NASPA
Student Affairs Administrators in Higher Education

TRAINING MATERIALS Track 1: Title IX Coordinators

Spring 2023

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NASPA
Student Affairs Administrators in Higher Education

Introduction: Critical Issues in Title IX and Sexual Misconduct

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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

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.

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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

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Some Key Features of the New Regulations

- 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

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Some Key Features of the New Regulations

- Choice in evidentiary standard preserved
  - "Preponderance of the evidence" or "clear and convincing"
- "Mandated reporters" supplants "responsible employees"
- Changes in jurisdiction and scope of Title IX
  - Off campus; study abroad
- Emphasis on "impartial"' processes free from bias and conflicts of interest
- "Supportive measures" supplants "interim measures"
- Separation of the decision-maker from other tasks
  - No more single-investigator model, but single decision-maker permitted.
- Appeals required
- Training mandates
- "Not a court"/ "Not a criminal justice system"

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Training Mandates Specific to the New Regulations

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

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

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

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Posting Training Materials to Your Website

"All materials used to train Title IX personnel:

- Must not rely on sex stereotypes,
- Must promote impartial investigations and adjudications of formal complaints of sexual harassment,
- Must be maintained by the school for at least 7 years,
- Must be publicly available on the school's website; if the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public."

"Schools must publish training materials that are up to date and reflect the latest training provided to Title IX personnel."

"If a school's current training materials are copyrighted or otherwise protected as proprietary business information (for example, by an outside consultant), the school still must comply with the Title IX Rule. **This may mean that the school has to secure permission from the copyright holder to publish the training materials on the school's website**."

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

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Permission from NASPA and Speakers

TRAINING MATERIALS

We will give each institution permission to post training materials (PowerPoint slide handouts, other handouts) to their website upon request. This permission must be granted from NASPA in writing before posting any training materials to your institution's website.

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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. Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30567.

We assume that all recipients will need to revise their grievance procedures. . . . At the IHE level, we assume this will take 12 hours for the Title IX Coordinator and 28 hours for an attorney with an additional four hours for an administrator to review and approve them. Id.

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.

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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.**

Budgetary and operational concerns?

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Prevalence Data

See generally Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (final rule) at 30075-83.

Postsecondary Institutions

One in five college women experience attempted or completed sexual assault in college; some studies state one in four. One in 16 men are sexually assaulted while in college. One poll reported that 20 percent of women, and five percent of men, are sexually assaulted in college.

Id. at 30076 (internal citations omitted).

62 percent of women and 61 percent of men experience sexual harassment during college.

Id. at 30076 (internal citation omitted).

Among undergraduate students, 23.1 percent of females and 5.4 percent of males experience rape or sexual assault; among graduate and undergraduate students 11.2 percent experience rape or sexual assault through physical force, violence, or incapacitation; 4.2 percent have experienced stalking since entering college.

Id. at 30076 (internal citations omitted).

A study showed that 63.3 percent of men at one university who self-reported acts qualifying as rape or attempted rape admitted to committing repeat rapes.

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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 women who reported sexually coercive experiences experienced the incident during their first four semesters on campus.

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.

Id. (internal citations omitted).

Prevalence Data – Postsecondary Institutions Cont'd

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.

Id. (internal citation omitted).

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 students at most major research universities reports being sexually harassed by a faculty member.

Id. (internal citations omitted).

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.

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Trauma-Based Approaches

Avoid or Use?

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

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Trauma

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

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

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Trauma Cont'd

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

Id. at 30069 (internal citation omitted).

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Trauma Cont'd

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

Id. (internal citation omitted).

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"Victim"/"Survivor" or "Perpetrator"

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

Id. at 30031.

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Our Mission Has Not Changed…

Enacted by Congress, Title IX seeks to reduce or eliminate barriers to educational opportunity caused by sex discrimination in institutions that receive federal funding.

This is the unchanged mission of Title IX!

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Title IX: FINAL RULE

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

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

Id. at 30026.

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Summary of Basic Requirements for a Grievance Process

A summary of the 10 elements of § 106.45(b)(1)(i-x) *Basic Requirements for a Grievance Process.*

1. Equitable treatment of parties/provision of remedies
2. Objective evaluation of evidence
3. No bias or conflicts of interest/training of Title IX personnel
4. Presumption of non-responsibility of respondent until 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 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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"Staying in Your Lane"

§ 106.45 may not be circumvented…

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

Id. at 30095.

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Retaliation

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

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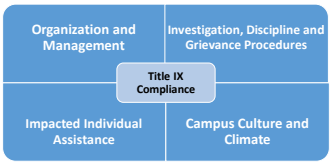
Four Corners Model

Lake's Four Corners of Title IX Regulatory Compliance



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Timing

These regulations slated to go into effect on August 14, 2020. This date is potentially subject to modification. Consult your attorneys.

The Dept. of Education has stated they will not enforce these regulations retroactively.

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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

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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

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NASPA
Student Affairs Administrators in Higher Education

Detailed Legal Foundations and the New Regulations

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NASPA TITLE IX TRAINING CERTIFICATE

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This Module is Designed for:

TRACK 1 – Title IX Coordinators

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

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What is Title IX? What is its mission?

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

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Title IX: FINAL RULE

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

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

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

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Title IX: FINAL RULE

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

Id. (emphasis added).

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Title IX: FINAL RULE

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

Id.

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Legal Foundations: How did we get here?

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Why do I need to know so much about law?

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Title IX Before and After April 2011

Before:

Campuses focused on equality in sports, admissions, etc.

April 2011 (Obama Administration):

Dear Colleague Letter released as a "reminder" that Title IX covers sexual harassment

Yale Investigation

The awakening of the Dept. of Education (DOE)

After April 2011 :

Numerous investigations/Substantial guidance

April 2014 FAQ document and White House Task Force to Protect Students from Sexual Assault report *Not Alone*

April 2015 guidance on the role of the Title IX Coordinator

The rise of vendors, experts, etc.

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Title IX and the Trump Administration

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

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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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The New Regulations and Previous Guidance

- Uncertain features of pre-existing guidance and status of "commentary" and blog posts.
  - New regulatory dynamics….
- What about "straddle" cases?
- DOE has said they will not enforce new regulations retroactively.

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New Regulations and Court Activity

Judicial activism and inactivism

- Lower courts and SCOTUS
- 6th Circuit in *Baum*
- 7th Circuit in *Purdue*
- 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 30115.
- 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?

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Challenges to the New Regulations

- 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 www.newsweek.com/betsy-devos-lawsuit-title-ix-rule-changes-sexual-harassment-1510147).
  - ACLU/NWLC
  - State Attorneys General
- 2020 General Election

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

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

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Federal Regulators: Two Key Players

Department of Education
Enforcement through Office for Civil Rights (regional offices)
Historical K-12 focus
Department of Justice
Largely dormant in higher ed for years
"Crime fighters" dealing with violence, drugs, weapons, etc.
[DOJ does not seem to have played a large role in the new Title IX regulations.]

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The Courts v. The Regulators

The Courts—Civil Action Under Title IX

- The US Supreme Court allows actions in court to pursue damages for Title IX (but with many limitations).
  - *Gebser v. Lago Vista Independent School District,* 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998).
  - *Davis v. Monroe County Bd. of Ed.,* 526 U.S. 629 (1999).
- Victims as "plaintiffs" face tough standards
  - Knowledge (Reporting)
  - Pattern
  - Objective
  - Deliberate indifference
- The Supreme Court has hesitated to:
  - Apply Title IX to a "single act"
  - Broadly protect LGBTQ rights, but see the recent *Bostock* Title VII decision (more to come on this…)

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Important Note!

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

Know when to talk with counsel.

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The Courts v. The Regulators

The Regulators

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

53

Whose View of Title IX Wins in the End?

Showdowns are coming!

CONGRESS

COURTS REGULATORS

→ Court cases are already testing some issues

54

Free Speech and Academic Freedom in the New Regulations

55

New Regulations and Free Speech/Academic Freedom

The § 106.30 definition [of sexual harassment] *captures categories of misconduct likely to impede educational 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 . . .*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30142.

Precisely because expressive speech, and not just physical conduct, may be restricted or punished as harassment, it is important to define actionable sexual harassment under Title IX in a manner consistent with respect for First Amendment rights, and principles of free speech and academic freedom, in education programs and activities. . . . *Id.*

The Department believes, however, that severity 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 academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient's community.

Id. at 30154.

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More on the First Amendment

The Supreme Court has not squarely addressed the intersection between First Amendment protection of speech and academic freedom, and non-sex discrimination Federal civil rights laws that include sexual harassment as a form of sex discrimination (i.e., Title VII and Title IX). With respect to sex discriminatory conduct in the form of admissions or hiring and firing decisions, for example, prohibiting such conduct does not implicate constitutional concerns even when the conduct is accompanied by speech, and similarly, when sex discrimination occurs in the form of non-verbal sexually harassing conduct, or speech used to harass in a quid pro quo manner, stalk, or threaten violence against a victim, no First Amendment problem exists. However, with respect to speech and expression, tension exists between First Amendment protections and the government's interest in ensuring workplace and educational environments free from sex discrimination when the speech is unwelcome on the basis of sex.

Id. at 30161-62 (internal citations omitted).

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"Sex"

58

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What is "sex" for Title IX purposes?

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

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

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

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

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

2001 Guidance pg. 3:

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

(emphasis added)

60

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

61

2018 OCR Statement

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

"Title IX also prohibits gender-based harassment, which is unwelcome conduct based on a student's sex, harassing conduct based on a student's failure to conform to sex stereotypes."

U.S. Dept. of Educ. Office for Civil Rights, *Sex-based Harassment*, https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue01.html (last visited July 8, 2020) (emphasis added).

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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.*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30177 (emphasis added).

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SCOTUS/*Bostock* and Implications for Title IX

Bostock v. Clayton County (June 15, 2020)

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

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

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Bostock 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."

65

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."

66

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."

67

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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"Due Process"

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Due Process

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

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Due Process

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

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

71

Due Process Cont'd*

[T]he final regulations prescribe a grievance process grounded in principles of due process for the benefit of both complainants and respondents, seeking justice in each sexual harassment situation that arises in a recipient's education program or activity.

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

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

Due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.' *Mathews*, 424 U.S. at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

Instead, due process 'is flexible and calls for such procedural protections as the particular situation demands.' *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

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

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

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More Due Process

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

73

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

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

Id. at 30097.

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

Id. at 30099.

What is a "court?"

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

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"Deliberate Indifference"

75

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

3-Part Framework

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

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30032 (numeration and emphasis added).

4. Promptness
5. Equitableness
6. Reasonableness

- New grievance procedures well beyond *Gebser*
- Roadmap for litigation?
- Risk of DOE enforcement?
- Doug Lederman, *A New Day at OCR* Inside Higher Ed (June 28, 2017).

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"Deliberate Indifference"

As the Supreme Court reasoned in Davis, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances."

Id. at 30091 (internal citation omitted).

[U]nless the recipient's response to sexual harassment is clearly unreasonable in light of the known circumstances, the Department will not second guess such decisions. *Id.* at 30092 (internal citation omitted).

77

"Deliberate Indifference" Cont'd

[T]he final regulations apply a deliberate indifference standard for evaluating a recipient's decisions with respect to selection of supportive measures and remedies, and these final regulations do not mandate or scrutinize a recipient's decisions with respect to disciplinary sanctions imposed on a respondent after a respondent has been found responsible for sexual harassment. *Id.* at 30034 n.60.

[T]he Department will not deem a recipient not deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment. *Id.* at 30091.

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A Review of the New Regulations

Operational considerations will be addressed in separate modules.

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

80

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§106.8(a) *Designation of coordinator.*

Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator." The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(emphasis added)

§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*

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.

83

84

§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.

85

"Severability" Throughout the Regulations

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

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§ 106.12 *Educational institutions controlled by religious organizations.*

87

§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.*

89

"Actual Knowledge"

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

90

"Complainant"

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

What is "alleged?"

91

"Respondent"

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

Allege = "report?"

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More on Complainants/Respondents

- *A person may be a complainant, or a respondent, even where no formal complaint has been filed and no grievance process is pending.* *Id.* at 30030.
- *References . . . to a complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent or guardian has the legal right to act on behalf of the individual.*
- *[T]he definitions of "complainant" and "respondent" do not restrict either party to being a student or employee, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student.* *Id.* at 30237 (*[illegible]* emphasis added).

93

"Consent"

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

This has been a central issue in fairness/consistency.

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

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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)

95

"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).

96

"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)

97

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.

99

"Supportive Measures" Cont'd

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

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

101

§106.44(a) *General response to sexual harassment.*

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

(emphasis added)

102

§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.

103

§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.

105

§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.

107

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

108

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

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

109

§ 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;

111

§ 106.45(b)(1)(ii)

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

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§ 106.45(b)(1)(iii)

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

113

§ 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)

114

§ 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 predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(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 sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

115

§ 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;

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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;

117

§ 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;

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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;

119

§ 106.45(b)(1)(viii)

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

120

§ 106.45(b)(1)(ix)

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

121

§ 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.

122

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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:

123

§ 106.45(b)(2)(i)(A)

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

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§ 106.45(b)(2)(i)(B)

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

125

§ 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.

126

§ 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.

127

§ 106.45(b)(3)(ii)

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

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§ 106.45(b)(3)(iii)

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

129

§ 106.45(b)(4)

(4) Consolidation of formal complaints. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

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§ 106.45(b)(5)

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

131

§ 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);

132

§ 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;

133

§ 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;

135

§ 106.45(b)(5)(v)

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

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§ 106.45(b)(5)(vi)

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

137

§ 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.

138

§ 106.45(b)(6)(i)

(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

139

§ 106.45(b)(6)(i) Cont'd

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

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§ 106.45(b)(6)(i) Cont'd

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

141

§ 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.

143

§ 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;

144

§ 106.45(b)(7)(ii)(B)

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

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§ 106.45(b)(7)(ii)(C)

(C) Findings of fact supporting the determination;

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§ 106.45(b)(7)(ii)(D)

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

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§ 106.45(b)(7)(ii)(E)

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

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§ 106.45(b)(7)(ii)(F)

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

149

§ 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.

150

§ 106.45(b)(7)(iv)

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

151

§ 106.45(b)(8)(i)

(8) Appeals.

