

2020 Cohort #3

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Introduction: Critical Issues in Title IX and Sexual Misconduct

Peter Lake Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy Stetson University College of Law



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This Module is Designed for:

TITLE IX

TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators TRACK 3 – Title IX Investigators

Structure of the NASPA Title IX Training

- Why three tracks?
- Why combine Title IX decision-makers and student conduct administrators in the second track?
- Why will Title IX coordinators receive all of the Title IX investigator training?
- Combination of asynchronous pre-recorded videos and live virtual sessions.
- Quizzes, questions and assessment.
- Certificate of completion.
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Nothing presented in any module in the NASPA Title IX Training Certificate is, or should be considered, legal advice!

Know when to consult legal counsel.

A Few Initial Thoughts on the New Regulations

- 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
- Status of preexisting guidance and resolutions
- Expect enforcement if regulations survive legal challenges in court

Some Key Features of the New Regulations 抗

- Title IX redefines sexual harassment and creates special grievance procedures for sexual harassment.
- What does this mean for your existing policies and Title IX compliance more generally?
- 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

Some Key Features of the New Regulations ma

- · 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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Training Time Estimated by the Department

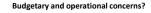
We assume all recipients will need to take time to review and understand these final regulations... At the IHE level, we assume eight hours for the Title IX Coordinator and 16 hours for an attorney. The second of the second of

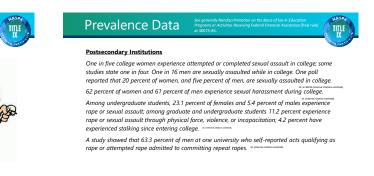
an attorney with an additional four hours for an administrator to review and approve them. ... We assume that all recipients will need to train their Title IX Coordinators, an

we assume that all recipients will need to train their The IX Loordinators, 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 decisionmaker for appeals). . . . We assume this training will take approximately eight hours for all staff at the . . . IHE level. "

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 original decision-maker or investigator Anyone implementing an informal process such a mediation, case management, records management, etc.





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valence Data – Postsecondary Institutions Cont'd	Prevalence Data – Postsecondary Institutions Cont'd	
More than 50 percent of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college; 84 percent of the	Of college students in fraternity and sorority life, 48.1 percent of females and 23.6 percent of males have experienced nonconsensual sexual contact, compared with 33.1 percent of females and 7.9 percent of males not in fraternity and sorority life.	
women who reported sexually coercive experiences experienced the incident during their first four semesters on campus. (# provide accounting)	Fifty-eight percent of female academic faculty and staff experienced sexual harassment across all U.S. colleges and universities, and one in ten female graduate	
Seven out of ten rapes are committed by someone known to the victim; for most women victimized by attempted or completed rape, the perpetrator was a boyfriend, ex-boyfriend, classmate, friend, acquaintance, or coworker.	students at most major research universities reports being sexually harassed by a faculty member.	
	Twenty-one to 38 percent of college students experience faculty/staff-perpetrated sexual harassment and 39 to 64.5 percent experience student-perpetrated sexual harassment during their time at their university.	

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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.

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...

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.

> partment of Education, Nondiscrimination on the Basis of Sav in Education Programs or thirties Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (final rule niline at www.govimfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30064 mphasis artifed

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 truthseeking.

Id. at 30069 (internal citation omitted).

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Trauma Cont'd "Victim"/"Survivor" or "Perpetrator" Further, the final regulations contain provisions specifically intended to take into account that complainants may be suffering results of trauma; for instance, § When the Department uses the term "victim" (or "survivor") or 106.44(a) has been revised to require that recipients promptly offer supportive "perpetrator" to discuss these final regulations, the Department assumes measures in response to each complainant and inform each complainant of the that a reliable process, namely the grievance process described in § availability of supportive measures with or without filing a formal complaint. To 106.45, has resulted in a determination of responsibility, meaning the protect traumatized complainants from facing the respondent in person, crossexamination in live hearings held by postsecondary institutions must never recipient has found a respondent responsible for perpetrating sexual involve parties personally auestioning each other, and at a party's request, the live harassment against a complainant. hearing must occur with the parties in separate rooms with technology enabling Id. at 30031 participants to see and hear each other. Id. (internal citation omitted).

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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!

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.

Id. at 30026.

TIŢĻE 1. Equitable treatment of parties/provision of remedies A summary of the

- 2. Objective evaluation of evidence
- 3. No bias or conflicts of interest/training of Title IX
- personnel
- § 106.45(b)(1)(i-x) 4. Presumption of non-responsibility of respondent until **Basic Requirements** for a Grievance

10 elements of

Process.

- process is complete 5. Reasonably prompt time frames
- 6. Articulate and publish the range of possible sanctions 7. Choose then evenly apply the evidentiary standard
 - 8. Provide procedures and standards for appeal
 - 9. Describe supportive measures
 - 10. Legally-privileged information can only be used if privilege is waived

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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

addressing the alleged misconduct under other provisions of the

recipient's own code of conduct. Id. at 30037-38 (emphasis added

formal complaint because the allegations do not meet the Title IX

definition of sexual harassment, does not preclude a recipient from

Similarly, nothing in these final regulations prevents a recipient from

the conduct constituting sexual harassment occurring outside the

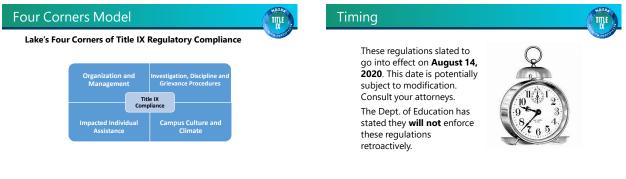
recipient's education program or activity, or occurring against a

addressing conduct that is outside the Department's jurisdiction due to

person who is not located in the United States. Id. at 30038 n. 108 (emphasis added)

Retaliation "Staying in Your Lane" § 106.45 may not be circumvented... · Against complainant, respondent, witnesses, advisors . . by processing sexual harassment complaints under non-Title IX Against employees provisions of a recipient's code of conduct. The definition of "sexual • Vigilantism—Digital or otherwise 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

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The Social Context



COVID-19

- Virtual hearings
- More online learning
 - More Clery/VAWA-type offenses?
- Budget cuts, hiring freezes, furloughs, etc. due to the pandemic

Social Justice Issues

Further training recommended...

- 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.
- Training on technology usage for live hearings on your campus.
 Especially important for decision-makers.
- · Additional and continued training on bias is always a good idea.
- Continuing education at regular intervals.
- REMEMBER—It's always good to hear from multiple voices!
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Thank You...

- to NASPA
- to my fellow presenters
- to **YOU!!!!**

Post-Module Questions

Student Affairs Administrators in Higher Education

Detailed Legal Foundations and the New Regulations

Peter Lake

Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy Stetson University College of Law



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This Module is Designed for:

TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators



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). [These issues are addressed in a separate module.]

Title IX is concerned with *institutional response* to discrimination.



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 <u>respond</u> 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 Activates Receiving Federal Financial Assistance, 85 Fed. Neg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FB-2020-05-19/pdf/2020-10512.pdf) at 30026

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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.

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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.



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Title IX and the Trump Administration



- Education Secretary Betsy DeVos
- Rescission of Obama-Era Guidance in 2017
 - Withdrawal of guidance on transgender students (Feb. 2017)
 - 2011 Dear College Letter (Sept. 2017)
 2014 Ouestions & Answers on Title IX and Sexual Violence (Sept. 2017)
- 2014 Questions & Answers on Title IX and Sexual Violence (Sept. 20
- 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 new 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.

Title IX: Current and 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), WITHDRAWN by, U.S. Dep't. of Education, Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017).
- Questions and Answers on Title IX and Sexual Violence (April 29, 2014) WITHDRAWN by, U.S. Dep't. of Education, Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017).
- Q&A on Campus Sexual Misconduct (Sept. 22, 2017).

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New Regulations and Previous Guidance New Regulations and Court Activity • Uncertain features of pre-existing guidance and status of "commentary" and blog posts. • Lower courts and SCOTUS • The New Regulations and Court Activity • Lower courts and SCOTUS • Other Courts and Body posts. • Circuit in Baum • The Circuit in Purdue • The Circuit in Purdue

- New regulatory dynamics....
- What about "straddle" cases?
- DOE has said they will not enforce new regulations retroactively.

- 3rd Circuit in University of Sciences
- U.S. District Court for District of Tennessee in *Rhodes* College
- See Jeremy Bauer-Wolf, Constitutional Due Process at Private Institutions? Inside Higher Ed (June 25, 2019).

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Litigation Risk

- Will the new regulations cause an increased risk of litigation?
- The Department doesn't think so. For example: "[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 2015.
- Actual cases are rising in number even before the regulations. Courts are referring to the new regulations already.
- · Fee shifting? Will colleges have to pay for attorney's fees of plaintiffs?



Congress

- The Department acknowledges that Congress could address Title IX sexual harassment through legislation, but Congress has not yet done so. Id. at 30060.
- House of Representatives Committee on Oversight Reform, Letter to DeVos-DoED re: Title IX (June 22, 2020).
- Pending Litigation
 - James Walker, Betsy DeVos Sued by Organizations Representing Student Victims of Sexual Violence, Newsweek (Jun. 11, 2020) (online at <u>www.newsweek.com/betsydevos-lawsuit-title-ix-rule-changes-sexual-harassment-1510147</u>).
 - ACLU/NWLC
 - State Attorneys General
- 2020 General Election

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
- Notice and Commen
- 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 [These are addressed in a separate module.]

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 new Title IX regulations.]

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Free Speech and Academic Freedom in the New Regulations

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New Regulations and Free Speech/Academic Freedom

The 5 106.30 definition [of sexual harassment] coptures categories of misconduct likely to impose
ducational access while avoiding a chill on free speech and academic freedom. The Department
agrees with commenters noting that the Department has a responsibility to enforce Title IX while not
interfering with principles of free speech and academic freedom.

Precisely because expressive speech, and not just physical conduct, may be restricted or punished as
consistent with respect for First Amendment rights, and principles of free speech and academic
freedom, in education programs and activities....

The Department believes, however, that sevently and pervasiveness are needed elements to ensure
that Title IX's nondiscrimination mandate does not punish verbal conduct in a manner that chills and
restricts speech and cademic freedom, and that recipients or not hold responsible for controlling
every stray, offensive remark that passes between members of the recipient's community.

M at 20154.

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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



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

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.

(emphasis added)

The 2001 guidance position is complicated by OCR statements and the new Title IX regulations and recent litigation.

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 F https://www2.ed.gov/about/offices/list/ocr/frontpa July 8, 2020) (emphasis added).

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Is "sex" defined in the new regulations? SCOTUS/Bostock and Implications for Title IX The word "sex" is undefined in the Title IX statute. The Bostock v. Clayton County (June 15, 2020) Department did not propose a definition of "sex" in A consolidation of three cases of employment discrimination under the NPRM and declines to do so in these final Title VII Holding: Employees are protected from discrimination due to their regulations. The focus of these regulations remains sexual orientation or gender identity under Title VII of the Civil Rights prohibited conduct. Act of 1964.

(Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (final

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Bostock Quotes

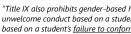
"These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff's sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group.

"Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."

Bostock Quotes

- · "An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.'
- "... homosexuality and transgender status are inextricably bound up with sex."
- · "We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."









More Quotes from Bostock – The Bostock Caveat

"The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today."

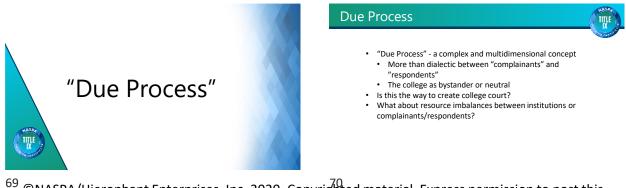
More Quotes from Bostock

"As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations... this Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers."

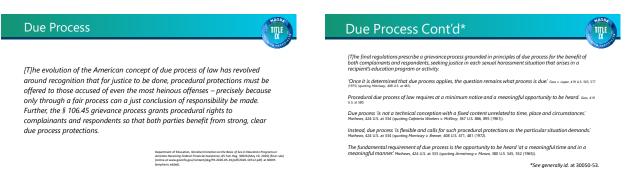
"Because the Religious Freedom Restoration Act (RFRA) operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." "But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too."

"So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way."

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More Due Process

- Chevron//Article II
- State Farm
- Protected Interests
- Matthews Balancing Test
- Citizens United → Associational Rights
- Originalism/Textualism

 Efficacy/Fairness to those not represented in a "hearing"

"College Court"

Freedom

Slippery Slope

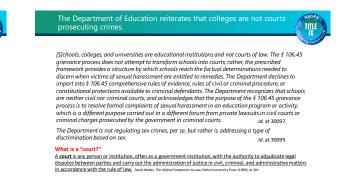
New Fairness Issues Created by

· Horowitz/Ewing and Academic

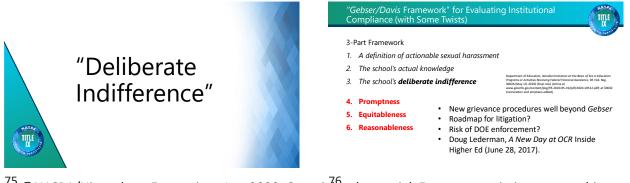
· Ghost of Hugo Black in Tinker

Substantive Due Process

Tenure for Students



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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 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, report as the results in the Title IX Coordinator receiving the person's verbal or written report. Such are report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

§106.8(b) *Dissemination of policy*.

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.

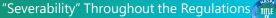
(2) Publications.

- (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.

§106.8(c) Adoption of grievance procedures m

A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. §106.8(d) Application outside the United States.

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



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.

§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.



harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).



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

What is "alleged?"



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More on Complainants/Respondents	"Consent"
 A person may be a complainant, or a respondent, even where no formal complaint has been filed and no grievance process is pending. ¹⁶ 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. ^{1d}. [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. ^{1d} at 30071-72[internal citations omitted, emphasis added). 	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?"

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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)

"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).

"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).

(emphasis added)

First Amendment and the Second Prong

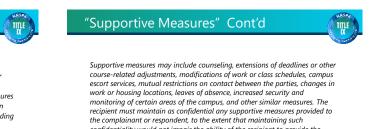
[P]rotection of free speech and academic freedom was weakened by the Department's use of wording that differed from the Davis definition of what constitutes actionable sexual harassment under Title IX . . . these final regulations return to the Davis definition verbatim, while also protecting against 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.

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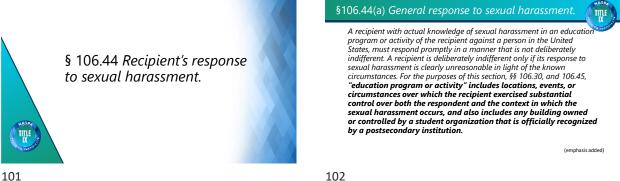
"Supportive Measures"

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.



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

A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

§106.44(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.

§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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§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.



§ 106.45(a) Discrimination on the basis of sem

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

§ 106.45(b) Grievance process.

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

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§ 106.45(b)(1)(i)

(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,



(ii) Require an objective evaluation of all relevant evidenceincluding 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.

§ 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)

§ 106.45 (b)(1)(iii) Cont'd

A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposi or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section

A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paraaraph (b)(5)(vii) of this section.

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sev stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment,

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§ 106.45(b)(1)(v)

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

§ 106.45(b)(1)(vi)

§ 106.45(b)(1)(iv)

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(iv) Include a presumption that the respondent is not responsible

responsibility is made at the conclusion of the grievance process;

for the alleged conduct until a determination regarding

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§ 106.45(b)(1)(vii)

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment:

§ 106.45(b)(1)(viii)



(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;





§ 106.45(b)(1)(ix)



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

§ 106.45(b)(1)(x)

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

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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:



(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 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 alleaed 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)(v) 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

§ 106.45(b)(2)(ii)



(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

§ 106.45(b)(3)(i)



(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

§ 106.45(b)(3)(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

determination as to the formal complaint or allegations therein.

recipient from gathering evidence sufficient to reach a

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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.



(4) Consolidation of formal complaints. A recipient may consolidat 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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§ 106.45(b)(5)

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

§ 106.45(b)(5)(i)



(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3);

§ 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;



§ 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;



(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 eaual opportunity to refer to such evidence during the hearing, including for purposes of cross-examination: and

§ 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.

§ 106.45(b)(6)(i)



(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 crossexamination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

§ 106.45(b)(6)(i) 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 crossexamination 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

Questions and evidence about the complainant's sexual predisposition 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 decisionmaker(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 crossexamination or other questions.

§ 106.45(b)(6)(i) Cont'd

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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§ 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.

§ 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;

§ 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;

§ 106.45(b)(7)(ii)(C)

(C) Findings of fact supporting the determination;

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§ 106.45(b)(7)(ii)(D) § 106.45(b)(7)(ii)(E) (D) Conclusions regarding the application of the recipient's code (E) A statement of, and rationale for, the result as to each conduct to the facts; 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.





(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.

§ 106.45(b)(7)(iv)

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



§ 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.



(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.





(9) Informal resolution. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient

§ 106.45(b)(9)(i)

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

§ 106.45(b)(9)(ii-iii)

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

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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;

§ 106.45(b)(10)(i)(B-D) (B) Any appeal and the result therefrom; (C) Amin formal unit in 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.



§ 106.71(a)

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.

§ 106.71(a) Cont'd

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

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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.





(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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Final Thoughts

- · We will talk further about how to operationalize the regulations and about bias, impartiality, etc. in the Developing Policies, Procedures and Practices module and in the live session on Title IX Grievance Procedures/Sexual Misconduct Procedures.
- · We will discuss "tuning" in depth in subsequent modules.
- · You now have the legal foundations to take the next step in the program!





Legal Intersectionality of Title IX, Title VII, Clery, VAWA, ADA/504, etc..

Peter Lake

Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy Stetson University College of Law

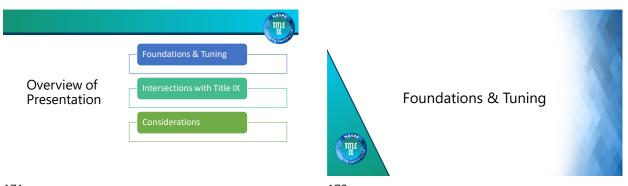
Jake Sapp Deputy Title IX Coordinator Austin College



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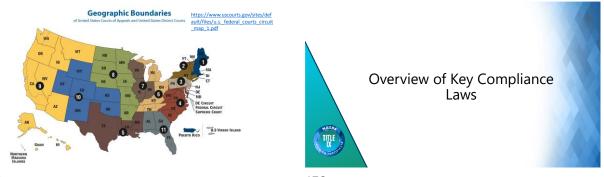
TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators

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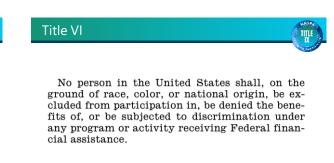
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Government Funding Requires Compliance	Title IX	
(b) By entering into a program participation agreement, an institution agrees that—	Education Amendments of 1972	
(1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, angreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA, including the requirement that the institution will use funds it receives under any Title IV, HEA program and any interest or other earnings thereon, solely for the purposes specified in and in accordance with that program;	Discrimination on the basis of sex 20 U.S.C. 1681 34 C.F.R. 106 Office of Civil Rights	1
20 U.S.C. § 1094 34 C.F.R. § 668.14		

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Title VII	Title VII Regulatory Requirements	THE
(a) Employer practices It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or	Unlawful Employment Practices: • Hiring / Firing / Otherwise • Segregate >> Deprive Employment Opportunities (training programs)	
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.	Disparate Impact Retaliation Prohibi	ted

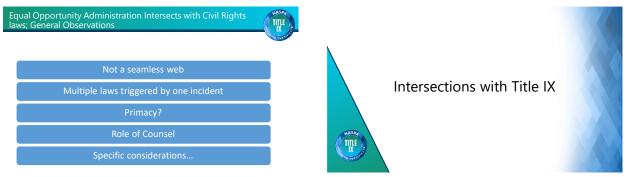


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Language of Title VI & Title IX

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,

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Key Title VI & Title IX Case Cannon v. Univ. of Chicago, 441	U.S. 677 (1979)	u)	<u> </u>
Female student rejected admis Excluded from participation b/c of her sex &	sion to Private Medical Schools. Schools received federal funding.	<u>Cannon</u> Analysis Title IX -> Title VI	Title IX is connected to Title VI: Legislative History • Support for & Arguments against • Article 1, Section 8, Clause 1 Reliance on Title IV Case Law
Does Title IX contain an Implied	d Private cause of action (COA)?		Bossier Parish School Board v. Lemon, 370 F.2d 847, 852 (CAS 1967)

Title VI Violations in Title IX Proceedings



Additionally, the Department will not tolerate discrimination on the basis of race, color, or national origin, which is prohibited under Title VI. If any recipient discriminates against any person involved in a Title IX proceeding on the basis of that person's race, color, or national origin, then the Department will address such discrimination under Title VI and its implementing regulations, in addition to such discrimination potentially constituting bias prohibited under § 106.45(b) (1)(iii) of these final regulations.

Para	alleled Court Enforcement	ASP4 TITLE
	<u>Alexander v. Sandoval</u> , 532 U.S. 275 (2001) -> <u>Cannon</u>	
	• Title VI IPCOA	
	Fennell v. Marion Indep. Sch. Dist., 804 F.3d 398 (5 Cir. App. 10/13/2015)	
	Title VI Deliberate Indifference	

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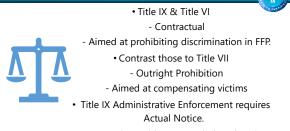


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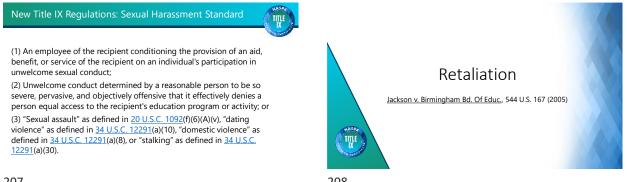




- Court Rejects Title VII Knowledge Theories



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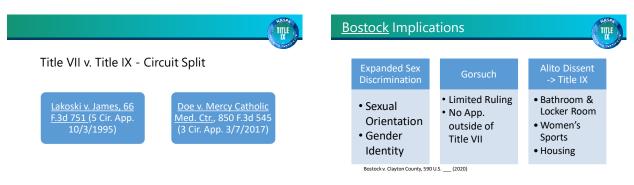
<u>Jackson</u> <u>Holding</u> Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination.

No Specific Title IX Retaliation Test

Title VII Used for Title IX Retaliation McDonnell Douglas Corp. v. Green, 411 U.S. 792 (197:

Establishes a 3 Step Burden Shifting Process:

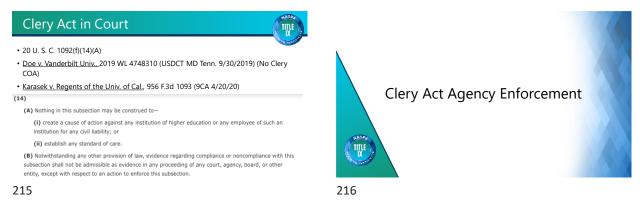
- Plaintiff establishes a Prima Facia case of discrimination
 "(1) Person engaged in protected conduct; (2) Person was subjected
 to an adverse employment action; and (3) the adverse employment
 action is causally linked to the protected conduct."
- 2. Defendant must articulate a legitimate, non-discriminatory reason for the adverse action
- Plaintiff must show by a preponderance of the evidence that the defendant's proffered reason is pretextual and that the actual reason for the adverse employment action is discriminatory."



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	New Title IX Regulations	
	Definitions -> VAWA/Save	
Clery Act/VAWA & Title IX	Off Campus Application	
(THE)	Clery ≠ Title IX	

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Michigan State University



- · Finding #1: Failure to Properly Classify Reported Incidents and Disclose Crime Statistics • Finding #2: Failure to Issue Timely Warnings in Accordance with Federal Regulations
- · Finding #3: Failure to Identify and Notify Campus Security Authorities and to Establish an Adequate
- System for Collecting Crimes Statistics from all Required Sources
- · Finding #4: Lack of Administrative Capability
- · Employ an independent Clery Compliance Officer, who will report to a high-level executive;
- · Establish a new Clery Compliance Committee that includes representation from more than 20 offices that play a role in campus safety, crime prevention, fire safety, emergency management, and substance abuse prevention; and
- · Create a system of protective measures and expanded reporting to better ensure the safety of its studentathletes in both intercollegiate and recreational athletic programs. Similar steps will be taken to better ensure the safety of minor children who participate in camps or other youth programs that are sponsored by the University or that are held on its properties.

Michigan State University – Clery & Title IX

- · Make substantial changes to the University's Title IX procedures and ensure that certain officials recus themselves from Title IX matters;
- Take remedial actions to address the impact of the sexual misconduct by Nassar and Strampel on students, faculty and other staff within the College, the Sports Medicine Clinic, and related facilities, programs and services;
- · Provide a process for those victims of Dr. Nassar, who have not otherwise had an opportunity to se remedy, to come forward and seek remedies to which they might be entitled;
- · Review the actions of current and former employees of the University who had notice but who failed to take appropriate action in response to reports of sexual misconduct by Nassar or Strampel and consider appropriate sanctions against those employees;
- · Address the campus climate around issues of sexual harassment and sexual violence, strengthen staff training, and assess the need for additional student services; and
- · Exercise adequate Title IX oversight of the University's youth programs by notifying Youth Program participants of its Title IX grievance procedure and that the procedures apply to Youth Programs
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University of North Carolina

Finding #1:	Lack of Administrative Capability
Finding #2:	Failure to Properly Define the Campus/Clery Geography
Finding #3:	Failure to Issue Timely Warnings
Finding #4:	Failure to Properly Compile and Disclose Crime Statistics
Finding #5:	Discrepancies between the Crime Statistics Included in the ASR and the Data
	Submitted to the Campus Safety and Security Data Analysis Cutting Tool 32
Finding #6:	Failure to Collect Campus Crime Information from All Required Sources
Finding #7:	Failure to Follow Institutional Policy in a Case of an Alleged Sex Offense44
Finding #8:	Failure to Disclose Accurate and Complete Disciplinary Referral Statistics -
	Failure to Retain Records Needed to Substantiate Clery Act Compliance
Finding #9:	Failure to Include Required Information in the Annual Fire Safety Reports54

	UN-Ca	mpus	On-		
2016 Criminal Offenses	Student Housing	Other	Campus (Total)	Non- Campus	Public Property
Criminal Homicide					
Murder/Non-Negligent Manslaughter	0	0	0	0	0
Negligent Manslaughter	0	0	0	0	0
Sex Offenses					
Sex Offense: Fondling	0	0	0	0	0
Sex Offense: Incest	0	0	0	0	0
Sex Offense: Rape	0	0	0	0	0
Sex Offense: Statutory Rape	0	0	0	0	0
		ampus	On-	Non-	Public
2017 Criminal Offenses	Student Housing	Other	Campus (Total)	Campus	Property
criminal Homicide					
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Sex Offense: Rape	0	0	0	0	0
Sex Offense: Statutory Rape	0	0	0	0	0

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			Digital Hearings
	ADA/504 & Title IX	Accommodations in Discipline	Summary of Investigators Reports
Contraction of the second seco			Rossley v. Drake University, 342 F. Supp. 3d 904 (S.D. Iowa 2018)
221		222	



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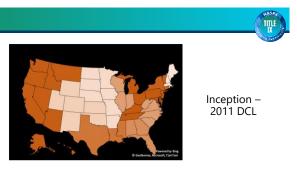
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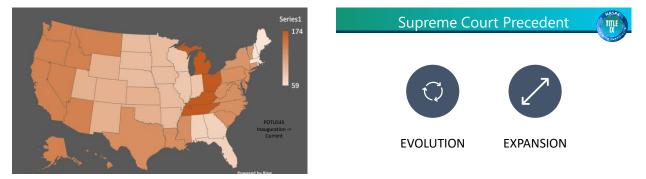




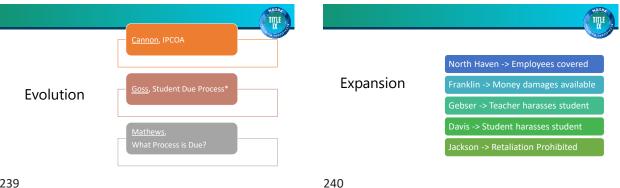




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Title IX – 1681	THE
(a) PROHIBITION AGAINST DISCRIMINATION; EXCEPTIONS NO p basis of sex, be excluded from participation in, be deni discrimination under any education program or activity except that: (b)Preferentialor disparate treatment because of in benefits; statistical evidence of imbalance (c)Preducational institution" defined (1)Classes of educational institution" defined (2)Educational institutions or religious comparizations with contrary religious terests torests	ed the benefits of, or be subjected to receiving Federal financial assistance, balance in participation or receipt of Federal (Pub. L. 92–318, title IX, § 901, June 23, 1972, 86 Stat. 373; Pub. L. 93–568, § 3(a), Dec. 31, 1974, 88 Stat. 1862; Pub. L. 94–482, title v, § 43(2), Oct. 11, 1976, 90
metrikalın marine 15 yılıbic educational institutions with traditional and continuing admissions (5) yılıbic educational institutions with traditional and continuing admissions (1) Social finatemilies or scorrifles; voluntary youth service organizations (1) Shory of ill conterences (8) Fahre-son or mother-daughter activities at educational institutions (9) Institution of histore ducation scholarship awardı in Dreauty' caseants	<u>Stat. 2234</u> ; Pub. L. 96–88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, <u>93 Stat. 677,</u> 692; Pub. L. 99–514, § 2, Oct. 22, 1986, <u>100</u> <u>Stat. 2095</u> .)



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Recognized Sex Discrimination COA				Circuit Splits
Deliberate	Retaliation	42 U.S.C. 1983 – Due Process &	Erroneous	Deliberate Indifference
Indifference	Indifference	Equal Protection	Outcome	Plausible Inference
Selective	Inequity in	Pre-Assault	Plausible	Pre-Assault claim
Enforcement	Athletics Claim	Inference	Employees & Title IX	

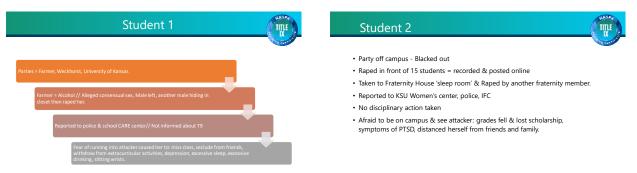
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comments made in class. Fired when discovered then can the recipient be said to "expose" its students to harassment or "cause" sexual relationship the encipient be said to "export the recipient sportants.
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Deliberate Indifference	
Supreme Court (Gebser & Davis) "That is, the deliberate indifference must, at a minimum, "cause [students] to undergo" harassment or "make them liable or vulnerable" to it." – Davis Circuit Split (Farmer v. Kollaritsch)	Farmer v. Kansas State Univ., 918 F.3d 1094 (10th Cir. 2019)

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	Court's Analysis
Dispute	 Davis: Random House Dictionary definition of "subject" to include, "to make liable; lay open; expose."
What harm must plaintiffs allege that KSU's argument =	 KSU = further actual incidents of sexual harassment required. CT = this runs counter to purpose of Title IX
indifference caused them?	 CT = cites to 4 USDCT cases & 11th Cir <u>Williams v. Bd of Regents</u> = specific action taken by survivors that have deprived them educational opportunities. Further Harassment required, but what is the Further Harassment?
	Acknowledge that Courts look at Further Harassment

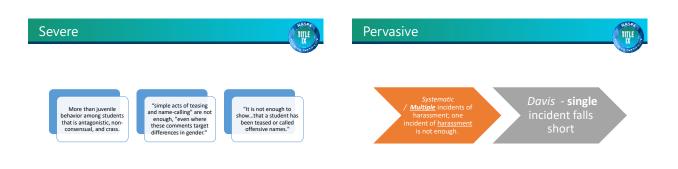


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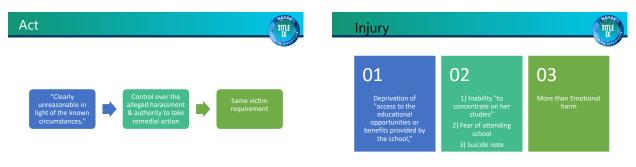
	Courts Analysis – Walkthrough of Each Davis Element
Davis allows liability when Schools:	• Davis = 2 parts
1) Cause students to undergo harassment	1) <u>Actionable Harassment</u> -> Non-Consensual = 1) Severe, 2) Pervasive, and 3) Objectively Offensive
= Requires further harassment2) Make students liable or vulnerable to it	2) <u>Deliberate Indifference</u>= 1) Knowledge, 2) Act, 3) Injury, 4) Causation
• = Must NOT require further harassment	



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Objectively Offensive	
	"Knowledge" = Actual Knowledge of an incident of actionable sexual harassment
"Behavior that would be offensive to a reasonable person under the	Rejects Constructive Knowledge
circumstances"	 Knowledge -> Action taken Connection
Constellation of surrounding circumstances, expectations, and relationships.	
Ages of the harasser and the victim and the number of individuals involved.	
The victim's perceptions are not determinative.	

