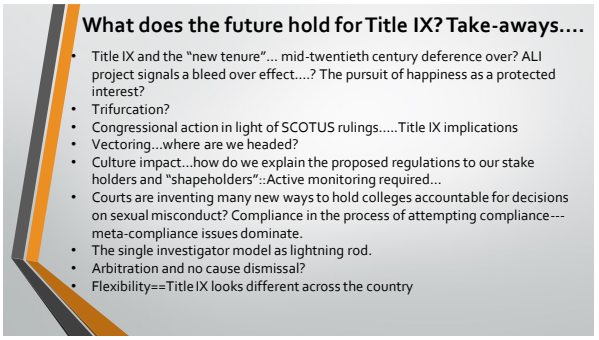
What does the future hold for Title IX? Take-aways….

- 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.
- Let's get Constitutional…What about *Citizens United*? Even *Gebser/Davis? Mathews v Eldridge? Textualism, Originalism, and the Title IV trojan horse.* ALI and "mission sensitivity."
- SCOTUS → limits of federal regulatory power
- Lawyers and legalisms….Student conduct dominated by law, lawyers and legalisms? Law as competitor?

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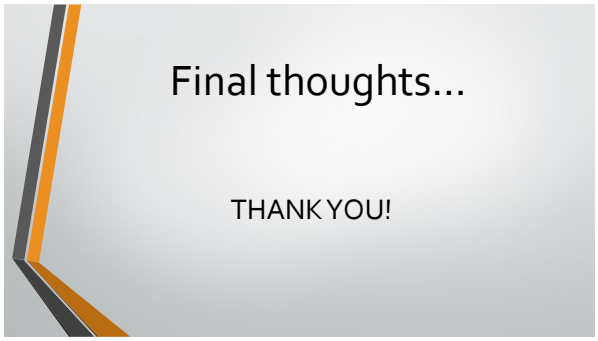


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