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

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§ 106.45(b)(8)(i)(A-C)

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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§ 106.45(b)(8)(ii)

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

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§ 106.45(b)(8)(iii)(A-F)

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

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

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

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

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

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

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§ 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 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—

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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;

157

§ 106.45(b)(9)(ii-iii)

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

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

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§ 106.45(b)(10)(i)(A)

(10) Recordkeeping.

(i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

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§ 106.45(b)(10)(i)(B-D)

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

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§ 106.45(b)(10)(ii)

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

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§ 106.71 *Retaliation.*

162

§ 106.71(a)

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

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§ 106.71(a) Cont'd

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

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§ 106.71(b)(1)

(b) Specific circumstances.

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

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§ 106.71(b)(2)

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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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!

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Thank You!

Assessment to follow…

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NASPA
Student Affairs Administrators in Higher Education

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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This Module is Designed for

TRACK 1 – Title IX Coordinators

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

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Overview of Presentation

- Foundations & Tuning
- Intersections with Title IX
- Considerations

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Foundations & Tuning

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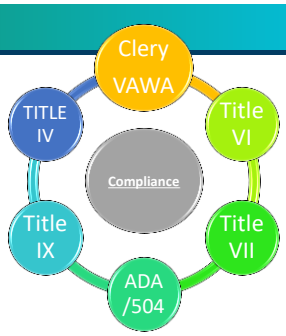

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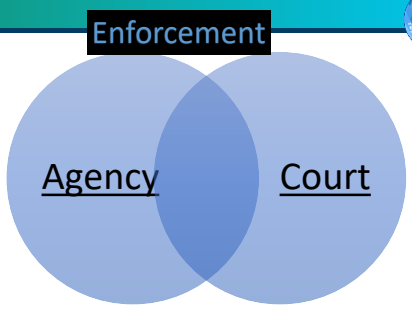

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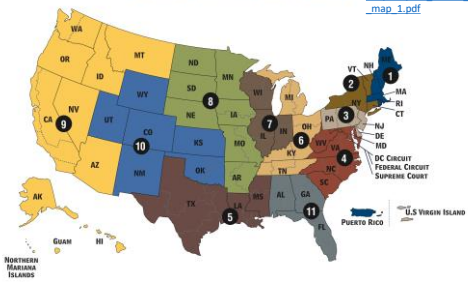
Geographic Boundaries

of United States Courts of Appeals and United States District Courts

https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf



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Overview of Key Compliance Laws

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Government Funding Requires Compliance

(b) By entering into a program participation agreement, an institution agrees that—

(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, agreements, 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;

20 U.S.C. § 1094
34 C.F.R. § 668.14

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Title IX

- Education Amendments of 1972
- Discrimination on the basis of sex
- 20 U.S.C. 1681
- 34 C.F.R. 106
- Office of Civil Rights

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Title IX

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, except that:

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Title IX Regulatory Requirements

Old Regulations

- July 21, 1974
- Notice of Non-Discrimination
- Responsible Employee
- Grievance Procedure
- Admissions & Recruitment
- Education
- Employment
- Title VI Procedures

New Regulations

- August 14, 2020
- Trained Coordinators, Decision-Makers, & Investigators
- Defines Sexual Harassment
- Mandatory Dismissal of certain Claims
- Live Hearing – Cross Examination
- Retaliation Prohibited

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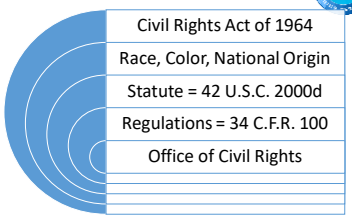
Title VI



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Title VI

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.

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Title VI Regulatory Requirements

- Application & Assurance
- Published Notice of Non-Discrimination
- Discrimination Prohibited
  - Student & Employee
- Data Review
- OCR Investigations
- Retaliation Prohibited
- Termination of Federal Funding

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Title VII

- Civil Rights Act of 1964
- Equal Employment Opportunity Act of 1972
- Unlawful Employment Practices
- 42 U.S.C. 2000e
- 29 C.F.R. 1600
- Equal Employment Opportunity

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Title VII

(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

(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.

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Title VII Regulatory Requirements

- Unlawful Employment Practices:
  - Hiring / Firing / Otherwise
  - Segregate -> Deprive Employment Opportunities (training programs)
- Race, color, religion, sex, national origin
- Disparate Impact
- Retaliation Prohibited

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Clery Act/VAWA

- Higher Education Act of 1965
- Crime Awareness and Campus Security Act of 1990
- Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act
- Violence Against Women Reauthorization Act of 2013
- Crime Reporting/Policy
- 20 U.S.C. 1092
- 34 C.F.R. 668.46
- Department of Education

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Clery Act

(f) Disclosure of campus security policy and campus crime statistics

(1) Each eligible institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of title 42, other than a foreign institution of higher education, shall on August 1, 1991, begin to collect the following information with respect to campus crime statistics and campus security policies of that institution, and beginning September 1, 1992, and each year thereafter, prepare, publish, and distribute, through appropriate publications or mailings, to all current students and employees, and to any applicant for enrollment or employment upon request, an annual security report containing at least the following information with respect to the campus security policies and campus crime statistics of that institution:

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Clery Act Regulatory Requirements

- Annual Security Report
- Crime Definitions
- Geography
- Crime Statistics
- Timely Warning
- Emergency Notification
- Retaliation Prohibited

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ADA & 504

- Rehabilitation Act of 1973
- Americans with Disabilities Act of 1990
- ADA Amendments 2008
- Discrimination on the basis of disability
- RA -> 29 U.S.C. 794
- RA -> 34 C.F.R. 104
- ADA -> 42 U.S.C. 126
- ADA II-> 28 C.F.R. 35
- ADA III -> 28 C.F.R. 36
- Department of Education &/or EEOC

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Regulatory Application

Americans with Disability:

- Title 1 = Employment Practices
- Title 2 = Public Schools
- Title 3 = Public Accommodation -> Private Schools

Section 504 of the Rehabilitation Act

- All Federal Funding Recipients

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Disability Regulatory Requirements

- Qualified Person
- Disability
- Technical Requirements
- Reasonable Accommodation
- Designated Employee
- Grievance Procedures
- Non-Discrimination Notice
- Discrimination Prohibited
  - General
  - Specifics
- Interactive Process

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Equal Opportunity Administration Intersects with Civil Rights laws; General Observations

- Not a seamless web
- Multiple laws triggered by one incident
- Primacy?
- Role of Counsel
- Specific considerations…

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Intersections with Title IX

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Title VI & Title IX

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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, except that:

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Key Title VI & Title IX Case
Cannon v. Univ. of Chicago, 441 U.S. 677 (1979)

Female student rejected admission to Private Medical Schools.

Excluded from participation b/c of her sex &

Schools received federal funding.

Does Title IX contain an Implied Private cause of action (COA)?

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Cannon 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
- Bossier Parish School Board v. Lemon, 370 F.2d 847, 852 (CA5 1967)

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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.

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Paralleled Court Enforcement

Alexander v. Sandoval, 532 U.S. 275 (2001)
-> Cannon

- 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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Title VII & Title IX

Interpretation
Retaliation
Circuit Splits
Bostock

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Interpretation

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Title VII standards applied to Title IX

Quid Pro Quo = (1) subject to unwelcome sexual advances by a supervisor or teacher and (2) reaction to these advances affected tangible aspects of compensation, terms, conditions, or privileges of employment or educational training.

- In rebuttal, the defendant may show that the behavior complained of either 1) did not take place or 2) that it did not affect a tangible aspect of the plaintiff's employment or education.

Hostile Environment = subjected to 1) unwelcome sexual advances 2) so "severe or pervasive" that it 3) altered their working or educational environment.

- In response, the defendant may show 1) that the events did not take place or 2) that they were isolated or genuinely trivial.
- Court must Determine whether conduct was Unwelcomed (physical gestures & verbal expressions) = Perspective Dilemma

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Supreme Court Considers Title VII & Title IX

1) Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992)
2) Gebser v. Lago Vista Indep. School Dist., 524 U.S. 274 (1998)
3) Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999)

- Reaffirms Cannon
- Severe, pervasive, & objectively offensive
- Title VII ≠ Title IX

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Supreme Court Compare & Contrast Civil Rights Statutes

- Title IX & Title VI
  - Contractual
  - Aimed at prohibiting discrimination in FFP.
- Contrast those to Title VII
  - Outright Prohibition
  - Aimed at compensating victims
- Title IX Administrative Enforcement requires Actual Notice.
  - Court Rejects Title VII Knowledge Theories

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Sexual Harassment Defined – Agencies

EEOC Title VII Sexual Harassment:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

DOE Sexual Harassment:

- Sexual harassment -> unwelcome conduct of a sexual nature.
- Sexual Violence -> physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent
- Gender Based Harassment -> is unwelcome conduct based on a student's actual or perceived sex.

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New Title IX Regulations: Sexual Harassment Standard

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

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

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Retaliation

Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167 (2005)

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Jackson Holding

- 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

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Title VII Used for Title IX Retaliation 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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Title VII v. Title IX - Circuit Split

Lakoski v. James, 66 F.3d 751 (5 Cir. App. 10/3/1995)

Doe v. Mercy Catholic Med. Ctr., 850 F.3d 545 (3 Cir. App. 3/7/2017)

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Bostock Implications

Expanded Sex Discrimination	Gorsuch	Alito Dissent -> Title IX
• Sexual Orientation • Gender Identity	• Limited Ruling • No App. outside of Title VII	• Bathroom & Locker Room • Women's Sports • Housing

Bostock v. Clayton County, 590 U.S. ___ (2020)

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Clery Act/VAWA & Title IX

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New Title IX Regulations

- Definitions -> VAWA/Save
- Off Campus Application
- Clery ≠ Title IX

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Clery Act in Court

- 20 U. S. C. 1092(f)(14)(A)
- Doe v. Vanderbilt Univ., 2019 WL 4748310 (USDCT MD Tenn. 9/30/2019) (No Clery COA)
- Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093 (9CA 4/20/20)

(14)

(A) Nothing in this subsection may be construed to—

(i) create a cause of action against any institution of higher education or any employee of such an institution for any civil liability; or

(ii) establish any standard of care.

(B) Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with this subsection shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action to enforce this subsection.

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Clery Act Agency Enforcement

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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 student-athletes 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.

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Michigan State University – Clery & Title IX

- Make substantial changes to the University's Title IX procedures and ensure that certain officials recuse 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 seek 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

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Finding #2: Failure to Properly Define the Campus/Clery Geography 13
Finding #3: Failure to Issue Timely Warnings..... 17
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Finding #8: Failure to Disclose Accurate and Complete Disciplinary Referral Statistics - Failure to Retain Records Needed to Substantiate *Clery Act* Compliance 51
Finding #9: Failure to Include Required Information in the Annual Fire Safety Reports.....54

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Florida Tech – Under Investigation

2016 Criminal Offenses	On-Campus Student Housing	On-Campus Other	On-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

2017 Criminal Offenses	On-Campus Student Housing	On-Campus Other	On-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

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ADA/504 & Title IX

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Accommodations in Discipline

Digital Hearings

Summary of Investigators Reports

Rossley v. Drake University, 342 F. Supp. 3d 904 (S.D. Iowa 2018)

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Legal Intersection Considerations

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Conduct Hearing Considerations

- Involved Officers -> Bias?
- Immediate Threat in Hearing
  - Emergency Response
- Granted Accommodations
  - In Person
  - Digital

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Final Considerations & Takeaways

Title IX Hearing ≠ vacuum	Multiple laws & regulations	Courts vs Agency
Clear Answers?	Policy Revisions	Practical Application

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Thank you!

Assessment to follow…

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NASPA
Student Affairs Administrators in Higher Education

Trends in Title IX Case Law & Related State Legal Mandates

Jake Sapp
Deputy Title IX Coordinator
Austin College

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This Module is Designed for:

Title IX Coordinator Track

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Material Acknowledgements

- Competing Narratives of Law
- Sensitive information covering Sexual Assault
- Sharing the law, Not my Personal Opinions

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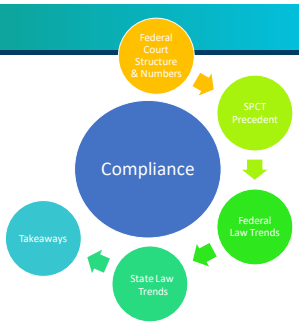
Overview of presentation



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Federal Court Structure & Numbers

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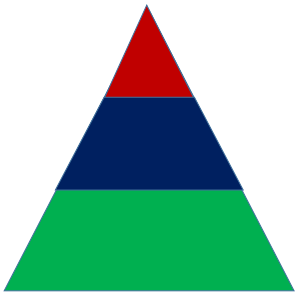

The United States Federal Courts

Supreme Court
United States Supreme Court

Appellate courts
U.S. Courts of Appeals (12 regional courts of appeals and the national jurisdiction Court of Appeals for the Federal Circuit)

Trial courts
U.S. District Courts (94 judicial districts and the U.S. bankruptcy courts)
U.S. Court of International Trade
U.S. Court of Federal Claims

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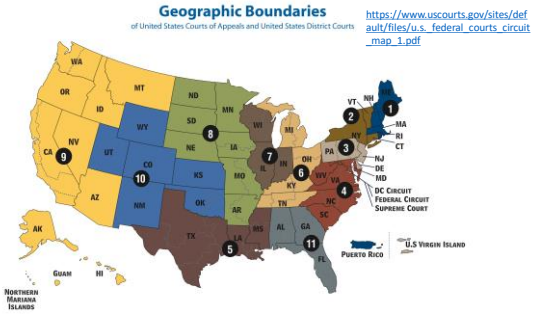

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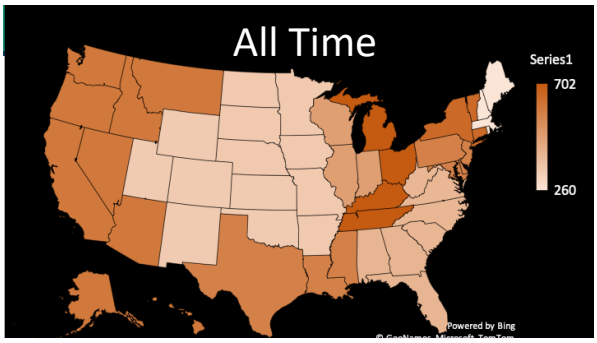

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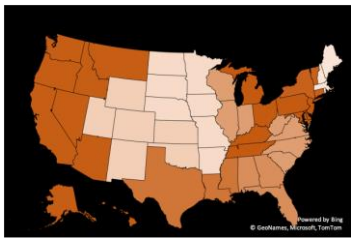

Inception – 2011 DCL

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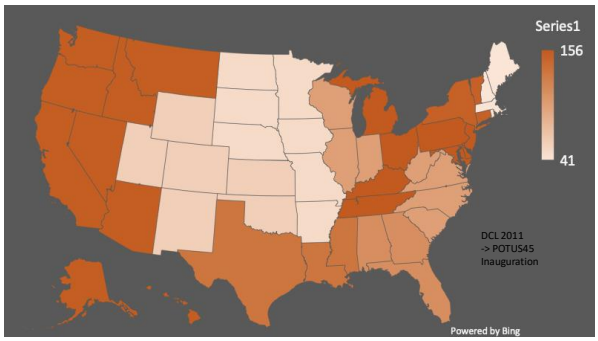

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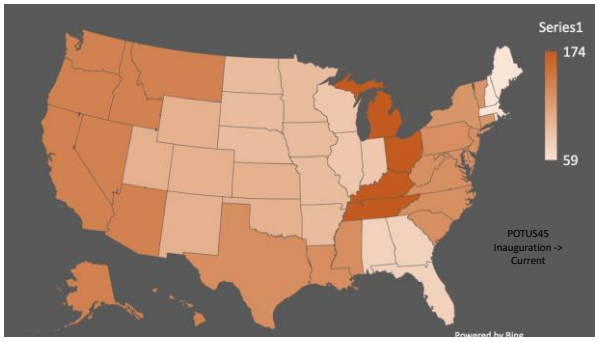

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Supreme Court Precedent

EVOLUTION

EXPANSION

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Evolution

- Cannon, IPCOA
- Goss, Student Due Process*
- Mathews, What Process is Due?