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Causation



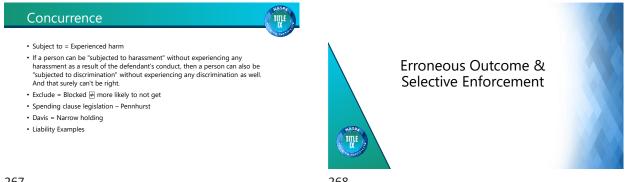
- "[T]he deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it."
- "But for" Test
- Plaintiffs = Vulnerability alone misreading
- · Correct Reading of Davis: Commission or Omission
- · Post notice harassment presumption
- Cormier, 29 Yale J.L. & Feminism at 23-24



- Plaintiff must plead, and ultimately prove:
- 1) An incident of actionable sexual harassment,
- 2) School's actual knowledge of it,
- 3) Some further incident of actionable sexual harassment,
- 4) The further actionable harassment (3) would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response,

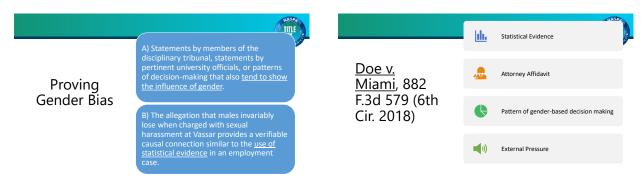
5) The Title IX injury is attributable to the post-actual-knowledge further harassment

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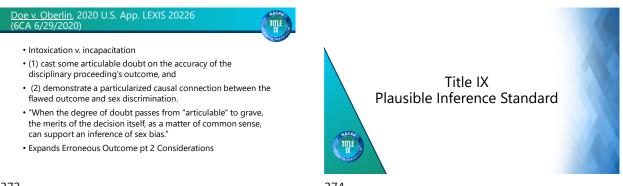


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Yusuf v. Vassar Coll., 35 F.3d 709 (2d Cir. 1994) • Yusuf a Bengali male = student at Vassar • Attacked by student roommate = drunk white male.	Title IX	Relation to Title VI & Title VII & Equal Protection Albert v. Carovano, 651 F2d 561 [2d Cir. 1988) Burt v. City of New York, 156F.2d 791 [2d Cir. 1946) Snowden v. Hughes, 321 U.S. 1 (1944)
Redected by student roomate – and white mate. Roommate's girlfriend retaliated by bringing sexual harassment charges. Notice Deficiencies Hearing Deficiencies	Erroneous Outcome &	"Title IX hars imposition of University discipline where gender is a motivating factor in the decision to discipline."
Yusuf Suspended for 1 semester. Alleged Violations of 42 USC 1981 & Title IX	Selective Enforcement	Erroneous Outcome = Innocent and wrongly found to have committed the offense.
	Linorcement	Selective Enforcement = Regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by gender.



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			<u>Univ.</u> , 928 F.3d 652 (7	'th Cir. 2019)
<u>Doe v.</u> Purdue Univ.,	Due Process & Title IX Legally Protected Entitlement? Contract			
928 F.3d 652 (7th Cir. 2019)	Fundamentally Unfair Procedures • ("[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.") Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter Concurring) • Failure to examine Jane Roe -> No impeachment	Implied Private Cause of Action -> Gebser	Erroneous Outcome & Selective Enforcement -> Yusuf	Deliberate Indifference -> <u>Doe</u> <u>v. Miami Univ.</u> , 882 F.3d 579 (6CA 2018)

7th Circuit Splits from all other circuits

"We see no need to superimpose doctrinal tests on the statute. All of these categories simply describe ways in which a plaintiff might show that sex was a motivating factor in a university's decision to discipline a student.

Do the alleged facts, if true, raise a plausible inference that the university discriminated against John "on the basis of sex"



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McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

Establishes a 3 Step Burden Shifting Process:

- 1. Plaintiff establishes a Prima Facia case of discrimination "(1) Person engaged in protected conduct; (2) Person was subjected to an adverse employment action; and (3) the adverse employment action is causally linked to the protected conduct.
- 2. Defendant must articulate a legitimate, non-discriminatory reason for the adverse action
- 3. Plaintiff must show by a preponderance of the evidence that the defendant's proffered reason is pretextual and that the actual reason for the adverse employment action is discriminatory."



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Outline of a 42 U.S.C. § 1983 Case 🛛 🥻
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- · 1) Deprived of a constitutional right (Liberty / Property)
- · 2) by a state official acting under the color of law
- 11th Amend 1) Waived 2) Abrogated by statute 3) Ex Parte Young exception– Prospective Relief
- <u>3 Causes of Action</u>
- Substantive Due Process Violation (bars certain arbitrary gov. actions "regardless of the fairness of the procedures used to to implement them." Actions that Shock the Conscience
- 2) Procedural Due Process Violation (guarantee of a fair procedure)
- 3) Equal Protection Violation (Equal treatment under the laws)



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Expanding Recognized Interests

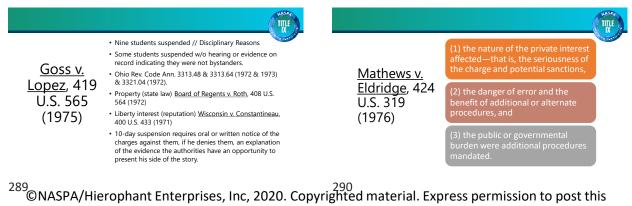
Liberty ... quaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men." <u>Meyer v.</u> <u>Nebraska</u>, 262 U.S. 390 (1923)

- · The Court has also made clear that the Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process. Board of Regents v. Roth, 408 U.S. 573 (1972)
- For '(w)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. <u>Wisconsin v. Constantineau</u>, 400 U.S. 433 (1971)

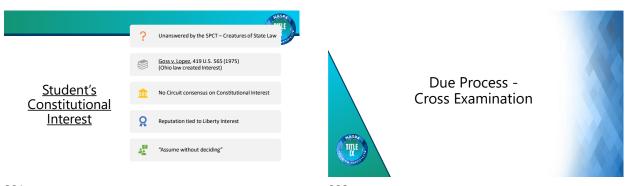
Student Interests in continuing education – Circuit split?



- Protected property interests: a property interest in continuing their education and a property. interest in a transcript "unmarred" by the finding of responsibility for sexual miscor
- 'As an initial matter, we note that the Supreme Court never has held that the interest in continued education at a public university constitutes a fundamental property or liberty interest that finds refuge in the substantive protections of the Due Process Clause." Martinson v. Regents of the Univ. of Mich., 563 F. Appx 365 (6th Ctr. 2014)
- "[O]ur own precedent suggests that the opposite is true," although this court has not definitively decided the issue
- A consensus on this issue does not appear to have emerged among our sister circuits either. <u>Williams v. Wendler</u>, 530 F.34 584 (7CA 2008) (holding that a suspension from a public university is not a deprivation of constitutional property). <u>Butler v. Rector & B.d. of Visitors of Coll.</u> <u>of William & Mary</u>, 121 F. Appx 515 (4th Cir. 2005) (assuming, without deciding, that a student had "a property interest in continued enormalitement" an amset's program that is protected by the Due Process Clause").



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		Haidak v. Univ. of MassAmherst, 933 F.3d 56 (1CA 8/6/2019)
<u>Doe v. Baum</u> , 903 F.3d 575 (6th Cir. 2018)	Procedural Due Process & Title IX (Goss, Mathews, Dixon, Univ. of Cinn, Flaim) Recognizes Student Interest = Property & Reputation	Gorman v. Univ. of Rhode Island, 837 F.2d 7 (1st Cir. 1988) (Goss, Mathews, Dixon, MagnaCarta) (Recognizes Paramount Student Interest, No cross exam
	→ <u>Jaksa v. Regents of Univ. of Michigan</u> , 597 F. Supp. 1245 (E.D. Mich. 1984) = Con 🖻 Cross Exam Disciplinary Decision -> Credibility Determination	required.) Schools Interest: 1) protecting itself and other students from those whose behavior violates the basic values of the school, 2) Allocation of resources toward "promoting & protecting the primary function of institutions that exist to provide education.
	Balance of Interests Procedural Due Process violation & Title IX Erroneous Outcome=External Pressure, crediting Roe, NoCrossEX	Haidak = Challenging the Suspension & Expulsion hearings Title IX & 1983. Not a common law trial // Rejects Baum

		Plummer me
	Due Process & Title IX Selective Enforcement	Inadequate Notice of standards, Unfair investigation, Bias, No direct
Plummer v.		evidence, No Cross Exam.
<u>Univ. of</u> <u>Houston</u> , 860 F.3d 767 (5th Cir. 2017)	Davis, Goss, Mathews, Dixon, Flaim(6CA)	 2nd Mathews = "The danger of error and the benefit of additional or alternate procedures" (video evidence)
	Univ. of Texas Med. Sch. at Houston v. Than, 901 S.W.2d 926 (Tex. 1995). Texas Constitution recognizes liberty interest in higher education/Reputation.	 "Additional procedures were not necessary in case without significant factual disputes" (Mathews & Flaim(6CA))
	School = Strong Interest: educational process, safe LE, preserving limited administrative resources.	Selective Enforcement
	Process = multiple meaningful opportunities to be heard & Video evidence of violation.	
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	(TH)	Pre-Assault Claim
Can Employees Sue under Title IX?	<u>Lakoski v. James</u> , 66 F.3d 751 (5CA 1995)	Karasek v. Regents of Univ. of California. 956 F.3d 1093 (9th Cir. 2020) SimSimpson v. Univ. of Colorado Boulder. 500 F.3d 1170 (10th Cir. 2007) (1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or
	Deeve Marry Cathalia	 (2) which related a registeriou fix of sexual narassment that was known of obvious (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered harassment that was so severe, pervasive,
	<u>Doe v. Mercy Catholic</u> <u>Med. Ctr</u> . 850 F.3d 545 (3d Cir. 2017)	and objectively offensive that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by the school

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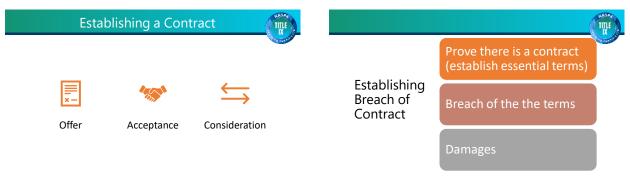


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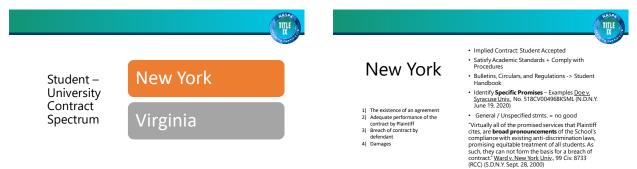


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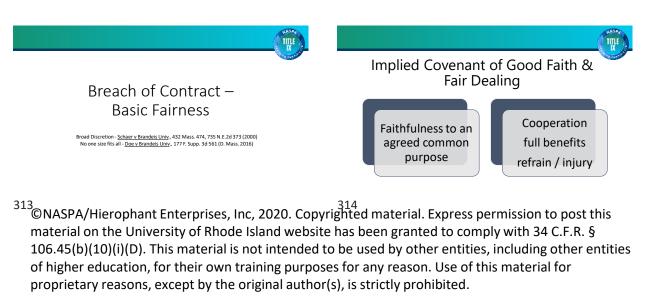


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Vincinia Contract Loui			
Virginia Contract Law <u>Owen v. Liberty Univ.</u> , No. 6:19-CV-00007,	Absolute Mutuality Required	Breach of	"What meaning the party making the
2020 WL 1856798 (W.D. Va. Apr. 13, 2020)	Unilateral Revision Clauses	Contract – Reasonable	which meaning use party making the manifestation, the university, should reasonably expect the other party to give it." = <u>Schaer v. Brandeis Univ.</u> , 432 Mass. 474, 735 N.E.2d 373 (2000)
 Legally enforceable obligation of a defendant to a plantiff The defs violation of obligation Injury or damage to plaintiff caused by breach of obligation 	University Conduct Policies ∉ Enforceable Contracts	Expectations	



Defamation	
Restatement (second) of Torts 558	Intentional Infliction of Emotional Distress
 (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; 	 (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
 (c) fault amounting at least to negligence on the part of the publisher [with respect to the act of publication]; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. 	 (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such persons' immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm. Restatement (second) Torts 46(1) (1965)

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	((Ŧ)
Negligence	Duty	State Causes of Action attached to Title IX	Breach of Contract: • Reasoanble Expectation • Basic Fairness
	Breach		Implied Covenant of Good Faith & Fair Dealing Defamation
	Causation		
	Damages	_	Negligence -> Novel



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	<u> </u>		<u>Doe v. Univ. (</u>	<u>of Scis.</u> – Holding	NAS OF THE OWNER
Doe v. Univ. of the Sciences – Ct Analysis	Academic (caution) v. Behavior	1	Doe states a plausible claim fo	or Breach of Contract	
	Assumes Contract is created Student substantial interest		Promised: Fair & Equitable	-> Suspension: some sort of hearing -> Credibility Case: Cross-Exam	
	DCL pressure Pennsylvania Law Fairness = Notice, Participate in live hearing, Cross Exam witnesses	σŢ2	Single model investigator viola	ates Fairness promised	
	Cites to Goss	\checkmark	Rehearing Requested -		

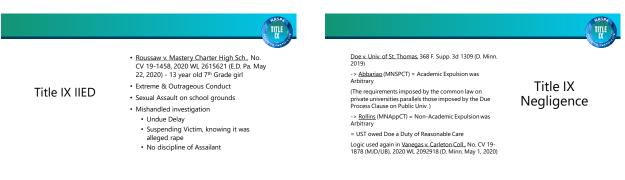
	Cruise Ship Party Case		~	1) 2012 Disciplinar RE & BF	y Proceedings -> BOK:
Doe v. Trustees of Bos. Coll., 892 F.3d 67 (1 st Cin 2010)	A.B> Assaulted on dance floor Policy: Impartial & Private 2012 disciplinary proceedings	Doe v. Boston Dispute	*	Board's decision w	as not impartial
	Neutrality - No Finding Chairperson -> Associate Dean -> Dean -> Associate Dean -> Board		℀	Prime Alternative	Culprit Violation
(1St Clf. 2018)	2014 Review New Evidence -> No Reconsideration			2) 2014 Review Contract?	Consideration? -> No Lawsuit (exchange) Independent Review

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		HASPA TITLE	<u>Rossley v. Drake Un</u>	<u>iiv.</u> , 342 F. Sup	op. 3d 904 (S.D.	lowa 2018)
Boston College Ruling	2012 Proceedings -> Interference with Board					
	A) Board's decision was not impartial		Board of Trustee	lowa Law -> Breach of Contract	Intent to be bound?	Unpaid, Volunteer position
	B) Prime Alternative Culprit Violation		No Wri Contrac			No leration,
	Cruise Ship Case -> Jury Verdict Case		Verbal cor			ontract

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Breach of Contract Cases Takeaway	/5	Title IX Defamation	NASP/ TITLE IX
POLICY ESSENTIAL TERMS FAIRNESS? PROMISES?	VS. REGULATIONS	Greenwell v. Univ. of Alabama Bd. of Trustees, No. 7:11-CV-2313-RDP, 2012 WL 3637768 (N.D. Ala. Aug. 22, 2012) • Female Employee • Complained -> Inequitable Pay & Disparate Treatment of students • Title IX Retailation claim • College knowingly made false statements: • District Attorney • Police • Dishonest Act & Thievery • Desv. Indiana Weslegan Univ., No. 1:20-CV-00039-HAB, 2020 WL 2474483 (N.D. Ind. May 12, 2020)-> Student HIV	



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	(The second s	California State C
California Title IX – Writ of Mandamus Cases	 <u>Doe v. Occidental College</u>, 40 Cal. App. 5th 208, 252 Cal. Rptr. 3d 646 (2019) <u>Doe v. Westmont</u>, 34 Cal. App. 5th 622, 246 Cal. Rptr. 3d 369 (2019) <u>Schrager v. Carry</u>, No. B282970, 2019 WL 1745858 (Cal. Ct. App. Apr. 18, 2019) <u>Doe v. Allee</u>, 30 Cal. App. 5th 1036, 242 Cal. Rptr. 3d 109 (2019) 'The common law requirements for a fair sexual misconduct hearing at a private college mirror the due process protections at public universities; these requirements are flexible and entail 	 No particular form of college : California law. A fair college sexual miscondu interests: 1) the accused student seeks t educational process, 2) the college tries to provide 3) the alleged victim, who ofte college campus with the accuse
335	no rigid procedure. "	336

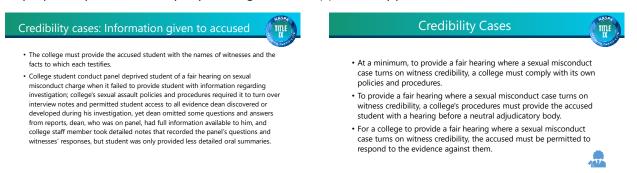
ourt Discipline Requirements TITLE

- e student disciplinary hearing is required under
- duct hearing strives to balance three competing to avoid unfair or mistaken exclusion from the
- le a safe environment for all of its students, ften lives, works, and studies on a shared
- used, wants to safequard their own well-being.

	Investigation
<u></u>	The combination of investigative and adjudicative functions does not, without more, deprive a college student accused of sexual miccorduct of a flair hearing.
(!)	Where critical witnesses provide inconsistent accounts of an alleged incident, independent evaluation of witness credibility is pivotal to a fair adjudication of a college sexual assault claim.
Ē	College student conduct panel deprived student of a fair hearing on sexual micconduct charge when it credited certain portions of non-test/lying witnesses' statements based solely on associate deark investigative reports, associate deark had dual role as investigate and ganet member, and all three panel members were linders of fact required to hear from cricical whereas before choosing to credit certain accounts over of hears.

Evidence · There is no formal right to discovery in student conduct review hearings. • Fair hearing requirements do not allow a college's adjudicatory body to rely on evidence that has never been revealed to the accused student when it assesses witness credibility.

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Credibility cases: Appearance of witnesses

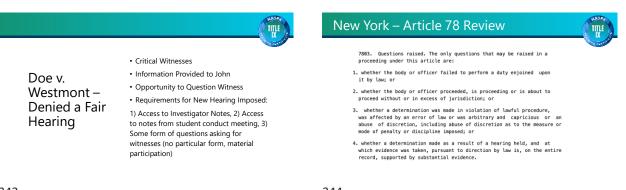
Not necessary to place the alleged victim and the accused in the same room. · The alleged victim and other critical witnesses must appear before the

adjudicatory body in some form-in person, by video conference, or by some other means-so the body can observe their demeanor.

· Some form of witness presence is required to enable a college's adjudicatory body, when considering a sexual misconduct claim, to determine whether the witness is worthy of belief, especially where there is no corroborating physical evidence to assist the body in resolving conflicting accounts.

Credibility cases: Cross examination

- · A college student accused of sexual misconduct is not entitled to directly cross-examine the alleged victim or other witnesses who testify at a sexual misconduct hearing
- · Where a college's sexual misconduct adjudication decision hinges on witness credibility, the accused must be permitted to pose questions to the alleged victim and other witnesses, even if indirectly.
- The accused must be able to pose questions to the witnesses in some manner, either directly or indirectly, such as through the adjudicatory body, but the body need not ask every question proposed by the accused.



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SB 212 – Mandatory Reporti	ing	Failure to Report / False Report
Mandatory Reporting Failure to Report - Crime Requi Reg Requi In the course and scope of employment Confidential employees Coord Pre Reasonably All information concercing the Gove	inistrative porting irrements dinator -> esident erning -> Board	 Texas A&M Central University Police Chief Report made against a former employee x2 https://www.fox7austin.com/news/killeen-police-arrest-kempner-police-chief-for-failure-to-report-title-ix-violations Class B misdemeanor If intent to conceal, then Class A misdemeanor

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Fairness in Women's Sports Act



Scientific Findings

- · Biological differences between Males & Females
- Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734 (R.I. 1992)
- Sex Specific Teams
- Broad Scope
- All Teams: Male, Female, Coed -> Prove Sex
- · Female Teams = No Males
- Creates COA (Student, School, Retaliation)

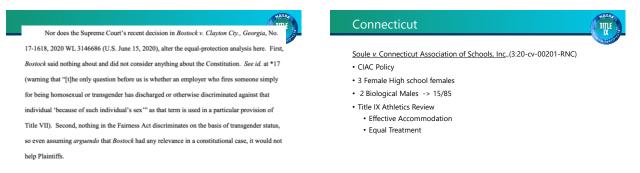
Vital Statistics Act

- Birth Certificate Rules · Definition of "sex"
- Compelling Interest

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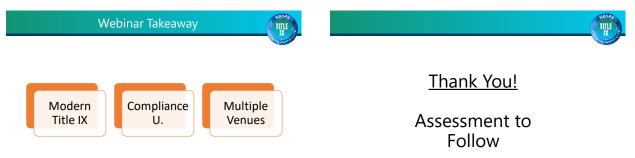
	A) Transgender Female Student at Boise State		DISTRICT COURT RICT OF IDAHO
<u>Hecox v. Little</u> , (1:20-cv-00184-	B) Jane Roe, Female Student at Boise High School	LINDSAY HECOX, <i>et al.</i> , Plaintiffs, V.	Case No. 1:20-cv-00184-DCN
DCN)	42 USC 1983	BRADLEY LITTLE, et al.,	STATEMENT OF INTEREST
	Title IX	Defendants.	

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			State L	aw Tren	ds	(
	Student and Administration Equality Act					
Oklahoma -	10-day Trigger -> Goss	Breach of Contract,	Defamation		ED,	Negligence
SB 1466 (attempted)	Procedural Requirements					
• •	Advocate may Fully Participate			oscribed Policy,		letics dates.
	Credibility Case -> Cross Exam					

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Why does this module combine these two tracks?

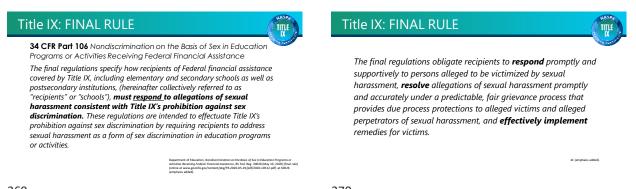


- Under the new Title IX regulations, Title IX coordinators are permitted to be investigators.
- It is important Title IX coordinators receive investigator training.
- Title IX coordinators, as a part of their overall oversight function, must understand the investigative process and how it has shifted under the new regulations, irrespective of whether they ever serve as the actual investigator.
- Title IX investigators should have working knowledge of the Title IX grievance system overall and understand their role within the system.

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

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.

Special Issues in Investigation*

- Definitions Under the New 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?

Note: These concepts will be covered in this module, subsequent modules, and in the live virtual session.

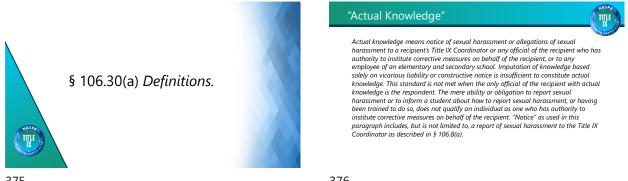


Is "sex" defined in the new regulations?

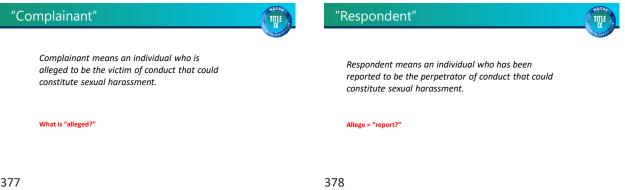
The word "sex" is undefined in the Title IX statute. The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations. The focus of these regulations remains prohibited conduct.

Important to look at campus policy and other relevant laws. Seek advice of counsel.

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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. 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.
- [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 Id. at 30071-72 (internal citations o tted, emphasis added) sexually harassed by a student.



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"Consent"

this section.

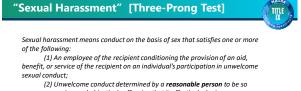
proprietary reasons, except by the original author(s), is strictly prohibited.

"Consent"—Not Defined in New Regulations "Formal Complaint" What will your campus definition be? Affirmative consent? Formal complaint means a document filed by a complainant or signed Will distribute across multiple offenses by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation Elements of sexual harassment. At the time of filing a formal complaint, a consent is a voluntary agreement to engage in sexual activity; · someone who is incapacitated cannot consent; complainant must be participating in or attempting to participate in (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) 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 past consent does not imply future consent; information required to be listed for the Title IX Coordinator under § 106.8(a), silence or an absence of resistance does not imply consent; and by any additional method designated by the recipient. · consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another; (emphasis added) consent can be withdrawn at any time; and coercion, force, or threat of either invalidates consent.

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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 sians 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).



The Assistant Secretary will not require recipients to adopt a particular

definition of consent with respect to sexual assault, as referenced in

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

This has been a central issue in fairness/consistency

severe, pervasive, and objectively offensive that it effectively denies a person eaual 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).

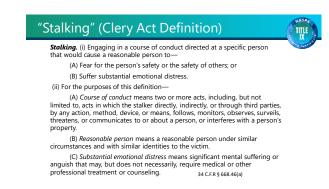
(emphasis added)

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.

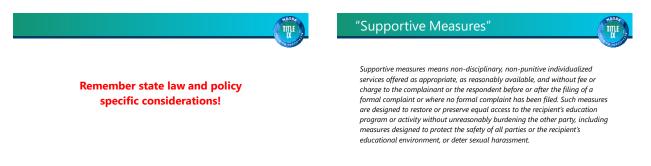
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True Contract	Detion of the second sec	
Domestic violence. (i) A felony or misdemeanor crime of violence committed—	Dating violence. Violence committed by a person who is or has been in a secial relationship of a romantic or intimate nature with the victim.	
(A) By a current or former spouse or intimate partner of 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	
(B) By a person with whom the victim shares a child in common;	between the persons involved in the relationship.	
(C) By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;	(ii) For the purposes of this definition—	
(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	(A) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.	
violence occurred, or	(B) Dating violence does not include acts covered under the definition	
(E) By any other person against an adult or youth victim who is orotected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.	of domestic violence.	
34 C.F.R § 668.46(a)	34 C.F.R § 668.46(a)	

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"Supportive Measures" Cont'd

Supportive measures may include counselina, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

§ 106.44 Recipient's response to sexual harassment.

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§106.44(a) General response to sexual harassment <u>§106.44(a)</u> Cont'd A recipient with actual knowledge of sexual harassment in an education A recipient's response must treat complainants and respondents program or activity of the recipient against a person in the United eauitably by offering supportive measures as defined in § 106.30 to a States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other sexual harassment is clearly unreasonable in light of the known actions that are not supportive measures as defined in § 106.30, against circumstances. For the purposes of this section, §§ 106.30, and 106.45, a respondent. The Title IX Coordinator must promptly contact the "education program or activity" includes locations, events, or complainant to discuss the availability of supportive measures as defined circumstances over which the recipient exercised substantial in § 106.30, consider the complainant's wishes with respect to supportive control over both the respondent and the context in which the measures, inform the complainant of the availability of supportive sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized measures with or without the filing of a formal complaint, and explain to by a postsecondary institution. the complainant the process for filing a formal complaint. (emphasis added)

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§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.

§106.44(b) Response to a formal complain

(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.

§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.

§106.44(d) Administrative leave.

Nothing in this subpart precludes a recipient from placing a nonstudent 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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§ 106.45 Grievance process for formal complaints of sexual harassment.

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.

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§ 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.



must-



(1) Basic requirements for grievance process. A recipient's grievance process

(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 disciplina sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

§ 106.45(b)(1)(ii)

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

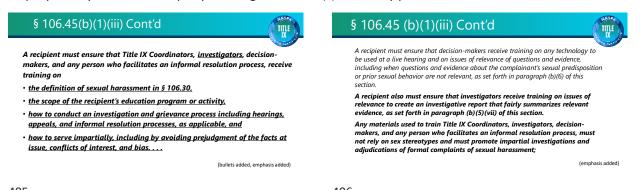
§ 106.45(b)(1)(iii)

(iii) Require that any individual designated by a recipient as 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.

(emphasis added)			(emphasis added)

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9	106.45	o(b)(1)(IV)		
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(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

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(emphasis added)





(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(emphasis added)

§ 106.45(b)(1)(vi)

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

§ 106.45(b)(1)(vii)

(vii) State whether the standard of evidence to be used to determin 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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TITLE

§ 106.45(b)(1)(viii)

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;



complainants and respondents; and

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§ 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.





(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:

(emphasis added

§ 106.45(b)(2)(i)(A)



TITLE

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

§ 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 of knowingly submitting false information during the grievance process.

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(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.	 (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.

§ 106.45(b)(3)(iii)



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(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.

(emphasis added)

§ 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.



§ 106.45(b)(5)

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must-

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(emphasis added)

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§ 106.45(b)(5)(i)

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3); (emphasis added)

§ 106.45(b)(5)(ii)

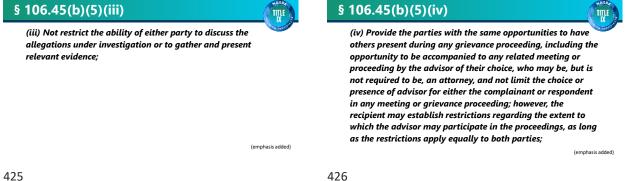
(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(emphasis added)

TITLE

(emphasis added)

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§ 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;

§ 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.

(emphasis added)

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(emphasis added)

§ 106.45(b)(5)(vi) Cont'd § 106.45(b)(5)(vii) Prior to completion of the investigative report, the recipient (vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic hearing is required under this section or otherwise provided) format or a hard copy, and the parties must have at least 10 or other time of determination regarding responsibility, send days to submit a written response, which the investigator will to each party and the party's advisor, if any, the investigative consider prior to completion of the investigative report. The report in an electronic format or a hard copy, for their review recipient must make all such evidence subject to the parties' and written response. 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 (emphasis added) (emphasis added)

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§ 106.45(b)(6)(i)

(6) Hearinas.

(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 crossexamination 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 crossexamination 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.

§ 106.45(b)(6)(i) Cont'd

Questions and evidence about the complainant's sexual predisposition of 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 decisionmaker(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 crossexamination or other questions.

§ 106.45(b)(6)(i) Cont'd

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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§ 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.



(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;

§ 106.45(b)(7)(ii)(C)



(C) Findings of fact supporting the determination;

§ 106.45(b)(7)(ii)(D)



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

§ 106.45(b)(7)(ii)(E)

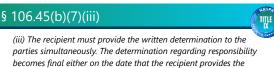
(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

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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.