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Expansion

- North Haven -> Employees covered
- Franklin -> Money damages available
- Gebser -> Teacher harasses student
- Davis -> Student harasses student
- Jackson -> Retaliation Prohibited

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Title IX – 1681

(a) Prohibition against discrimination; exceptions 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, except that:

(b)Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

(c)"Educational institution" defined

(1)Classes of educational institutions subject to prohibition
(2)Educational institutions commencing planned change in admissions
(3)Educational institutions of religious organizations with contrary religious tenets
(4)Educational institutions training individuals for military services or merchant marine
(5)Public educational institutions with traditional and continuing admissions policy
(6)Social fraternities or sororities; voluntary youth service organizations
(7)Boy or Girl conferences
(8)Father-son or mother-daughter activities at educational institutions
(9)Institution of higher education scholarship awards in "beauty" pageants

(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 IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234; Pub. L. 96–88, title III, § 301(a)(1), title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

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Federal Law Trends

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Recognized Sex Discrimination COA

- 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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Circuit Splits

- Deliberate Indifference
- Plausible Inference
- Pre-Assault claim
- Employees & Title IX

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Gebser – Teacher on Student Deliberate Indifference

- "We think, moreover, that the response must amount to deliberate indifference to discrimination."
- Damages remedy requires: An Appropriate person has Actual Knowledge & fails to adequately respond.
- App. Person: an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf
- Actual Knowledge: Not constructive knowledge or should have known standard.

The Principal only had knowledge of inappropriate comments made in class. Fired when discovered sexual relationship.

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Davis – Student on Student Deliberate Indifference

1) Respondent is a Federal Funding Recipient
2) Appropriate Official has
3) Actual Knowledge of misconduct
4) Misconduct is so Severe, Pervasive, and Objectively Offensive
5) That it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school &,
6) Recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.
7) Damages liability is limited to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to "expose" its students to harassment or "cause" them to undergo it "under" the recipient's programs.

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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)

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Farmer v. Kansas State Univ., 918 F.3d 1094 (10th Cir. 2019)

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Student 1

Parties = Farmer, Weckhorst, University of Kansas

Farmer = Alcohol // Alleged consensual sex, Male left, another male hiding in closet then raped her.

Reported to police & school CARE center// Not informed about T9

Fear of running into attacker caused her to: miss class, seclude from friends, withdraw from extracurricular activities, depression, excessive sleep, excessive drinking, slitting wrists.

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Student 2

- Party off campus - Blacked out
- Raped in front of 15 students = recorded & posted online
- Taken to Fraternity House 'sleep room' & Raped by another fraternity member.
- Reported to KSU Women's center, police, IFC
- No disciplinary action taken
- Afraid to be on campus & see attacker: grades fell & lost scholarship, symptoms of PTSD, distanced herself from friends and family.

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Dispute

What harm must plaintiffs allege that KSU's deliberate indifference caused them?

KSU's argument = further Sexual harassment required

VS

Farmer's argument = vulnerable Is enough

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Court's Analysis

- Davis: Random House Dictionary definition of "subject" to include, "to make liable . . . ; lay open; expose."
- KSU = further actual incidents of sexual harassment required. CT = this runs counter to purpose of Title IX
- CT = cites to 4 USDCT cases & 11th Cir Williams v. Bd of Regents = 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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Holding

- Plaintiffs can state a viable Title IX claim for student-on-student harassment by alleging that the funding recipient's deliberate indifference caused them to be "vulnerable to" further harassment without requiring an allegation of subsequent actual sexual harassment.
- Reasonable Fear Warning

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Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613 (6th Cir. 2019)

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Facts

1) Kollaritsch (reported sexual assault, investigation, no contact order issued, saw each other on campus 9 times, reported retaliation, investigated, lawsuit filed)

2) Gross (reported sexual assault, investigation, expulsion, new investigation (lawyers) overturned OG decision, reinstated, lawsuit filed)

3) Jane Roe 1 (reported sexual assault, investigation, insufficient evidence, male student withdrew from college, lawsuit filed)

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Dispute

1) Is Further Actionable Conduct required? What is it?

2) Meaning of Severe, Pervasive, & Objectively Offensive.

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Davis allows liability when Schools:

1) Cause students to undergo harassment

- = Requires further harassment

2) Make students liable or vulnerable to it

- = Must NOT require further harassment

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Courts Analysis – Walkthrough of Each Davis Element

- Davis = 2 parts
  - 1) Actionable Harassment -> Non-Consensual
    = 1) Severe, 2) Pervasive, and 3) Objectively Offensive
  - 2) Deliberate Indifference
    = 1) Knowledge, 2) Act, 3) Injury, 4) Causation

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Severe

More than juvenile behavior among students that is antagonistic, non-consensual, and crass.

"simple acts of teasing and name-calling" are not enough, "even where these comments target differences in gender."

"It is not enough to show…that a student has been teased or called offensive names."

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Pervasive

Systematic / ***Multiple*** incidents of harassment; one incident of harassment is not enough.

Davis - **single** incident falls short

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Objectively Offensive

"Behavior that would be offensive to a reasonable person under the circumstances"

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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Knowledge

- "Knowledge" = Actual Knowledge of an incident of actionable sexual harassment
- Rejects Constructive Knowledge
- Knowledge -> Action taken Connection

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Act

"Clearly unreasonable in light of the known circumstances," → Control over the alleged harassment & authority to take remedial action → Same victim requirement

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Injury

01
Deprivation of "access to the educational opportunities or benefits provided by the school,"

02
1) Inability "to concentrate on her studies"
2) Fear of attending school
3) Suicide note

03
More than Emotional harm

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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

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Kollaritsch Deliberate Indifference Holding

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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Concurrence

- Subject to = Experienced harm
- If a person can be "subjected to harassment" without experiencing any harassment as a result of the defendant's conduct, then a person can also be "subjected to discrimination" without experiencing any discrimination as well. And that surely can't be right.
- Exclude = Blocked ⊠ more likely to not get
- Spending clause legislation – Pennhurst
- Davis = Narrow holding
- Liability Examples

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Erroneous Outcome & Selective Enforcement

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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.
- Roommate's girlfriend retaliated by bringing sexual harassment charges.
- Notice Deficiencies
- Hearing Deficiencies
- Yusuf Suspended for 1 semester.
- Alleged Violations of 42 USC 1981 & Title IX

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Title IX Erroneous Outcome & Selective Enforcement

Relation to Title VI & Title VII & Equal Protection
Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988)
Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946)
Snowden v. Hughes, 321 U.S. 1 (1944)

"Title IX bars imposition of University discipline where gender is a motivating factor in the decision to discipline."

Erroneous Outcome = Innocent and wrongly found to have committed the offense.

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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Proving Gender Bias

A) Statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender.

B) The allegation that males invariably lose when charged with sexual harassment at Vassar provides a verifiable causal connection similar to the use of statistical evidence in an employment case.

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Doe v. Miami, 882 F.3d 579 (6th Cir. 2018)

- Statistical Evidence
- Attorney Affidavit
- Pattern of gender-based decision making
- External Pressure

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Doe v. Oberlin, 2020 U.S. App. LEXIS 20226 (6CA 6/29/2020)

- Intoxication v. incapacitation
- (1) cast some articulable doubt on the accuracy of the disciplinary proceeding's outcome, and
- (2) demonstrate a particularized causal connection between the flawed outcome and sex discrimination.
- "When the degree of doubt passes from "articulable" to grave, the merits of the decision itself, as a matter of common sense, can support an inference of sex bias."
- Expands Erroneous Outcome pt 2 Considerations

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Title IX Plausible Inference Standard

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Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019)

Due Process & Title IX

- Legally Protected Entitlement?
- Contract

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

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Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019)

Implied Private Cause of Action -> Gebser → Erroneous Outcome & Selective Enforcement -> Yusuf → Deliberate Indifference -> Doe v. Miami Univ., 882 F.3d 579 (6CA 2018)

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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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Plausible Discrimination Finding

- Credited Jane Roe w/o ever hearing directly from her
- Refused to hear from JD's witnesses
- Panel Members must read the Investigative Report
- Facebook Post = "Alcohol isn't the cause of sexual assault. Men are"

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Doe v. University of the Sciences, No. 19-2966 (3d Cir. May 29, 2020)

- We agree with the Seventh Circuit and "see no need to superimpose doctrinal tests on the [**Title IX**] statute." Thus, we adopt the Seventh Circuit's straightforward pleading standard
- **Pleadings must support a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex.**
- External Pressure + Sex as motivating factor.
  DCL 2011 + No investigation of Accusers

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Title IX & Athletics

Archaic Assumption = historical assumptions about boys' and girls' physical capabilities

Effective Accommodation = 34 C.F.R. § 106.41(c)(1)

Equal Treatment = 34 C.F.R. § 106.41(c)(2)-(10)

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Athletics – Effective Accommodation

- (1) showing substantial proportionality (the number of women in intercollegiate athletics proportionate to their enrollment);
- (2) proving that the institution has a "history and continuing practice of program expansion" for the underrepresented sex (in this case, women); or
- (3) where the university cannot satisfy either of the first two options, establishing that it nonetheless "fully and effectively accommodate[s]" the interests of women

Mansourian v. Regents of Univ. of California, 602 F.3d 957 (9th Cir. 2010)

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Title IX Retaliation

- Retaliation against a person b/c they complained of sex discrimination is another form of intentional sex discrimination. = Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167 (2005)

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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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Title IX & 42 USC § 1983

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Outline of a 42 U.S.C. § 1983 Case

- 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
- 3 Causes of Action
  1) 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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Due Process Cases

- Goldberg v. Kelly, 397 U.S. 254 (1970);
- Regents v. Roth, 408 U.S. 564 (1972);
- Goss v. Lopez, 419 U.S. 565 (1975);
- Mathews v. Eldridge, 424 U.S. 319 (1976);
- Bishop v. Wood, 426 U.S. 341 (1976);
- Paul v. Davis, 424 U.S. 693 (1976);
- Codd v. Velger, 429 U.S. 624 (1977);
- Ingraham v. Wright, 430 U.S. 651 (1977)

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Expanding Recognized Interests

- Liberty . . . guaranteed (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.' Meyer v. Nebraska, 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.' Wisconsin v. Constantineau, 400 U.S. 433 (1971)

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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 misconduct.
- "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. App'x 365 (6th Cir. 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. Williams v. Wendler, *530 F.3d 584 (7CA 2008)* (holding that a suspension from a public university is not a deprivation of constitutional property); Butler v. Rector & Bd. of Visitors of Coll. of William & Mary, 121 F. App'x 515 (4th Cir. 2005) (assuming, without deciding, that a student had "a property interest in continued enrollment" in a master's program "that is protected by the Due Process Clause").

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Goss v. Lopez, 419 U.S. 565 (1975)

- Nine students suspended // Disciplinary Reasons
- Some students suspended w/o hearing or evidence on record indicating they were not bystanders.
- Ohio Rev. Code Ann. 3313.48 & 3313.64 (1972 & 1973) & 3321.04 (1972).
- Property (state law) Board of Regents v. Roth, 408 U.S. 564 (1972)
- Liberty interest (reputation) Wisconsin v. Constantineau, 400 U.S. 433 (1971)
- 10-day suspension requires oral or written notice of the charges against them, if he denies them, an explanation of the evidence the authorities have an opportunity to present his side of the story.

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Mathews v. Eldridge, 424 U.S. 319 (1976)

(1) the nature of the private interest affected—that is, the seriousness of the charge and potential sanctions,

(2) the danger of error and the benefit of additional or alternate procedures, and

(3) the public or governmental burden were additional procedures mandated.

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Student's Constitutional Interest

- Unanswered by the SPCT – Creatures of State Law
- Goss v. Lopez, 419 U.S. 565 (1975) (Ohio law created Interest)
- No Circuit consensus on Constitutional Interest
- Reputation tied to Liberty Interest
- "Assume without deciding"

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Due Process - Cross Examination

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Doe v. Baum, 903 F.3d 575 (6th Cir. 2018)

- Procedural Due Process & Title IX
- (Goss, Mathews, Dixon, Univ. of Cinn, Flaim) Recognizes Student Interest = Property & Reputation
- -> Jaksa v. Regents of Univ. of Michigan, 597 F. Supp. 1245 (E.D. Mich. 1984) = Con ≠ Cross Exam
- Disciplinary Decision -> Credibility Determination
- Balance of Interests
- Procedural Due Process violation & Title IX Erroneous Outcome=External Pressure, crediting Roe, NoCrossEX

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Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56 (1CA 8/6/2019)

- Gorman v. Univ. of Rhode Island, 837 F.2d 7 (1st Cir. 1988)
- (Goss, Mathews, Dixon, MagnaCarta) (Recognizes Paramount Student Interest, No cross exam 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.
- Haidak = Challenging the Suspension & Expulsion hearings Title IX & 1983.
- Not a common law trial // Rejects Baum

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Plummer v. Univ. of Houston, 860 F.3d 767 (5th Cir. 2017)

- Due Process & Title IX Selective Enforcement
- Davis, Goss, Mathews, Dixon, Flaim(6CA)
- 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.
- School = Strong Interest: educational process, safe LE, preserving limited administrative resources.
- Process = multiple meaningful opportunities to be heard & Video evidence of violation.

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Plummer

- Inadequate Notice of standards, Unfair investigation, Bias, No direct evidence, No Cross Exam.
- 2nd Mathews = "The danger of error and the benefit of additional or alternate procedures" (video evidence)
- "Additional procedures were not necessary in case without significant factual disputes" (Mathews & Flaim(6CA))
- Selective Enforcement

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Can Employees Sue under Title IX?

Lakoski v. James, 66 F.3d 751 (5CA 1995)

Doe v. Mercy Catholic Med. Ctr. 850 F.3d 545 (3d Cir. 2017)

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Pre-Assault Claim

- 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 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, 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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Novel Title IX Cases

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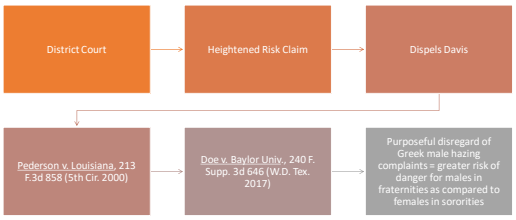
Gruver v. Louisiana, 401 F. Supp. 3d 742 (M.D. La. 2019)



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McCluskey v. State of Utah

Complaint filed

Equal Protection // Deliberate Indifference under Title IX

School's Omission led to Death

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Federal Law Trends

SPCT: Deliberate Indifference & Retaliation
Fed Cir: EO, SE, AA, PI, PA, XExam

Evolution

Expansion

Civil Rights

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Evolution & Expansion of Title IX Liability

- Deliberate Indifference
- Erroneous Outcome
- Selective Enforcement
- Retaliation
- Inequity in Athletics
- Pre-Assault Claim
- 42 U.S.C. 1983 – Due Process & Equal Protection
- Plausible Inference
- Heightened Risk -> Student Death

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State Law Trends

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State Law Overview

- State Law Causes of Action
- Federal Courts Using State Law
- Federal Courts & State Law Key Cases
- State Courts & Student Discipline
- State Laws Dealing with Title IX
- Series Takeaways

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State Law Causes of Action

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Establishing a Contract

Offer

Acceptance

Consideration

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Establishing Breach of Contract

- Prove there is a contract (establish essential terms)
- Breach of the the terms
- Damages

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Student – University Contract Spectrum

- New York
- Virginia

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New York

1) The existence of an agreement
2) Adequate performance of the contract by Plaintiff
3) Breach of contract by defendant
4) Damages

- Implied Contract: Student Accepted
- Satisfy Academic Standards + Comply with Procedures
- Bulletins, Circulars, and Regulations -> Student Handbook
- Identify Specific Promises – Examples Doe v. Syracuse Univ., No. 518CV00496BKSML (N.D.N.Y. June 19, 2020)
- General / Unspecified stmts. = no good

"Virtually all of the promised services that Plaintiff cites, are broad pronouncements of the School's compliance with existing anti-discrimination laws, promising equitable treatment of all students. As such, they can not form the basis for a breach of contract." Ward v. New York Univ., 99 Civ. 8733 (RCC) (S.D.N.Y. Sept. 28, 2000)

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Virginia Contract Law

Owen v. Liberty Univ., No. 6:19-CV-00007, 2020 WL 1856798 (W.D. Va. Apr. 13, 2020)

1) **Legally enforceable obligation** of a defendant to a plaintiff
2) The def's violation of obligation
3) Injury or damage to plaintiff caused by breach of obligation

- Absolute Mutuality Required
- Unilateral Revision Clauses
- University Conduct Policies ≠ Enforceable Contracts

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Breach of Contract – Reasonable Expectations

"What meaning the party making the manifestation, the university, should reasonably expect the other party to give it." = Schaer v. Brandeis Univ., 432 Mass. 474, 735 N.E.2d 373 (2000)

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Breach of Contract – Basic Fairness

Broad Discretion - Schaer v Brandeis Univ., 432 Mass. 474, 735 N.E.2d 373 (2000)
No one size fits all - Doe v Brandeis Univ., 177 F. Supp. 3d 561 (D. Mass. 2016)

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Implied Covenant of Good Faith & Fair Dealing

Faithfulness to an agreed common purpose

Cooperation
full benefits
refrain / injury

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Defamation

Restatement (second) of Torts 558

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (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.

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Intentional Infliction of Emotional Distress

- (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.
- (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 person's 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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Negligence

- Duty
- Breach
- Causation
- Damages

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State Causes of Action attached to Title IX

Breach of Contract:
- Reasoanble Expectation
- Basic Fairness
- Implied Covenant of Good Faith & Fair Dealing

Defamation

IIED

Negligence -> Novel

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Federal Courts & State Law
Key Cases

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Doe v. Univ. of Scis., No. 19-2966, 2020 WL 2786840 (3d Cir. May 29, 2020)

- Roe 1 -> No Alcohol // No Condom = Non-Consensual
- Roe 2 -> Alcohol // Non-Consensual
- Notice of Investigation
- Investigator -> Outside Attorney
- Credibility Case
- Expulsion -> Appeal -> Lawsuit

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Sciences Policy

- Student Handbook
- Promise: Prompt, fair, & equitable
- "Do not include all of the same protections by the courts."
- Procedural Protections: Given info on allegations, opportunity to review witness stmts., opportunity to defend in front of investigator, opportunity to identify witnesses.

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Science s Dispute

- Credibility Case, No cross exam, no live hearing before a panel.
- "Full-dress" hearing not required.

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Doe v. Univ. of the Sciences – Ct Analysis

- Academic (caution) v. Behavior
- Assumes Contract is created
- Student substantial interest
- DCL pressure
- Pennsylvania Law
- Fairness = Notice, Participate in live hearing, Cross Exam witnesses
- Cites to Goss

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Doe v. Univ. of Scis. – Holding

- Doe states a plausible claim for Breach of Contract
- Promised: Fair & Equitable
  - -> Suspension: some sort of hearing
  - -> Credibility Case: Cross-Exam
- Single model investigator violates Fairness promised
- Rehearing Requested -

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Doe v. Trustees of Bos. Coll., 892 F.3d 67 (1st Cir. 2018)

- Cruise Ship Party Case
- A.B. -> Assaulted on dance floor
- Policy: Impartial & Private
- 2012 disciplinary proceedings
  - Neutrality - No Finding
  - Chairperson -> Associate Dean -> Dean -> Associate Dean -> Board
- 2014 Review
  - New Evidence -> No Reconsideration

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Doe v. Boston Dispute

- 1) 2012 Disciplinary Proceedings -> BOK: RE & BF
- Board's decision was not impartial
- Prime Alternative Culprit Violation
- 2) 2014 Review Contract? — Consideration? -> No Lawsuit (exchange) Independent Review

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Boston College Ruling

- 2012 Proceedings -> Interference with Board
- A) Board's decision was not impartial
- B) Prime Alternative Culprit Violation
- Cruise Ship Case -> Jury Verdict Case

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Rossley v. Drake Univ., 342 F. Supp. 3d 904 (S.D. Iowa 2018)

- Board of Trustee
- Iowa Law -> Breach of Contract
- Intent to be bound?
- Unpaid, Volunteer position
- No Written Contract, or Verbal conditions
- Liablity Insurance -> bargained for exchange?
- No Consideration, No Contract

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Breach of Contract Cases Takeaways

- POLICY
- ESSENTIAL TERMS -> SPECIFICS
- FAIRNESS?
- PROMISES?
- VS. REGULATIONS

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Title IX Defamation

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 Retaliation claim
- College knowingly made false statements:
  - District Attorney
  - Police
  - Dishonest Act & Thievery
- Doe v. Indiana Wesleyan Univ., No. 1:20-CV-00039-HAB, 2020 WL 2474483 (N.D. Ind. May 12, 2020)-> Student HIV

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Title IX IIED

- Roussaw v. Mastery Charter High Sch., No. CV 19-1458, 2020 WL 2615621 (E.D. Pa. May 22, 2020) - 13 year old 7th Grade girl
- Extreme & Outrageous Conduct
- Sexual Assault on school grounds
- Mishandled investigation
  - Undue Delay
  - Suspending Victim, knowing it was alleged rape
  - No discipline of Assailant

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Title IX Negligence

Doe v. Univ. of St. Thomas, 368 F. Supp. 3d 1309 (D. Minn. 2019)

-> Abbariao (MNSPCT) = Academic Expulsion was Arbitrary

(The requirements imposed by the common law on private universities parallels those imposed by the Due Process Clause on Public Univ.)

-> Rollins (MNAppCT) = Non-Academic Expulsion was Arbitrary

= UST owed Doe a Duty of Reasonable Care

Logic used again in Vanegas v. Carleton Coll., No. CV 19-1878 (MJD/LIB), 2020 WL 2092918 (D. Minn. May 1, 2020)

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State Courts & **Student Discipline**

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California – Writ of Administrative Mandate

CHAPTER 2. Writ of Mandate [[1084.] - [1097.]] *(Chapter 2 enacted 1872.)*

1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Article 6 (commencing with Section 68630) of Chapter 2 of Title 8 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

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California Title IX – Writ of Mandamus Cases

- Doe v. Occidental College, 40 Cal. App. 5th 208, 252 Cal. Rptr. 3d 646 (2019)
- Doe v. Westmont, 34 Cal. App. 5th 622, 246 Cal. Rptr. 3d 369 (2019)
- Schrager v. Carry, No. B282970, 2019 WL 1745858 (Cal. Ct. App. Apr. 18, 2019)
- Doe v Allee, 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 rigid procedure. "

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California State Court Discipline Requirements

- No particular form of college student disciplinary hearing is required under California law.
- A fair college sexual misconduct hearing strives to balance three competing interests:
- 1) the accused student seeks to avoid unfair or mistaken exclusion from the educational process,
- 2) the college tries to provide a safe environment for all of its students,
- 3) the alleged victim, who often lives, works, and studies on a shared college campus with the accused, wants to safeguard their own well-being.

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Investigation

The combination of investigative and adjudicative functions does not, without more, deprive a college student accused of sexual misconduct of a fair 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.

College student conduct panel deprived student of a fair hearing on sexual misconduct charge when it credited certain portions of non-testifying witnesses' statements based solely on associate dean's investigative reports; associate dean had dual role as investigator and panel member, and all three panel members were finders of fact required to hear from critical witnesses before choosing to credit certain accounts over others.

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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: Information given to accused

- The college must provide the accused student with the names of witnesses and the facts to which each testifies.
- College student conduct panel deprived student of a fair hearing on sexual misconduct charge when it failed to provide student with information regarding investigation; college's sexual assault policies and procedures required it to turn over interview notes and permitted student access to all evidence dean discovered or developed during his investigation, yet dean omitted some questions and answers from reports, dean, who was on panel, had full information available to him, and college staff member took detailed notes that recorded the panel's questions and witnesses' responses, but student was only provided less detailed oral summaries.

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Credibility Cases

- At a minimum, to provide a fair hearing where a sexual misconduct case turns on witness credibility, a college must comply with its own policies and procedures.
- To provide a fair hearing where a sexual misconduct case turns on witness credibility, a college's procedures must provide the accused student with a hearing before a neutral adjudicatory body.
- For a college to provide a fair hearing where a sexual misconduct case turns on witness credibility, the accused must be permitted to respond to the evidence against them.

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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.

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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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Doe v. Westmont – Denied a Fair Hearing

- Critical Witnesses
- Information Provided to John
- Opportunity to Question Witness
- Requirements for New Hearing Imposed:

1) Access to Investigator Notes, 2) Access to notes from student conduct meeting, 3) Some form of questions asking for witnesses (no particular form, material participation)

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New York – Article 78 Review

7803. Questions raised. The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

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New York – Article 78 Case

- Doe v. Columbia Univ., No. 19 CIV. 5357 (ER), 2020 WL 1528545 (S.D.N.Y. Mar. 31, 2020)
- Both claim Non-Consensual Sex
- Male claims Incapacitation

1) Failure to follow own procedures

2) Arbitrary & Capricious

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State Courts & Student Discipline Takeaways

Public-Private Mirror

Sued in multiple venues

Broader than Title IX

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State Laws/ Regulations Dealing with Title IX

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New York

Enough is Enough Law (L 2015, Ch76)

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Texas

- HB 1735 – Policy Requirements
- SB 212 - Employee Reporting
- SB 449 – Transcript Notations
- Baylor University

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SB 1735 Overall Policy/Enforcement

- Sexual Misconduct Policy
- Definitions – Student v Employee
- Trauma Informed Training
- MOUs
- Continued Disciplinary Process
- 2 Million-dollar Penalty

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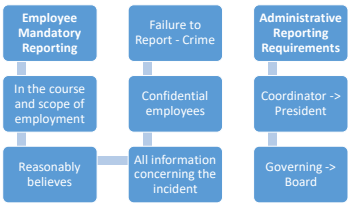
SB 212 – Mandatory Reporting



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Failure to Report / False Report

- 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

1) Class B misdemeanor
2) If intent to conceal, then Class A misdemeanor

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SB 449

- DISCIPLINARY PROCESS CONTINUES AFTER GRADUATION OR WITHDRAW
- INELIGIBLE TO REENROLL FOR A NON-ACADEMIC/NON-FINANCIAL
- MANDATORY TRANSCRIPT NOTATION

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Idaho

- HB 500 - Fairness in Women's Sports Act
- HB 509 - Idaho Vital Statistics Act

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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)

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Vital Statistics Act

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

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Hecox v. Little, (1:20-cv-00184-DCN)

- A) Transgender Female Student at Boise State
- B) Jane Roe, Female Student at Boise High School
- 42 USC 1983
- Title IX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LINDSAY HECOX, *et al.*, Plaintiffs, v. BRADLEY LITTLE, *et al.*, Defendants.	Case No. 1:20-cv-00184-DCN **STATEMENT OF INTEREST**

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Nor does the Supreme Court's recent decision in *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020), alter the equal-protection analysis here. First, *Bostock* said nothing about and did not consider anything about the Constitution. *See id.* at *17 (warning that "[t]he only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex'" as that term is used in a particular provision of Title VII). Second, nothing in the Fairness Act discriminates on the basis of transgender status, so even assuming *arguendo* that *Bostock* had any relevance in a constitutional case, it would not help Plaintiffs.