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.



§ 106.45(b)(8)(i)

(8) Appeals.

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

§ 106.45(b)(8)(i)(A-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.

§ 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.

§ 106.45(b)(9)

(9) Informal resolution. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination reaarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient-

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§ 106.45(b)(9)(i)

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

§ 106.45(b)(9)(ii-iii)

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

§ 106.45(b)(10)(i)(A)

(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;

§ 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.

(emphasis added)

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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(a)

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.

§ 106.71(a) Cont'd

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

(emphasis added)

§ 106.71(b)(1)



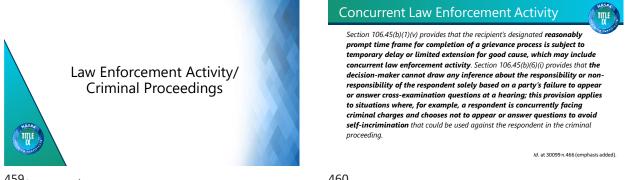
(b) Specific circumstances.

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

§ 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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Concurrent Law Enforcement Activity Cont'd

Further, subject to the requirements in § 106.45 such as that evidence se 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).

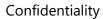
Law Enforcement Cannot Be Used to Skirt Title IX Process

[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, emphasis added)

Police Investigations

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



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Id. at 30099 n. 467

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 Special Issues for 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 Investigations 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 [Separate module addresses FERPA, recordkeeping and confidentiality.] Id. at 30071 (emphasis added)

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Who Should Serve as an Investigator? Job Description Attorneys? • Required Competencies · Outside Investigator? Reporting Structure · Campus Safety/Security? • Full Time vs. Part Time Student Conduct Officers? Time Requirements • Title IX Coordinator/Deputy Title IX Coordinator? · Potential Conflicts of Interest Human Resources? · Co-investigators? Soft skills

Requirements



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

Requirements (cont'd)

- · Comfortable with subject matter
- Able to apply policies and think critically
- Comfortable with conflict
- · Ability to build rapport
- Collaborative
- · Ability to remain objective and neutral

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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?

The Minimum and Maximum Role of the Investigator Cont'd

- · Gather all relevant information regarding an allegation of sexual harassment.
- · Interview all relevant parties
- Collect and organize relevant evidence
- · Credibility Assessments?
- Weighing Evidence?
- · Write a detailed investigative report
- · [Separate module on writing an investigative report.]
- · Make recommendations for interim measures or accommodations?
- Findings of Responsibility→ Remember: There must be a separate decisionmaker

Sample Policy Elements



- 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

Sample Policy Elements Continued

- 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

Id. at 30086-87 (emphasis added)

- Formal complaints
- Grievance process
- Evidentiary standard
- Notification of outcome
- Appeal process

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Scope/Off-Campus Jurisdiction	"Involvement in an education program or activity me
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.	[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 in obligation to investigate a complainant's formal complaint to the acomplainant's in or set is to be involved) in the recipient's education program or activity so that recipients are not required to investigate and adjudicate allegations where the complainants may be affliated with a recipient with the recipient while recognizing that complainants may be affliated with a recipient or the course of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident

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(emphasis added)



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Prior Sexual History/Sexual Predisposition Rape Shield Language Section 106.45(b)(6)(i)-(ii) protects complainants (but not [T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or respondents) from questions or evidence about the evidence about a complainant's sexual predisposition (with no complainant's prior sexual behavior or sexual predisposition, exceptions) and about a complainant's prior sexual behavior subject to mirroring rape shield protections applied in Federal courts. two exceptions. Id. at 30103 (emphasis added) 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 arievance process. The scope of the auestions 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

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;
- guestions 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).

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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Does DOE require "Implicit Bias" training? **Conflict of Interest** The Department declines to specify that training of Title IX personnel must include implicit bias training; the nature of the training required A conflict between the private interests and the under § 106.45(b)(1)(iii) is left to the recipient's discretion so long as it official responsibilities of a person in a position of achieves the provision's directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, trust. conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes. Id. at 30084.

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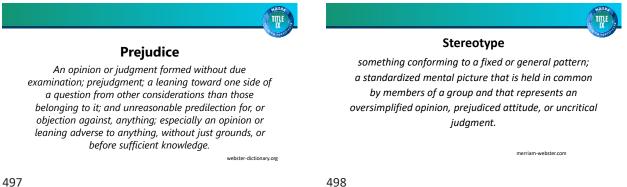
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"Sex Stereotypes"

- 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!

All Title IX personnel should serve in their roles impartially. All Title IX personnel should avoid • prejudgment of facts prejudice conflicts of interest hias

sex stereotypes

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

You now have the legal foundations to take the next step in the NASPA Title IX Training Certificate program!

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This Module is Designed for:



TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student **Conduct Administrators**

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.

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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 Operationalizing the new Title IX the detailed and thoughtful work of informing a complainant of regulations requires making options, offering supportive measures to complainants through an certain choices. 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. "Tuning" is important. Id. at 30091

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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

[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

"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.



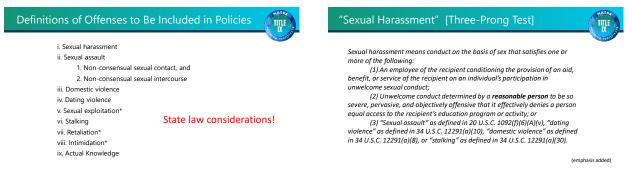
Policy Basics

- Single policy or multiple policies?
- Who creates policy? You? Your TIX Team? Conduct? Committee? Counsel?
- Title IX $\leftarrow \rightarrow$ Student Conduct (reference each other)
- Title IX ← → HR
- Consensual relations policies (do you have these?)
- Terminology
 - "Complainant" vs. "Alleged to be the Victim of conduct that could constitute sexual harassment"/"Survivor"
 - "Respondent" vs. "Reported to be the Perpetrator of conduct that could constitute sexual harassment"
 - · Formal complaint, document filed by a complainant, supportive measures
 - What is a "day?" (Business day, calendar day, "school" day?)

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Introduction	 Confidentiality of information generally
Scope	 Requests for confidentiality
Support services, supportive measures, and how to	 Opportunity to provide/access to information
access	 Prohibition against retaliation
Title IX Coordinator's contact information (and	 Sanction and remedies, and how they will be determined
deputy coordinators) and how to report	 Formal complaints*
"Mandated reporters"	Grievance process
Definitions of key terms, such as sexual harassment	Evidentiary standard
and consent	Notification of outcome
Timeframes, both for reporting and for resolution	Appeal process

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"Consent"—Not Defined in New 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;

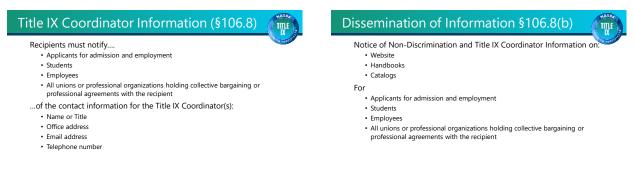
 - · silence or an absence of resistance does not imply consent; · consent to engage in sexual activity with one person does not imply consent to engage in
 - sexual activity with another;
 - · consent can be withdrawn at any time; and
 - · coercion, force, or threat of either invalidates consent.



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Domestic violence. (i) A felony or misdemeanor crime of violence committed—	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.
 (A) By a current or former spouse or intimate partner of 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
(B) By a person with whom the victim shares a child in common;	between the persons involved in the relationship.
(C) By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;	(ii) For the purposes of this definition—
(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	(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
(E) By any other person against an adult or youth victim who is orotected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.	of domestic violence.
34 C.F.R § 668.46(a)	34 C.F.R § 668.46(a)

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Title IX Personnel

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Title IX Personnel

· Title IX investigator

Case managers?

Title IX coordinator—MUST be designated

 Title IX decision-maker(s)/Appellate officer(s) · Anyone implementing an informal process (if offered)

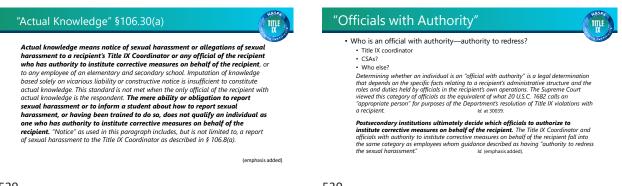
 The Title IX coordinator can be the investigator. • The decision-maker cannot be the same person as the investigator or the Title IX coordinator.

of higher education, for their own training purposes for any reason. Use of this material for proprietary reasons, except by the original author(s), is strictly prohibited.

Outsourcing/Requiring Legally Trained Title IX Operatives Personnel Decisions Should we appoint deputy Title IX coordinators? The Department notes that nothing in the final regulations precludes a [T]he recipient may need to or wish to designate multiple employees as Title IX Co Title IX Coordinator and additional staff to serve as deputy Title IX Coordinators. recipient from carrving out its responsibilities under § 106.45 by outsourcing such responsibilities to professionally trained investigators · Should the Title IX coordinator take on the role of investigator, as permitted in the new and adjudicators outside the recipient's own operations. The Department regulations? (See id. 30135 n.596.) How many decision makers? (New regulations suggest training at least two so one can be the appellate officer.) declines to impose a requirement that Title IX Coordinators, investigators, or decision-makers be licensed attorneys (or otherwise to · Single decision-maker or a panel? specify the qualifications or experience needed for a recipient to fill such · What should we outsource? Advantages/disadvantages? positions), because leaving recipients as much flexibility as possible to Budgetary concerns/limited staff on very small campuses fulfill the obligations that must be performed by such individuals will Bias make it more likely that all recipients reasonably can meet their Title IX Conflicts of interest? responsibilities. · Appropriate relationships between Title IX coordinator and other functions Role of counsel? Id. at 30105.

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Training "Best practices"/"Experts"/Certification Impartiality of Title IX operatives No bias No conflicts of interest "Actual Knowledge," Notice, No sexual stereotypes in training materials Training on the institution's specific policies, procedures and processes "Mandatory Reporters" 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 527 528



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Actual Knowledge/Employees	Limiting Mandatory Reporters A Rejection of "Responsible 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	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 M. at 30040 (emphasis added).
with authority") conveys actual knowledge to the recipient and	[T]he approach in these final regulations allows postsecondary institutions to decide which of
triggers the recipient's response obligations.	their employees must, may, or must only with a student's consent, report sexual harassmer
Id. at 30039 (emphasis added).	to the recipient's Title IX Coordinator (a report to whom always triggers the recipient's response
NOTE: The Department of Education has discontinued use of the term and previous structure of "responsible employees," i.e. "mandated reporters."	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
Rather than using the phrase "responsible employees," these final regulations describe the pool of employees to whom notice triggers the recipient's response obligations.	"swep takes of the best way to broad reports juding including the ducks of successful pearing "swept under the reg 'by postsecondary institutions is ont 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 benefi victims or harms victims is a complicated issue as to which research is conflicting. Id: a 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)

"Mandatory Reporters'

• Should IHE's designate a large cadre of "mandatory reporters" even if they are permitted to?

TITLE

- 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?

"Notice"

Notice results whenever . . . Title IX Coordinator, or any official with authority witnesses sexual harassment: hears about sexual harassment or sexua 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 usina 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).

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)

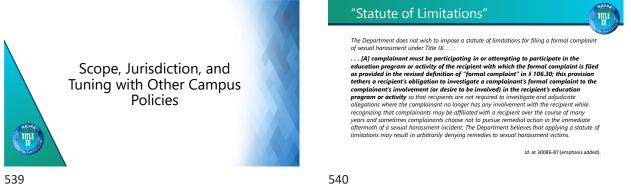
See id. at 30087.

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TITLE

Anonymous Reports Notice Cont'd INiotice of sexual harassment or allegations of sexual harassment to [T]he Department does not take a position in the NPRM or these final regulations on the recipient's Title IX Coordinator or to an official with authority to institute corrective measures on behalf of the recipient (herein, whether recipients should encourage anonymous reports of sexual harassment . with authority") will trigger the recipient's obligation to respond. Id. at 30087. Postsecondary institution students have a clear channel through the Title IX [I]f a recipient cannot identify any of the parties involved in the alleged sexual 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 harassment based on the anonymous report, then a response that is not clearly contact information, so that "any person" may report sexual harassment in unreasonable under light of these known circumstances will differ from a response person, by mail, telephone, or e-mail (or by any other means that results in under circumstances where the recipient knows the identity of the parties involved in the Title IX Coordinator receiving the person's verbal or written report), the alleaed harassment, and the recipient may not be able to meet its obligation to. 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 for instance, offer supportive measures to the unknown complainant. the listed telephone number or e-mail address. Id. at 30087 Id. at 30106 (emphasis added)

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"Statute of Limitations" and Dismissal of Complaint mu

[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)

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.

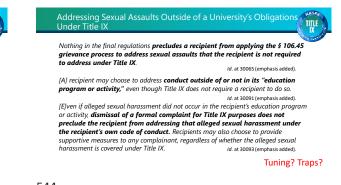
(emphasis added)

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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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"Non-sexual Harassment Sex Discrimination"	Conduct That Does Not Meet Sexual Harassment
§ 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).	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 Mats0095.
	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).



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No Reasonable Cause Threshold Title IX Coordinator/Gatekeeping The Department declines to add a reasonable cause threshold into Title IX Coordinators have always had to consider whether a report § 106.45. The very purpose of the § 106.45 grievance process is to satisfies the criteria in the recipient's policy, and these final regulations ensure that accurate determinations regarding responsibility are are not creating new obstacles in that regard. The criteria that the Title reached, impartially and based on objective evaluation of relevant IX Coordinator must consider are statutory criteria under Title IX or criteria under case law interpreting Title IX's non-discrimination evidence; the Department believes that goal could be impeded if a mandate with respect to discrimination on the basis of sex in the recipient's administrators were to pass judgment on the sufficiency recipient's education program or activity against a person in the United of evidence to decide if reasonable or probable cause justifies States, tailored for administrative enforcement. Additionally, these final completing an investigation. 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 Id. at 30105 harassment. Id. at 30090 (internal citation omitted, emphasis added)



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

Id. at 30069 (emphasis added) Who is a "teacher" and what is a "classroom?"

Are teachers prohibited from addressing serious violations at the time they are occurrina?

Chilling effect?

The Department does not believe that evaluating verbal harassment situations for severity, pervasiveness, and objective offensiveness will chill reporting of unwelcome conduct, because recipients retain discretion to respond to reported situations not covered under Title IX. Thus, recipients may encourage students (and employees) to report any unwanted conduct and determine whether a recipient must respond under Title IX, or chooses to respond under a non-Title IX policy.

Id. at 30154 (emphasis added)

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TITLE

Trigger Warnings? **Tuning with Other Policies and Campus Functions** These final regulations neither require nor prohibit a recipient from providing of · Student and Organizational Conduct triager warning prior to a classroom discussion about sexual harassmen Employment Conduct including sexual assault; § 106.6(d)(1) does assure students, employees (including • Disability Services teachers and professors), and recipients that ensuring non-discrimination on the basis of sex under Title IX does not require restricting rights of speech, expression, Equity and academic freedom guaranteed by the First Amendment. Whether the recipient Security would like to provide such a trigger warning and offer alternate opportunities for Threat Assessment those students fearing renewed trauma from participating in such a classroom discussion is within the recipient's discretion. Bias Incident Reporting Id. at 30419 (emphasis added). Care Team Reports

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Prompt Timeframes



• No 60-day rule

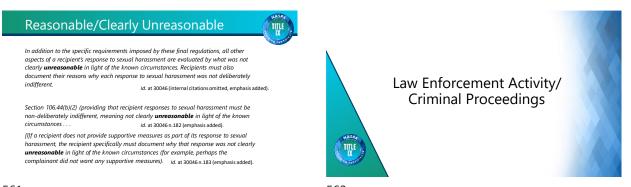
- What is "prompt"?
- · What timeframes should we set?
- · Examples of possible delays?
 - · Absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities §106.45(b)(1)(v)

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

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Concurrent Law Enforcement Activity

Section 106.45(b)(1)(v) provides that the recipient's designated reasonably prompt time frag 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 us 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).

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).

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."

Confidentiality

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Id. at 30099 n. 467

Confidentiality and FERPA Protections 'Gag orders" are not permitted, but ... abuses of a party's ability to discuss the allegations can be Section 106.71(a) requires recipients to keep confidential the identity of any individual addressed through tort law and retaliation prohibitions. 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 Id. at 30296. 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 [§106.45(b)(5)(iii)] applies only to discussion of "the allegations under law, or as necessary to conduct proceedings under Title IX), and § 106.71(b) states that under investigation," which means that where a complainant 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 reports sexual harassment but no formal complaint is filed, § measures except as necessary to provide the supportive measures. These provisions are 106.45(b)(5)(iii) does not apply, leaving recipients discretion to intended to protect the confidentiality of complainants, respondents, and witnesses during a impose non-disclosure or confidentiality requirements on Title IX process, subject to the recipient's ability to meet its Title IX obligations consistent with complainants and respondents. constitutional protections. Id. at 30071 (emphasis added). [Separate module addresses FERPA, recordkeeping and confidentiality.]

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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)



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

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)

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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.

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

Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

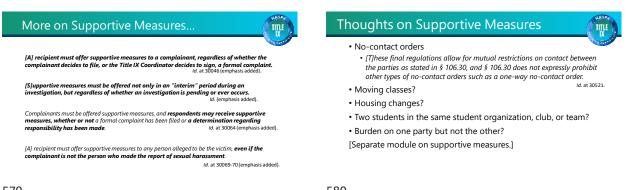
§106.44(a) Cont'd

... The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint...

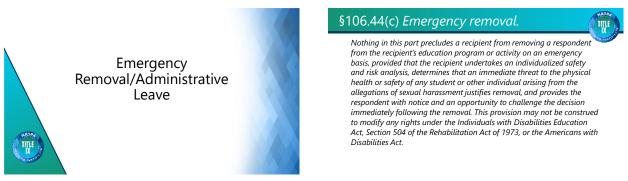
(emphasis added)

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Emergency Removal of Respondent

IThese final regulations expressly authorize recipients to remove a respondent from the recipient's education programs or activities on an emergency basis, with or without a grievance process pending, as long as post-deprivation notice and opportunity to challenge the removal is given to the respondent. A recipient's decision to initiate an emergency removal will also be evaluated under the deliberate indifference standard.

Id. at 30046 (internal citation omitted)

§106.44(d) Administrative leave.

Nothing in this subpart precludes a recipient from placing a nonstudent 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?

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)

"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 sians 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).

"Formal Complaint" Cont'd

A "formal complaint" is a document that initiates a recipient's arievance 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)

§ 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.



(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.





(4) Consolidation of formal complaints. A recipient may consolidat 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.

Thoughts on Formal Complaints



Signed?

- Digital?
- Verified?
- Notary?
- Attestation or oath?
- Privileges?
- How to handle false reports?

§ 106.45(b)(2)(i)(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. (emphasis added)

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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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mphasis added)

§ 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;

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 t 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)

[·] Provision for false reports/providing false information in code/policy?

"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.

 (Wihile 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.

 (a. # 30257.
- 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.
 Should not be viewed as practicing law, but rather "as providing advocacy services to a
- Should not be viewed as practicing law, but rather "as providing advocacy services to a complainant or respondent." Id. at 30299.

"Witnesses" as "Advisors"

The Department acknowledges commenters' concerns that advisors may also serve as witnesses in Title IX proceedings, or may not wish to conduct cross-examination for a party whom the advisor would otherwise be willing to advise, or may be unavailable to attend all hearings and meetings. Notwithstanding these potential complications that could arise in particular cases, the Department believes it would be inappropriate to restrict the parties' 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 (emphasis added).

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"Witnesses" as "Advisors" Cont'd "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 How can/should advisors participate in the process? to party advisors (including advisors provided to a party by a Section 106.45(b)(5)(vi) (evidence subject to inspection and review must be sent electronically o postsecondary institution as required under § 106.45(b)(6)(i)), and in hard copy to each party and the party's advisor of choice). Id. at 30298 n. 1168 thus, the existence of a possible conflict of interest where an advisor Section 106.45(b)(5)(vii) (a copy of the investigative report must be sent electronically or in hard is assisting one party and also expected to give a statement as a copy to each party and the party's advisor of choice). Id. at 30298 n. 1169 witness does not violate the final regulations. Rather, the perceived "conflict of interest" created under that situation would be taken [T]he final regulations make one exception to the provision in § 106.45(b)(5)(iv) that recipients into account by the decision-maker in weighing the credibility and 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 crosspersuasiveness of the advisor-witness's testimony. examination, such cross-examination must be conducted by party advisors. Id. at 30298 n. 1167 Id at 30299

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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 crossexamination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.



§ 106.45(b)(6)(i) 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 crossexamination 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.

(emphasis added)

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?
- · Hearing rules?

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 (emphasis added).

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ore on § 106.45	Recipients may not
§ 106.45 would, for example, permit a recipient to require parties personally to answer questions posed by an investigator during an	adopt evidentiary rules of admissibility that contravene those view evidentiary requirements prescribed under § 106.45
terview, or personally to make any opening or closing atements the recipient allows at a live hearing, so long as	adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice
such rules apply equally to both parties. 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. (emphasis added).	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)
	/d. at 30294 (internal ci

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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 decisionmaker, 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)

Rules Regarding Weight and Credibility

A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decisionmaker 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)

Prior Sexual History



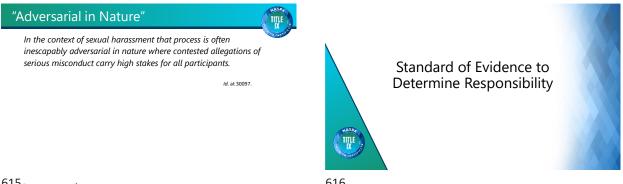
Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal courts.

Id. at 30103 (emphasis added)

Cross-Examination

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

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§ 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:

"Standard of Evidence"

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



Sanctions and Remedies



The Department does not require particular so nctions – or therapeutic interventions – fo 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 nd 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 melt er datussi nas seitlinnihes tinar issuosi instasament täckint ere griftanse evinetuti ere sanoiden "alialored to the specifici studion" may include particular sanctions against the resonader such as counseling, warning, disciplinary action, or esculating consequences. For easons descri throughout this preamble, the final regulations modify this approach to focus on remedies for the complainant who was victimized rather than on second quessing the recipient's disciplinary sanction Complement into respect to the respondent. However, the final regulations are consistent with the 2001 decisions with respect to the respondent. However, the final regulations are consistent with the 2001 Guidance's approach instanch as \$ 106.45(b)(1)(0).47(first that "tempedies" may consist of individualized services similar to those described in \$ 106.300 supportive measures" except that remedies need not avoid disciplining or burdening the respondent.

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Disciplinary Decisions/Sanctions Must Themselves Sanctions Not Be Discriminatory The Department notes that while Title IX does not give the If a respondent is found responsible in a grievance process for sexual Department a basis to impose a Federal standard of fairness or harassment what is an appropriate sanction? proportionality onto disciplinary decisions, Title IX does, of course, · Is anything less than expulsion okay? require that actions taken by a recipient must not constitute sex discrimination; Title IX's non-discrimination mandate applies as · Schools maintain discretion and flexibility in imposing sanctions much to a recipient's disciplinary actions as to any other action AFTER a respondent has been found responsible. taken by a recipient with respect to its education programs or Make sure to outline the possible RANGE of sanctions clearly in your activities. policy. Can include a continuation of supportive measures. Id. at 30104

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§ 106.45(b)(1)(i)

the respondent:

(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

(emphasis added)





Where a respondent is found responsible for sexual harassment as defined in § 106.30. the recipient must provide remedies to the complainant designed to restore or preserve the complainant's equal access to education.

Id. at 30083 (emphasis added).

Remedies

- Examples of remedies for an individual complainant
 - Can be a continuation of supportive measures (such as a nocontact 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 new regulations turn on "remedies for the complainant" not sanctions against the respondent.
- Are there academic remedies based on the impact the event had?

Appeals

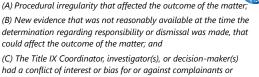
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§ 106.45(b)(8)(i)

(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:





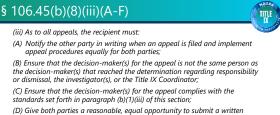
naa a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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§ 106.45(b)(8)(ii)

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





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.

Points on Appeals

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



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§ 106.45(b)(9)

(9) Informal resolution. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination reaarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient-

§ 106.45(b)(9)(i)

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

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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.

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

Points on Informal Resolution

- The new regulations don't require it, but informal resolution is allow
- Equitable/Trained
- · Should you offer it?
- Pros/Cons
- · Increased complainant autonomy
- Who should implement?
- What type of training is needed?
- Mediator training?
- · When can't we use informal resolution?
- · When the allegation is that an employee sexually harassed a student

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.

§ 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.





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.



Bias/Prejudice/Stereotypes/Prejudgment/Conflicts of Interest

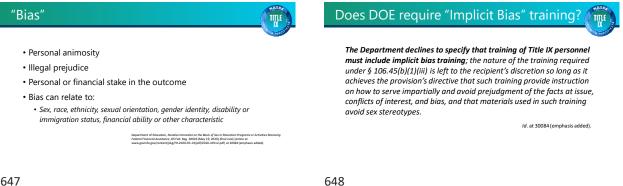
[S]ome complainants, including or especially girls of color, face school-level responses to their reports of sexual harassment infected by bias, prejudice, or stereotypes. Id. at 30084

§ 106.45(b)(1)(iii) [prohibits] Title IX Coordinators, investigators, and decisionmakers, and persons who facilitate informal resolution processes from having conflicts of interest or bias against complainants or respondents generally, or against an individual complainant or respondent, [and requires] training that also includes "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."

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Conflict of Interest

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

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Prejudgment A judgment reached before the evidence is available	Prejudice An opinion or judgment formed without due examination; prejudgment; a leaning toward one side of a question from other considerations than those belonging to it; and unreasonable predilection for, or objection against, anything; especially an opinion or leaning adverse to anything, without just grounds, or before sufficient knowledge.
webster-dictionary.org	webster-dictionary.org

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Conclusion

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Policy should reflect practice and practice should reflect policy.

All Title IX personnel should serve in their roles impartially.	Whose side are you on?
All Title IX personnel should avoid	
 prejudgment of facts 	
 prejudice 	You have no "side" other than the
 conflicts of interest 	integrity of the process.
• bias	
• sex stereotypes	

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Supportive Measures Within the New Title IX Regulations

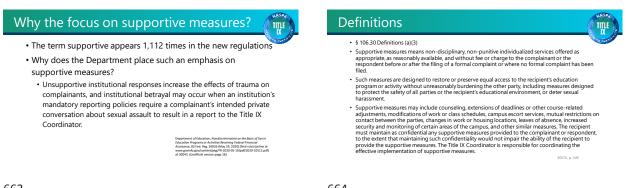
Jill Dunlap, PhD Senior Director for Research, Policy, and Civic Engagement NASPA



This Module is Designed for

TRACK 1 – Title IX Coordinators

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Breaking It Down	Breaking It Down
 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. "supportive measures, as defined in § 106.30, are 'offered without fee or charge to the complainant or the respondent." 	Purpose • 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.
30546, p. 521	3040, p. 435

Breaking It Down

Examples

· Supportive measures may include:

- Counseling Extensions of deadlines or other course-related adjustments
- o Modifications of work or class schedules
- Campus escort services
- o Mutual restrictions on contact between the parties
- o Changes in work or housing locations
- Leaves of absence
- $_{\odot}$ Increased security and monitoring of certain areas of the campus, and other similar measures

Breaking It Down

Confidentiality

- · 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.
- · "The Title IX Coordinator need not, and should not, disclose the complainant's identity to the respondent during the process of selecting and implementing supportive measures for the complainant."

30285. p. 260: 30286. p. 261

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Definitions continued

- Supportive measures as:
- o Differentiated from interim measures
- o Differentiated from remedies
- Referred to as "accommodations" or "protective measures" under Clery
 - "The definition of supportive measures emphasizes that supportive measures are "individualized services" reasonably available "before or after the filing of a formal complaint or where no formal complaint has been filed."





- "In order to determine that a complainant has been victimized and is entitled to remedies (which, unlike supportive measures, need not avoid burdening a respondent), allegations of Title IX sexual harassment must be resolved through the § 106.45 grievance process, designed to reach reliable factual determinations."
- · "With respect to remedies, the final regulations require a recipient to provide remedies to a complainant where a respondent has been found responsible, and notes that such remedies may include the same individualized services described in § 106.30 as 'supportive measures."

Justification for language change



 Describing such individualized services in § 106.30 as "supportive measures" rather than as "interim" measures or "interim" steps reinforces that supportive measures must be offered to a complainant whether or not a grievance process is pending, and reinforces that the final regulations authorize initiation of a grievance process only where the complainant has filed, or the Title IX Coordinator has signed, a formal complaint.

§ 106.44(a); § 106.44(b)(1); § 106.30 (defining "formal complaint")

Policy requirements

§ 106.45

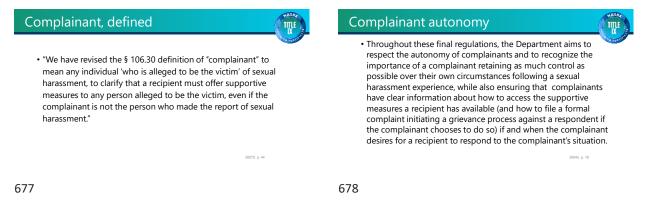
Grievance process for formal complaints of sexual harassment (1)(ix)

• Recipients must: Describe the range of supportive measures available to complainants and respondents.

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Justification for "range of sanctions" language	Importance of policy language
"These final regulations leave recipients legitimate and necessary flexibility to	 Commenters told the Department about the importance of transparency regarding availability of supportive measures.
 make decisions regarding the supportive measures, remedies, and discipline that best address each sexual harassment incident." "Like the Supreme Court, the Department believes that recipients have unique knowledge of their own educational environment and student body, and are best 	 "The Department agrees that requiring recipients to describe the range of supportive measures available to complainants and respondents is an important part of ensuring that the grievance process is transparent to all members of a recipient's educational community. Section 06.45(b)(1)(ix), particularly, notifies both parties of the kind of individualized services that may be available while a party navigates a grievance process,
positioned to make decisions about which supportive measures and remedies meet each complainant's need to restore or preserve the right to equal access to education, and which disciplinary sanctions are appropriate against a respondent who is found responsible for sexual harassment."	which many commenters asserted is a stressful and difficult process for complainants and respondents."
30044, p. 19	30267 p. 251

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Additional considerations



- "These final regulations require a recipient to respond to sexual harassment whenever the recipient has notice of sexual harassment that occurred in the recipient's own education program or activity, regardless of whether the complainant or respondent is an enrolled student or an employee of the recipient."
- "Further, under § 106.44(a) the recipient must offer supportive measures to a complainant alleged to be the victim of sexual harassment occurring at a building owned or controlled by an officially recognized student organization."
- "The benefits of third-party reporting do not, however, require the third party themselves to become the "complainant" because, for example, supportive measures must be offered to the alleged victim, not to the third party who reported the complainant's alleged victimization." "The Department further reiterates that recipients retain discretion to provide supportive measures to any complainant even where the harassment is not pervasive."

30488. p. p. 463: 30197. p. 172: 30121. p. 96: 30165. p. 140

Recordkeeping

§ 106.45 (10)(D)(ii) Grievance process for formal complaints of sexual harassment.

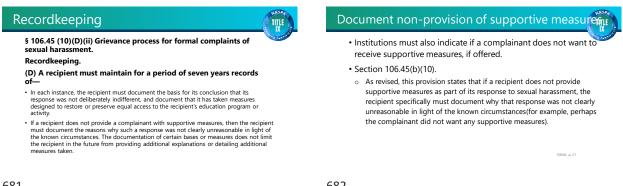
Recordkeeping.

(D) A recipient must maintain for a period of seven years records of-

• (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.