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Connecticut

Soule v. Connecticut Association of Schools, Inc.,(3:20-cv-00201-RNC)

- CIAC Policy
- 3 Female High school females
- 2 Biological Males -> 15/85
- Title IX Athletics Review
  - Effective Accommodation
  - Equal Treatment

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Oklahoma - SB 1466

(attempted)

- Student and Administration Equality Act
- 10-day Trigger -> Goss
- Procedural Requirements
- Advocate may Fully Participate
- Credibility Case -> Cross Exam

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State Law Trends

- Breach of Contract,
- Defamation,
- IIED,
- Negligence
- Procedural Requirements,
- Proscribed Policy,
- Athletics Mandates.

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Webinar Takeaway

- Modern Title IX
- Compliance U.
- Multiple Venues

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Thank You!

Assessment to Follow

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NASPA
Student Affairs Administrators in Higher Education

Legal Foundations for Title IX Investigators Under 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 at Stetson University College of Law

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This Module is Designed for:

TRACK 1 – Title IX Coordinators

TRACK 3 – Title IX Investigators

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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.

367

What is Title IX? What is its mission?

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

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Title IX: FINAL RULE

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

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

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

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Title IX: FINAL RULE

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

Id. (emphasis added).

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Title IX: FINAL RULE

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

Id.

371

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.

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A Review of the New Regulations

Operational considerations will be addressed in separate modules.

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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.*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30177 (emphasis added).

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

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§ 106.30(a) *Definitions.*

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"Actual Knowledge"

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

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"Complainant"

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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"Respondent"

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

Allege = "report?"

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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.*
- *References . . . to a complainant, respondent, or other individual with respect to exercise of rights under Title IX should be understood to include situations in which a parent or guardian has the legal right to act on behalf of the individual.*
- *[T]he definitions of "complainant" and "respondent" do not restrict either party to being a student or employee, and, therefore, the final regulations do apply to allegations that an employee was sexually harassed by a student.*

Id. at 30030.

Id. at 30037 (emphasis added).

379

"Consent"

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

This has been a central issue in fairness/consistency.
How does "consent" fit into the new framework for "sexual harassment?"

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"Consent"—Not Defined in New Regulations

- **What will your campus 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.

381

"Formal Complaint"

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.

(emphasis added)

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"Formal Complaint" Cont'd

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

383

"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)

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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.

385

"Stalking" (Clery Act Definition)

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

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

(B) Suffer substantial emotional distress.

(ii) For the purposes of this definition—

(A) *Course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

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

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

34 C.F.R § 668.46(a)

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"Domestic Violence" (Clery Act Definition)

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

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

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

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

(D) By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or

(E) By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

34 C.F.R § 668.46(a)

387

"Dating Violence" (Clery Act Definition)

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

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

(ii) For the purposes of this definition—

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

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

34 C.F.R § 668.46(a)

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Remember state law and policy specific considerations!

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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.

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"Supportive Measures" Cont'd

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

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

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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. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

(emphasis added)

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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.

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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.

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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.

396

§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.

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

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

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

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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.

401

§ 106.45(b)(1)(i)

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

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

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§ 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;

(emphasis added)

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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.

(emphasis added)

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§ 106.45(b)(1)(iii) Cont'd

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

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

(bullets added, emphasis added)

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§ 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 predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(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 sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(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)

407

§ 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;

(emphasis added)

408

§ 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;

409

§ 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;

410

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§ 106.45(b)(1)(viii)

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

411

§ 106.45(b)(1)(ix)

(ix) Describe the range of supportive measures available to 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.

(emphasis added)

413

§ 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:

414

§ 106.45(b)(2)(i)(A)

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

415

§ 106.45(b)(2)(i)(B)

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

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§ 106.45(b)(2)(ii)

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

(emphasis added)

417

§ 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.

(emphasis added)

418

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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.

(emphasis added)

419

§ 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.

420

§ 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.

(emphasis added)

421

§ 106.45(b)(5)

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

(emphasis added)

422

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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)

423

§ 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)

424

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§ 106.45(b)(5)(iii)

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

(emphasis added)

425

§ 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)

426

§ 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;

(emphasis added)

427

§ 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)

428

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§ 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)

429

§ 106.45(b)(5)(vii)

(vii) Create an investigative report that fairly summarizes relevant evidence and, <u>at least 10 days prior to a hearing</u> (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)

430

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§ 106.45(b)(6)(i)

(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

431

§ 106.45(b)(6)(i) Cont'd

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

432

§ 106.45(b)(6)(i) Cont'd

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

433

§ 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.

435

§ 106.45(b)(7)(ii)(A)

(ii) The written determination must include—

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

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§ 106.45(b)(7)(ii)(B)

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

437

§ 106.45(b)(7)(ii)(C)

(C) Findings of fact supporting the determination;

438

§ 106.45(b)(7)(ii)(D)

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

439

§ 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.

441

§ 106.45(b)(7)(iii)

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

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§ 106.45(b)(7)(iv)

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

443

§ 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:

444

§ 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.

445

§ 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.

447

§ 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 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—

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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;

449

§ 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.

450

§ 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;

(emphasis added)

451

§ 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.

453

§ 106.71 *Retaliation.*

454

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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.

455

§ 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)

456

§ 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.

457

§ 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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Law Enforcement Activity/ Criminal Proceedings

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Concurrent Law Enforcement Activity

Section 106.45(b)(1)(v) provides that the recipient's designated reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for good cause, which may include concurrent law enforcement activity. Section 106.45(b)(6)(i) provides that the decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party's failure to appear or answer cross-examination questions at a hearing; this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal proceeding.

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

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Concurrent Law Enforcement Activity Cont'd

Further, subject to the requirements in § 106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process. § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party or other source" which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 106.45(b)(1)(ii).

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

461

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).

462

Police Investigations

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

Id. at 30099 n. 467.

463

Confidentiality

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Confidentiality and FERPA Protections

Section 106.71(a) requires recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation. Section 106.30 defining "supportive measures" instructs recipients to keep confidential the provision of supportive measures except as necessary to provide the supportive measures. These provisions are intended to protect the confidentiality of complainants, respondents, and witnesses during a Title IX process, subject to the recipient's ability to meet its Title IX obligations consistent with constitutional protections.

[Separate module addresses FERPA, recordkeeping and confidentiality.]

Id. at 30071 (emphasis added).

465

Special Issues for Investigations

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Who Should Serve as an Investigator?

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

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Job Description

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

468

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

469

Requirements (cont'd)

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

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"Adversarial in Nature"

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

Id. at 30097.

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The Investigation Process Itself

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

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The *Minimum* and *Maximum* Role of the Title IX Investigator

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

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

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

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Sample Policy Elements

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

475

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

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Scope/Off-Campus Jurisdiction

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

Id. at 30093.

477

"Involvement in an education program or activity"

. . . [A] complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed as provided in the revised definition of "formal complaint" in § 106.30; this provision tethers a recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipient's education program or activity so that recipients are not required to investigate and adjudicate allegations where the complainant no longer has any involvement with the recipient while recognizing that complainants may be affiliated with a recipient over the course of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident. . . .

Id. at 30086-87 (emphasis added).

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Educational 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)

479

§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.

480

Relevance

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

Id. at 30247 n. 1018.

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).

[Also covered in a separate module.]

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Prior Sexual History/Sexual Predisposition

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

Id. at 30103 (emphasis added).

Rape Shield Language

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

*1) if offered to **prove that someone other than the respondent committed the alleged sexual harassment**, or*

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

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

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Consent and Rape Shield Language

[A] recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process. The scope of the questions or evidence permitted and excluded under the rape shield language in § 106.45(b)(6)(i)-(ii) will depend in part on the recipient's definition of consent, but, whatever that definition is, the recipient must apply it consistently and equally to both parties, thereby avoiding the ambiguity feared by the commenter.

Id. at 30125.

Rape Shield Language

[T]he rape shield language in this provision:

- *considers all questions and evidence of a complainant's sexual predisposition irrelevant, with no exceptions;*
- *questions and evidence about a complainant's prior sexual behavior are irrelevant unless they meet one of the two exceptions;*
- *and **questions and evidence about a respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.***

Id. at 30352 (emphasis added).

485

486

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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Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

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Bias/Prejudice/Stereotypes/Prejudgment/Conflicts of Interest

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

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

Bias/Conflicts of Interest

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

Id. at 30103 (emphasis added).

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

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

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

"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*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30084 (emphasis added).

491

492

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.

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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.

merriam-webster.com

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Impartial

Not partial or biased: treating or affecting all equally

merriam-webster.com

495

Prejudgment

A judgment reached before the evidence is available

webster-dictionary.org

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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

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Stereotype

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

merriam-webster.com

498

"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!

499

All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

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Whose side are you on?

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

501

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

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Thank You!

Assessment to follow…

503

NASPA Student Affairs Administrators in Higher Education

Developing Policies, Procedures and Practices

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

NASPA TITLE IX TRAINING CERTIFICATE

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504

This Module is Designed for:

TRACK 1 – Title IX Coordinators

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

505

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.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30046 (internal citations omitted, emphasis added).

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Not Merely "Checking Off Boxes"

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

Id. at 30091.

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Operationalizing the new Title IX regulations requires making certain choices.

"Tuning" is important.

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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.

509

"Flexibility" Cont'd

Within the standardized § 106.45 grievance process, recipients retain significant flexibility and discretion, including decisions to:

- *designate the reasonable time frames that will apply to the grievance process;*
- *use a recipient's own employees as investigators and decisionmakers or outsource those functions to contractors;*
- *determine whether a party's advisor of choice may actively participate in the grievance process;*
- *select the standard of evidence to apply in reaching determinations regarding responsibility;*
- *use an individual decision-maker or a panel of decision-makers;*
- *offer informal resolution options;*
- *impose disciplinary sanctions against a respondent following a determination of responsibility; and*
- *select procedures to use for appeals.*

Id. at 30097 (bullets added).

510

Policy Basics: What Should be Included?

511

Policy Basics

- Single policy or multiple policies?
- Who creates policy? You? Your TIX Team? Conduct? Committee? Counsel?
- Title IX ←→ Student Conduct (reference each other)
- Title IX←→ HR
- Consensual relations policies (do you have these?)
- Terminology
  - "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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Policy Elements

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

513

Policy Elements

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

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Definitions of Offenses to Be Included in Policies

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

State law considerations!

515

"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)

516

"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.

517

"Stalking" (Clery Act Definition)

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

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

(B) Suffer substantial emotional distress.

(ii) For the purposes of this definition—

(A) *Course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

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

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

34 C.F.R § 668.46(a)

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"Domestic Violence" (Clery Act Definition)

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

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

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

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

(D) By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or

(E) By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

34 C.F.R § 668.46(a)

519

"Dating Violence" (Clery Act Definition)

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

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

(ii) For the purposes of this definition—

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

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

34 C.F.R § 668.46(a)

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Title IX Coordinator Information (§106.8)

Recipients must notify….

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

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

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

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Dissemination of Information §106.8(b)

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

- Website
- Handbooks
- Catalogs

For

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

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Title IX Personnel

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Title IX Personnel

- Title IX coordinator—MUST be designated
- Title IX investigator
- 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.*
- Case managers?

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Outsourcing/Requiring Legally Trained Title IX Operatives

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

Id. at 30105.

525

Personnel Decisions

- Should we appoint deputy Title IX coordinators?
  - *[T]he recipient may need to or wish to designate multiple employees as Title IX Coordinators or designate a Title IX Coordinator and additional staff to serve as deputy Title IX Coordinators.* *Id.* at 30117.
- Should the Title IX coordinator take on the role of investigator, as permitted in the new regulations? (*See id.* 30135 n.596.)
- How many decision makers? (New regulations suggest training at least two so one can be the appellate officer.)
- Single decision-maker or a panel?
- What should we outsource? Advantages/disadvantages?
- Budgetary concerns/limited staff on very small campuses
- Bias
- Conflicts of interest?
- Appropriate relationships between Title IX coordinator and other functions.
- Role of counsel?

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Training

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

Id. at 30567.

527

"Actual Knowledge," Notice, "Mandatory Reporters"

528

"Actual Knowledge" §106.30(a)

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

(emphasis added)

529

"Officials with Authority"

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

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

Id. at 30039.

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

530

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Actual Knowledge/Employees

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

Id. at 30039 (emphasis added).

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

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

531

Limiting Mandatory Reporters
A Rejection of "Responsible Employees"

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

Id. at 30040 (emphasis added).

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

Id. (emphasis added).

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

532

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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).

533

"Mandatory Reporters"

- Should IHE's designate a large cadre of "mandatory reporters" even if they are permitted to?
- Pros/cons?
- Conflicts in research?
- How much time to you have to notify folks of the change?
- Does it make sense to stay the course – for this first year, and wait and see if a change is needed?

534

"Notice"

Notice results whenever . . . Title IX Coordinator, or any official with authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant's parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means. These final regulations emphasize that any person may always trigger a recipient's response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient's website. The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by "any person" who believes that sexual harassment may have occurred and requires a recipient's response.

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

535

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.

536

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Anonymous Reports

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

Id. at 30087.

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

Id. at 30087.

537

Notice Cont'd

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

Id. at 30106 (emphasis added).

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Scope, Jurisdiction, and Tuning with Other Campus Policies

539

"Statute of Limitations"

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

. . . [A] complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed as provided in the revised definition of "formal complaint" in § 106.30; this provision tethers a recipient's obligation to investigate a complainant's formal complaint to the complainant's involvement (or desire to be involved) in the recipient's education program or activity so that recipients are not required to investigate and adjudicate allegations where the complainant no longer has any involvement with the recipient while recognizing that complainants may be affiliated with a recipient over the course of many years and sometimes complainants choose not to pursue remedial action in the immediate aftermath of a sexual harassment incident. The Department believes that applying a statute of limitations may result in arbitrarily denying remedies to sexual harassment victims.

Id. at 30086-87 (emphasis added).

540

"Statute of Limitations" and Dismissal of Complaint

[T]he § 106.45 grievance process contains procedures designed to take into account the effect of passage of time on a recipient's ability to resolve allegations of sexual harassment. For example, if a formal complaint of sexual harassment is made several years after the sexual harassment allegedly occurred, § 106.45(b)(3)(ii) provides that . . .

- *if the respondent is no longer enrolled or employed by the recipient, or*
- *if specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein,*

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

Id. at 30087 (bullets added).

541

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)

542

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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.

543

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

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

Id. at 30065 (emphasis added).

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

Id. at 30091 (emphasis added).

[E]ven if alleged sexual harassment did not occur in the recipient's education program or activity, dismissal of a formal complaint for Title IX purposes does not preclude the recipient from addressing that alleged sexual harassment under the recipient's own code of conduct. Recipients may also choose to provide supportive measures to any complainant, regardless of whether the alleged sexual harassment is covered under Title IX. *Id.* at 30093 (emphasis added).

Tuning? Traps?

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"Non-sexual Harassment Sex Discrimination"

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

Id. at 30095.

545

Conduct That Does Not Meet Sexual Harassment Definition

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

Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct. *Id.* at 30037-38 (emphasis added).

Similarly, nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States.

Id. at 30038 n.108 (emphasis added).

Tuning? Traps?

546

§ 106.45 may not be circumvented…

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

Id. at 30095.

547

Scope/Off-Campus Jurisdiction

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

Id. at 30093.

Will colleges eliminate RSO recognition?

Will RSO's choose to leave?

Relationship Agreements

Study Abroad?

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RSO's/Greek Life

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

Id. at 30061 (emphasis added).

549

Organizational Responsibility Under Title IX

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

Id. at 30096 (emphasis added).

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No Reasonable Cause Threshold

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

Id. at 30105.

551

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).

552

Classroom Behavior

Nothing in the final regulations reduces or limits the ability of a teacher to respond to classroom behavior. If the in-class behavior constitutes Title IX sexual harassment, the school is responsible for responding promptly without deliberate 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" while a grievance process resolves any factual issues about the sexual harassment incident. If the in-class behavior does not constitute Title IX sexual harassment (for example, because the conduct is not severe, or is not pervasive), then the final regulations do not apply and do not affect a decision made by the teacher as to how best to discipline the offending student or keep order in the classroom.

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 occurring?

553

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).

554

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Trigger Warnings?

These final regulations neither require nor prohibit a recipient from providing a trigger warning prior to a classroom discussion about sexual harassment including sexual assault*; § 106.6(d)(1) does assure students, employees (including teachers and professors), and recipients that ensuring non-discrimination on the basis of sex under Title IX does not require restricting rights of speech, expression, and academic freedom guaranteed by the First Amendment.* ***Whether the recipient would like to provide such a trigger warning and offer alternate opportunities for those students fearing renewed trauma from participating in such a classroom discussion is within the recipient's discretion.***

Id. at 30419 (emphasis added).

555

Tuning with Other Policies and Campus Functions

- Student and Organizational Conduct
- Employment Conduct
- Disability Services
- Equity
- Security
- Threat Assessment
- Bias Incident Reporting
- Care Team Reports

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Prompt, Equitable, Reasonable

557

Prompt Responses

The final regulations require recipients to respond promptly by:

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

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

558

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)

559

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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Reasonable/Clearly Unreasonable

In addition to the specific requirements imposed by these final regulations, all other aspects of a recipient's response to sexual harassment are evaluated by what was not clearly unreasonable in light of the known circumstances. Recipients must also document their reasons why each response to sexual harassment was not deliberately indifferent. *Id.* at 30046 (internal citations omitted, emphasis added).

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

[I]f a recipient does not provide supportive measures as part of its response to sexual harassment, the recipient specifically must document why that response was not clearly unreasonable in light of the known circumstances (for example, perhaps the complainant did not want any supportive measures). *Id.* at 30046 n.183 (emphasis added).

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Law Enforcement Activity/ Criminal Proceedings

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Concurrent Law Enforcement Activity

Section 106.45(b)(1)(v) provides that the recipient's designated reasonably prompt time frame for completion of a grievance process is subject to temporary delay or limited extension for good cause, which may include concurrent law enforcement activity. Section 106.45(b)(6)(i) provides that the decision-maker cannot draw any inference about the responsibility or non-responsibility of the respondent solely based on a party's failure to appear or answer cross-examination questions at a hearing; this provision applies to situations where, for example, a respondent is concurrently facing criminal charges and chooses not to appear or answer questions to avoid self-incrimination that could be used against the respondent in the criminal proceeding. Further, subject to the requirements in § 106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process. § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient "from a party or other source" which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 106.45(b)(1)(ii). *Id.* at 30099 n.466 (emphasis added).

563

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).

564

Police Investigations

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

Id. at 30099 n. 467.

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Confidentiality

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Confidentiality and FERPA Protections

Section 106.71(a) requires recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation. Section 106.30 defining "supportive measures" instructs recipients to keep confidential the provision of supportive measures except as necessary to provide the supportive measures. These provisions are intended to protect the confidentiality of complainants, respondents, and witnesses during a Title IX process, subject to the recipient's ability to meet its Title IX obligations consistent with constitutional protections.

Id. at 30071 (emphasis added).

[Separate module addresses FERPA, recordkeeping and confidentiality.]

567

"Gag orders" are not permitted, but

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

Id. at 30296.

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

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Non-disclosure Agreements?

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

Id. at 30304

(emphasis added).

569

Complainant Autonomy/Desire to Move Forward in a Formal Process

570

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.

571

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

Id. at 30045 (emphasis added).

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Moving Forward Against the Wishes of a Complainant

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

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Implementing Supportive Measures

575

§ 106.30(a) "Supportive Measures"

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

576

§ 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.

577

§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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More on Supportive Measures...

[A] recipient must offer supportive measures to a complainant, regardless of whether the complainant decides to file, or the Title IX Coordinator decides to sign, a formal complaint.
Id. at 30046 (emphasis added).

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

Complainants must be offered supportive measures, and respondents may receive supportive measures, whether or not a formal complaint has been filed or a determination regarding responsibility has been made. *Id.* at 30064 (emphasis added).

[A] recipient must offer supportive measures to any person alleged to be the victim, even if the complainant is not the person who made the report of sexual harassment.
Id. at 30069-70 (emphasis added).

579

Thoughts on Supportive Measures

- No-contact orders
  - *[T]hese final regulations allow for mutual restrictions on contact between the parties as stated in § 106.30, and § 106.30 does not expressly prohibit other types of no-contact orders such as a one-way no-contact order.*
- Moving classes? *Id.* at 30521.
- Housing changes?
- Two students in the same student organization, club, or team?
- Burden on one party but not the other?

[Separate module on supportive measures.]

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Emergency Removal/Administrative Leave

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§106.44(c) *Emergency removal.*

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

582

Emergency Removal of Respondent

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

Id. at 30046 (internal citation omitted).

583

§106.44(d) *Administrative leave.*

Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

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Thoughts on Emergency Removal and Administrative Leave

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

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A Closer Look at Formal Complaints

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§ 106.30(a) "Formal Complaint"

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.

(emphasis added)

587

"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).

588

"Formal Complaint" Cont'd

A "formal complaint" is a document that initiates a recipient's grievance process, but a formal complaint is not required in order for a recipient to have actual knowledge of sexual harassment, or allegations of sexual harassment, that activates the recipient's legal obligation to respond promptly, including by offering supportive measures to a complainant.

Id. at 30030 (emphasis added).

589

§ 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.

591

§ 106.45(b)(3)(iii)

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

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Dismissal of Complaint

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

Id. at 30087.

[I]f a recipient dismisses a formal complaint or any allegations in the formal complaint, the complainant should know why any of the complainant's allegations were dismissed and should also be able to challenge such a dismissal by appealing on certain grounds.

Id. at 30088.

593

§ 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.

594

Thoughts on Formal Complaints

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

595

§ 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.

(emphasis added)

597

Advisors and Hearings

[Hearings and evidence are addressed in separate modules.]

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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;

599

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

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

See id. at 30109 (emphasis added).

600

"Advisors"

- Complainants and respondents can have any advisor of their choosing.
- Some will choose a lawyer as an advisor. Some will want a lawyer but will not be able to afford one. Equitable treatment issues?
- Some may have a family member, a friend, or another trusted person serve as their advisor.
- If a party does not have an advisor, the school must provide one.
  - *[W]hile the final regulations do not require the recipient to pay for parties' advisors, nothing the in the final regulations precludes a recipient from choosing to do so.* *Id.* at 30297.
- Effective representation?
  - *[P]roviding parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation.* *Id.*
  - Should not be viewed as practicing law, but rather "as providing advocacy services to a complainant or respondent." *Id.* at 30299.

601

"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

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

Id. at 30299.

603

"Advisors" Cont'd

How can/should advisors participate in the process?

Section 106.45(b)(5)(vi) (evidence subject to inspection and review must be sent electronically or in hard copy to each party and the party's advisor of choice). *Id.* at 30298 n. 1168.

Section 106.45(b)(5)(vii) (a copy of the investigative report must be sent electronically or in hard copy to each party and the party's advisor of choice). *Id.* at 30298 n. 1169.

[T]he final regulations make one exception to the provision in § 106.45(b)(5)(iv) that recipients have discretion to restrict the extent to which party advisors may actively participate in the grievance process: Where a postsecondary institution must hold a live hearing with cross-examination, such cross-examination must be conducted by party advisors. *Id.* at 30298 n. 1167.

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§ 106.45(b)(6)(i)

(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

605

§ 106.45(b)(6)(i) Cont'd

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

(emphasis added)

606

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?

607

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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More on § 106.45

§ 106.45 would, for example, permit a recipient to require parties personally to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements the recipient allows at a live hearing, so long as such rules apply equally to both parties. *Id.* at 30298 (emphasis added).

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).

609

Recipients may not…

. . . adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45 . . .

. . . adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice . . .

. . . adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege) . . .

Id. at 30294 (internal citations omitted).

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Rules for Evaluating Evidence

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

Id. at 30294 (emphasis added).

611

Rules Regarding Weight and Credibility

A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents. Because a recipient's investigators and decision-makers must be trained specifically with respect to "issues of relevance," any rules adopted by a recipient in this regard should be reflected in the recipient's training materials, which must be publicly available.

Id. at 30294 (emphasis added).

612

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).

613

Cross-Examination

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

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"Adversarial in Nature"

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

Id. at 30097.

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Standard of Evidence to Determine Responsibility

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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;

617

"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?

618

Sanctions and Remedies

619

Sanctions

The Department does not require particular sanctions – or therapeutic interventions – for respondents who are found responsible for sexual harassment, and leaves those decisions in the sound discretion of State and local educators.

Id. at 30063 (emphasis added).

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

Id. at 30096 (emphasis added).

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

Id. at 30096 n.456 (emphasis added).

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Disciplinary Decisions/Sanctions Must Themselves Not Be Discriminatory

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

Id. at 30104.

621

Sanctions

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

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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;

(emphasis added)

623

Remedies

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

Id. at 30083 (emphasis added).

624

Remedies

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

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Appeals

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§ 106.45(b)(8)(i)

(8) Appeals.

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

§ 106.45(b)(8)(i)(A-C)

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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§ 106.45(b)(8)(ii)

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

§ 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.

629

630

Points on Appeals

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

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Informal Resolution

[Separate module on informal resolution.]

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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 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—

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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;

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§ 106.45(b)(9)(ii-iii)

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

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

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Ending an Informal Process

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

Id. at 30059 n.286.

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Points on Informal Resolution

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

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A Closer Look at Retaliation

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§ 106.71(a)

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

§ 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.

§ 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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Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

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Bias/Prejudice/Stereotypes/Prejudgment/Conflicts of Interest

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

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

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Bias/Conflicts of Interest

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

Id. at 30103 (emphasis added).

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

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

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

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"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*

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

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

merriam-webster.com

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Impartial

Not partial or biased: treating or affecting all equally

merriam-webster.com

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Prejudgment

A judgment reached before the evidence is available

webster-dictionary.org

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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

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Stereotype

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

merriam-webster.com

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"Sex Stereotypes"

- What is a *sex* stereotype? What does DOE mean by this term?
- What are some examples of sex stereotypes?
- An example of a scholarly paper on stereotypes:
  - S. Kanahara, *A Review of the Definitions of Stereotype and a Proposal for a Progressive Model*, Individual Differences Research. Vol. 4 Issue 5 (Dec. 2006).
- Sex stereotypes are to be avoided in training and in actual practice.
- Be especially careful when doing case studies of any kind.
- Anyone can be a complainant or respondent, and all are individuals!

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Conclusion

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Policy should reflect practice and practice should reflect policy.

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All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

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Whose side are you on?

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

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Remember...

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

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Thank You...

Assessment will follow.

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NASPA
Student Affairs Administrators in Higher Education

Supportive Measures Within the New Title IX Regulations

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

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This Module is Designed for

TRACK 1 – Title IX Coordinators

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Why the focus on supportive measures?

- The term supportive appears 1,112 times in the new regulations
- Why does the Department place such an emphasis on supportive measures?
  - Unsupportive institutional responses increase the effects of trauma on complainants, and institutional betrayal may occur when an institution's mandatory reporting policies require a complainant's intended private conversation about sexual assault to result in a report to the Title IX Coordinator.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30043. (Unofficial version page 18).

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Definitions

- § 106.30 Definitions (a)(3)
- Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
- Supportive measures 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.