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TITLE



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Clery Act Alignment

 The good news is your institution is likely already doing most of this Under Clery,

Your (policy) statement should identify and provide specific information about appropriate and available services for victims at your institution. Provide information about how a student or employee can access these services or request information. Provide specific contact information. Be sure to include both on- and off-campus services, as applicable. We recommend that institutions reach out to organizations that assist victims of dating violence, domestic violence, sexual assault and stalking, such as local rape crisis centers and state and territorial coalitions against domestic and sexual violence, when developing this list of services. If there are no on- or off-campus services, you must state this fact in your policy statement.

Clery Act Alignment

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TITLE

· Within your Annual Security Report, you already must provide:

A statement of available services [that] should be updated annually to reflect currently available services. A statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation and working situations or protective measure

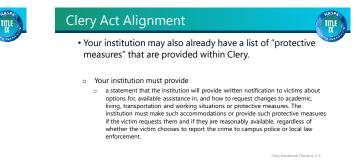
The institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement

Clery Act Alignment

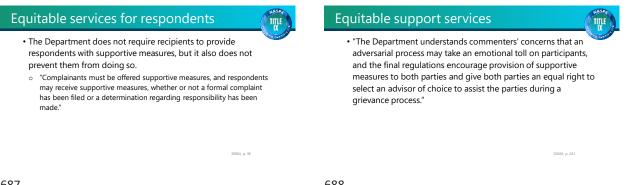


· Your institution is also likely already providing confidential protective measures under Clery.

o Maintain as confidential any accommodations or protective measures provided to the victim, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the accommodations or protective measures



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Supportive services for respondents Equitable, not equal "The Department does not equate the trauma experienced by a sexual "The Department does not intend, and the final regulations do not harassment victim with the experience of a perpetrator of sexual require, to impose a requirement of equality or parity with respect to 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 supportive measures provided to complainants and respondents." · "By defining supportive measures to mean individualized services be offered to complainants and respondents (see § 106.30 defining "supportive measures"), and \$106.45(b)(5)(iv) requires recipients to provide that cannot unreasonably burden either party, these final regulations both parties the same opportunity to select an advisor of the party's incentivize recipients to make supportive measures available to choice. These provisions recognize that the stress of participating in a respondents, but these final regulations require recipients to offer grievance process affects both complainants and respondents and may necessitate support and assistance for both parties." supportive measures to complainants." 30277, p. 252; 30276, p. 251 689 690

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.

Timing of supportive measures

- The Department reiterates that "no written statement is required in order to receive The Department retails that how much statements required in order to receive supportive measures, and that there is no time limit on a complainant's decision to file a formal complaint, so the decision to sign and file a formal complaint need not occur in the immediate aftermath of sexual violence when a survivor may have the greatest difficulty focusing, recalling details, or making decisions."
- · "A complainant may disclose or report immediately (if the complainant desires) to receive supportive measures and receive information about the option for filing a formal complaint, and that disclosure or report may be verbal, in writing, or by any other means of giving notice
- "These final regulations do not expressly require a recipient to continue providing supportive measures upon a finding of non-responsibility, and the Department declines to require recipients to lift, remove, or cease supportive measures for complainants or respondents upon a finding of non-responsibility.

30130. p. 105: 30130. p. 105: 30183. p. 158

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30184. p. 577

When not to provide supportive services Supportive measures are not punitive TITLE "The Department acknowledges that there may be specific instances in "Under § 106.30, a supportive measure must not be punitive or which it is impossible or impractical to provide supportive measures. For disciplinary, but may burden a respondent as long as the burden is example, the recipient may have received an anonymous report or a report not unreasonable. from a third party and cannot reasonably determine the identity of the · "Emergency removal may be undertaken in addition to implementing complainant to promptly contact the complainant. Similarly, if a supportive measures designed to restore or preserve a complainant's complainant refuses the supportive measures that a recipient offers (and the supportive measures offered are not clearly unreasonable in light of equal access to education. the known circumstances) and instead insists that the recipient take punitive action against the respondent without a formal complaint and Placing a complainant (not respondent) on paid leave, if employed by the institution grievance process under § 106.45, the Department will not deem the · Changing respondent's class schedule, housing, or dining hall recipient's response to be clearly unreasonable in light of the known assignment may be acceptable circumstances. · Removing respondent from teams, clubs, or other extracurricular activities may not be acceptable 30231, p. 206; 30236, p. 211; 30231, p. 206

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Deliberate indifference

· Rule protects against deliberate indifference by ensuring "that recipients respond to sexual harassment by offering supportive measures designed to restore or preserve a complainant's equal educational access without treating a respondent as responsible until after a fair grievance process."

Deliberate indifference



· "The school is responsible for responding promptly without deliberate indifference, including offering appropriate supportive measures to the complainant, which may include separating the complainant from the respondent, counseling the respondent about appropriate behavior, and taking other actions that meet the § 106.30 definition of "supportive measures."

Informal resolutions and supportive measures

• With respect to the relationship between supportive measures and informal resolution, the Department wishes to clarify that supportive measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the safety of all parties and the recipient's education and environment or determing sexual barassment. Unlike informal resolutions, which may result in disciplinary measures designed to pursh the respondent. Supportive measures must be non-disciplinary and non-puntive. 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. Informal resolutions may reach agreements between the parties, facilitated by the providing finality for both parties in terms of resolving allegations raised in a formal complaint of sexual harassment. Leaves and informal resolution may result in disciplinary measures, while providing finality for both parties in terms of resolving allegations raised in a formal complaint of sexual harasment. Because an informal resolution unless a formal complaint is filed.

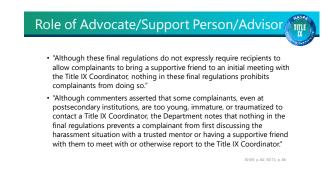
Retaliation

 "A recipient may warn a respondent that retaliation is prohibited and inform the respondent of the consequences of retaliating against the complainant, as part of a supportive measure provided for a complainant, because such a warning is not a punitive or disciplinary action against the respondent."

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Role of Title IX Coordinator

- "The Title IX Coordinator, a specially trained employee who must respond promptly to the alleged victim by offering supportive measures and confidentially discussing with the alleged victim the option of filing a formal complaint."
- The rule defines "supportive measures" and mandates that Title IX Coordinators are responsible for effective implementation of supportive measures).



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Role of Others on Campus

 "This does not preclude recipient employees or administrators other than the Title IX Coordinator from implementing supportive measures for the complainant (or for a respondent)."

 "The final regulations, \$ 106.30 defining "supportive measures," require that the Title IX Coordinator is responsible for the effective implementation of supportive measures; however, this does not preclude other recipient employees or administrators from implementing supportive measures for a complainant (or a respondent) and in fact, effective implementation of most supportive measures; requires the Title IX Coordinator to coordinate with administrators, employees, and offices outside the Title IX office (for example, notifying campus security of the terms of a no-contact order, or working with the school registrar to appropriately reflect a complainant's withdrawal from a class, or communicating with a professor that complainant needs to re-take an exam)."

Role of third party reporting

 "These final regulations preserve the benefits of allowing third party reporting while still giving the complainant as much control as reasonably possible over whether the school investigates, because under the final regulations a third party can report—and trigger the Title IX Coordinator's obligation to reach out to the complainant and offer supportive measures but the third party cannot trigger an investigation. Further, the final regulations allow a complainant to initially report for the purpose of receiving supportive measures, and to later decide to file a formal complaint."

TITLE

Costs associated with interim measures

• The Department made a determination, based on comments that it received to the NPRM, about what it believes to be the cost of supportive measures provided by institutions.

• "The Department has included a cost of \$250 for supportive measures."



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Title IX Evidence Issues

Peter Lake

Professor of Law, Charles A. Dana Chair, and 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

Jake Sapp Deputy Title IX Coordinator Austin College

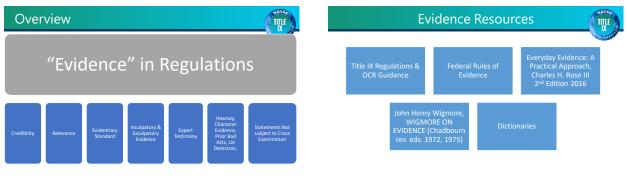


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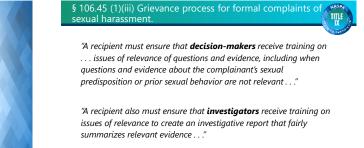


TRACK 1 – Title IX Coordinators TRACK 2 - Title IX Decision-Makers and Student Conduct Administrators TRACK 3 - Title IX Investigators

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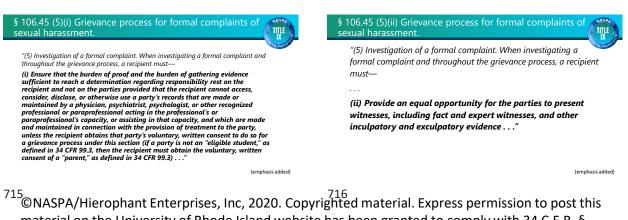
(emphasis added)

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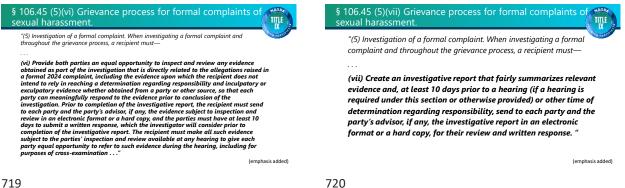
§ 106.45 (1)(vii) Grievance process for formal comp sexual harassment. "(1)Basic requirements for grievance process. A recipient's g process must— (vii) State whether the standard of evidence to be used responsibility is the preponderance of the evidence sta clear and convincing evidence standard, apply the sam evidence for formal complaints against students as for complaints against employees, including faculty, and same standard of evidence to all formal complaints of	rievance to determine ndard or the e standard of formal ipply the	 \$ 106.45 (1)(x) Grievance process for formal complaints of sexual harassment. "(1)Basic requirements for grievance process. A recipient's grievance process must— (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." 	
harassment"	(emphasis added)	(emphasis added)	
74 0	(emphasis auteu)		
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§ 106.45 does not set parameters around the "quality" of evidence that can be relied on, § 106.45 does prescribe that all relevant evidence, inculpatory and exculpatory, whether obtained by the recipient from a party or from another source, must be objectively evaluated by investigators and decision-makers free from conflicts of interest or bias and who have been trained in (among other matters) how to serve impartially.	 § 106.45 (5)(iii) Grievance process for formal complaints of sexual harassment. "(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must— (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence"
(emphasis added)	(emphasis added)

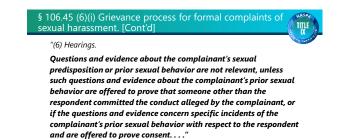
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§ 106.45 (6)(i) Grievance process for formal complaints or sexual harassment.

"(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. . . . Only relevant crossexamination 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."



(emphasis added)

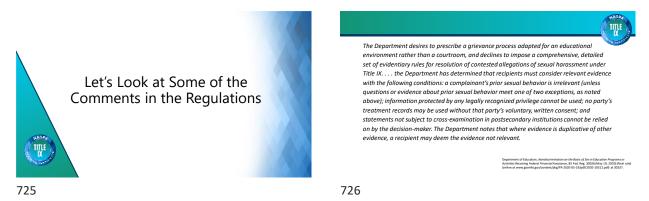
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(emphasis added)

§ 106.45 (6)(i) Grievance process for formal complaint sexual harassment. [Cont'd] "(6) Hearings. If a party or witness does not submit to cross-examinat the live hearing, the decision-maker(s) must not rely of statement of that party or witness in reaching a determination regarding responsibility; provided, how that the decision-maker(s) cannot draw an inference a the determination regarding responsibility based soled party's or witness's absence from the live hearing or re answer cross-examination or other questions"	ntion at nn any ever, ibout ly on a	 \$ 106.45 (6)(ii) Grievance process for formal complaints of sexual harassment. "(6) Hearings. (ii) With or without a hearing, 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 allege 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. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant." 	
	(emphasis added)	(emphae	sis added)
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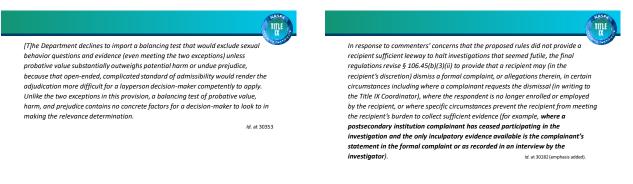


In order to preserve the benefits of live, back-and-forth questioning and follow-up questioning unique to cross-examination, the Department declines to impose a requirement that questions be submitted for screening prior to the hearing (or during the hearing); the final regulations revise this provision to clarify that cross-examination must occur "directly, orally, and in redi time" during the live hearing, balanced by the express provision that questions asked of parties and witnesses must be relevant, and before a party or witness answers a cross-examination question the decision-maker must determine relevance (and explain a determination of irrelevance). This provision does not require a decision-maker to give a lengthy or complicated explanation; it is sufficient, for example, for a decision-maker to explain that a question is irrelevance the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations. The Department believes the protections of the rape shield language remain stronger if decisionmakers are not given discretion to decide that sexual behavior is admissible where its probative value substantially outweighs the danger of harm to a victim and unfair prejudice to am party. If the Department permitted decision-makers to balance ambiguous factors like "unfair prejudice" to make admissibility decisions, the final regulations would convey an expectation that a non-lawyer decision-maker sto apply a single admissibility rule (relevance), including this provision's specification that sexual behavior is irrelevant with two concrete exceptions. This approach leaves inadmissibile or excluded, except on the ground of relevance (and in conformity) with other requirements in 50.64, S, including the provisions discussed above whereby the decisionmaker cannot rely on statements of a party or witness if the party or witness did na submit to crossexamination, a party's rotament neords cannot be used without the party's valuntary consent, and information, party's rotament neords.

Id. at 30351-52

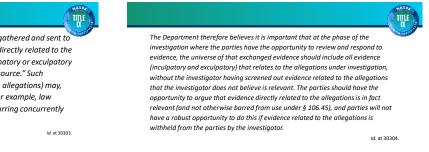
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§ 106.45(b)(5)(vi) [emphasizes] that the evidence gathered and sent to the parties for inspection and review is evidence "directly related to the allegations" which must specifically include "inculpatory or exculpatory evidence whether obtained from a party or other source." Such inculpatory or exculpatory evidence (related to the allegations) may, therefore, be gathered by the investigator from, for example, law enforcement where a criminal investigation is occurring concurrently with the recipient's Title IX grievance process.





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

Regardless of whether certain demographic groups are more or less financially disadvantaged and thus more or less likely to hire an attorney as an advisor of choice, decision-makers in each case must reach determinations based on the evidence and not solely based on the skill of a party's advisor in conductina crossexamination. The Department also notes that the final regulations require a trained investigator to prepare an investigative report summarizing relevant evidence, and permit the decision-maker on the decision-maker's own initiative to ask questions and elicit testimony from parties and witnesses, as part of the recipient's burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence. Thus, the skill of a party's advisor is not the only factor in bringing evidence to light for a decisionmaker's consideration. Id. at 30332.

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Unlike court trials where often the trier of fact consists of a jury of laypersons untrained in evidentiary matters, the final regulations require decision-makers to be trained in how to conduct a grievance process and how to serve impartially, and specifically including training in how to determine what auestions and evidence are relevant. The fact that decision-makers in a Title IX grievance process must be trained to perform that role means that the same well-trained decision maker will determine the weight or credibility to be given to each piece of evidence, and the training required under § 106.45(b)(1)(iii) allows recipients flexibility to include substantive training about how to assign weight or credibility to certain types or categories of evidence, so long as any such training promotes impartiality and treats complainants and respondents equally. Thus, for example where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally by not, for instance automatically assigning higher weight to exculpatory character evidence than to inculpatory Id. at 30337 (emphasis added) character evidence



Id. at 30337.

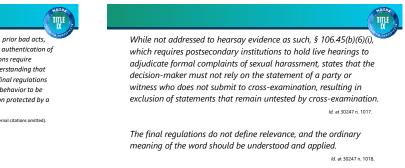
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and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

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While the proposed rules do not speak to admissibility of hearsay, prior bad acts character evidence, polygraph (lie detector) results, standards for authentication of evidence, or similar issues concerning evidence, the final regulations require recipients to gather and evaluate relevant evidence, with the understanding that this includes both inculpatory and exculpatory evidence, and the final regulations deem questions and evidence about a complainant's prior sexual behavior to be irrelevant with two exceptions and preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).

Id. at 30247-48 (internal citations omitted)





The Department understands that courts of law operate under comprehensive, complex rules of evidence under the auspices of judges legally trained to apply those rules of evidence (which ofter intersect with other procedural and substantive legal rules, such as rules of procedure, and constitutional rights). Such comprehensive rules of evidence admit hearsay (generally, out-of-court statements offered to prove the truth of the matter asserted) under certain conditions, which differ in criminal and civil trials. Because Title IX grievance processes are not court proceedings, comprehensive rules of evidence do not, and need not, apply. Rather, the Department has prescribed procedures designed to achieve a fair, reliable outcome in the context of sexual harassment in ar education program or activity where the conduct alleged constitutes sex discrimination under Title IX. While judges in courts of law are competent to apply comprehensive, complicated rules of evidence, the Department does not believe that expectation is fair to impose on recipients, whose primary function is to provide education, not to resolve disputes between students and employees. Id. at 30347

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The Department understands commenters' concerns that a blanket rul 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

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[W]here a party or witness does not appear and is not cross	s-examined, the statements of that party
or witness cannot be determined reliable, truthful, or credil	ble in a non-courtroom setting like that of
an educational institution's proceeding that lacks subpoend	powers, comprehensive rules of
evidence, and legal professionals [R]ecipients are educe	ational institutions that should not be
converted into de facto courtrooms. The final regulations th	nus prescribe a process that simplifies
evidentiary complexities while ensuring that determination	s regarding responsibility result from
consideration of relevant, reliable evidence. The Departmen	nt declines to adopt commenters'
suggestion that instead the decision-maker should be perm	itted to rely on statements that are not
subject to cross-examination, if they are reliable; making su	ich a determination without the benefit
of extensive rules of evidence would likely result in inconsist	tent and potentially inaccurate
assessments of reliability. Commenters correctly note that a	courts have not imposed a blanket rule
excluding hearsay evidence from use in administrative proc	eedings. However, cases cited by
commenters do not stand for the proposition that every ad	ministrative proceeding must be
permitted to rely on hearsay evidence, even where the age	ncy lacks subpoena power to compel
witnesses to appear.	Id. at 30348.

While commenters correctly observe that the Confrontation Clause is

concerned with use of testimonial statements against criminal

evidence in a criminal court. For reasons discussed above, the

on recipients, whether patterned after civil or criminal rules.

defendants, even if use of a non-testimonial statement poses no

constitutional problem under the Sixth Amendment, the statement

would still need to meet a hearsav exception under applicable rules of

Department does not wish to impose a complex set of evidentiary rules

Id. at 30347.

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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) ... Credibility Determinations
 Issues of Relevance
 Setting the Evidentiary Standard
 Inculpatory & Exculpatory Evidence
 Expert Testimony
 Hearsay & Character
 Federal Court on Title IX Evidence

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Credibility Determinations

- 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 complainant 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.

Credibility Determinations

- 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 occur. Inconsistencies alone may 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.
 Cherk worr own bias at the door. Do not pre-index your findings until all relevant
- Check your own bias at the door. Do not pre-judge your findings until all relevant information is heard. Do not be lured towards confirmation bias.

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Relevance

The new Title IX regulations "specifically... require investigators and decision-makers to be trained on issues of relevance, including how to apply the rape shield provisions."

The decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing.

Title IX Regulations – Relevance

- Require an "objective evaluation of all relevant evidence" 106.45(b)(1)(ii)
- The Department <u>declines to define</u> certain terms in this provision such as "upon request," "relevant," or "evidence directly related to the allegations," as these terms should be interpreted using their plain and ordinary meaning.

ps://www.federalregister.gov/d/2020-10512/p-3515

FRE 401 – Court Room Test for Relevant Evidence



Evidence in federal court is relevant if:

- a) It has any tendency to make a fact more or less probable than it would be without the evidence; and
- b) The fact is of consequence in determining the action.
- Irrelevant Evidence Evidence not tending to prove or disprove a matter in issue.
 Bryan A, Gardner, Black's Law Dictionary 10, (2014), Pg. 676
- Does the question call for an answer that makes an issue of material fact more or less likely?

Merriam Webster Definition of Relevant

- Having significant and demonstrable bearing on the matter at hand.
- Tending logically to prove or disprove a fact of consequence or to make the fact more or less probable and thereby aiding the trier of fact in making a decision
 - "Relevant." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/relevant Accessed 12 Jul. 2020.

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FRE 403 = Court Room Exclusions What is Probative? Not Applied to Title IX Hearings • Title IX Regulations do not define Probative "The Court may exclude relevant evidence if its probative value" substantially outweighed by a danger of one or more of the · Evidence that tends to prove or disprove a point in Issue. following: Unfair Prejudice, Confusing the Issues, Misleading the Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 677 jury, Undue delay, Wasting time, Needlessly presenting • "Each single piece of evidence must have a plus value." cumulative evidence." 1 JOHN H. WIGMORE, EVIDENCE 410 (1940) · Need to apply • "A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice."

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What Exclusions do Apply in Title IX Hearings

1) Legally Recognized Privileged Information -> (Attorney/Client & Dr./Client)

- Complainant's Sexual Predisposition (always) & Prior Sexual History Unless... Two Exceptions
- 3) Treatment Records without the parties written voluntary consent
- A recipient may adopt rules of order or decorum to forbid badgering a witness.
 OCR Blog Post: The decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination.
- 6) A Recipient may fairly deem repetition of the same question to be irrelevant.

Relevant but Hostile

Where the substance of a question is relevant, but the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically "leans in" to the witness's personal space), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.

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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Relevance Litany...Making the Determination

- 1) What is at Issue?
- 2) Admissibility Versus Probative
- 3) What does the offered evidence go to prove? Not does it prove this at point of admissibility

4) Apply the Regulatory standards as applicable...Title IX hearings not governed by FRE per se

- Cross Examination & Relevance Determination The decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. • "[T]his provision does not require a decision-maker to give a lengthy or complicated explanation; it is sufficient, for a decision-maker to explain that a question is irrelevant because the question asks about a detail that is not probative of any material fact concerning the allegations." • "[D]irectly, orally, and in real time" precluding a requirement that cross examination questions be submitted or screened prior to the live hearing. h /2020-10512/p-
 - · "The recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing." In

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Evidentiary Standards

"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;" https://www.federalregister.gov/d/2020-10512/p-6468

- 1) Clear & Convincing
- 2) Preponderance of the Evidence

Standard of Proof - Preponderance of the Evidence

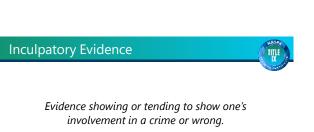
Using a preponderance of the evidence standard, and considering relevant definitions in the Policy, the hearing panel weighs the evidence to determine whether the Respondent violated the Policy. 50.01% likelihood or 50% and a feather Which side do you fall on?

"The Greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force, superior evidentiary weight that, though not sufficient to free the mind wholly from all reasoanble doubt, is still sufficient to incline a mind to one side of the issue rather than the other." Bryan A. Gardner, Black's Law Dictionary 10, (2014). , 1373

Standard of Proof – Clear and Convincing

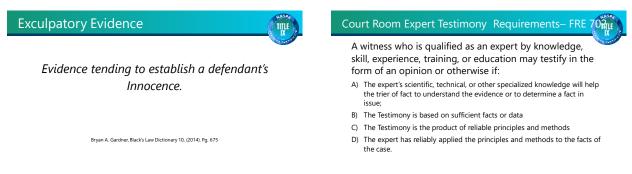


- · Evidence indicating that the thing to be proved is highly probable or reasonably certain. Bryan A. Gardner, Black's Law Dicti
- · Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. CACI No. 201. More Likely True-Clear and Co

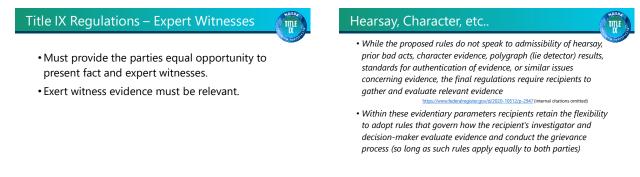


Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 676

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FRE 801 – Hearsay



(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement

FRE 801 - Exclusions From Hearsay

- (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement.
- (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other
 proceeding or in a deposition;

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- (B) is consistent with the declarant's testimony and is offered:
- (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent imprope
 influence or motive in so testifying; or
- · (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
- (C) identifies a person as someone the declarant perceived earlier. · (2) An Opposing Party's Statement. The statement is offered against an opposing party and
- (A) was made by the party in an individual or representative capacity;
- (B) is one the party manifested that it adopted or believed to be true
- (C) was made by a person whom the party authorized to make a statement on the subject; • (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed
- (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

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FRE 803 – Exceptions to the Rule Against Hearsay

(1) **Present Sense Impression**. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it. (2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause

(Not Entire Rule)

Statements Not Subject to Cross Exam

OCR Blog Post -> https://www2.ed.gov/about/offices/list/ocr/blog/20200522.html 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. Section 106.45(b)(6)(i)

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Potential Federal Court Rulings on Evidence

Haidak v. University of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. App. 8/6/2019)

"The rules that govern a common law trial need not govern a university disciplinary proceeding. But the rules of trial may serve as a useful benchmark to guide our analysis." Id. at 67

For example, even in a full-blown federal trial, "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b). And extrinsic evidence aside, the court has ample discretion to exclude evidence "if its probative value is substantially outweighed by a danger of ... undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Because a federal district court would have been well within its discretion in excluding the transcript, it follows <u>a fortiori</u> that an identical decision by the Hearing Board did not violate Haidak's right to due process.





Interview Techniques for Title IX Investigators Under the New Regulations

Dr. Jennifer R. Hammat Dean of Students University of Southern Indiana



This Module is Designed for

TRACK 1 – Title IX Coordinators TRACK 3 – Title IX Investigators

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Reference

Unless otherwise noted, source: 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 https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf). Decisions and Flexibility

The Department has given you some flexibility here. As you draft your policies and procedures, you have a decision to make about how you conduct your investigations. This is largely based on your staffing level and if you intend to have your investigator make any determinations of credibility of evidence and/or parties (Obama era investigations). It is one of the decisions you will need to make as a campus. If you stay the course, and continue to have investigators determine credibility and relevance, very little changes. If you decide they will not do this, investigations change significantly.

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Outsourcing Is an Option

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.

A note about §106.45(b)(7)

Section 106.45(b)(7) specifies that the decision-maker must be a different person from the Title IX Coordinator or investigator, but the final regulations do not preclude a Title IX Coordinator from also serving as the investigator.

ld. at 30135 n.596.

§ 106.45(b)(5)(i)-(vii)



Requires recipients to investigate formal complaints in a manner that:

- Keeps the burden of proof and burden of gathering evidence on the recipient while protecting every party's right to consent to the use of the party's own medical, psychological, and similar treatment records;
- Provides the parties equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence;
- Does not restrict the parties from discussing the allegations or gathering evidence; Id. at 30053

106.45(b)(5)(i)-(vii) continued

- · Gives the parties equal opportunity to select an advisor of the party? choice (who may be, but does not need to be, an attorney);
- Requires written notice when a party's participation is invited or expected for an interview, meeting, or hearing;
- · Provide both parties equal opportunity to review and respond to the evidence gathered during the investigation; and
- Sends both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility Id at 20052

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§ 106.45(b)(1)(i)-(x) continued

- Requires Title IX Coordinators, investigators, decisionmakers, and persons who facilitate informal resolutions to be free from conflicts of interest and bias and trained to serve impartially without prejudging the facts at issue;
- Presumes the non-responsibility of respondents until conclusions of the grievance process;
- Includes reasonably prompt time frames for the grievance process:

Id. at 30053 (emphasis added

<u>§ 106.4</u>5(b)(1)(i)-(x) continued

- Informs all parties of critical information about recipient's procedures including the range of remedies and disciplinary sanctions a recipient may impose, the standard of evidence applied by the recipient to all formal complaints of sexual harassment under Title IX (which must be either the preponderance of the evidence standard, or the clear and convincing evidence standard), the recipient's appeal procedures, and the range of supportive measures available to both parties; and
- · Protects any legally recognized privilege from being pierced during a grievance process. Id. at 30053.

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 mediato), and two decision-makers (assuming an additional decision-maker for appeals). We assume this training will leak approximately eight hours for all staff at the ... IHE leaks.

Id. at 30567





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What has happened?

- · A formal complaint has been received (and signed).
- · An initial meeting with the Title IX Coordinator has happened to provide support measures.
- · A notice of investigation has gone out to both parties.
- · The case has been assigned to you (the investigator) or as the Title IX Coordinator, you are the investigator, or you have outsourced the investigation.
- The investigator has read the formal complaint.
- Which route for investigations has your school opted for? · Investigations with or without credibility assessments?

Preparing your questions pre-interview

- Read the Formal Complaint
- · Write out the questions you have about the report on first read.
- · Read the Formal Complaint again.
 - · What additional guestions do you have about the incident narrative. · Who is identified in the Formal Complaint you feel you need to interview.
- · What questions do you have for those individuals?
- · Have all of these typed out ahead of the first interview.
- · Revise and update with additional questions and witnesses as you go.

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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;

Crossover interview techniques

- Title IX investigation framework is good practice for other kinds of investigations:
- Code of Conduct violations
- Threat assessment or BIT concerns investigations
- · Educational conversations with student
- · Academic Integrity case investigations
- Hazing investigations



Fact Finding and Data Collection (with credibility assessment)

How to start an interview

Introduce yourself

- Is small talk appropriate? Build rapport. Establish baseline responses*
- · Explain your role
- Explain you will be note/taking/recording the interview for notes
- · Ask interviewee to share their recollections of the incident. Do not interrupt the narrative
 - · Let them talk until they are done
 - · Follow up questions later

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Remember your role Follow-up questions You are NOT a party's lawyer, advisor, counselor, parent, or friend · When seeking clarification after the party's initial recollection of the You ARE an investigator and a facilitator event, try to ask questions that build confidence and put them at You ARE free from bias ease You ARE free from prejudgment · "You said you left the party around 1am, is that correct?" You ARE interested in finding out fact about the incident · "You said you recalled having three cups of 'red solo cup' punch, is You ARE interested in the truth that right?' Being Impartial ≠ Being a Robot · If they are describing a location, it might be helpful to ask them to You can be a neutral fact-finder and still show empathy and kindness. sketch out the room for you (if it is a residence hall, you should have Investigation spaces should be judgement free zones those schematics on your computer to pull up/print out).

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Clarifications

- When asking harder questions about the order of events, or specific about the conversation or activities, you may run into a series of "I don't know" or "I can't remember" statements. That's ok.
- Reassure the party its ok that they cannot remember or don't know.
- · You can move to another question or kind of questioning.
- · If you hit a memory gap, ask them some sensory questions to see if it triggers any memories. Often there are memories they cannot access unless you ask the question from a different lens.

Sense and Feel questions

- "Can you draw what you experienced?"
- · "What were you feeling when XYZ occurred?"
- · "What did you smell?"
- "Can you show me?"
- · "What were you feeling when you were kissing?"
- "Tell me more about that."
- "What did you hear?"
- "Tell me about his/her eyes."
- "What can you not forget?"