30574, p. 549

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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.'"

30546, p. 521

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Breaking It Down

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.

30460, p. 435

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Breaking It Down

Examples

- **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.

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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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Confidentiality, continued

- **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.**

30071, p. 46

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Confidentiality vs. anonymity

- **"In order for a recipient to provide supportive measures to a complainant, it is not possible for the complainant to remain anonymous because at least one school official (e.g., the Title IX Coordinator) will need to know the complainant's identity in order to offer and implement any supportive measures. Section 106.30 defining 'supportive measures' directs the recipient to maintain as confidential any supportive measures provided to either a complainant or a respondent, to the extent that maintaining confidentiality does not impair the recipient's ability to provide the supportive measures."**

30133, p. 108

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Definitions continued

- **Supportive measures as:**
  - Differentiated from interim measures
  - 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." 30282, p. 257

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Remedies

- **"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."** 30085, p. 60
- **"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.'"**

30190, p. 600

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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")

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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

- "These final regulations leave recipients legitimate and necessary flexibility to make decisions regarding the supportive measures, remedies, and discipline that best address each sexual harassment incident."
- "Like the Supreme Court, the Department believes that recipients have unique knowledge of their own educational environment and student body, and are best 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."

30044, p. 19

Importance of policy language

- Commenters told the Department about the importance of transparency regarding availability of supportive measures.
- "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, which many commenters asserted is a stressful and difficult process for complainants and respondents."

30267, p. 251

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Complainant, defined

- "We have revised the § 106.30 definition of "complainant" to mean any individual 'who is alleged to be the victim' of sexual harassment, to clarify that a recipient must offer supportive measures to any person alleged to be the victim, even if the complainant is not the person who made the report of sexual harassment."

30070, p. 44

Complainant autonomy

- Throughout these final regulations, the Department aims to respect the autonomy of complainants and to recognize the importance of a complainant retaining as much control as possible over their own circumstances following a sexual harassment experience, while also ensuring that complainants have clear information about how to access the supportive measures a recipient has available (and how to file a formal complaint initiating a grievance process against a respondent if the complainant chooses to do so) if and when the complainant desires for a recipient to respond to the complainant's situation.

30043, p. 18

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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

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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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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—

- 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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Document non-provision of supportive measures

- Institutions must also indicate if a complainant does not want to receive supportive measures, if offered.
- Section 106.45(b)(10).
  - As revised, this provision states that if a recipient does not provide supportive measures as part of its response to sexual harassment, the recipient specifically must document why that response was not clearly unreasonable in light of the known circumstances(for example, perhaps the complainant did not want any supportive measures).

30046, p. 21

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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 Handbook, 8-14

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Clery Act Alignment

- 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 measures.
  - 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 Handbook, 8-14

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Clery Act Alignment

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

Clery Handbook Checklist, C-9

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Clery Act Alignment

- Your institution may also already have a list of "protective measures" that are provided within Clery.
  - Your institution must provide
    - 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 measures. 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 Handbook Checklist, C-9

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Equitable services for respondents

- The Department does not require recipients to provide respondents with supportive measures, but it also does not prevent them from doing so.
  - "Complainants must be offered supportive measures, and respondents may receive supportive measures, whether or not a formal complaint has been filed or a determination regarding responsibility has been made."

30064, p. 38

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Equitable support services

- "The Department understands commenters' concerns that an adversarial process may take an emotional toll on participants, and the final regulations encourage provision of supportive measures to both parties and give both parties an equal right to select an advisor of choice to assist the parties during a grievance process."

30266, p. 241

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Supportive services for respondents

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

30103, p. 78

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Equitable, not equal

- "The Department does not intend, and the final regulations do not require, to impose a requirement of equality or parity with respect to supportive measures provided to complainants and respondents."
- "By defining supportive measures to mean individualized services that cannot unreasonably burden either party, these final regulations incentivize recipients to make supportive measures available to respondents, but these final regulations require recipients to offer supportive measures to complainants."

30277, p. 252; 30276, p. 251

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One-Way No-Contact Orders

- A fact-specific inquiry is required into whether a carefully crafted no-contact order restricting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if a recipient issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no-contact order may be appropriate.

30184, p. 577

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Timing of supportive measures

- The Department reiterates that "no written statement is 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

692

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When not to provide supportive services

- "The Department acknowledges that there may be specific instances in which it is impossible or impractical to provide supportive measures. For example, the recipient may have received an anonymous report or a report from a third party and cannot reasonably determine the identity of the complainant to promptly contact the complainant. Similarly, if a complainant refuses the supportive measures that a recipient offers (and the supportive measures offered are not clearly unreasonable in light of the known circumstances) and instead insists that the recipient take punitive action against the respondent without a formal complaint and grievance process under § 106.45, the Department will not deem the recipient's response to be clearly unreasonable in light of the known circumstances."

30209, p. 184

693

Supportive measures are not punitive

- "Under § 106.30, a supportive measure must not be punitive or disciplinary, but may burden a respondent as long as the burden is not unreasonable."
- "Emergency removal may be undertaken in addition to implementing supportive measures designed to restore or preserve a complainant's equal access to education."
- Placing a complainant (not respondent) on paid leave, if employed by the institution
- Changing respondent's class schedule, housing, or dining hall assignment may be acceptable
- 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."

30034, p. 9

695

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."

30069, p. 44

696

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 other party and without constituting punitive or disciplinary actions including by protecting the safety of all parties and the recipient's educational environment or deterring sexual harassment. Unlike informal resolutions, which may result in disciplinary measures designed to punish the respondent, supportive measures must be non-disciplinary and non-punitive. 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 recipient, that include similar measures but that also could include disciplinary measures, while providing finality for both parties in terms of resolving allegations raised in a formal complaint of sexual harassment. Because an informal resolution may result in disciplinary or punitive measures agreed to by a respondent, we have revised § 106.45(b)(9) to expressly state that a recipient may not offer informal resolution unless a formal complaint is filed.

30401, p. 376

697

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."

30278, p. 253

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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).

30106, p. 81; 30118, p. 93

699

Role of Advocate/Support Person/Advisor

- "Although these final regulations do not expressly require recipients to allow complainants to bring a supportive friend to an initial meeting with the Title IX Coordinator, nothing in these final regulations prohibits complainants from doing so."
- "Although commenters asserted that some complainants, even at postsecondary institutions, are too young, immature, or traumatized to contact a Title IX Coordinator, the Department notes that nothing in the final regulations prevents a complainant from first discussing the harassment situation with a trusted mentor or having a supportive friend with them to meet with or otherwise report to the Title IX Coordinator."

30109, p. 84; 30113, p. 88

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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 a complainant needs to re-take an exam)."

30134, p. 109

701

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."

30194, p. 169

702

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."

30559, p. 534

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Thank You!

Assessment to follow…

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NASPA
Student Affairs Administrators in Higher Education

Title IX Evidence Issues

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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

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Overview

"Evidence" in Regulations

- Credibility
- Relevance
- Evidentiary Standard
- Inculpatory & Exculpatory Evidence
- Expert Testimony
- Hearsay, Character Evidence, Prior Bad Acts, Lie Detectors,
- Statements Not subject to Cross Examination

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Evidence Resources

- Title IX Regulations & OCR Guidance
- Federal Rules of Evidence
- Everyday Evidence: A Practical Approach, Charles H. Rose III 2nd Edition 2016
- John Henry Wigmore, WIGMORE ON EVIDENCE (Chadbourn rev. eds. 1972, 1975)
- Dictionaries

708

Let's examine some language from the final regulations…

709

§ 106.45 (1)(iii) Grievance process for formal complaints of sexual harassment.

"A recipient must ensure that decision-makers receive training on . . . issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant . . ."

"A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence . . ."

(emphasis added)

710

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

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

. . .

(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 . . ."

(emphasis added)

711

§ 106.45 (1)(iv) Grievance process for formal complaints of sexual harassment.

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

. . .

(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)

712

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§ 106.45 (1)(vii) Grievance process for formal complaints of sexual harassment.

"(1)Basic requirements for grievance process. 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 . . ."

(emphasis added)

713

§ 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."

(emphasis added)

714

§ 106.45 (5)(i) 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—

(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)

715

§ 106.45 (5)(ii) 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—

. . .

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

(emphasis added)

716

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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.

(emphasis added)

717

§ 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)

718

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§ 106.45 (5)(vi) 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—

. . .

(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 2024 complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination . . ."

(emphasis added)

719

§ 106.45 (5)(vii) 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—

. . .

(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)

720

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

"(6) Hearings.

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

(emphasis added)

721

§ 106.45 (6)(i) Grievance process for formal complaints of sexual harassment. [Cont'd]

"(6) Hearings.

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. . . ."

(emphasis added)

722

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§ 106.45 (6)(i) Grievance process for formal complaints of sexual harassment. [Cont'd]

"(6) Hearings.

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. . . ."

(emphasis added)

723

§ 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 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. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant."

(emphasis added)

724

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Let's Look at Some of the Comments in the Regulations

725

The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and declines to impose a comprehensive, detailed set of evidentiary rules for resolution of contested allegations of sexual harassment under Title IX. . . . the Department has determined that recipients must consider relevant evidence with the following conditions: a complainant's prior sexual behavior is irrelevant (unless questions or evidence about prior sexual behavior meet one of two exceptions, as noted above); information protected by any legally recognized privilege cannot be used; no party's treatment records may be used without that party's voluntary, written consent; and statements not subject to cross-examination in postsecondary institutions cannot be relied on by the decision-maker. The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30337.

726

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 real 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 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.

Id. at 30343.

727

The Department believes the protections of the rape shield language remain stronger if decision-makers 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 any 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 must possess the legal expertise of judges and lawyers. Instead, the Department expects decision-makers to apply a single admissibility rule (relevance), including this provision's specification that sexual behavior is irrelevant with two concrete exceptions. This approach leaves the decisionmaker discretion to assign weight and credibility to evidence, but not to deem evidence inadmissible or excluded, except on the ground of relevance (and in conformity with other requirements in § 106.45, including the provisions discussed above whereby the decisionmaker cannot rely on statements of a party or witness if the party or witness did not submit to cross-examination, a party's treatment records cannot be used without the party's voluntary consent, and information protected by a legally recognized privilege cannot be used).

Id. at 30351-52

728

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[T]he Department declines to import a balancing test that would exclude sexual behavior questions and evidence (even meeting the two exceptions) unless probative value substantially outweighs potential harm or undue prejudice, because that open-ended, complicated standard of admissibility would render the adjudication more difficult for a layperson decision-maker competently to apply. Unlike the two exceptions in this provision, a balancing test of probative value, harm, and prejudice contains no concrete factors for a decision-maker to look to in making the relevance determination.

Id. at 30353

729

In response to commenters' concerns that the proposed rules did not provide a recipient sufficient leeway to halt investigations that seemed futile, the final regulations revise § 106.45(b)(3)(ii) to provide that a recipient may (in the recipient's discretion) dismiss a formal complaint, or allegations therein, in certain circumstances including where a complainant requests the dismissal (in writing to the Title IX Coordinator), where the respondent is no longer enrolled or employed by the recipient, or where specific circumstances prevent the recipient from meeting the recipient's burden to collect sufficient evidence (for example, ***where a postsecondary institution complainant has ceased participating in the investigation and the only inculpatory evidence available is the complainant's statement in the formal complaint or as recorded in an interview by the investigator****).*

Id. at 30282 (emphasis added).

730

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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.

Id. at 30303.

731

The Department therefore believes it is important that at the phase of the investigation where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant. The parties should have the opportunity to argue that evidence directly related to the allegations is in fact relevant (and not otherwise barred from use under § 106.45), and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator.

Id. at 30304.

732

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.

733

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 conducting cross-examination. 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 decision-maker's consideration.

Id. at 30332.

734

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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 questions 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 character evidence.*** *Id.* at 30337 (emphasis added).

735

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

Id. at 30337.

736

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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).

737

While not addressed to hearsay evidence as such, § 106.45(b)(6)(i), which requires postsecondary institutions to hold live hearings to adjudicate formal complaints of sexual harassment, states that 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.

***Id.* at 30247 n. 1017.**

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

***Id.* at**

738

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 often 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 an 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.

739

While commenters correctly observe that the Confrontation Clause is concerned with use of testimonial statements against criminal 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 hearsay exception under applicable rules of evidence in a criminal court. For reasons discussed above, the Department does not wish to impose a complex set of evidentiary rules on recipients, whether patterned after civil or criminal rules.

Id. at 30347.

740

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

Id. at 30348.

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[W]here a party or witness does not appear and is not cross-examined, the statements of that party or witness cannot be determined reliable, truthful, or credible in a non-courtroom setting like that of an educational institution's proceeding that lacks subpoena powers, comprehensive rules of evidence, and legal professionals. . . . [R]ecipients are educational institutions that should not be converted into de facto courtrooms. The final regulations thus prescribe a process that simplifies evidentiary complexities while ensuring that determinations regarding responsibility result from consideration of relevant, reliable evidence. The Department declines to adopt commenters' suggestion that instead the decision-maker should be permitted to rely on statements that are not subject to cross-examination, if they are reliable; making such a determination without the benefit of extensive rules of evidence would likely result in inconsistent and potentially inaccurate assessments of reliability. Commenters correctly note that courts have not imposed a blanket rule excluding hearsay evidence from use in administrative proceedings. However, cases cited by commenters do not stand for the proposition that every administrative proceeding must be permitted to rely on hearsay evidence, even where the agency lacks subpoena power to compel witnesses to appear.

Id. at 30348.

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

Id. at 30354.

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Considerations for Applying Regulatory Requirements

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Recipients may not…

. . . adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45 . . .

. . . adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice . . .

. . . adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege) . . .

Id. at 30294 (internal citations omitted).

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1) Credibility Determinations
2) Issues of Relevance
3) Setting the Evidentiary Standard
4) Inculpatory & Exculpatory Evidence
5) Expert Testimony
6) Hearsay & Character
7) 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.

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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.
- 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.

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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.*

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

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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?

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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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What is Probative?

- Title IX Regulations do not define Probative
- Evidence that tends to prove or disprove a point in Issue.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 677

- "Each single piece of evidence must have a plus value."