A word about trauma

- · Anyone you speak with about alleged sexual harassment (complainant, respondent, or witnesses) could have experienced or still be experiencing trauma as a result of the alleged situation.
- · Be cognizant that talking to you may be very difficult for the parties.
- · Remember to document their experience with as little interruption as possible. Follow-up questions should be limited.
- · Ideally, you want the party being interviewed to do most of the speaking. Modified from: Russell Strand, Frontline Training Confe

Meet the student where they are:

Baseline knowledge =

- · How to evaluate risk
- · Factors to consider in decision-making
- · Medically accurate knowledge of sex, reproduction, sexual health
- Ability to navigate interpersonal relationships
- Communication skills
- Conflict resolution skills Emotional intelligence
- · Not all students know the same thing about the same things

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TITLE



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Credibility: EEOC Guidance



- · Inherent plausibility: Is the testimony believable on its face? Does it make sense? · Demeanor: Did the person seem to be telling the truth or lying?
- · Motive to falsify: Did the person have a reason to lie?
- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at aroun the time that they occurred) or **physical evidence** (such as written documentation) that corroborates th party's testimony?
- · Past record: Did the alleged harasser have a history of similar behavior in the past? None of the above factors are determinative as to credibility. For example, the fact that there are no eye
 witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since
 harassment of one occurs behind closed doors. Furthermore, the fact that the alleged harassre engaged i
 similar behavior in the past does not necessarily mean that he or she did so again.

Investigative relevance

- "The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the investigator does not believe the evidence to be credible and thus does not intend to rely on it).
- The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the evidence in the investigative report." Id. at 30248

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nvestigative relevance continued	§ 106.45(b)(7)
"The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence)."	Section 106.45(b)(7) also helps prevent injection of bias into Title IX sexual harassment grievance processes, by requiring transparent descriptions of the steps taken in an investigation and explanation of the reasons why objective evaluation of the evidence supports findings of facts and conclusions based on those facts.
(d. at 30249.	

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An Investigative Note about Rape Shield Laws

The final regulations permit exchange of all evidence "directly related to the allegations in a formal complaint" during the investigation, but require the investigator to only summarize "relevant" evidence in the investigative report (which would exclude sexual history information deemed by these final regulations to be "not relevant"), and require the decision-maker to objectively evaluate only "relevant" evidence during the hearing and when reaching the determination regarding responsibility.

Id. at 30352

Rape Shield Continued

To further reinforce the importance of correct application of the rape shield protections, we have revised § 106.45(b)(6)(i) to explicitly stat that only relevant questions may be asked, and the decision-maker must determine the relevance of each crossexamination questions before a party or witness must answer.

Id. at 30352

Obligations

"The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it). The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report."

Id. at 30352 (internal citations omitted).

Obligations Continued

"The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence)."

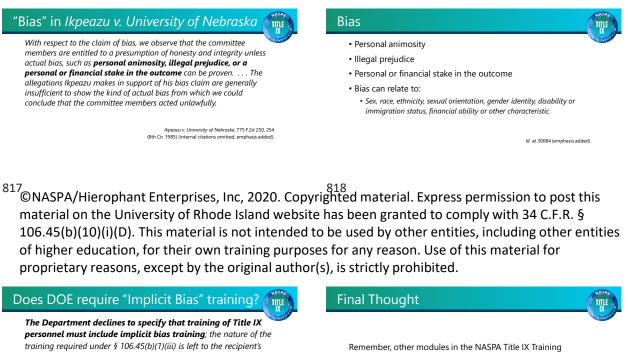
Id. at 30248-49.

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Remember, other modules in the NASPA Title IX Training Certificate curriculum address student conduct, Title IX hearings, Title IX investigations, report writing, informal resolution, FERPA/records management, evidence, etc.

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discretion so long as it achieves the provision's directive that such

training provide instruction on how to serve impartially and avoid

prejudgment of the facts at issue, conflicts of interest, and bias, and

Id. at 30084 (emphasis added)

that materials used in such training avoid sex stereotypes.



Constructing a Report

Dr. Jennifer R. Hammat Dean of Students University of Southern Indiana



821

This Module is Designed for

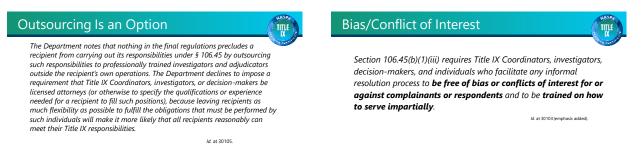


TRACK 1 - Title IX Coordinators TRACK 3 - Title IX Investigators

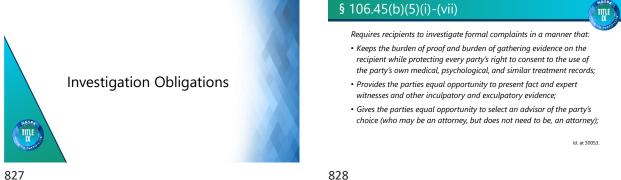
Reference

Unless otherwise noted, source: 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 https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf).

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§ 106.45(b)(5)(i)-(vii) continued

• Requires written notices when a party's participation is invited of expected for an interview, meeting, or hearing;

- Provides both parties equal opportunity to review and respond to the evidence gathered during the investigation;
- · Sends both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility.

Report Purpose

We agree that the final regulations seek to provide strong, clear procedural protections to complainants and respondents, including apprising both parties of the evidence the investigator has determined to be relevant, in order to adequately prepare for a hearing (if one is required or otherwise provided) and to submit responses about the investigative report for the decision-maker to consider even when I hearing is not required or otherwise provided.

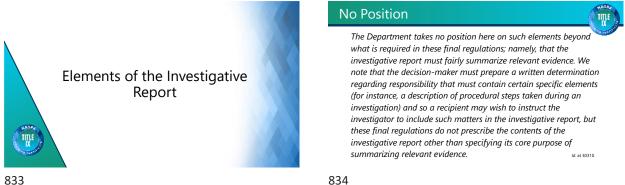
M at 20200

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Id. at 30053

 A valuable part of this process is giving parties (and advisors who are providing assistance to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing or submit arguments to a decision-maker where a hearing is not required or otherwise provided. In the context of a grievance process that involves multiple 	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.
complainants, multiple respondents, or both, a recipient may issue a single investigative report.	61 at 30308.
Id. at 30309.	

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Why review the report?

- Allowing the parties to review and respond to the investigative report is important to providing the parties with notice of the evidence the recipient intends to rely on in deciding whether the evidence supports the allegations under investigation.
- These final regulations do not prescribe a process for the inclusion of additional support information or for amending or supplementing the investigative report in light of the parties' responses after reviewing the report.

Discretion

- · Recipients enjoy discretion with respect to whether and how to amend and supplement the investigative report as long as any such rules and practices apply equally to both parties, under the revised introductory sentences of § 106.45(b). Id. at 30310.
- A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to the finalization of the investigative report thereby allowing each party to respond to the evidence in the investigative report sent to the parties under § 106.45(b)(5)(vii). Id at 30310-11

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Id. at 30310

scretion continued	Reminders
A recipient also may provide both parties with an opportunity to respond to any additional evidence the other party proposes after reviewing the investigative report. If a recipient allows parties to provide additional evidence in response to the investigative report any such additional evidence will not qualify as new evidence tha was reasonably available at the time the determination regarding	 "The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely or such evidence (for instance, where evidence is directly related to the allegations but the investigator does not believe the evidence to be credible and thus does not intend to rely on it).
responsibility was made for purposes of appeal under § 106.45(b)(8)(i)(B).	 The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the evidence in the investigative report."

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Reminders continued

"The parties then have equal opportunity to review the investigative report: if a party disaarees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence)."

Id. at 30248-49.

§ 106.45(b)(7)



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Section 106.45(b)(7) also helps prevent injection of bias into Title 1 sexual harassment grievance processes, by requiring transparent descriptions of the steps taken in an investigation and explanation of the reasons why objective evaluation of the evidence supports findings of facts and conclusions based on those facts.

Id. at 30389 (emphasis added).



Report Sections to Consider

Background

I. BACKGROUND AND REPORTED CONDUCT

• Summary of allegation goes here. Identify the names of the CP and RP here and the Investigator. [One paragraph summary].

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Jurisdiction Scope **III. SCOPE OF THE INVESTIGATION II. JURISDICTION** IThis is the timeline and details pertinent to the case. It is the · This office houses the Title IX Office which has campus-wide record of when it was reported. If a No Contact Order was responsibility for investigating alleged violations of the Sexual issued. When parties were notified, interviewed, submitted Harassment Policy. This office responds to claims of harassment evidence, asked for additional parties to be interviewed, and if (including sexual assault), stalking, dating violence, domestic they rescheduled or didn't respond. violence, and retaliation brought forward by students, • This is the accounting for the time it took for the investigation. It employees or third parties. will match what is in the file, (in emails and in phone logs). (1-2 paragraphs).]

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Scope continued

• Parties interviewed:

- Complainant Name, in-person interviews on February 7, 2019
- Respondent Name, in-person interview on February 8, 2019
- Witness 1 Name, in-person interview on February 9, 2019
- Witness 2 Name, in-person interview on February 10, 2019
- Witness 3 Name, in-person interview on February 11, 2019
- Witness 4 Name, in-person interview on February 12, 2019

Scope continued

TITLE IX

- Documentary evidence acquired:
- Written statement of Complainant Name, dated February 5, 2019
- Text message correspondence between CP Name and Witness 1
 Name (received February 21, 2019)
- Text message correspondence between CP Name and Witness 2 Name (received February 21, 2019)
- Text message correspondence between Witness 2 Name and Witness 3 Name (received February 18, 2019)
- Video shared by Witness 4, February 20, 2019
- Photographs shared by Witness 3 and Witness 4, February 21, 2019

Relevant policies**



IV. RELEVANT POLICY AND LAW PROHIBITING SEXUAL HARASSMENT (INCLUDING SEXUAL ASSAULT) AND RETALIATION

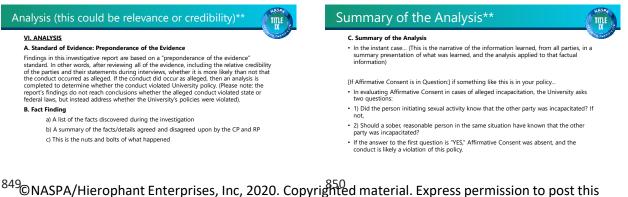
· This is straight from your policy. What are the relevant policy prohibitions you have published with regard to sexual harassment (the definitions and why it is being investigated).

· In this new format, this section could be optional, we included it to make the investigative report complete.

Investigation SUMMARY V. INVESTIGATION SUMMARY A. Statement Summary of the Parties Complainant: Respondent: B. Documentary Evidence Below is the list of the documentary evidence reviewed for this report: · Documentation and investigative files obtained by the Title IX Investigator; · The written statement provided by the COMPLAINANT and evidence; · The written statement provided by the RESPONDENT and evidence; and

· University policies.

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Credibility Assessment**

TITLE

- D. Credibility Asse
- According to the Equal Employment Opportunity Commi Unlawful Harassment by Supervisors dated June 18, 1999 If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Cr assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consi
- Inherent plausibility: Is the testimony believable on its face? Does it make sense?
- · Demeanor: Did the person seem to be telling the truth or lying?
- Motive to falsify: Did the person have a reason to lie?
- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- Past record: Did the alleged harasser have a history of similar behavior in the past?
- None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs b closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not nece mean that he or she did so again.

Credibility Assessment**

· These factors will now be assessed for the purposes of this investigation.

TITLE

- The Complainant...
- The Respondent...
- The Witnesses...

Relevant Evidence



- · List of the evidence provided
- · Summary of whether determined to be relevant or not
- · Can break this out by inculpatory and exculpatory
- · One party may provide more than the other
- · Make sure you assign who provided the evidence in the summary of evidence (and the dates received in the timeline of events - evidence is often sent after interviews with the investigator).

Conclusions and/or Recommendations

VII. CONCLUSION

- The investigator finds that the credible evidence evidence supports a possible violation(s) of the University's Sexual Harassment policy. This report will be forwarded to the decision-maker. OR
- The investigator finds the credible evidence **does not support** a possible violation(s) of the University's *Sexual Harassment policy*. This report will be forwarded to the decision-maker.

VII. RECOMMENDATIONS

As a Title IX matter, the University has the authority to evaluate the allegations and make findings as applied to students and employees for disciplinary purposes. The investigator recommends that the Respondent should go through the live hearing process for possible volations of the University Sexual Harassment Policy. In similarly stuated cases of this nature, a common outcome has been Suspension from the University **OR**.

As a Title IX matter, the University has the authority to evaluate the allegations and make findings as applied to students and employees for disciplinary purposes. The investigator **does not** recommend the Respondent should go through the live hearing process for possible violations of the University Sexual Harassment Policy.

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Involve your colleagues

- · Draft up a template that works for your school
- · Draft it together
- Have counsel review it
- · Have students review it
- Have academics review it
- · You want this template to be the blueprint all investigator use
- Modify as you need. Keep it simple.



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Bias/Conflict 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)

"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.

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

Bias



· Personal animosity

- Illegal prejudice
- · Personal or financial stake in the outcome
- · Bias can relate to:

· Sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability or other characteristic

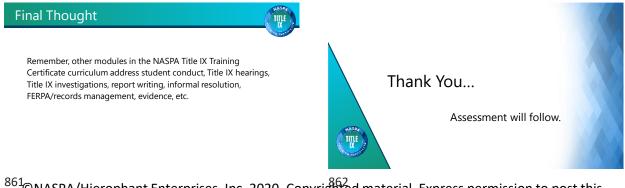
Id. at 30084 (emphasis added).

Does DOE require "Implicit Bias" training

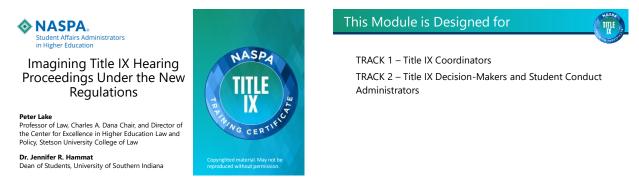
The Department declines to specify that training of Title IX personnel must include implicit bias training; the nature of the training required under § 106.45(b)(1)(iii) is left to the recipient's discretion so long as it achieves the provision's directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes.

Id. at 30084 (emphasis added)

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Reference

Unless otherwise noted, source: 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 https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf).

This Module is an Overview

We will discuss topics more in depth in the live virtual session, including:

- · Supportive Measures, Sanctions and Remedies
- Consent
- Advisors
- · Special Issues in Cross-Examination
- · No-Shows and Failure to Submit to Cross-Examination
- Appeals

[Some of these topics are also covered in other pre-recorded modules.]

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Decision-Maker Training Mandates

[T]he decision-maker will be trained in how to conduct a grievance process, including

- · How to determine relevance
- How to apply the rape shield protections
- How . . . to determine the relevance of a cross-examination question before a party or witness must answer. Id. at 30353 (bullets added).

Eliciting Testimony

The Department also notes that the final regulations require a trained investigator to prepare an investigative report summarizing relevant evidence, and permit the decision-maker on the decision-maker's own initiative to ask questions and elicit testimony from parties and witnesses, as part of the recipient's burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence.

Id. at 30332

§106.45(b)(6)(i) Live Hearings & Cross-Examination

(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.

§106.45(b)(6)(i) Live Hearings & Cross-Examination

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 decisionmaker(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 crossexamination on behalf of that party.

(emphasis added)

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§106.45(b)(6)(i) Rape Shield & Cross-Examination

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

§106.45(b)(6)(i) "Hearsay"

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) Staging a Live Hearing

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.

§ 106.45(b)(3)(i)—Mandatory Dismissal

(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.

§106.45(b)(3)(ii)—Permissive Dismissal

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 alleaations 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. (emphasis and bullets added)

Hearings

- · What is a "hearing"?
- · Single decision-maker vs. a panel of decision makers?
- Rules of evidence?
- · Hearing rules/rules of decorum
- · Pauses, "time-outs"
- · Objections?
- · Calling the investigator as the first witness?
- · Opening and closing statements?
- · Should all hearings be online (currently)?
- · What are the differences?
- Online hearings
- Platforms? . Security?

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Relevance Cont'd

limited exceptions).

The new Title IX regulations specifically . . .

... require investigators and decision-makers to be trained

shield provisions (which deem questions and evidence about a

Id. at 30125 (emphasis added)

on issues of relevance, including how to apply the rape

complainant's prior sexual history to be irrelevant with two



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)

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)

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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Decision-Maker to Determine Relevance Cont'd

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 question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

Id. at 30331

Decision-Maker to Determine Relevance Cont'd

Thus, for example, where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decision-maker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.

Id. at 30337 (internal citation omitted)

Decision-Maker to Determine Relevance Cont'd

While the Department will enforce these final regulations to ensure that recipients comply with the § 106.45 grievance process, including accurately determining whether evidence is relevant, the Department notes that § 106.44(b)(2) assures recipients that, when enforcing these final regulations, the Department will refrain from second quessing a recipient's determination regarding responsibility based solely on whether the Department would have weighed the evidence differently.

Id. at 30337 (internal citation omitted)

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Decision-Maker to Determine Relevance Cont'd

The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing. If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing. Id. at 30343.

Decision-Maker to Determine Relevance Cont'd

Decision-Maker to Determine Relevance Cont'd

The new regulations require "on the spot" determinations about a

[A]n explanation of how or why the question was irrelevant to the

regulations (for example, in the case of sexual predisposition or

prior sexual behavior information) provides transparency for the

parties to understand a decisionmaker's relevance determinations.

allegations at issue, or is deemed irrelevant by these final

question's relevance.

Requiring the decision-maker to explain relevance decisions during the hearing only reinforces the decision-maker's responsibility to accurately determine relevance, including the irrelevance of information barred under the rape shield language.

Id. at 30343.

Id. at 30343

ld. at 30343.

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Decision-Maker to Determine Relevance Cont'd

This provision does not require a decision-maker to give a lengthy or complicated explanation; it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations. No lengthy or complicated exposition is required to satisfy this provision.

Id. at 30343.

Decision-Maker to Determine Relevance Cont'c

If a party or witness disagrees with a decision-maker's determination that a question is relevant, during the hearing, the party or witness's choice is to abide by the decision-maker's determination and answer, or refuse to answer the question, but unless the decision-maker reconsiders the relevance determination prior to reaching the determination regarding responsibility, the decisionmaker would not rely on the witness's statements.

Id. at 30349 (internal citations omitted)



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Decision-Maker to Determine Relevance Cont'd

The party or witness's reason for refusing to answer a relevant question does not matter. This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or email thread) and one party refuses to submit to cross-examination and the other does submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on Id. at 30349 (internal citations omitted)

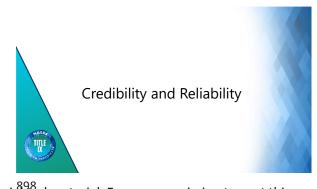
Consent

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Elements to consider

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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Credibility and Reliability

A decision-maker must exclude irrelevant questions, and nothing in the final regulations precludes a recipient from adopting and enforcing (so long as it is applied clearly, consistently, and equally to the parties) a rule that deems duplicative questions to be irrelevant or to impose rules of decorum that require questions to be asked in a respectful manner; however any such rules adopted by a recipient must ensure that all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).

ld. at 30331 n.1285 (emphasis added)

Credibility and Reliability

Probing the credibility and reliability of statements asserted by witness contained in such evidence (police reports, SANE reports, medical reports, and other documents or records) requires the parties to have the opportunity to cross-examine the witness making the statements.

Cross-examination (which differs from questions posed by a neutral factfinder) constitutes a unique opportunity for parties to present a decisionmaker with the party's own perspective about evidence. This adversarial testing of credibility renders the person's statement sufficiently reliable for consideration and fair for consideration by the decision-maker. Id. at 303

Credibility and Reliability

Although observing demeanor is not possible without live crossexamination, a decision-maker may still judge credibility based on, for example, factors of plausibility and consistence in party and witness statements.

Specialized legal training is not a prerequisite for evaluating credibility, as evidenced by the fact that many criminal and civil court trials rely on jurors (for whom no legal training is required) to determine the facts of the case including credibility of witnesses.

Credibility and Trauma

The Department notes that decisionmakers are obligated to serve impartially and thus should not endeavor to 'develop a personal relationship" with one party over another regardless of whether one party is located in a separate room or not. For the same reasons that judging credibility solely on demeanor presents risks of inaccuracy generally, the Department cautions that judging credibility based on a complainant's demeanor through the lens of whether observed demeanor is 'evidence of trauma' presents similar risks of inaccuracy. The Department reiterates that while assessing demeanor is one part of judging credibility, other factors are consistency, plausibility, and reliability. Real-time cross-examination presents an opportunity for parties and decision-makers to test and evaluate credibility based on all these factors.

Id. at 30356 (internal citation omitted).

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Other Factors Besides Demeanor Other Factors Besides Demeanor Cont'd [C]redibility determinations are not based solely on observing demeanor, but also are based on other factors (e.g., specific details, [A]ssessing demeanor is just one of the ways in which crossinherent plausibility, internal consistency, corroborative evidence). examination tests credibility, which includes assessing plausibility, Cross-examination brings those important factors to a decisionconsistency, and reliability; judging truthfulness based solely on maker's attention in a way that no other procedural device does; demeanor has been shown to be less accurate than, for instance, furthermore, while social science research demonstrates the evaluating credibility based on consistency. limitations of demeanor as a criterion for judging deception, studies Id. at 30355 demonstrate that inconsistency is correlated with deception. Id. at 30321

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Reliability Image: Constraint of the credibility-testing function of cross-examination, even where non-appearance is due to death or post-investigation disability. Role of Lawyers and Advisors 905 906

§ 106.45(b)(5)(iv) Advisor of Choice

Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their 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:

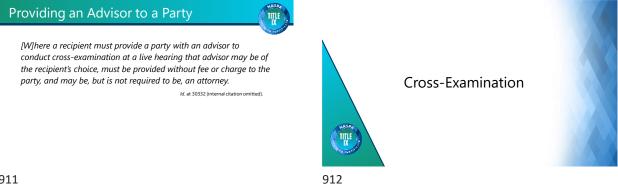
"Advisors"

- · Complainants and respondents can have any advisor of their choosing.
- · How will an advisor be designated?
- · 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 free of charge.
- · The school is not obligated to train advisors.
- · How can/should advisors participate in the process?

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Advisors in a Hearing 'Representation?" The Department notes that the final regulations, § 106.45(b)(5)(iv) and 106.45(b)(6)(i), make clear that the choice or presence of a party's Whether a party views an advisor of choice as "representing" the advisor cannot be limited by the recipient. To meet this obligation a party during a live hearing or not, this provision only requires recipient also cannot forbid a party from conferring with the recipients to permit advisor participation on the party's behalf to party's advisor, although a recipient has discretion to adopt rules governing the conduct of hearings that could, for example, include conduct cross-examination; not to "represent" the party at the live rules about the timing and length of breaks requested by parties or hearing. A recipient may, but is not required to, allow advisors to advisors and rules forbidding participants from disturbing the "represent" parties during the entire live hearing (or, for that matter, hearing by loudly conferring with each other. throughout the entire grievance process). Id. at 30342 Id. at 30339 (emphasis added)

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Cross-examination

[T]he Department does not believe that the benefits of adversarial cross-examination can be achieved when conducted by a person ostensible designated as a "neutral" official. This is because the function of cross-examination is precisely not to be neutral but rather to point out in front of the neutral decisionmaker each party's unique perspective about relevant evidence and desire regarding the outcome of the case.

ld at 30335 (internal citati

Cross-examination and Credibility

Cross-examination is essential in cases like Doe's because it does more than uncover inconsistencies - it takes aim at credibility like no other procedural device. Id. at 30328, n.1268

Due process requires cross-examination in circumstances like these because it is the greatest legal engine ever invested for uncovering the truth. Id. at 30328, n.1267

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The "Pause"	Recipient to Remain Neutral
Before a complainant, respondent, or witness answers a cross-examination question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking cross- examination questions any decision to exclude a question as not relevant.	[T]he reason cross-examination must be conducted by a party's advisor, and not by the decision-maker or other neutral official, is so that the recipient remains truly neutral throughout the grievance process . To the extent that a party wants the other party questioned in an adversarial manner in order to further the asking party's views and interests, that questioning is conducted by the party's own advisor, and not by the recipient. Thus, no complainant (or respondent) need feel as though the recipient is "taking sides" or otherwise engaging in cross- examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.
/d. at 30331 (emphasis added).	ld. at 30316 (emphasis added).

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'Cross-examination" = Asking Questions

The Department disagrees that cross-examination places a victim (or any party or witness) "on trial" or constitutes an interrogation; rather, cross-examination properly conducted simply constitutes a procedure by which each party and witness answers questions posed from a party's unique perspective in an effort to advance the asking party's own interests.

Id. at 30315 (emphasis added)

Purpose is not to Humiliate or Berate

[T]he essential function of cross-examination is not to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe a party's narrative in order to give the decisionmaker the fullest view possible of the evidence relevant to the allegations at issue.

Id. at 30319.

DARVO techniques

[C]ross-examination does not inherently rely on or necessitate DARVO techniques, and recipients retain discretion to apply rules designed to ensure that cross-examination remains focused on relevant topics conducted in a respectful manner. Recipients are in a better position than the Department to craft rules of decorum best suited to their educational environment. Id. at 30319

DARVO="Deny, Attack, and Reverse Victim and Offender"

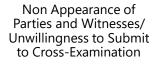
Equal Rights to Cross-examination

§ 106.45(b)(6)(i) grants the right of cross-examination equally to complainants and respondents, and cross-examination is as useful and powerful a truth-seeking tool for a complainant's benefit as for a respondent, so that a complainant may direct the decisionmaker's attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility in the respondent's statements.

Id. at 30330.

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The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. . . . Where a witness cannot or will not appear and be cross-examined, that person's statements will not be relied on by the decision-maker . . . Id. at 30348

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Non Submission to Cross-examination

The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. "Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.

Non Submission to Cross-examination Cont'd

While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements. Id. at 30349 (internal citations omitted).

Non Submission to Cross-examination Cont'd

If parties do not testify about their own statement and submit to crossexamination, the decision-maker will not have the appropriate context for the statement, which is why the decision-maker cannot consider that party's statements. This provision requires a party or witness to "submit to cross-examination" to avoid exclusion of their statements; the same exclusion of statements does not apply to a party or witness's refusal to answer questions posed by the decision-maker. If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements.

Non Submission to Cross-examination Cont'd

This is because cross-examination (which differs from questions posed by a neutral fact-finder) constitutes a unique opportunity for parties to present a decision-maker with the party's own perspectives about evidence. This adversarial testing of credibility renders the person's statements sufficiently reliable for consideration and fair for consideration by the decision-maker, in the context of a Title IX adjudication often overseen by laypersons rather than judges and lacking comprehensive rules of evidence that otherwise might determine reliability without crossexamination.

Id. at 30349 (internal citations omitted)

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Id. at 30349 (internal citations omitted)

Non Submission to Cross-examination Cont'd 'Remaining Evidence" [W]here a party or witness does not appear at a live hearing or § 106.45(b)(6)(i) includes language that directs a decision-maker to reach the determination regarding responsibility based on the evidence refuses to answer cross-examination questions, the decision-maker remaining even if a party or witness refuses to undergo crossmust disregard statements of that party or witness but must reach examination, so that even though the refusing party's statement cannot a determination without drawing any inferences about the be considered, the decision-maker may reach a determination based on determination regarding responsibility based on the party or the remaining evidence so long as no inference is drawn based on the witness's failure or refusal to appear or answer questions. Thus, for party or witness's absence from the hearing or refusal to answer crossexamination (or other) questions. Thus, even if a party chooses not to example, where a complainant refuses to answer crossappear at the hearing or answer cross-examination questions (whether examination questions but video evidence exists showing the out of concern about the party's position in a concurrent or potential underlying incident, a decision-maker may still consider the civil lawsuit or criminal proceeding, or for any other reason), the party's available evidence and make a determination. mere absence from the hearing or refusal to answer questions does not affect the determination regarding responsibility in the Title IX grievance Id at 30328 process. Id. at 30322

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"Remaining Evidence" Cont'd

[1]f the case does not depend on party's or witness's statements but rather on other evidence (e.g., video evidence that does not consist of "statements" or to the extent that the video contains nonstatement evidence) the decision-maker can still consider that other evidence and reach a determination, and must do so without drawing any inference about the determination based on lack of party or witness testimony. This result thus comports with the Sixth Circuit's rationale in Baum that cross-examination is most needed in cases that involve the need to evaluate credibility of parties as opposed to evaluation of non-statement evidence.

ld. at 30328





[T]he final regulations expressly authorize a recipient, in the recipient's discretion, to allow any or all participants to participate in the live hearing virtually.

Id. at 30332.

[T]echnology must enable all participants to see and hear other participants, so a telephonic appearance would not be sufficient . . . Id at 30348

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Technology Decision-makers must be trained on how to use technology at The final regulations permit a recipient to apply temporary their institution to run a live hearing. delays or limited extensions of time frames to all phases of a Software, hardware, programs, apps, etc. grievance process where good cause exists. For example, the · Practice and run throughs need for parties, witnesses, and other hearing participants to secure · Internet connectivity checks in advance? transportation, or for the recipient to troubleshoot technology · Contingency plan or statement that hearings may have to be to facilitate a virtual hearing, may constitute good cause to rescheduled if the campus or a party has connectivity issues. postpone a hearing. · Be prepared for the live event Id. at 30361-62 (emphasis added). · Everyone is prepared (mentally and otherwise) for a live hearing and something impedes the process that could have been prevented.

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Remember: Schools must create an audio or audiovisual recording, or transcript, of any live hearing.





"Adversarial in Nature"



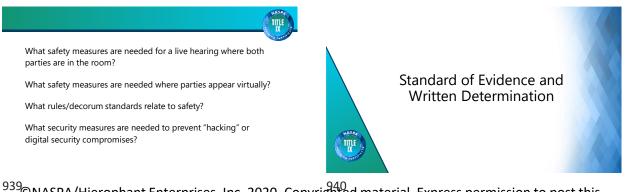
In the context of sexual harassment that process is often inescapably adversarial in nature where contested allegations of serious misconduct carry high stakes for all participants. Id. at 30097.

Emergency Removal

With respect for a process to remove a respondent rom a recipient's education program or activity, these final regulations provide an emergency removal process in § 106.44(c) if there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment. A recipient must provide a respondent with notice and an opportunity to challenge the emergency removal decision immediately following the removal.

Id. at 30183

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§ 106.45(b)(7)

Requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's grievance procedures for use in all formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and convincing evidence standard), and the recipient must simultaneously send the parties a written determination explaining the reasons for the outcome.

Id. at 30054 (emphasis added

Written Determination Regarding Responsibilit

The written determination must include-

- (A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
- (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;
- (C) Findinas of fact supporting the determination:
- (D) Conclusions regarding the application of the recipient's code of conduct to the facts; (E) A statement of, and rationale for, the result as to each allegation, including a
- A statement of and rotatione for, the result is to each allegation, including a determination regarding responsibility, any disciplinary statictions 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
- (F) The recipient's procedures and permissible bases for the complainant and respondent to § 106.45(b)(7)(ii)(A-F)

§ 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.

§ 106.45(b)(7)(iv)

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

[The connection of supportive measures, sanctions and remedies to the hearing/decision-maker.]

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§ 106.45(b)(8)(i)(A-C) Bases for Appeals (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.



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).

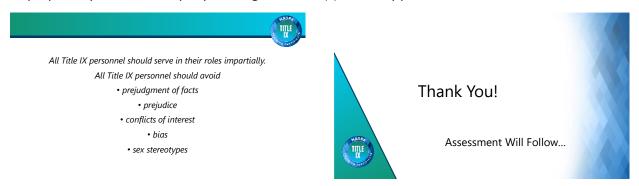
Bias/Conflict of Interest

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.

- · Personal animosity
- Illegal prejudice
- · Personal or financial stake in the outcome
- · Bias can relate to:

Sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability or other characteristic

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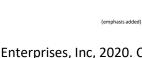


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§ 106.45(b)(9) Cont'd

[A]t any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication . . .

(emphasis added)

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§ 106.45(b)(9)(i) (Written Notice)

§ 106.45(b)(9) Informal resolution.

A recipient may not require as a condition of enrollment or

employment, or enjoyment of any other right, waiver of the

right to an investigation and adjudication of formal complaints

continuing enrollment, or employment or continuing

of sexual harassment consistent with this section. [A] recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is

Parties must be provided written notice that outlines • The allegations

filed.

 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

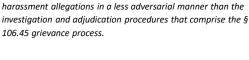
(emphasis and bullets added)

§ 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.

(emphasis added)



Nondiscrimination on one pass of 54x w concurrent ce, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online a

Informal resolution may present a way to resolve sexual

The Department believes an explicit definition of "informal resolution" in the final regulations is unnecessary. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities. Id. at 30401.





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Because informal resolution is only an option, and is never required, under the final regulations, the Department does not believe that § 106.45(b)(9) presents conflict with other Federal or State laws or practices concerning resolution of sexual harassment allegations through mediation or other alternative dispute resolution processes.

Id. at 30404

Points on Informal Resolution

 The new regulations don't require it, but informal resolution is allowed.

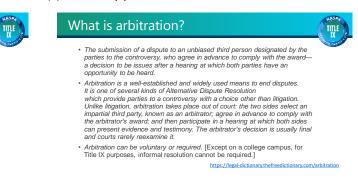
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- · A formal complaint must be filed before any informal resolution process can begin.
- · Both parties must voluntarily agree to informal resolution (written consent required). [No coercion or undue influence.]
- No "informed" consent standard as such, other than information required by regulations.
- Parties do not have to be in the same room...often, they are not.
- · Equitable implementation by trained personnel

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Points on Informal Resolution

- Should you offer it?
 - Pros/Cons
 - · Increased complainant autonomy · Training of personnel is required under the new regulations
- · 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?
- What does this look like in practice?



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What is mediation? Cont'd

The mediator uses a wide variety of techniques to guide the process in a constructive direction and to help the parties find their optimal solution. A mediator is facilitative in that she/he manages the interaction between parties and facilitates open communication. Mediation is also evaluative in that the mediator analyzes issues and relevant norms ("reality-testing"), while refraining from providing prescriptive advice to the parties (e.g., "You should do....").

https://en.wikipedia.org/wiki/Mediation

TITLE

What is mediation? Cont'd

The term "mediation" broadly refers to any instance in which a third party helps others reach an agreement. More specifically, mediation has a structure, timetable, and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. Mediation is becoming a more peaceful and internationally accepted solution to end the conflict. Mediation can be used to resolve disputes of any magnitude.

https://en.wikipedia.org/wiki/Mediation

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What is mediation? Cont'd Mediation does not bar imposition of penalties. Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends E.g., Rajib Chanda, Mediating University Sexual Assault Cases, 6 Harv. on the mediator's skill and training. As the practice gained popularity, training programs, certifications, and licensing followed, which produced trained and Negotiation L. Rev. 265, 301 (2001) (defining mediation as "a process through which two or more disputing parties negotiate a voluntary professional mediators committed to the discipline. settlement with the help of a 'third party' (the mediator) who typically has no stake in the outcome" and stressing that this "does not impose a JAMS 'win-win' requirement, nor does it bar penalties. A party can 'lose' or be American Arbitration Association (AAA) penalized; mediation only requires that the loss or penalty is agreed to American Bar Association, ADR Section by both parties—in a sexual assault case, 'agreements . . . may include Association for Conflict Resolution (ACR) reconciliation, restitution for the victim, rehabilitation for whoever needs · CPR Institute for Dispute Resolution it, and the acceptance of responsibility by the offender.") · National Association for Community Mediation Id. at 30406 n.1519 (emphasis added). https://en.wikipedia.org/wiki/Mediation

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A 'mediation option for sexual assault victims addresses' each of the three main reasons why sexual assault is underreported—

- 1) 'that victims anticipate social stigmatization
- 2) perceive a difficulty in prosecution, and
- 3) consider the effect on the offender

[B]ecause mediation is not adversarial, avoids the need to "prove" charges, and gives the victim control over the range of penalties on the offender, all of which likely 'encourage [victims] to report the incident.'

> Id. at 30404 n.1517 (quoting Rajib Chanda, Mediating University Sexual Assault Cases, 6 Harv. Negotiation L. Rev. 265, 305 (2001) (numeration added).

What is restorative justice?

A restorative justice program aims to get offenders to take responsibility for their actions, to understand the harm they have caused, to give them an opportunity to redeem themselves and to discourage them from causing further harm. For victims, its goal is to give them an active role in the process and to reduce feelings of anxiety and powerlessness. Restorative justice is founded on an alternative theory to the traditional methods of justice, which often focus on retribution. However, restorative justice programs can complement traditional methods.

Academic assessment of restorative justice is positive. Most studies suggest it makes offenders less likely to reoffend. A 2007 study also found that it had the highest rate of victim satisfaction and offender accountability of any method of justice. Its use has seen worldwide growth since the 1990s. Restorative justice inspired and is part of the wider study of restorative practices.

How can it be used in Title IX/sexual misconduct?

Koss MP, Wilgus JK, Williamsen KM. Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance With Title IX Guidance. *Trauma Violence Abuse*. 2014;15(3):242-257. doi:10.1177/1524838014521500

HASPA TITLE IX

Restorative Justice

- Theories about its effectiveness include:
- · The offender has to learn about the harm they have caused to their victim making it hard for them to justify their behavio
- · It offers a chance to discuss moral development to offenders who may have had little of it in their life.
- · Offenders are more likely to view their punishment as legitimate
- · The programs tend to avoid shaming and stigmatizing the offender.

Many restorative justice systems, especially victim-offender mediation and family group conferencing, require participants to sign a confidentiality agreement. These agreements usually state that conference discussions will not be disclosed to nonparticipants. The rationale for confidentiality is that it promotes open and honest communication. https://en.wikipedia.org/wiki/Restorative_justice

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Id. at 30406 (emphasis added)

With respect to the implications of restorative justice and the

recipient reaching a determination regarding responsibility, the

Department acknowledges that generally a critical feature of

responsibility does not necessarily mean the recipient has

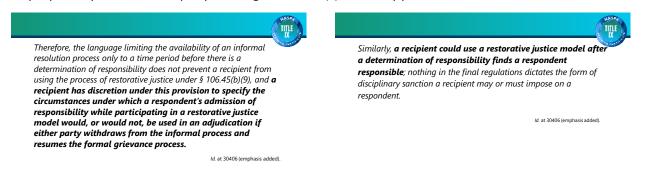
restorative justice as a type of informal resolution must be a

at the start of the process. However, this admission of

also reached that determination, and participation in

voluntary decision on the part of the respondent.

restorative justice is that the respondent admits responsibility



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Confidentiality and Informal Processes

The Department appreciates the concerns raised by some commenters that the confidential nature of informal resolutions may mean that the broader educational community is unaware of the risks posed by a perpetrator; however, the final regulations impose robust disclosure requirements on recipients to ensure that parties are fully aware of the consequences of choosing informal resolution, including the records that will be maintained or that could or could not be shared, and the possibility of confidentiality requirements as a condition of entering a final agreement.

Id. at 30404 (emphasis added)

Confidentiality Cont'd

We believe as a fundamental principle that parties and individual recipients are in the best position to determine the conflict resolution process that works for them; for example, a recipient may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report, or may determine that the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved.

Id. at 30404 (internal citation omitted)

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Confidentiality Cont'd Ending an Informal Process The recipient's determination about the confidentiality of informa resolutions may be influenced by the model(s) of informal [A]n informal resolution process, in which the parties voluntarily resolution a recipient chooses to offer; for example, a mediation participate, may end in an agreement under which the respondent model may result in a mutually agreed upon resolution to the agrees to a disciplinary sanction or other adverse consequence, situation without the respondent admitting responsibility, while a without the recipient completing a grievance process, under § restorative justice model may reach a mutual resolution that 106.45(b)(9). involves the respondent admitting responsibility. The final Id. at 30059 n.286 regulations permit recipients to consider such aspects of informal resolution processes and decide to offer, or not offer, such processes, but require the recipient to inform the parties of the nature and consequences of any such informal resolution processes. Id. at 30404

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The Critical Role of the Title IX Coordinator

Peter Lake

Professor of Law Charles A Dana Chair and Director of the Center for Excellence in Higher Education Law and Policy Stetson University College of Law



This Module is Designed for:

TRACK 1 – Title IX Coordinators

§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."

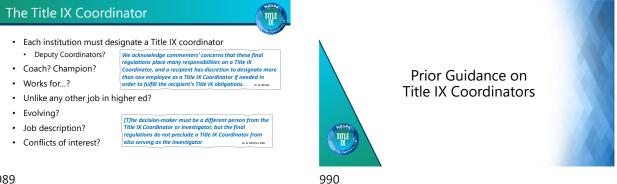
Cannot be "in name only."

(emphasis added)

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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 employees 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, mail during non-business hours) by using the telephone number or electronic mail dadress, or by mail to the office address, listed for the Title IX Coordinator.	If the Title IX Coordinator is located in an administrative office or building that restricts, or impliedly restricts, access only to certain students (e.g., a women's center), such a location could violate \$ 106.8(a) by not "authorizing" a Title IX Coordinator to comply with all the duties required of a Title IX Coordinator under these final regulations (for example, a Title IX Coordinator must intake reports and formal complaints of sexual harassment from any complainant regardless of the complainants sex).
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Guidance from April 2015



Three items released by OCR on April 24, 2015:

- 1. Dear Colleague Letter regarding Title IX Coordinators
- 2. Letter directly to Title IX Coordinators
- 3. Title IX Resource Guide

These have not been rescinded or withdrawn as of July 20, 2020. https://www.ed.gov/news/press-releases/new-guidance-us-department-educationreminds-schools-obligation-designate-title-ix-coordinator

April 2015 Cont'd

- · These publications were "not new guidance," however, reflected OCR enforcement experience at the time.
- · The evolution of the Title IX Coordinator position and OCR learning through voluntary compliance efforts.

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Highlights Cont'd



Authority → "Formal and informal"

- · Multiple coordinators are okay, but one "lead" with "ultimate oversight"
- "Training"/"Time"
- · Only rare person doesn't need training
- "In most cases, the recipient will need to provide an employee with training to act as its Title IX coordinator. The training should explain the different facets of Title IX, including regulatory provisions, applicable OCR quidance, and the recipient's Title IX policies and grievance procedures." (4/24/15 DCL, pg. 6.)

Highlights Cont'd

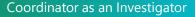
- Title IX does not specify who should determine the outcome of Title IX complaints . . . The Title IX coordinator could play this role, provided there are no conflicts of interest, but does not have to. (4/24/15 DCL pg. 4.)
 - This is not allowed under the new regulations!
- · Assist in the development of an annual climate survey and coordinate data collection and analysis (survey is not mandated)
- · Should be involved in drafting/revising policy and procedures related to Title IX
 - · Readable and age-appropriate language
 - Understandable by students with disabilities and English language learners

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Even where the Title IX Coordinator is also the investigator, the Title IX Coordinator must be trained to serve impartially ... Id. at 30135

Effective Implementation of Supportive Measures

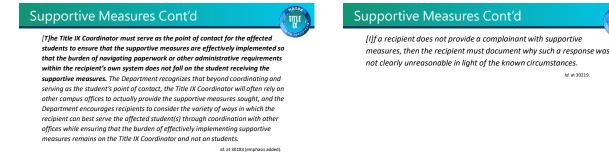
[A]s part of a recipient's response to a complainant, the recipient must offer the complainant supportive measures, irrespective of whether a complainant files a formal complaint, and the Title IX Coordinator must contact the complainant to discuss availability of supportive measures, consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint.

Id. at 30064-65 (emphasis added)

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Supportive Measures Cont'd

These final regulations do not expressly require a recipient to continue providing supportive measures upon a finding of non-responsibility, and the Department declines to require recipients to lift, remove, or cease supportive measures for complainants or respondents upon a finding of non-responsibility. Recipients retain discretion as to whether to continue supportive measures after a determination of non-responsibility.

Id. at 30183 (emphasis added)

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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Assisting in Filing a Formal Complaint

Nothing in these final regulations precludes a Title IX Coordinator from assisting a complainant (or parent) from filling out a document intended to serve as a formal complaint: however, a Title IX Coordinator must take care not to offer such assistance to pressure the complainant (or parent) to file a formal complaint as opposed to simply assisting the complainant (or parent) administratively to carry out the complainant's (or parent's) desired intent to file a formal complaint. No person may intimidate, threaten, or coerce any person for the purpose of interfering with a person's rights under Title IX, which includes the right not to participate in a grievance process.

Decision-Maker with Regards to Moving Forward Against the Wishes of the Complainant [T]he decision to initiate a grievance process in situations where the comp does not want an investigation or where the complainant intends not to participate should be made thoughtfully and intentionally, taking into account the circumstances of the situation including the reasons why the complainant wants or does not want the recipient to investigate. The Title IX Coordinator is trained with special responsibilities that involve interacting with complainants, making the Title IX Coordinator the appropriate person to decide to initiate a grievance process on behalf of the recipient. Other school administrators may report sexual harassment incidents to the Title IX Coordinator, and may express to the Title IX Coordinator reasons why the administrator believes that an investigation is warranted, but the decision to initiate a grievance process is one that the Title IX Coordinator must make. Id. at 30134 (emphasis added)

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Signatory of a Formal Complaint

The Department does not view a Title IX's Coordinator decision to sign a formal complaint as being adverse to the respondent. A Title IX Coordinator's decision to sign a formal complaint is made on behalf of the recipient (for instance, as part of the recipient's obligation not to be deliberately indifferent to known allegations of sexual harassment), not in support of the complainant or in opposition to the respondent or as an indication of whether the allegations are credible, have merit, or whether there is evidence sufficient to determine responsibility.

Id. at 30134 (emphasis added)

Signatory of a Formal Complaint Cont'd

[W]hen the Title IX Coordinator signs a formal complaint, the Title IX Coordinator does not become a complainant, or otherwise a party, to a grievance process, and must still serve free from bias or conflict of interest for or against any party.

In order to ensure that a recipient has discretion to investigate and adjudicate allegations of sexual harassment even without the participation of a complainant, in situations where a grievance process is warranted, the final reaulations leave that decision in the discretion of the recipient's Title IX Coordinator.

Id. at 30134 (emphasis added)

Signatory of a Formal Complaint Cont'd

However, deciding that allegations warrant an investigation does not necessarily show bias or prejudgment of the facts for or against the complainant or respondent. The definition of conduct that could constitute sexual harassment, and the conditions necessitating a recipient's response to sexual harassment allegations, are sufficiently clear that a Title IX Coordinator may determine that a fair, impartial investigation is objectively warranted as part of a recipient's non-deliberately indifferent response, without prejudging whether alleged facts are true or not. . . . the Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient's behalf.

Id. at 30134-35 (internal citations omitted, emphasis added)

Signatory of a Formal Complaint Cont'd

The final regulations give the Title IX Coordinator discretion to sign a formal complaint, and the Title IX Coordinator may take circumstances into account such as whether a complainant's allegations involved violence, use of weapons, or similar factors. . . . in some situations, the Title IX Coordinator may believe that signing a formal complaint is not in the best interest of the complainant and is not otherwise necessary for the recipient to respond in a non-deliberately indifferent manner.

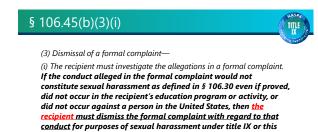
Id. at 30217-18 (emphasis added).

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Dismissal/Consolidation of Complaints

- How and when are Title IX coordinators required or able to dismiss complaints?
- Mandatory Dismissal
- · Discretionary Dismissal
- How and when are Title IX coordinators able to consolidate complaints?
- · Is this a point of flexibility/choice?



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.







(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.

§ 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.

Witness

Even where the Title IX Coordinator testifies as a witness, the Title IX Coordinator is still expected to serve impartially without prejudgment of the facts at issue.

Id. at 30336 (emphasis added)

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ecommendations to a Decision-Maker?	Remedies
Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decision- maker for consideration, but the final regulations require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decision-maker) who did not participate in the case as an investigator or Title IX Coordinator.	The final regulations revise § 106.45(b)(7)(iv) to state that the Title IX Coordinator is responsible for effective implementation of remedies, thereby indicating that where a written determination states that the recipient will provide remedies to a complainant, the complainant can then communicate separately with the Title IX Coordinator to discuss the nature of such remedies.
	Id. at 30520 (emphasis added).

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Coordination Function/Point Person

- · Assigns investigator(s) (if multiple options are available)
- · Assigns decision-maker(s) (if multiple options are available)
- · Implements and manages supportive measures
- · Implements and manages remedies
- · Delegation of tasks

Delegation of Tasks

Nothing in the final regulations restricts the tasks that a Title IX Coordinator may delegate to other personnel, but the recipient itself is responsible for ensuring that the recipient's obligations are met, including the responsibilities specifically imposed on the recipient's Title IX Coordinator under these final regulations, and the Department will hold the recipient responsible for meeting all obligations under these final regulations.

Id. at 30463 (emphasis added)

Bias/Conflicts of Interest/Prejudice

Every Title IX Coordinator must be free from conflicts of interest and bias and, under revised § 106.45(b)(1)(iii), trained in how to serve impartially and avoid prejudgment of the facts at issue. No recipient is permitted to ignore a sexual harassment report, regardless of the identity of the person alleged to have been victimized, and whether or not a school administrator might be inclined to apply harmful stereotypes against believing complainants generally or based on the complainant's personal characteristics or identity.

Id. at 30083 (emphasis added)

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Bias/Conflicts of Interest/Prejudice Cont'd

The Department understands commenters' concerns that the final regulations work within a framework where a recipient's own employees are permitted to serve as Title IX personnel, and the potential conflicts of interest this creates.... The Department declines to require recipients to use outside, unaffiliated Title IX personnel because the Department does not conclude that such prescription is necessary to effectuate the purposes of the final regulations; although recipients may face challenges with respect to ensuring that personnel serve free from conflicts of interest and bias, recipients can comply with the final regulations by using the recipient's own employees.

Id. at 30251-52 (emphasis added, internal citation omitted)

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Bias/Conflicts of Interest/Prejudice Cont'd

[T]he Department's authority under Title IX extends to regulation of recipients themselves, and not to the individual personnel serving as Title IX Coordinators, investigators, decision-makers, or persons who facilitate an informal resolution process. Thus, the Department will hold a recipient accountable for the end result of using Title IX personnel free from conflicts of interest and bias, regardless of the employment or supervisory relationships among various Title IX personnel. To the extent that recipients wish to adopt best practices to better ensure that conflicts of interest do not cause violations of the final regulations, recipients have discretion to adopt practices suggested by commenters, such as ensuring that investigators have institutional independence or decidina that Title IX Coordinators should have no role in the hiring or firing of investigators. Id. at 30252.

Bias/Conflicts of Interest/Prejudice Cont'd

[T]he Department declines to state whether particular professional experiences or affiliations do or do not constitute per se violations of § 106.45(b)(1)(iii). The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially.

Id. at 30252 (emphasis added)

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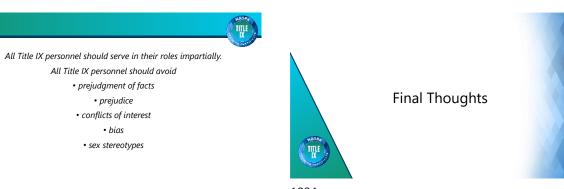
Bias/Conflicts of Interest/Prejudice Cont'd

Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particula person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person who a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role Id. at 30252 (emphasis added)

Bias/Conflicts of Interest/Prejudice Cont'd

The Department cautions parties and recipients from concluding bias, or possible bias, based solely on the outcomes of grievance processes decided under the final regulations; for example, the mere fact that a certain number of outcomes result in determinations of responsibility, or nonresponsibility, does not necessarily indicate or imply bias on the part of Title IX personnel.

Id. at 30252 (emphasis added).



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Final Thoughts for Title IX Coordinators..

- · Know when to ask for legal assistance.
- Reach out to colleagues at other institutions.
- Orchestrating and planning are big parts of the job.
- · Ensure supportive measures and remedies are effectively administered.
- · Seek continuing training and educational opportunities.

Final Thoughts for Title IX Coordinators

- · You are the lynchpin for Title IX compliance for your institution.
- You are the expert on your campus for Title IX compliance.
- · You can help to ensure Title IX procedures are free from bias and conflicts of interest.
- You are essential in fulfilling the mission of Title IX-to reduce or eliminate barriers to educational opportunities created by sex discrimination!

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📀 NASPA. Student Affairs Administrators in Higher Education

Records Management and FERPA

Melissa M. Carleton Bricker & Eckler LLP



This Module is Designed for:



TRACK 1 – Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student **Conduct Administrators** TRACK 3 - Title IX Investigators

Agenda

- · What laws protect confidentiality in Title IX cases?
 - FERPA
 - Clery Act
 - HIPAA?
 - Title IX itself
 - State laws
- What information must the Title IX office maintain?
- · What information is available to the public?

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Educational Records?

- Yes:
 - · "Records that are directly related to a student and maintained by an educational agency or a party acting for that agency" 34 C.F.R. 99.3 Disciplinary records
 - · Handwriting, print, computer media, video tape, audio tape, film, microfilm, microfiche
 - EMAILS

- No: Personal notes, 34 C.F.R. 99.3
- Employee records, 34 C.F.R. 99.3
- · Law enforcement records, 34 C.F.R. 99.3
- · Grades on peer-graded papers, before they are collected and recorded by a teacher (Sup. Ct., 2002)
- Treatment records, 34 C.F.R. 99.3
- Alumni records, 34 C.F.R. 99.3

Personally Identifiable Information

Includes:

- Student's name
- · Name of the student's parents and other family members
- · Address of the student or the student's family
- · Social security numbers
- Student ID numbers
- Biometric records (fingerprints, retina scans)
- · Student's date of birth, place of birth, and mother's maiden name

Personally Identifiable Information



ALSO Includes:

· Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; and

 Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

Who May Access Records?

• Students who are 18 years of age or are attending an institution of postsecondary education ("eligible students") must be permitted to access their education records.

Access:

- · Means the opportunity inspect/review records
- · Does not mean that they get copies, unless circumstances would effectively prevent the eligible student from exercising their rights without copies

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But Wait – What About Parents?

· Parents of Eligible Students may access information: With consent of the eligible student

- · If your institution permits the release of information to parents of tax endent students, and it notifies those students of this in its annual FERPA notice
- If the student is under the age of 21 and the student has violated a law, rule, or policy governing the use or possession of alcohol or a controlled substance and the institution has determined that the student has committed a disciplinary violation with respect to that use or possession, 34 C.F.R. 99.31(a)(15)
- · If another exception is met to disclose without consent of the student

Access for School Officials · "School officials" may access student records if the school determines that they have a legitimate educational interest in such records. 34 C.F.R. 99.31(a)(1)(i)(A). • "School officials" should be defined in your policy and annual FERPA notice. · Contractors, consultants, and even volunteers may be "school officials" in some situations. · Use "reasonable methods" to ensure that educational records are not accessed by school officials that do not have a legitimate educational interest in them · Be cautious in your sharing of information only with those who "need to know" and telling them what they need to know.

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Access by Consent

· Other individuals may access educational records with a signed and dated written consent from the eligible student.

The written consent must:

· Specify the records that may be disclosed;

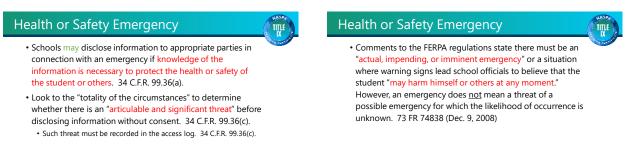
- State the purpose of the disclosure; and
- · Identify the party or class of parties to whom the disclosure may be made. 34 C.F.R. 99.30.

Exceptions – Disclosure without Consent

- · Directory Information
- Health or Safety Emergency
- · Post-Secondary Disclosure to Victim of Certain Violent/Sexual Crimes
- · Post-Secondary Disclosure of Final Disciplinary Result, Certain Violent/Sexual Crimes
- · Disclosure of Sanctions Relating to Harassed Student
- Student's New School
- · Completely De-Identified/Redacted Records
- Judicial Order/Subpoena
- · Government Audit/Investigation



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Disclosure to Crime Victims

- · Disclosures may be made to the victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense
 - · Crime of violence includes forcible sex offenses (rape, sodomy, sexual assault with an object, fondling). See 34 C.F.R. 99.39.
- · The disclosure may only include the final results of the disciplinary proceeding with respect to that alleged crime or offense. Final results include:
 - Name of the student
 - · Violation committed (code section and essential findings to support violation)
 - · Sanction imposed, date of imposition, and duration
- · Disclosure may occur regardless of whether violation was found to have been committed.

Disciplinary Results to Public

- · Institutions of postsecondary education may disclose final disciplinary results if:
 - · A student is an alleged perpetrator of a crime of violence or nonforcible sex offence (see 34 C.F.R. 99.39) and
 - · With respect to the allegation, the student has committed a violation of the institution's rules or policies.
- . The student may not disclose the name of any other student, including a victim or witness, without prior written consent of the other student.
- See 34 C.F.R. 99.31(a)(14); 34 C.F.R. 99.39

Sanctions to Harassed Student

- "The Department has long viewed FERPA as permitting a school to ... the harassed student ... information about the sanction imposed upon a student who was found to have engaged in harassment when that sanction directly relates to the harassed student."
 - · February 9, 2015 Letter to Loren W. Soukup (relies on January 2001
 - OCR Guidance re: Sexual Harassment in Schools)
 - Available online at http://ow.ly/QLOX303yUre

Records to New School

· Records can be disclosed to officials of another school where the student seeks to enroll, intends to enroll, or has enrolled, so long as the disclosure is for purposes related to the student's enrollment or transfer. 34 C.F.R. 99.31(A)(2).

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- · Prior to disclosure, the previous school must attempt to notify the eligible student of the disclosure, unless the annual notice states that such disclosures may be made without notice. 34 C.F.R. 99.34(a)
- · If such a disclosure is made, the eligible student may request a receive a copy of the record that was disclosed, and also a hearing. 34 C.F.R. 99.34(a)(2) and (3).

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Government Audit/Investigation

· FERPA does not prohibit disclosure in the following cases:

- Government officials for audit purposes See 34 C.F.R. § 99.35
- Educational research studies See 34 C.F.R. § 99.31(a)(6)
- Accrediting agencies for purposes of carrying out accrediting functions - 34 C.F.R. § 99.31

What does Title IX say about FERPA?

• "The obligation to comply with [the Title IX regulations] is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99." • 34 C.F.R. 106.6(f)

Clery Act

- · In cases involving sexual assault, dating violence, domestic violence, and stalking, you must provide victims with information about how you will protect their confidentiality and how you will complete publicly available recordkeeping (like your Clery crime log) without inclusion of personally identifying information about the victim.
- Be careful of names, locations, contact information, identifying information
- · Like FERPA, you can release information if the release is compelled by statute or court order and you take reasonable steps to notify the victim of the disclosure.
- See 34 C.F.R. 668.46(b)(11)(iii) for more details.

Clery Act

 In cases involving sexual assault, dating violence, domestic violence, and stalking, the institution must share with both parties:

- The result of any institutional disciplinary proceeding, including any initial, interim, and final decision by the institution, as well as the rationale for the result and the sanctions
- · The institution's procedures for appeal, if such procedures are available
- Any change to the result and
- · When such results become fina
- Any information that will be used during informal and formal disciplinary meetings and hearings
- · Compliance with the above does not constitute a violation of FERPA per 34 C.F.R. 668.46(I).

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HIPAA? Title IX and Confidentiality HIPAA protects certain treatment records that may be held Section 106.71(a) requires recipients to keep confidential the by your institution's health/counseling center or hospital. identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or · Generally, when a party provides written consent for filed a formal complaint of sexual harassment, any complainant, any treatment records to be used in Title IX proceedings, they individual who has been reported to be the perpetrator of sex become education records subject to FERPA, not HIPAA discrimination, any respondent, and any witness (unless permitted • See Joint Guidance on the Application of FERPA and HIPAA by FERPA, or required under law, or as necessary to conduct to Student Health Records, U.S. Department of Education proceedings under Title IX), and § 106.71(b) states that exercise of and U.S. Department of Health and Human Services, rights protected by the First Amendment is not retaliation. December 2019 Final regulations at 30071.

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Title IX and Confidentiality

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.

Final regulations at 30071

"Gag Orders" Not Permitted, But...

... abuses of a party's ability to discuss the allegations can be addressed through tort law and retaliation prohibitions. [§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.

Final regulations at 30296

Non-Disclosure Agreements?

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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.

Final Regulations at 30304.

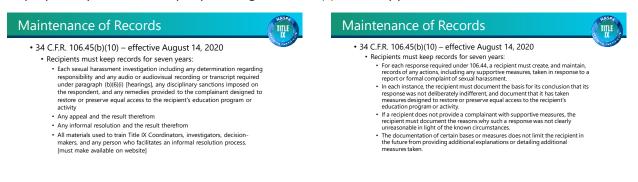
State Laws

· Privacy laws vary from state to state but may include causes of action such as:

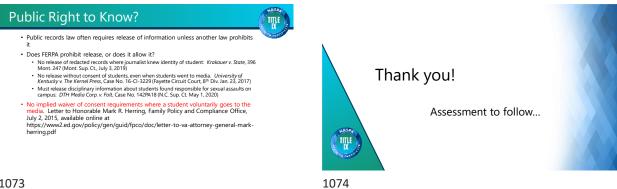
TITLE

- "Right of privacy"
- "False light invasion of privacy"
- Defamation
- · Protections for employee personnel files
- · Consult with legal counsel for additional restrictions that may apply regarding release of records and information in vour state

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and Prevention

Peter Lake

Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy Stetson University College of Law



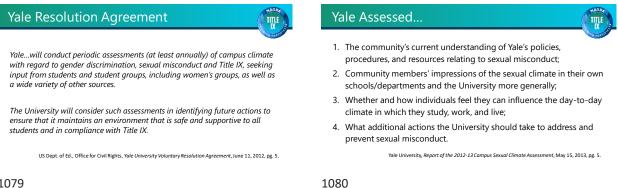
This Module is Designed for:

TRACK 1 – Title IX Coordinators

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The White House Task Force to Protect Students from Sexual Assault (Not Alone report in April 2014)

Provided schools with a toolkit for developing and conducting a climate survey.

Called on colleges and universities to voluntarily conduct the survey in 2015. The surveys were never mandated by the Obama administration, although some thought they might eventually be required through legislation or administrative enforcement.

How is this addressed in the new regulations?

The Department understands that sexual harassment occurs throughout society and not just in educational environments, that data support the proposition that harassina behavior can escalate if left unaddressed, and that prevention of sexual harassment incidents before they occur is a worthy and desirable agal. The final regulations describe the Title IX legal obligations to which the Department will vigorously hold schools, colleges, and universities accountable in responding to sexual harassment incidents. Identifying the root causes and reducing the prevalence of sexual harassment across our Nation's schools and campuses remains within the province of schools, colleges, universities, advocates, and experts.

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 https://www.govinfo.agv/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30070 (emphasis added).

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Guiding Principle #1: Education

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Education



- · Identify core educational challenges and opportunities
- Utilize academic departments focused on related issues: (Health studies, gender studies, etc.)
- New regulations allow us to address "trigger" and other issues in the classroom; "the classroom exception"
- Train staff, faculty and students on Title IX, including sexual violence and other forms of sexual harassment in light of the three-part definition
- New regulations may help to identify "capital" offenses and stress the importance of fairness in all equal opportunity work—and the damaging impacts of bias
- Use informal resolution as an opportunity for education if appropriate; conflict resolution skill development

Education

The Department appreciates commenters who expressed a belief in the importance of educating students about consent, healthy relationships and communication, drug and alcohol issues, and sexual assault prevention (as well as bullying and harassment, generally). The Department shares commenters' beliefs that measures preventing sexual harassment from occurring in the first place are beneficial and desirable. Although the Department does not control school curricula and does not require recipients to provide instruction regarding sexual consent, nothing in these final regulations impedes a recipient's discretion to provide educational information to students.

> 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 https://www.govinfo.av/content/joks/FR-2020-05-19/pdf/2020-10512.pdf) at 30125-26 (emphasis added).

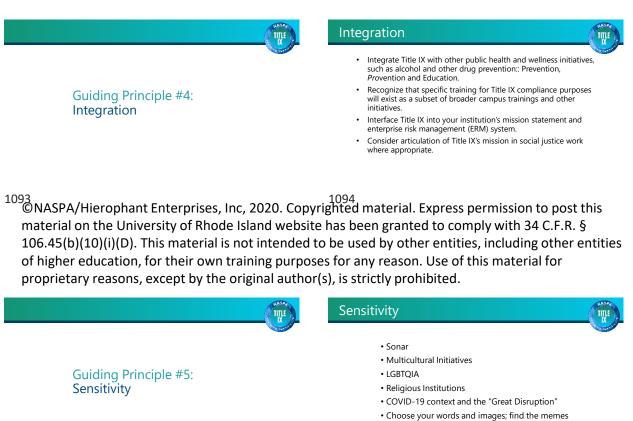
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	The Law
	•The law recognizes its own limits with regard to combatting sex discrimination •Thus, voluntary compliance
Guiding Principle #2: The Law	 Resist "Legalese" where possible Remember, the Department of Education states that Colleges are not courtrooms; evidence in a "usual" sense Title IX personnel and advisors need not be legally trained It believes that the new regulations will not be a cause for increased litigation

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and thought leaders energizing your community

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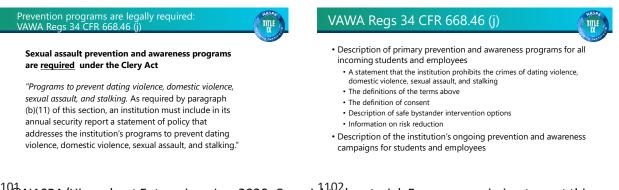
Prevention

- Use evidence-based strategies Centers for Disease Control and Prevention, Division of Violence Prevention, Preventing Sexual Violence on College Campuses: Lessons from Research and Practice (April 2014)
- Use a comprehensive strategy Consider the following model from the CDC, Preventing Sexual Violence on College Campuses: Lessons from Research and Practice (April 2014)



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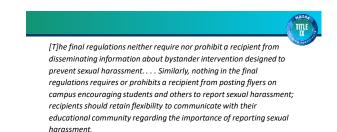
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The Department shares commenters' beliefs that measures preventing sexual harassment from occurring in the first place are beneficial and desirable.

> Department of Education, Nondiscrimination on the Basis of Sex in Education Programs Department of Education, wondiscrimination on the basis of sex in Education F or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 13 2020)(final rule) (online at https://www.govinfo.gov/content/pkg/FR-2020-05: 19/pdf/2020-10512.pdf) at 30126.



Id. at 30471.



Id. at 30190.

The Department declines to . . . add a requirement of educational outreach and prevention programming elsewhere within the final regulations. The Department notes that nothing in the final regulations prevents recipients from undertaking such efforts. . . . With respect to a general requirement that recipients provide prevention and community education programming, the final regulations are focused on governing a recipient's response to sexual harassment incidents, leaving additional education and prevention efforts within a recipient's discretion.

Final Thoughts

- Flexibility to do prevention work does not mean do nothing!
- Remember to combat bias, sex stereotypes, prejudice and prejudgement in campus Title IX efforts: the values of a well-run Title IX system are important for a community.
- Encourage constructive dialogue about Title IX compliance efforts.
- Celebrate efficacy where it exists.
- Remember the mission of Title IX.

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What we hope to accomplish.



- Updates and Highlight of Select Issues (~45 minutes)
- Tabletop Exercises in Breakout Groups (45 minutes)
- Discuss Tabletop Exercises in the Larger Group (~30 minutes)
- · Open time for Questions (~30 minutes)
- Please send questions in a message directly to Jake Sapp.
- · We will not read your name.
- · We will stay slightly past the ending time to answer questions, if necessary. If you need to log out at the exact ending time, please do so.
- · This session is being recorded.
 - However, discussion in your breakout session will not be recorded.

Definitive Answers vs. Choice Points

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OCR Title IX website launched on August 14, 2020.

https://sites.ed.gov/titleix/



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106.44(a)

The Title IX Coordinator must:

- 1) Promptly contact the complainant to discuss the availability of supportive measures.
- 2) Consider the complainant's wishes with respect to supportive measures,
- 3) Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,
- 4) Explain to the complainant the process for filing a formal complaint.



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

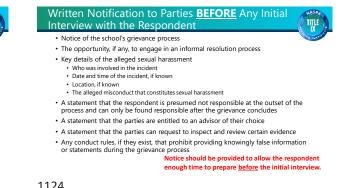
https://www.federalregister.gov/d/2020-10512/p-573

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106.44(b) + 106.45

1) Fulfill the 106.44(a) mandatory response 2) Issue Notice of Allegations 3) Gatekeeping



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Special Issues Highlight #3 Gatekeeping and Dismissal and Consolidation of Formal Complaints

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 of 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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Assisting in Filing a Formal Complaint

Nothing in these final regulations precludes a Title IX Coordinator from assisting a complainant (or parent) from filling out a document intended to serve as a formal complaint; however, a Title IX Coordinator must take care not to offer such assistance to pressure the complainant (or parent) to file a formal complaint as opposed to simply assisting the complainant (or parent) administratively to carry out the complainant's (or parent's) desired intent to file a formal complaint. No person may intimidate, threaten, or coerce any person for the purpose of interfering with a person's rights under Title IX, which includes the right not to participate in a grievance process.

Id. at 30136 (emphasis add

Dismissal/Consolidation of Complaints

- · How and when are Title IX coordinators required or able to dismiss complaints?
 - Mandatory Dismissal
 - Discretionary Dismissal
- · How and when are Title IX coordinators able to consolidate complaints?
- · Is this a point of flexibility/choice?

§ 106.45(b)(3)(i)



(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(emphasis added)

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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

determination as to the formal complaint or allegations therein.

(emphasis added)

recipient from gathering evidence sufficient to reach a



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Recipients Discretion (non-exhaustive)



federalregister.gov/d/2020-10512/p-1594

· Required objective standards for prohibition on conflicts of interest & bias https:

· Addressing conduct that falls outside of Title IX

Introduction of New Evidence https://www.federalregister.gov/d/2020-10512/p-3412

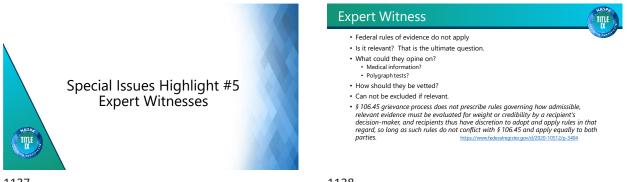
"Flexibility"

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
- · 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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Confidentiality

- · Parties must be free to collect evidence.
- · What about sharing of information on social media?
 - Defamation?
 - Retaliation?



The Department thus believes that § 106.45(b)(5)(iii)—permitting the parties to discuss the allegations under investigation, and to gather and present evidence-furthers the Department's interest in promoting a fair investigation that gives both parties meaningful opportunity to participate in advancing the party's own interests in case, while abuses of a party's ability to discuss the allegations can be addressed through tort law and retaliation prohibitions.

[T]his provision in no way immunizes a party from abusing the right to "discuss the allegations under investigation" by, for example, discussing those allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation.

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The Department recognizes commenters' concerns that some discussion about the allegations under investigation may fall short of retaliation or tortious conduct, yet still cause harmful effects. For example, discussion and gossip about the allegations may negatively impact a party's social relationships. For the above reasons, the Department believes that the benefits of § 106.45(b)(5)(iii), for both parties, outweigh the harm that could result from this provision. This provision, by its terms, 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.



As to the requirement in § 106.45(b)(5)(iii) that recipients must not restrict parties' ability "to gather and present evidence," the purpose of this provision is to ensure that parties have equal opportunity to participate in serving their own respective interests in affecting the outcome of the case.

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'Gag orders" are not permitted, but

[§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. (emphasis added).

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)



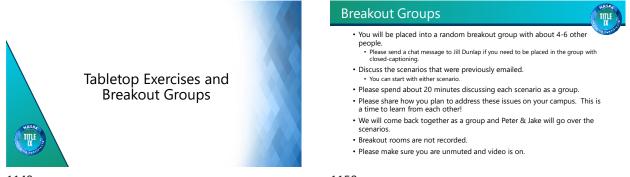
Special Issues Highlight #7 Litigation Issues

 Deliberate Indifference
 Retaliation
 42 U.S.C. 1983 -Due Process & Equal Protection
 Erroneous Outcome

 Selective Enforcement
 Inequity in Athletics
 Pre-Assault Claim
 Plausible Inference



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Scenario #1

You are the Title IX Coordinator at ABC University, which has an online Title IX formal complaint form. You receive a completed and signed form from an ABC student, Complainant A, via the online reporting portal. Complainant A alleges that Respondent X, a fellow ABC student, "mouth kissed and fondled the genitals" of Complainant A while Complainant A was heavily intoxicated and could not give consent. The alleged misconduct occurred on a campus-sponsored week-long trip to France as part of an annual trip sponsored by the French Club. You, as the Title IX coordinator, reach out to Complainant A speak with you.

Scenario #1 Continued

The next day, and before you receive any response from Complainant A, you receive another formal complaint form via the online reporting portal from another complainant, Complainant B. Complainant B, also a student at ABC, alleges the same respondent, Respondent X, sent Complainant B several unsolicited and inappropriate text messages and inappropriately touched Complainant B on the buttocks on a few occasions while out socially with the same group in France. Respondent X exhibited similar behavior once back on campus, seeking out Complainant B in their residence hall common room and grabbing Complainant B's buttocks without consent. In addition, once back in the U.S. Respondent X accelerates the inappropriate texting. Respondent X is now sending Complainant B nude "selfies." Respondent X ignores Complainant B. This increased "setting," coupled with hearing about Complainant B melainam B. This increased "setting," coupled with hearing about Complainant B melains the Strepated Complainant B to file a formal complaint. Complainant B melainse respondent X serves as the club's president.

Scenario #1 Continued

Neither Complainant A nor Complainant B notified the faculty membe who accompanied the group on the trip of the alleged misconduct while out of the country.

Scenario #1— Questions

 Should either of these formal complaints, or specific allegations contained therein, be dismissed under Title IX? Why or why not? Would the dismissal, if any, be mandatory or discretionary under Title IX?

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- If either of the formal complaints, or specific allegations contained therein, should be dismissed under Title IX, who makes that determination, how, and when?
- · If either of the complaints, or any allegations contained therein, are dismissed under Title IX what, if anything, can the campus do to address these incidents?

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Scenario <u>#2</u> Scenario #2 Continued Respondent and Complainant have notified you, the Title IX coordinator, of the Two days before the hearing, Complainant contacts you via email and states that Complainant has heard that Respo ndent's advisor, Law Yer, is an attorney. Complainan following information regarding their advisors: would like to change their advisor to someone who is an attorney, but their preference, Att Respondent has designated Law Yer as Respondent's advisor of choice. Orney, cannot make the hearing date with this little notice. Complainant asks for the hearing to be pushed back four to five weeks to accommodate the schedule of Att Orney Complainant has designated Par Ent as Complainant's advisor of choice Complainant indicates that Complainant, Complainant's original advisor (Par Ent), and Per the requirements in § 106.45(b)(5)(vi), after interviewing parties and witnesses potential new advisor (Att Orney), all agree that heading into a live hearing "against" a party with an attorney while Complainant does not have an attorney is fundamentally and gathering physical evidence, the Title IX investigator sends the initial collection of evidence to Complainant, Respondent and their advisors. Respondent and unfair and inequitable. Att Orney called your campus general counsel to discuss this Complainant submit their responses to the evidence to the investigator within the matter. Att Orney states that not allowing the extension prevents Complainant from allotted 10-day timeframe. The Title IX investigator then takes into account the "having an advisor of choice" represent Complainant at the hearing and this violates Title IX. Your campus general counsel is concerned there will be a lawsuit and/or Complainant will contact the Department of Education if the request for an extension is not granted. As responses of both parties to the evidence and begins to draft the final investigative report. the Title IX coordinator, you are concerned with this request for a four to five week Five days later, the final investigative report is provided to both parties and their will cause the hearing to move into the period of final exams, right ension because this advisors, with notice that the live hearing will take place 14 days later. before the conclusion of the fall semester.

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Scenario #2-Questions

- · Should Complainant's request for an extension be granted? Why or why not? How would you arrive at a conclusion?
- What in the new Title IX regulations, if anything, speaks to this issue? How should advisors be officially designated as such, when and to whom? How will you handle changes in advisors mid-way through a grievance? Is this permitted?
- · How should the role of advisors be discussed in your campus policies or in materials relating to preparing parties for a grievance process?



Advisors

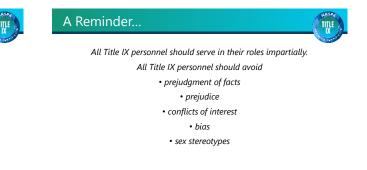
- · How should your policies address advisors?
- In a Title IX grievance process recipients must allow parties to select advisors of the parties' choice, who may be, but need not be, attorneys, while continuing to insist that any restrictions on the active participation of advisors during the grievance process must apply equally to both parties. 10512/n-344
- What resources advisors be given?
 - · Copy of policies that address their participation in investigation interviews and hearings?
 - · Copy of rules of decorum for a hearing? FERPA waiver?
 - · Non-disclosure agreement?

Closing Thoughts and **O**uestions

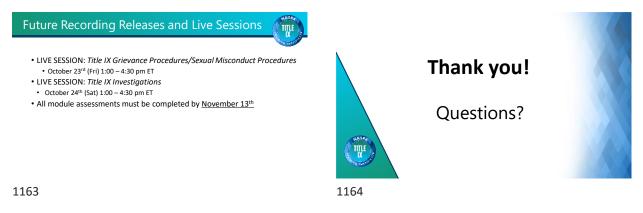
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Closing Thoughts

- Tuning
- Multiple Legal Authorities
- "Looking around corners."
- · "Policy should reflect practice and practice should reflect policy."



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LIVE SESSION on Title IX Grievance Procedures/Sexual **Misconduct Procedures**

October 23 2020

Peter Lake, Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy, Stetson University College of Law Dr. Jennifer R. Hammat, Dean of Students University of Southern Indiana



This Live Session is Designed for...



TRACK 1 - Title IX Coordinators TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators

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What we hope to accomplish...

- · Highlight of Select Issues (~90 minutes)
- Tabletop Exercises in Breakout Groups (45 minutes)
- Discuss Tabletop Exercises in the Larger Group (~45 minutes)
- · Open time for Questions (~30 minutes)
- · Please send questions in a message directly to Jennifer Hammat.
- · We will not read your name.
- We will stay slightly past the end time if needed to answer questions but if you need to leave at the exact ending time, that's ok.
- This session is being recorded.
 - However, discussion in your breakout session will not be recorded.

Definitive Answers vs. Choice Points

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Recent Withdrawal of Prior Guidance

- January 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties
- April 2015 resources for Title IX Coordinators, including the Dear Colleague Letter and the Title IX Resource Guide
- September 2017 Q&A on Campus Sexual Misconduct



Title IX Coordinator ← → Decision-Maker

Nothing in the final regulations prevents Title IX Coordinators from offering recommendations regarding responsibility to the decision-maker for consideration, but the final regulations require the ultimate determination regarding responsibility to be reached by an individual (i.e., the decisionmaker) who did not participate in the case as an investigator or Title IX Coordinator.

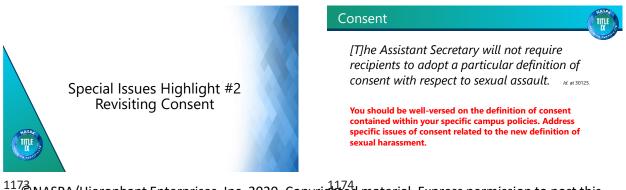
Should the Title IX coordinator offer recommendations on responsibility?

Title IX Investigator $\leftarrow \rightarrow$ Decision-Maker

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 (emphasis added

Should the investigator be called as a first witness routinely?

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Consent

The Department agrees that recipients must clearly define consent and must apply that definition consistently, including as between men and women and as between the complainant and respondent in a particular Title IX grievance process because to do otherwise would indicate bias for or against complainants or respondents generally, or for or against an individual complainant or respondent, in contravention of § 106.45(b)(1)(iii), and could potentially be "treatment of a complainant" or "treatment of a respondent" that § 106.45(a) recognizes may constitute sex discrimination in violation of Title IX.

Id. at 30125 (emphasis added).

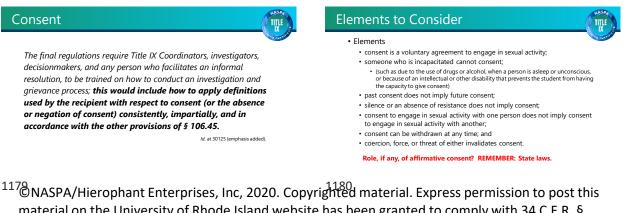
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Consent

Regardless of how a recipient's policy defines consent for sexual assault purposes, the burden of proof and the burden of collecting evidence sufficient to reach a determination regarding responsibility, rest on the recipient under § 106.45(b)(5)(i). The final regulations do not permit the recipient to shift that burden to a respondent to prove consent, and do not permit the recipient to shift that burden to a complainant to prove absence of consent.

Id. at 30125 (emphasis added).

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§ 106.45 may not be circumvented... . by processing sexual harassment complaints under non-Title IX provisions Special Issues Highlight #4 of a recipient's code of conduct. The definition of "sexual harassment" in § 106.30 constitutes the conduct that these final regulations, implementing Title Revisiting Advisors and IX, address. . . . [W]here a formal complaint alleges conduct that meets the Title IX definition of "sexual harassment," a recipient must comply with § Cross-Examination 106.45. Id. at 30095.

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"Mitigation of Trauma"

The Department agrees with commenters that the truth-seeking function of cross-examination can be achieved while mitigating any re-traumatization of complainants because under the final regulations:

Cross-examination is only conducted by party advisors and not directly or personally by the parties themselves;

- upon any party's request the entire live hearing, including cross-examination, must occur with the parties in separate rooms;
 questions about a complainant's prior sexual behavior are barred subject to two limited
- exceptions;
- a party's medical or psychological records can only be used with the party's voluntary consent:
- recipients are instructed that only relevant questions must be answered and the decision-maker must determine relevance prior to a party or witness answering a crossexamination question; and
- recipients can oversee cross-examination in a manner that avoids aggressive, abusive questioning of any party or witness. ld. at 30313 (internal citations omitted, bullets added)

Purpose is not to Humiliate or Berate

[T]he essential function of cross-examination is not to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe a party's narrative in order to give the decisionmaker the fullest view possible of the evidence relevant to the allegations at issue.

Id. at 30319.

"Cross-examination" = Asking Questions TIŢĻE

The Department disagrees that cross-examination places a victim (or any party or witness) "on trial" or constitutes an interrogation; rather, crossexamination properly conducted simply constitutes a procedure by which each party and witness answers auestions posed from a party's unique perspective in an effort to advance the asking party's own interests. Id. at 30315 (emphasis added)

[C]onducting cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue; no legal or other training or expertise can or should be required to ask factual questions in the context of a Title IX grievance process Id. at 30319 (emphasis added).

The "Pause"

Before a complainant, respondent, or witness answers a cross-examination question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking crossexamination questions any decision to exclude a question as not relevant.

Id. at 30331 (emphasis added).

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espectful Questioning The Department acknowledges that predictions of harsh, aggressive,	Abusive Questioning Should Not be Tolerated [W]here the substance of a question is relevant, but the manner in
victim-blaming cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as an interrogation. However, recipients retain discretion under the final regulations to educate a recipient's community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (that apply equally to both parties) to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive.	which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically "leans in" to the witness's personal space), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.
<i>Id.</i> at 30316.	

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Advisors as Cross-Examiners

If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor. Similarly, if an advisor that the recipient provides refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct crossexamination on behalf of that party.

ld. at 30320

Assigned Advisor

The assigned advisor is not required to assume the party's version of events is accurate, but the assigned advisor still must conduct cross-examination on behalf of the party.

Id. at 30341.

Firing an Advisor

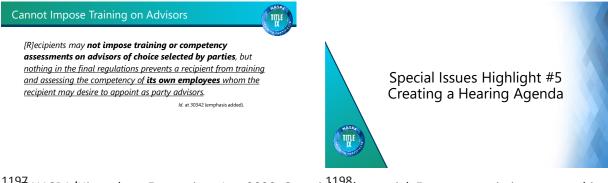
A party cannot "fire" an assigned advisor during the hearing, but the party correctly asserts that the assigned advisor is refusing to "conduct cross-examination on the party's behalf" then the recipient is obligated to provide the party an advisor to perform that function, whether that means counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor. If a party to whom the recipient assigns an advisor refuses to work with the advisor when the advisor is willing to conduct cross-examination on the party's behalf, then for reasons described above that party has no right of self-representation with respect to conducting cross-examination, and that party would not be able to pose any Id. at 30342 (emphasis added) cross-examination questions.



Whether advisors also may conduct direct examination is left to a recipient's discretion (though any rule in this regard must apply equally to both parties).

Id. at 30342 (emphasis added)

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§ 106.45(b)(1)(iv)

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;



(emphasis added)

A Sample Outline Of A Hearing Agenda

Start of Hearing, Introduction, Rules of Decorum, Technology specifics, etc.	and the second s
Opening Statements (if allowed – time limit?) · Opening Statement by Respondent Outsioning by Decision-Maker(s) · Questioning of Investigator (if required) · Questioning of Respondent · Questioning of Witnesses Hearing Break (for parties to finalize their cross-examination questions—time limit?) Cross-examination (and Direct-examination, if allowed) · Complianant's advisor questions the Ecomplainant and any Witnesses Becision-Maker(s) sak sam, follow-up questions Closing Statements (if allowed – Time limit?) · Consing Statement by Complianant · Closing Statement by Respondent	REMEMBER: Decision-makers must be trained on technology used in a hearing. Schools must create an audio or audiovisual recording, or transcript, of any live hearing.



Under this provision a recipient may, for instance, adopt rules that instruct party advisors to conduct questioning in a respectful, nonabusive manner, decide whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, place reasonable time limitations on a hearing, and so forth.

Id. at 30361.

Special Issues Highlight #6 Revisiting Non Appearance of Parties and Witnesses/ Unwillingness to Submit to Cross-Examination

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No Subpoena Power Over Witnesses

The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. . . . Where a witness cannot or will not appear and be cross-examined, that person's statements will not be relied on by the decision-maker . . . Id. at 30348

Non Submission to Cross-examination

The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. "Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.

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Non Submission to Cross-examination Cont'd

While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements. Id. at 30349 (internal citations omitted).

Non Submission to Cross-examination Cont'd

If parties do not testify about their own statement and submit to cro examination, the decision-maker will not have the appropriate context for the statement, which is why the decision-maker cannot consider that party's statements. This provision requires a party or witness to "submit to cross-examination" to avoid exclusion of their statements; the same exclusion of statements does not apply to a party or witness's refusal to answer questions posed by the decision-maker. If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements.

Id. at 30349 (internal citations omitted)

Non Submission to Cross-examination Cont'd

This is because cross-examination (which differs from questions posed by a neutral fact-finder) constitutes a unique opportunity for parties to present a decision-maker with the party's own perspectives about evidence. This adversarial testing of credibility renders the person's statements sufficiently reliable for consideration and fair for consideration by the decision-maker, in the context of a Title IX adjudication often overseen by laypersons rather than judges and lacking comprehensive rules of evidence that otherwise might determine reliability without crossexamination.

Id. at 30349 (internal citations omitted)

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Non-Appearance of Party/Advisor Where a Complainant Does Not Appear [A] party's advisor may appear and conduct cross-examination In cases where a complainant files a formal complaint, and then even when the party whom they are advising does not appear. does not appear or refuses to be cross-examined at the hearing, Similarly, where one party does not appear and that party's this provision excludes the complainant's statements, including advisor of choice does not appear, a recipient-provided allegations in a formal complaint. advisor must still cross-examine the other, appearing party Id. at 30347. "on behalf of" the non-appearing party, resulting in consideration of the appearing party's statements but not the nonappearing party's statements (without any inference being drawn based on the non-appearance). Id. at 30346.

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Where a Respondent Does Not Appear

[E]ven where a respondent fails to appear for a hearing, the decision-maker may still consider the relevant evidence (excluding statements of the nonappearing party) and reach a determination regarding responsibility, though the final regulations do not refer to this as a "default judgment." If a decision-maker does proceed to reach a determination, no inferences about the determination regarding responsibility may be drawn based on the nonappearance of a party.

Id. at 30349

Where No Party Appears

Non Submission to Cross-examination Cont'd

[W]here a party or witness does not appear at a live hearing or refuses to answer cross-examination auestions, the decision-maker

a determination without drawing any inferences about the

example, where a complainant refuses to answer cross-

available evidence and make a determination.

determination regarding responsibility based on the party or

examination auestions but video evidence exists showing the

underlying incident, a decision-maker may still consider the

must disregard statements of that party or witness but must reach

witness's failure or refusal to appear or answer questions. Thus, for

[E]ven if no party appears for the live hearing such that no party's statements can be relied on by the decision-maker, it is still possible to reach a determination regarding responsibility where nonstatement evidence has been gathered and presented to the decisionmaker.

Id. at 30361

Id. at 30328

1211

"Remaining Evidence"

§ 106.45(b)(6)(i) includes language that directs a decision-maker to reach the determination regarding responsibility based on the evidence remaining even if a party or witness refuses to undergo crossexamination, so that even though the refusing party's statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness's absence from the hearing or refusal to answer crossexamination (or other) questions. Thus, even if a party chooses not to appear at the hearing or answer cross-examination questions (whether out of concern about the party's position in a concurrent or potential civil lawsuit or criminal proceeding, or for any other reason), the party's mere absence from the hearing or refusal to answer questions does not affect the determination regarding responsibility in the Title IX grievance process.

"Remaining Evidence" Cont'd

[I]f the case does not depend on party's or witness's statements but rather on other evidence (e.g., video evidence that does not consist of 'statements' or to the extent that the video contains nonstatement evidence) the decision-maker can still consider that other evidence and reach a determination, and must do so without drawing any inference about the determination based on lack of party or witness testimony. This result thus comports with the Sixth Circuit's rationale in Baum that cross-examination is most needed in cases that involve the need to evaluate credibility of parties as opposed to evaluation of non-statement evidence.

Id. at 30328.

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Special Issues Highlight #7 Using Evidence to Make a Determination of Responsible/Not Responsible and Burden of Proof

§ 106.45(b)(7)

Requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator **to reach a determination** regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's grievance procedures for use in all formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and convincing evidence standard)...

Id. at 30054 (emphasis added)

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§ 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;

Recipient Bears the Burden of Gathering Evidence

[I]t is the recipient's burden to impartially gather evidence and present it so that the decision-maker can determine whether the recipient (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence selected by the recipient for making determinations.

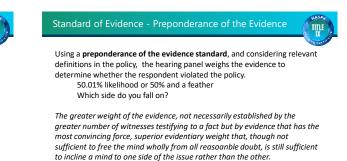
Id. at 30292 (emphasis added).

(emphasis added)

Burden of Proof

Whether the evidence gathered and presented by the recipient (i.e., gathered by the investigator and with respect to relevant evidence, summarized in an investigative report) does or does not meet the burden of proof, the recipient's obligation is the same: To respond to the determination regarding responsibility by complying with § 106.45 (including effectively implementing remedies for the complainant if the respondent is determined to be responsible).

Id. 30291 (emphasis added).



Bryan A. Gardner, Black's Law Dictionary 10, (2014), 1373

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Standard of Evidence – Clear and Convincing Recipients May Train Beyond Relevance Unlike court trials where often the trier of fact consists of a jury of laypersons • Evidence indicating that the thing to be proved is highly probable untrained in evidentiary matters, the final regulations require decision-makers to be or reasonably certain. Bryan A. Gardner, Black's Law Dictionary 10, (2014). 674 trained in how to conduct a grievance process and how to serve impartially, and · Certain facts must be proved by clear and convincing evidence, specifically including training in how to determine what questions and evidence are which is a higher burden of proof. This means the party must relevant. The fact that decision-makers in a Title IX grievance process must be persuade you that it is highly probable that the fact is true. trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and the CACI No. 201. More Likely True-Clear and Convincing Proof training required under § 106.45(b)(1)(iii) allows recipients flexibility to include substantive training about how to assign weight or credibility to certain types or categories of evidence, so long as any such training promotes impartiality and treats complainants and respondents equally. Id. at 30337 (emphasis added)

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Training Beyond Relevance Is Not Required

[T]he § 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.

[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient's training materials. Id. at 30293.

Rules on Weight of Evidence

A recipient may, for example, adopt a rule regarding the weight of 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.

Id. at 30294.

Weighing Evidence

Thus, for example, where a cross-examination auestion or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence. Id. at 30337 (emphasis added).

Second-Guessing from OCR on Weight

While the Department will enforce these final regulations to ensure that recipients comply with the § 106.45 grievance process, including accurately determining whether evidence is relevant, the Department notes that § 106.44(b)(2) assures recipients that, when enforcing these final regulations, the Department will refrain from second guessing a recipient's determination regarding responsibility based solely on whether the Department would have weighed the evidence differently.

Id. at 30337 (internal citation omitted, emphasis added)

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Credibility/Demeanor and Trauma

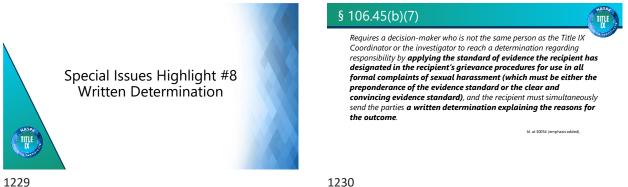
For the same reasons that judging credibility solely on demeanor presents risks of inaccuracy generally, the Department cautions that judging credibility based on a complainant's demeanor through the lens of whether observed demeanor is "evidence of trauma" presents similar risks of inaccuracy. The Department reiterates that while assessing demeanor is one part of judging credibility, other factors are consistency, plausibility, and reliability. Real-time cross-examination presents an opportunity for parties and decision-makers to test and evaluate credibility based on all these factors.

Id. at 30356 (internal citation omitted)

Evidence-From Relevance to Probativeness Weigh the impact of physical evidence. Consider role of photographic and videograp evidence.

- · Walk throughs?
- · Weigh the testimony of each party and witness
- Believability/Credibility
- [C] redibility determinations are not based solely on observing demeanor, but also are based on other factors (e.g., specific details, inherent plausibility, internal consistency, corroborative evidence). Mi at 30021. Reliability
- · Bias/Interest in the outcome/ "Prejudicial"
- Persuasiveness
- Consistency Opinion/Fact/Expert testimony
- "Judicial Notice"
- Weigh all the evidence: coherence//no prejudgment before judgement—avoid confirmation bias
- Combat sex stereotypes
 No improper inferences: ex. Refusal to testify.

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Written Determination Regarding Responsibility

The written determination must include-

- (A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
- (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;
- (C) Findings of fact supporting the determination;
- (D) Conclusions regarding the application of the recipient's code of conduct to the facts;
- (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 remedees 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
- (F) The recipient's procedures and permissible bases for the complainant and respondent to appeal. § 106.45(b)(7)(ii)(A-F)

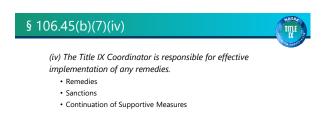
IRAC: Basic content of a report

- Issue(s)/Procedural Posture
- Rule (Policies/Allegations)
- · Analysis (Rationales)
- Conclusion(s)
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Potential Outcomes	
 Responsible Not Responsible Push? (Burden of proof) The final regulations require the burden of proof to remain on the recipient, and the recipient must reach a determination of responsibility against the respondent if the vidence meets the applicable standard of oridence. <i>u</i> = 1000 (1	REMEMBER: No premature dismissal of a formal complaint based on burden of proof (which is different than the three mandatory dismissal standards – alleged conduct does not meet the definition of sexual harassment, did not organist a person in the United States.) [A] recipient should not apply a discretionary dismissal in situations where the recipient does not know whether it can meet the burden of proof under § 106.45(b)(5)(). Decisions about whether the recipient's burden of proof has be more in corrold must be made in accordance with §§ 106.45(b)(5)(-f) - not prematurely made by persons other than the decision-maker, without following those adjudication and written determinations.

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Special Issues Highlight #10 **Revisiting Appeals**

§ 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.

Three required standards for appeal. You may have other standards, but they must apply equitably and equally



(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:

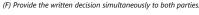
(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(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



Points on Appeals



- · What choices do we need to make?
 - · Who should decide appeals and what training do they need?
 - · How many appellate officers do we need?
 - · What are the procedures for appeals?
 - · How do appellate officers arrive at a determination?
 - · What "additional bases" could exist?



Tabletop Exercises and **Breakout Groups**

Breakout Groups

· You will be placed into a random breakout group with about 4-6 other people.

· Please send a chat message to Jill Dunlap if you need to be placed in the group with closed-captioning.

- Discuss the scenarios that were previously emailed.
- Please spend about 45 minutes discussing the scenarios as a group.
- · Please share how you plan to address these issues on your campus. This is a time to learn from each other!
- · We will come back together as a group and Peter & Jennifer will go over the scenarios.
- · Breakout rooms are not recorded.
- · Please make sure you are unmuted and video is on.

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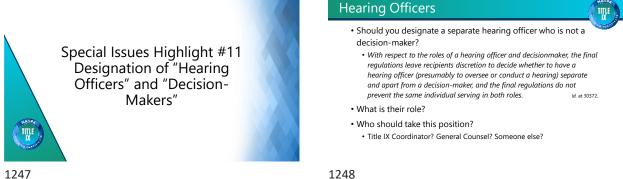
Scenario #1

ABC University's policies state that the Title IX Coordinator will serve as the "hearing officer" to "manage the logistics of the hearing process and to assist the hearing panel. The hearing officer is empowered to enforce rules of decorum as well." ABC University policies also specify that the Title IX Coordinator "is not a decision-maker." Per ABC University policies, the decision-making function is entrusted to a panel consisting of three individuals trained as Title IX decision-makers-two faculty members, and one student who is selected from a pool of available and appropriately trained student Title IX decision-makers.

Scenario #1— Ouestions

- · Can a Title IX coordinator be a "hearing officer" separate from the decision-maker(s)? Is there anything in the new Title IX regulations that prevents this? Is this a desirable or problematic approach?
- Who else might be a "hearing officer" (not a decision-maker)? The school's attorney? What, if anything, could be problematic with that approach?
- · Is there anything in the new regulations that prevents students from serving on a hearing panel? Will your campus allow students to serve on hearing panels as decision-makers? Why or why not?

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Decision-Makers



- · Who are appropriate decision-makers?
- Faculty, staff, students?

 [T]he final regulations do not preclude a recipient from allowing student leaders to serve in Title IX roles so long as the recipient can meet all requirements in § 106.45 and these final regulations, and leaves it to a recipient's judgment to decide under what circumstances, if any, a recipient wants to involve student leaders in Title IX roles. Id. at 30253.

 Outside decision-makers or "adjudicators"? What about law firms? • § 106.8(a) specifies that the Title IX Coordinator must be an "employee" designated and authorized by the recipient to coordinate the recipient's efforts to comply with Title IX obligations. No such requirement of employee status applies to, for instance, serving as a decision-maker on a hearing panel. Id. at 30253 n.1037

- No bias or conflicts of interest
- Training

Decision-Maker Training Mandates

[T]he decision-maker will be trained in how to conduct a grievance process, including

- · How to determine relevance
- · How to apply the rape shield protections
- · How . . . to determine the relevance of a cross-examination question before a party or witness must answer.

Id. at 30353 (bullets added).

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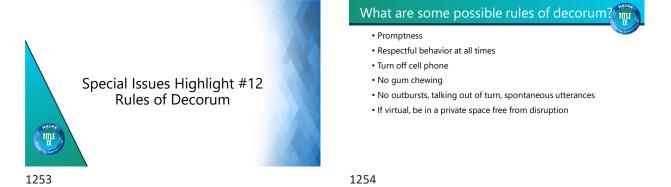
Scenario #2

In a Title IX hearing, Complainant's advisor, Ad Visor, is cross-examining Respondent in a live in-person hearing where both parties are present. Upon hearing Respondent's answer to Ad Visor's question, Complainant yells out "That's a lie!'

Scenario #2-Ouestions

- How should a decision-maker address this situation? Is the spontaneous utterance "evidence"?
- Should a campus adopt hearing rules addressing spontaneous utterances/ decorum in the course of a hearing? If so, what might these rules look like?
- What are ways in which rules of decorum might differ for an inperson hearing versus a virtual hearing?
- Who enforces the rules of decorum at the live hearing?

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Advisor/Party Interactions During A Hearing

The Department notes that the final regulations, § 106.45(b)(5)(iv) and § 106.45(b)(6)(i), make clear that the choice or presence of a party's advisor cannot be limited by the recipient. To meet this obligation a recipient also cannot forbid a party from conferring with the party's advisor, although a recipient has discretion to adopt rules governing the conduct of hearings that could, for example, include rules about the timing and length of breaks requested by parties or advisors and rules forbidding participants from disturbing the hearing by loudly conferring with each other.

Id. at 30339 (emphasis added).

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Scenario #3

Scenario #3 Continued

Before Respondent can answer and before the decision-maker can take a pause to determine if the question is relevant, Att Orney, the advisor for Respondent states:

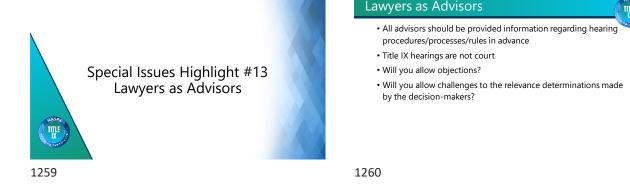
Att Orney: "Objection. Compound and Argumentative. This question also calls for irrelevant information and I direct my advisee not to answer.

The decision-maker then asks Law Yer to offer a response to the objection. Law Yer: "This question is relevant because it sets up the facts on what happened on the night in question and it shows a pattern of bad behavior by Respondent involving other victims."

Scenario #3-Questions

- Is this utterance by Law Yer a "question?"
- Will you allow rhetorical, compound or argumentative questions? Why or why not?
- Is this a question seeking relevant information? Why or why not? • Should you, the decision-maker, ever take evidence of any "prior bad acts" of the parties into account?
- · How will you address speaking objections, if at all?
- If you are unsure if a question is or is not relevant, what should you do?
- Do you have actual notice of a potential Title IX violation involving Witness 1?
- How will you manage issues relating to lawyers as advisors that may arise in a hearing?

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At a Title IX hearing in which you are a decision-maker, Complainant's advisor, La Yer, is posing questions through cross-examination to Respondent. Law Yer asks Law Yer: "On the night in question, before you engaged in sexual misconduct with my client, you were seen "feeding shots" to Witness 1 according to several witnesses. Witness 1 stated to the investigator that you made Witness 1 feel extremely uncomfortable with repeated sexual advances that night. Witness 1 has attested to this here today [Note: This is true.] and has submitted to crossexamination. In fact, although Witness 1 has not submitted any formal complaints against you, Witness 1 believes you may have "taken advantage" of Witness 1 at a party in on-campus housing last semester by touching Witness 1 inappropriately when Witness 1 was too intoxicated to give consent. Complainant believes you have engaged in a pattern of doing this to other individuals. Did you inappropriately touch Witness 1 last semester or at any time while Witness 1 was too intoxicated to give consent?



Challenging the Relevance Determination

The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing. If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenaina the relevance determination (after receiving the decision-maker's explanation) during the hearing. Id. at 30343 (emphasis added)

Scenario #4

In a Title IX hearing, Complainant is asked the following question by Respondent's advisor on cross-examination:

"Isn't it true that you had sexual relations with Respondent's roommate and Witness 3 in the month before the alleged incident with Respondent occurred?"

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Scenario #4— Questions

- Is this a relevant question? Why or why not?
- · When are questions about a complainant's prior sexual history allowed?
- · How will you communicate "rape shield" provisions to advisors prior to a hearing?

Special Issues Highlight #14 Relevance & Rape Shield Protections

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Relevance

[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

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)

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)

Decision-Maker to Determine Relevance

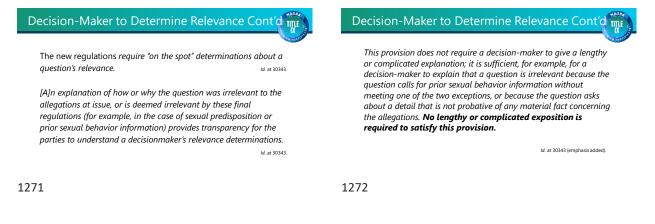
We have also revised § 106.45(b)(6)(i) in a manner that builds in a "pause" to the cross-examination process; before a party or witness answers a cross-examination question, the decisionmaker must determine if the question is relevant.

Id. at 30323.

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Decision-Maker to Determine Relevance Cont'd Decision-Maker to Determine Relevance Cont'd Only relevant cross-examination and other questions may be asked Thus, for example, where a cross-examination question or piece of of a party or witness. Before a complainant, respondent, or witness evidence is relevant, but concerns a party's character or prior bad answers a cross-examination auestion, the decision-maker must acts, under the final regulations the decision-maker cannot exclude first determine whether the question is relevant and explain any or refuse to consider the relevant evidence, but may proceed to decision to exclude a question as not relevant. objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, Id. at 30331. so long as the decision-maker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence. Id. at 30337 (internal citation omitted)

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Decision-Maker to Determine Relevance Cont'd

If a party or witness disagrees with a decision-maker's determination that a question is relevant, during the hearing, the party or witness's choice is to abide by the decision-maker's determination and answer, or refuse to answer the question, but unless the decision-maker reconsiders the relevance determination prior to reaching the determination regarding responsibility, the decisionmaker would not rely on the witness's statements. Id. at 30349 (internal citations omitted)

Decision-Maker to Determine Relevance Cont'd

The party or witness's reason for refusing to answer a relevant question does not matter. This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or email thread) and one party refuses to submit to cross-examination and the other does submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on Id. at 30349 (internal citations omitted)

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Scenario #5 Scenario #5— Questions Is this a relevant guestion? In a Title IX hearing, Respondent is asked the following question by • When are questions about a respondent's prior sexual Complainant's advisor on cross-examination: history allowed? "Isn't it true that you got into trouble your senior year of high school for sending nude photos of Complainant to your friends after you The Department reiterates that the rape shield language . . . does hooked up with Complainant in high school?" not pertain to the sexual predisposition or sexual behavior of respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.

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Closing Thoughts

- "Policy should reflect practice and practice should reflect policy."
- · Remember, any rules or procedures you implement must 1. Not run afoul of the final regulations
 - 2. Must be equally applied to the parties

Closing Thoughts

• "Looking around corners."

Tuning

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Thank You...

Ouestions?

NASPA Student Affairs Administrators in Higher Education

LIVE SESSION on Title IX Investigations

October 24, 2020

Peter Lake, Professor of Law, Charles A. Dana Chair, and Director of the Center for Excellence in Higher Education Law and Policy, Stetson University College of Law Dr. Jennifer R. Hammat, Dean of Students University of Southern Indiana



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This Live Session is Designed for...

TRACK 1 – Title IX Coordinators
TRACK 3 – Title IX Investigators



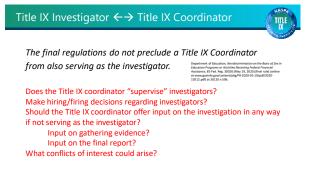


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Special Issues Highlight #1 Relationships of Investigator to Other Title IX Operatives



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Written Notification to Parties **BEFORE** Any Initial Interview with the Respondent

- · Notice of the school's grievance process
- The opportunity, if any, to engage in an informal resolution process
- · Key details of the alleged sexual harassment
 - Who was involved in the incident Date and time of the incident, if know
 - · Location, if known
- The alleged misconduct that constitutes sexual harassm
- · A statement that the respondent is presumed not responsible at the outset of the
- process and can only be found responsible after the grievance concludes
- · A statement that the parties are entitled to an advisor of their choice
- · A statement that the parties can request to inspect and review certain evidence
- · Any conduct rules, if they exist, that prohibit providing knowingly false information tatements during the grievance process Notice should be provided to allow the respondent

enough time to prepare before the initial interview.

Remember the Presumption of Non-Responsibility

A recipient's grievance process must-

Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

§ 106.45(b)(1)(iv)(emphasis added)

1296



Special Issues Highlight #3 Concurrent Law Enforcement Investigation/Police Reports

Concurrent Law Enforcement Activity

Further, subject to the requirements in § 106.45 such as that evidence s 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.

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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 Is it possible to be told to "stand down" in regards to gathering. However, because legal standards for criminal conducting your Title IX investigation by police or other legal investigations are different, police investigations or reports may not authority? What about pending litigation? be determinative of whether harassment occurred under Title IX What should you do? and do not relieve the school of its duty to respond promptly and effectively." Id. at 30099 n. 467 (emphasis added).

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Special Issues Highlight #5 Definition of "Consent"

Consent

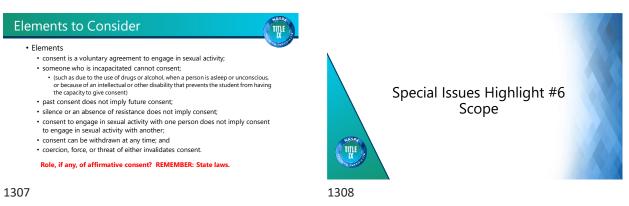
[T]he Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault. Id. at 30125.

You should be well-versed on the definition of consent contained within your specific campus policies. Address specific issues of consent related to the new definition of sexual harassment.

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(T)
f the § 106.30 definition of sexual harassment ssault" as used in the Clery Act, 20 U.S.C. /hich, in turn, refers to the FBI's Uniform Crime n (FBI UCR) and includes forcible and nonforcible as rape, fondling, and statutory rape which of 'without the consent of the victim."

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§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. . . "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

> What does your campus policy state specifically regarding the scope of "education programs or activities?"

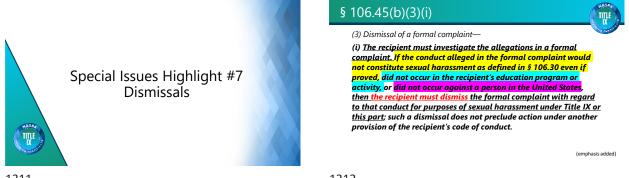
> > (emphasis added)

TIŢĻE

Example of "Scope" in a Policy

This policy applies to ABC University students, employees, and third-parties located within the United States both on and off campus, as well as in the digital realm. Off-campus coverage of this policy is limited to incidents that occur on employee-led trips, at internship or service learning sites, and college-owned properties (including buildings operated by Registered Student Organizations), or in any context where the University exercised substantial control over both alleged harassers and the context in which the alleged harassment occurred.

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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.

§ 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.

(emphasis added)



Whether sexual harassment occurs in a recipient's education program or activity is a fact-specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred.

Id. at 30204 (emphasis added)

More on Dismissals

Example: the Title IX Coordinator receives a formal complaint for alleged sexual misconduct that occurred between two students in an off-campus apartment complex where the university had no substantial control over the context or the alleged harasser.

- Is this within the scope of the policy example described above? If not, who dismisses? Regulations say the "recipient." Who specifically?
- · Remember, a formal complaint must be investigated.
- Will there be a "pre-investigation" inquiry/"fact-specific" inquiry by an investigator to determine?
- · What "level" of investigation is required here?
- · Will a decision-maker have to make a determination?

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Special Issues Highlight #8 Investigating New Issues That Arise In an Investigation

§ 106.45(b)(2)(ii)

(ii) If, in the course of an investigation, the recipient decide 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.

(emphasis added)

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What has happened?

- · A formal complaint has been received (and signed).
- · An initial meeting with the Title IX Coordinator has happened to provide support measures.
- · A notice of investigation has gone out to both parties.
- The case has been assigned to you (the investigator) or as the Title IX Coordinator, you are the investigator, or you have outsourced the investigation
- · The investigator has read the formal complaint.
- · Which route for investigations has your school opted for? Investigations with or without credibility assessments?

Preparing your questions pre-interview



- · Read the Formal Complaint
 - · Write out the questions you have about the report on first read.
- · Read the Formal Complaint again.
 - · What additional questions do you have about the incident narrative.
 - · Who is identified in the Formal Complaint you feel you need to interview.
- · What questions do you have for those individuals?
- Have all of these typed out ahead of the first interview.
- · Revise and update with additional questions and witnesses as you go.

Crossover interview techniques

- Title IX investigation framework is good practice for other kinds of investigations:
- Code of Conduct violations
- · Threat assessment or BIT concerns investigations
- · Educational conversations with student
- · Academic Integrity case investigations
- · Hazing investigations

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Remember your role

You are NOT a party's lawyer, advisor, counselor, parent, or friend You ARE an investigator and a facilitator You ARE free from bias You ARE free from prejudgment You ARE interested in finding out fact about the incident You ARE interested in the truth

Being Impartial ≠ Being a Robot You can be a neutral fact-finder and still show empathy and kindness. Investigation spaces should be judgement free zones

Follow-up questions

- · When seeking clarification after the party's initial recollection of the event, try to ask questions that build confidence and put them at ease.
- "You said you left the party around 1am, is that correct?"
- · "You said you recalled having three cups of 'red solo cup' punch, is that right?"
- · If they are describing a location, it might be helpful to ask them to sketch out the room for you (if it is a residence hall, you should have those schematics on your computer to pull up/print out).

Clarifications

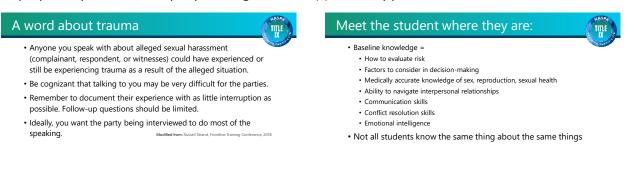
- When asking harder questions about the order of events, or specifics about the conversation or activities, you may run into a series of "I don't know" or "I can't remember" statements. That's ok.
- · Reassure the party its ok that they cannot remember or don't know.
- · You can move to another question or kind of questioning.
- If you hit a memory gap, ask them some sensory questions to see if it triggers any memories. Often there are memories they cannot access unless you ask the question from a different lens.

Sense and Feel questions

- "Can you draw what you experienced?"
- "What were you feeling when XYZ occurred?"
- "What did you smell?"
- "Can you show me?"
- · "What were you feeling when
- you were kissing?"
- "Tell me more about that."
- "What did you hear?"
- "Tell me about his/her eyes."
- "What can you not forget?"

ce: Russell Strand. Frontline Training Conference. 2018

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Ask them for evidence they want reviewed

- Inculpatory evidence
- Exculpatory evidence
- Relevant to the allegations
- Rape shield law protections
- Witnesses to interview
- · If they know of others with similar experiences
- Character testimony is permitted

Why would you consider conducting an investigation without assessing credibility

- TITLE IX
- Cross purpose. The purpose of the hearing is to determine credibility of all the parties and all the evidence. If the investigator does this, one could later assert bias against the investigator for making their assessment of the parties and/or the evidence.
- Time. Investigations that accept information, gather documents, and statements, and provide a relevance review of said documents would make for an effective summary of the investigative materials presented for the hearing to sort through.
- Repetition. Anything anyone says to you, they will have to say again at the hearing and be subject to cross-examination, or it won't be considered.



Tabletop Exercises and **Breakout Groups**

Breakout Groups

- · You will be placed into a random breakout group with about 4-6 other people.
 - Please send a chat closed-captioning. a chat message to Jill Dunlap if you need to be placed in the group with
- · Discuss the scenarios that were previously emailed. · You can start with either scenario
- · Please spend about 60 minutes discussing the scenarios as a group.
- Please share how you plan to address these issues on your campus. This is a time to learn from each other!
- · We will come back together as a group and Peter & Jennifer will go over the scenarios.
- · Breakout rooms are not recorded.
- · Please make sure you are unmuted and video is on.

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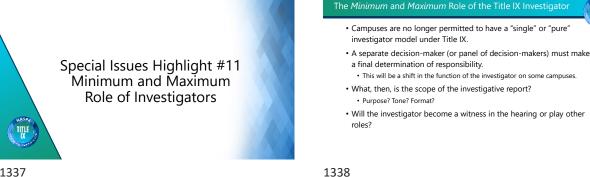
Scenario #1

In response to the new Title IX regulations, ABC University is moving from a single-investigator model to a hearing panel model. The Title IX coordinator has called a zoom meeting with all Title IX personnel to discuss making changes to the institution's policies and procedures. The Title IX coordinator begins to discuss the role of the investigators under the new grievance procedures and suggests that the investigator's role will be changing in some significant ways and some decisions must be made as to the role of the investigators.

Scenario #1— Ouestions

- What significant changes to the investigative function, if any, should be considered?
- Should the investigator address credibility of parties and witnesses in the final investigative report? Why or why not? Should the investigator make recommendations on findings of responsibility in
- the final investigative report? Why or why not?
- · Should the investigator make recommendations as to the sanctions/remedies that should be imposed? Why or why not?
- · Should the Title IX coordinator have any input in the investigation process and/or report writing? Why or why not?
- Should the investigator be called as a routine, or first, witness in Title IX hearings? Why or why not?

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- · Gather all relevant information regarding an allegation of sexual harassment.
- · Interview all relevant parties
- · Collect and organize relevant evidence
- Credibility Assessments?
- Weighing Evidence?
- · Write a detailed investigative report
- Make recommendations for interim measures or accommodations?
- · Findings of Responsibility?



A recipient's grievance process must-

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.

(emphasis added)

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Scenario #2

You are an investigator for ABC University investigating an allegation of nonconsensual sexual contact between Complainant and Respondent, two Freshmen students at ABC. Complainant alleges Complainant was intoxicated and unable to give consent at the time the sexual contact occurred. Complainant submits as evidence a letter from a high school that Respondent and Complainant both attended. The letter from the high school shows a finding of responsibility against Respondent for sending nude photos of Complainant while Complainant was passed out at a party via text message to a friend. Complainant also submits a letter from a juvenile court showing a judgement against Respondent for the "sexting" act and penalties imposed on Respondent including a fine, mandatory counseling and community service.

Scenario #2— Questions

- Should this evidence be included in the "universe of evidence" given to both parties and their advisors for their response prior to the finalization of the final investigative report?
- Is this relevant evidence that should be included in the final report? Why or why not? How would you determine this?

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Special Issues Highlight #12 "Universe of Evidence," "Relevance" and Rape Shield Protections

§ 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.

§ 106.45(b)(5)(vi) Cont'd

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 (emphasis added)

§ 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.

(emphasis added)

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"Universe of Evidence"

[T]he universe of evidence given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence directly related to the allegations; determinations as to whether evidence is "relevant" are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii) (requiring creation of an investigative report that "fairly summarizes all relevant evidence").

Is this essentially a "mini notice-and-comment" process?

Submission of Evidence and Sharing of Responses

A recipient may require all parties to submit any evidence that they would like the investigator to consider prior to when the parties' time to inspect and review evidence begins. Alternatively, a recipient may choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence under § 106.45(b)(5)(vi) and also an opportunity to respond to the other party's additional evidence. Similarly, a recipient has discretion to choose whether to provide a copy of each party's written response to the other party to ensure a fair and transparent process and to allow the parties to adequately prepare for any hearing that is required or provided under the grievance process. Id. at 30307 (emphasis add

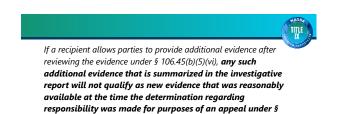
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Not Allowing Parties to Respond to Additional Evidence

If a recipient chooses not to allow the parties to respond to additional evidence provided by a party in these circumstances, the parties will still receive the investigative report that fairly summarizes relevant evidence under § 106.45(b)(5)(vii) and will receive an opportunity to inspect and review all relevant evidence at any hearing and to refer to such evidence during the hearing, including for purposes of cross-examination at live hearings under § 106.45(b)(5)(vi).

Id. at 30307 (emphasis added)

Id. at 30248 n.1021 (emphasis added)

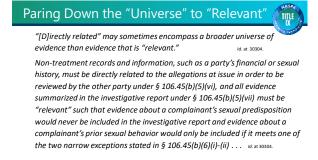


Id. at 30307 (emphasis added)

106.45(b)(8).



Should investigators incorporate any party's responses to the "universe of evidence" (in whole or in part) into the final report?



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Relevance	Relevance
[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.	The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.
<i>Id.</i> at 30354.	

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Relevance Cont'd

The new 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).





[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 (emphasis added).



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)

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

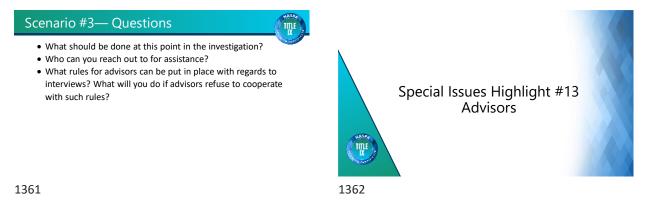
2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove consent.

Id. at 30336 n.1308 (emphasis added)

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Possible Format for the Final Investigative Report	Scenario #3
I. BACKGROUND AND REPORTED CONDUCT II. JURISDICTION III. SCOPE OF THE INVESTIGATION IV. RELEVANT POLICY AND LAW PROHIBITING SEXUAL HARASSMENT (INCLUDING SEXUAL ASSAULT AND RETALIATION): V. INVESTIGATION AND SUMMARY OF RELEVANT EVIDENCE A. Statements of Parties and Witnesses B. Documentary Evidence VL ANALYSIS? VII. CONCLUSION	You, a Title IX investigator, are conducting an interview with a party in a Title IX grievance process. This party is a faculty member who is accompanied to the interview by a union representative and a personal attorney. You find it very difficult to interview the party because of the back and forth talk between the party and the party's advisors, who at times audibly offer conflicting advice to the party. The campus allows both parties to have two advisors present at the interviews and subsequent hearing (the other party in this matter will have a disability advocate and a personal attorney). Eventually the interview process becomes untenable because of interchanges among the advisors and party; you stop the interview mid-way through.
Covered in-depth in the module on report-writing.	

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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; (emphasis added) TIŢĻE

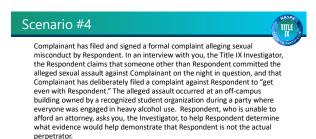
The Department believes that requiring recipients to allow both parties to have an advisor of their own choosing accompany them throughout the Title IX grievance process, and also to participate within limits set by recipients, is important to ensure fairness for all parties.

Id. at 30298 (emphasis added)

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Advisors

- · Advisor of party's choice
 - · Could be a parent, friend, an attorney, an employee of the college
 - · Could even be a witness in the investigation
- · Schools cannot require a particular type of advisor, nor can they require an advisor to have a specific type of training
- · Schools may provide resources to advisors to better understand the process
- · Schools may implement limits for participation by advisors in meetings and rules of decorum for hearings as long as they are applied equally



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Scenario #4-Questions

- Who bears the burden of evidence in this situation?
- What type of exculpatory evidence could support Respondent's claims? What type of inculpatory evidence might undermine Respondent's claims?
- In light of "rape shield" protections, how might Complainant be questioned regarding this information in a follow-up interview? May you "help" the Respondent? How will you respond to Respondent's
- request?
- Might you now have actual notice that the Respondent is a Complainant?



§ 106.45(b)(7)

Requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's grievance procedures for use in all formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and convincing evidence standard) . . .

§ 106.45(b)(1)(ii)

(ii) Require an objective evaluation of all relevant evidenceincluding 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;

(emphasis added)

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Id. at 30054 (emphasis added)

It is the recipient's burden to impartially gather vidence and present it so that the decision-maker can etermine whether the recipient (not either party) has nown that the weight of the evidence reaches or falls nort of the standard of evidence selected by the ecipient for making determinations.	The Department agrees with commenters that even so-called "he said/she said" cases often involve evidence in addition to the parties' respective narratives, and the § 106.45 grievance process obligates recipients to bear the burden of gathering evidence and to objectively evaluate all relevant evidence, both inculpatory and exculpatory, including the parties' own statements as well as other evidence.

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Objective Evaluation of Evidence

§ 106.45 does not set parameters around the "quality" of evidence that can be relied on, § 106.45 does prescribe that all relevant evidence, inculpatory and exculpatory, whether obtained by the recipient from a party or from another source, must be objectively evaluated by investigators

Id. at 30105 (emphasis added)

Data Gaps

deficiencies.

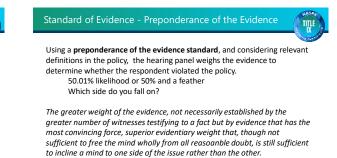
[E]vidence subject to inspection and review must include inculpatory and exculpatory evidence whether obtained from a party or from another source. The Department does not believe it is necessary to require investigators to identify data gaps in the investigative report. because the parties' right to inspect and review evidence, and review and respond to the investigative report, adequately provide opportunity to identify any perceived data gaps and challenge such

Id. at 30248 (emphasis added)

Burden of Proof

Whether the evidence gathered and presented by the recipien (i.e., gathered by the investigator and with respect to relevant evidence, summarized in an investigative report) does or does not meet the burden of proof, the recipient's obligation is the same: To respond to the determination regarding responsibility by complying with § 106.45 (including effectively implementing remedies for the complainant if the respondent is determined to be responsible).

Id. at 30291 (emphasis added)

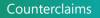


Bryan A. Gardner, Black's Law Dictionary 10, (2014), 1373

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Standard of Evidence – Clear and Convincing • Evidence indicating that the thing to be proved is highly probable or reasonably certain. Bryan A. Gardner, Black's Law Dictionary 10, (2014). 674 · Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must Special Issues Highlight #15 persuade you that it is highly probable that the fact is true. Counterclaims CACI No. 201. More Likely True—Clear and Convincing Proof

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The Department cautions recipients that some situations will involve counterclaims made between two parties, such that a respondent is also a complainant, and in such situations the recipient must take care to apply the rape shield protections to any party where the party is designated as a "complainant" even if the same party is also a "respondent" in a consolidated grievance process.

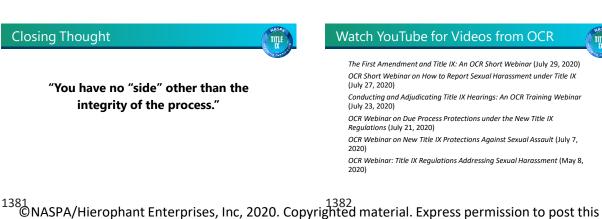
Id. at 30352 (internal citation omitted, emphasis added)



Closing







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Jan Barrier (1997)	A Reminder
	All Title IX personnel should serve in their roles impartially.
OCR Title IX website launched on August 14, 2020.	All Title IX personnel should avoid
	 prejudgment of facts
https://sites.ed.gov/titleix/	• prejudice
	 conflicts of interest
	• bias
	 sex stereotypes

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