1 JOHN H. WIGMORE, EVIDENCE 410 (1940).

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FRE 403 = Court Room Exclusions Not Applied to Title IX Hearings

- "The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: Unfair Prejudice, Confusing the Issues, Misleading the jury, Undue delay, Wasting time, Needlessly presenting cumulative evidence."
- 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)
2) Complainant's Sexual Predisposition (always) & Prior Sexual History Unless… Two Exceptions
3) Treatment Records without the parties written voluntary consent
4) A recipient may adopt rules of order or decorum to forbid badgering a witness.
5) 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.* https://www.federalregister.gov/d/2020-10512/p-3779 -
6) A Recipient may fairly deem repetition of the same question to be irrelevant.

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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.

https://www.federalregister.gov/d/2020-10512/p-3779

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Rape Shield Language

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

*1) if offered to **prove that someone other than the respondent committed the alleged sexual harassment**, or*

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

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

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Title IX Hearing – FRE 412 Rape Shield Protections

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) *Criminal Cases*. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) *Civil Cases*. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

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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*

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Cross Examination & Relevance Determinations

- 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." https://www.federalregister.gov/d/2020-10512/p-3896
- "[D]irectly, orally, and in real time" precluding a requirement that cross examination questions be submitted or screened prior to the live hearing. https://www.federalregister.gov/d/2020-10512/p-3897
- "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." https://www.federalregister.gov/d/2020-10512/p-3892

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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

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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

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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 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 persuade you that it is highly probable that the fact is true. CACI No. 201. More Likely True—Clear and Convincing Proof https://www.justia.com/documents/trials-litigation-caci.pdf

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Inculpatory Evidence

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

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

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Exculpatory Evidence

Evidence tending to establish a defendant's Innocence.

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

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Court Room Expert Testimony Requirements– FRE 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

A) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
B) The Testimony is based on sufficient facts or data
C) The Testimony is the product of reliable principles and methods
D) The expert has reliably applied the principles and methods to the facts of the case.

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Title IX Regulations – Expert Witnesses

- Must provide the parties equal opportunity to present fact and expert witnesses.
- Exert witness evidence must be relevant.

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Hearsay, Character, etc..

- *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* https://www.federalregister.gov/d/2020-10512/p-2947

(internal citations omitted)

- *Within these evidentiary parameters recipients retain the flexibility to adopt rules that govern how the recipient's investigator and decision-maker evaluate evidence and conduct the grievance process (so long as such rules apply equally to both parties)*

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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

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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;
- (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 improper 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; or
- (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)

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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 a fortiori that an identical decision by the Hearing Board did not violate Haidak's right to due process. *Id.*

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Thank You!

Assessment to follow...

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NASPA
Student Affairs Administrators in Higher Education

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.

Id. at 30135 n.596.

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§ 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.

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

- *Gives the parties equal opportunity to select an advisor of the party's 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 30053.

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Training

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§ 106.45(b)(1)(i)-(x)

- *Treats complainants and respondents equitably by recognizing the need for complaints to receive remedies where a respondent is determined responsible and for respondents to face disciplinary sanctions only after a fair process determines responsibility;*
- *Objectively evaluates all relevant evidence both inculpatory and exculpatory, and ensures that rules voluntarily adopted by a recipient treat the parties equally;*

Id. at 30053.

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§ 106.45(b)(1)(i)-(x) continued

- *Requires Title IX Coordinators, investigators, decision-makers, 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).

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§ 106.45(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.

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Training

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

Id. at 30567.

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Investigations

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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?

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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.

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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;

791

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

792

Fact Finding and Data Collection (with credibility assessment)

793

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

794

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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

795

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).

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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.

797

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?"

Source: Russell Strand, Frontline Training Conference, 2018

798

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 Conference, 2018

799

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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Gathering and Evaluating Evidence (with Credibility Assessment)

801

Types of Evidence

VERBAL

- Interviews with:
  - Parties
  - Witnesses
  - Others with relevant information

PHYSICAL

- Images (photos and videos)
- Text messages
- Screen shots
- Documents
- E-mails
- Security footage
- Medical records

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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

803

Credibility of the Parties and Evidence

- Credibility = "the accuracy and reliability of evidence."
- A credibility assessment is necessary for each piece of evidence considered in the investigation.

Source: Nedda Black, J.D., et al., *The ATIXA Playbook: Best Practices for the Post-Regulatory Era* at 101 (ATIXA, 2017).

804

Credibility: EEOC Guidance

- If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:
- 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 to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

805

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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Investigative relevance 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 30249.

§ 106.45(b)(7)

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.

Id. at 30389 (emphasis added).

807

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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 cross-examination questions before a party or witness must answer.

Id. at 30352.

809

810

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).

811

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.

812

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Without Credibility Assessment

813

Why would you consider this?

- 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.

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Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

815

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).

816

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

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

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

817

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).

818

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Does DOE require "Implicit Bias" training?

The Department declines to specify that training of Title IX personnel must include implicit bias training; the nature of the training required under § 106.45(b)(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).

819

Final Thought

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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Thank You...

Assessment will follow.

821

NASPA
Student Affairs Administrators in Higher Education

Constructing a Report

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

822

This Module is Designed for

TRACK 1 – Title IX Coordinators

TRACK 3 – Title IX Investigators

823

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).

824

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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.

825

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).

826

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Investigation Obligations

827

§ 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;*
- *Gives the parties equal opportunity to select an advisor of the party's choice (who may be an attorney, but does not need to be, an attorney);*

Id. at 30053.

828

§ 106.45(b)(5)(i)-(vii) continued

- *Requires written notices when a party's participation is invited or 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.*

Id. at 30053.

829

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.

Id. at 30309.

830

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Report purpose and combining continued

- *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 complainants, multiple respondents, or both, a recipient may issue a single investigative report.*

Id. at 30309.

831

Findings or Conclusions in Report?

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

Id. at 30308.

832

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Elements of the Investigative Report

833

No Position

The Department takes no position here on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence. We note that the decision-maker must prepare a written determination regarding responsibility that must contain certain specific elements (for instance, a description of procedural steps taken during an investigation) and so a recipient may wish to instruct the investigator to include such matters in the investigative report, but these final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence.

Id. at 30310.

834

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.*

Id. at 30310.

835

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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Discretion continued

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 that was reasonably available at the time the determination regarding responsibility was made for purposes of appeal under § 106.45(b)(8)(i)(B).

Id. at 30311.

837

Reminders

- *"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.

838

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Reminders 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.

839

§ 106.45(b)(7)

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.

Id. at 30389 (emphasis added).

840

Report Sections to Consider

841

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

II. JURISDICTION

- This office houses the Title IX Office which has campus-wide responsibility for investigating alleged violations of the Sexual Harassment Policy. This office responds to claims of harassment (including sexual assault), stalking, dating violence, domestic violence, and retaliation brought forward by students, employees or third parties.

843

Scope

III. SCOPE OF THE INVESTIGATION

- [This is the timeline and details pertinent to the case. It is the record of when it was reported. If a No Contact Order was issued. When parties were notified, interviewed, submitted evidence, asked for additional parties to be interviewed, and if they rescheduled or didn't respond.
- This is the accounting for the time it took for the investigation. It 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

845

Scope continued

- 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

846

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.

847

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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Analysis (this could be relevance or credibility)**

VI. ANALYSIS

A. Standard of Evidence: Preponderance of the Evidence

Findings in this investigative report are based on a "preponderance of the evidence" standard. In other words, after reviewing all of the evidence, including the relative credibility of the parties and their statements during interviews, whether it is more likely than not that the conduct occurred as alleged. If the conduct did occur as alleged, then an analysis is completed to determine whether the conduct violated University policy. (Please note: the report's findings do not reach conclusions whether the alleged conduct violated state or federal laws, but instead address whether the University's policies were violated).

B. Fact Finding

a) A list of the facts discovered during the investigation

b) A summary of the facts/details agreed and disagreed upon by the CP and RP

c) This is the nuts and bolts of what happened

849

Summary of the Analysis**

C. Summary of the Analysis

- In the instant case... (This is the narrative of the information learned, from all parties, in a summary presentation of what was learned, and the analysis applied to that factual information)

[If Affirmative Consent is in Question:] if something like this is in your policy...

- In evaluating Affirmative Consent in cases of alleged incapacitation, the University asks two questions:
- 1) Did the person initiating sexual activity know that the other party was incapacitated? If not,
- 2) Should a sober, reasonable person in the same situation have known that the other party was incapacitated?
- If the answer to the first question is "YES," Affirmative Consent was absent, and the conduct is likely a violation of this policy.

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Credibility Assessment**

- D. Credibility Assessment
- According to the Equal Employment Opportunity Commission's *Enforcement Guidance on Vicarious Employer Liability for 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. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:
- 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 to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

851

Credibility Assessment**

- These factors will now be assessed for the purposes of this investigation.
- The Complainant...
- The Respondent...
- The Witnesses...

852

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).

853

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 violations of the University Sexual Harassment Policy. In similarly situated 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.

854

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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.

855

Bias, Impartiality, Conflicts of Interest, Sex Stereotypes

856

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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).

857

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

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

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

858

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).

859

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).

860

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Final Thought

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.

861

Thank You...

Assessment will follow.

862

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NASPA
Student Affairs Administrators in Higher Education

Imagining Title IX Hearing Proceedings Under 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

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

863

This Module is Designed for

TRACK 1 – Title IX Coordinators

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

864

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).

865

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.]

866

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Live Hearings and Decision-Makers

867

Separate Decision-Maker(s)

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).

868

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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).

869

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.

870

§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.

871

§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 decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

(emphasis added)

872

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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.

873

§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.

874

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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.

875

§ 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.

(emphasis added)

876

§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 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.*

(emphasis and bullets added)

877

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 and Rape Shield Protections

879

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.

880

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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).

881

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).

882

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).

883

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.

884

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Counterclaims

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).

885

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.

886

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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.

887

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).

888

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 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).

889

Decision-Maker to Determine Relevance Cont'd

The new regulations *require "on the spot" determinations about a question's relevance.* *Id.* at 30343.

[A]n explanation of how or why the question was irrelevant to the allegations at issue, or is deemed irrelevant by these final 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.

Id. at 30343.

890

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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.

891

Decision-Maker to Determine Relevance Cont'd

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.

892

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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.

893

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).

894

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).

895

Consent

896

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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.

897

Credibility and Reliability

898

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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).

Id. at 30331 n.1285 (emphasis added).

899

Credibility and Reliability

Probing the credibility and reliability of statements asserted by witnesses 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.

Id. at 30349.

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 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 30349.

900

Credibility and Reliability

Although observing demeanor is not possible without live cross-examination, 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.

Id. at 30364.

901

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).

902

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Other Factors Besides Demeanor

[C]redibility determinations are not based solely on observing demeanor, but also are based on other factors (e.g., specific details, inherent plausibility, internal consistency, corroborative evidence). Cross-examination brings those important factors to a decision-maker's attention in a way that no other procedural device does; furthermore, while social science research demonstrates the limitations of demeanor as a criterion for judging deception, studies demonstrate that inconsistency is correlated with deception.

Id. at 30321.

903

Other Factors Besides Demeanor Cont'd

[A]ssessing demeanor is just one of the ways in which cross-examination tests credibility, which includes assessing plausibility, consistency, and reliability; judging truthfulness based solely on demeanor has been shown to be less accurate than, for instance, evaluating credibility based on consistency.

Id. at 30355.

904

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Reliability

[W]hether a witness's statement is reliable must be determined in light of the credibility-testing function of cross-examination, even where non-appearance is due to death or post-investigation disability.

Id. at 30348.

905

Role of Lawyers and Advisors

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;

907

"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

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).

909

"Representation?"

Whether a party views an advisor of choice as "representing" the party during a live hearing or not, this provision only requires recipients to permit advisor participation on the party's behalf to conduct cross-examination; not to "represent" the party at the live hearing. A recipient may, but is not required to, allow advisors to "represent" parties during the entire live hearing (or, for that matter, throughout the entire grievance process).

Id. at 30342.

910

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Providing an Advisor to a Party

[W]here a recipient must provide a party with an advisor to conduct cross-examination at a live hearing that advisor may be of the recipient's choice, must be provided without fee or charge to the party, and may be, but is not required to be, an attorney. *Id.* at 30332 (internal citation omitted).

911

Cross-Examination

912

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 decision-maker each party's unique perspective about relevant evidence and desire regarding the outcome of the case.

Id. at 30335 (internal citations omitted, emphasis added).

913

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.

914

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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 cross-examination questions any decision to exclude a question as not relevant.

Id. at 30331 (emphasis added).

915

Recipient to Remain Neutral

[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.

Id. at 30316 (emphasis added).

916

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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).

917

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.

918

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"

https://dynamic.uoregon.edu/jjf/defineDARVO.html

919

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 decision-maker's attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility in the respondent's statements.

Id. at 30330.

920

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Non Appearance of Parties and Witnesses/ Unwillingness to Submit to Cross-Examination

921

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.

922

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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.

Id. at 30349.

923

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).

924

Non Submission to Cross-examination Cont'd

If parties do not testify about their own statement and submit to cross-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).

925

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 cross-examination.

Id. at 30349 (internal citations omitted).

926

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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 questions, the decision-maker must disregard statements of that party or witness but must reach a determination without drawing any inferences about the determination regarding responsibility based on the party or witness's failure or refusal to appear or answer questions. Thus, for example, where a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination.

Id. at 30328.

927

"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 cross-examination, 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 cross-examination (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.

Id. at 30322.

928

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"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 non-statement 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.

929

Technology

930

[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.

931

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

932

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Technology

Decision-makers must be trained on how to use technology at their institution to run a live hearing.

- Software, hardware, programs, apps, etc.
- Practice and run throughs
- Internet connectivity checks in advance?
- Contingency plan or statement that hearings may have to be rescheduled if the campus or a party has connectivity issues.
- Be prepared for the live event
  - Everyone is prepared (mentally and otherwise) for a live hearing and something impedes the process that could have been prevented.

933

The final regulations permit a recipient to apply temporary delays or limited extensions of time frames to all phases of a grievance process where good cause exists. For example, the need for parties, witnesses, and other hearing participants to secure transportation, or for the recipient to troubleshoot technology to facilitate a virtual hearing, may constitute good cause to postpone a hearing.

Id. at 30361-62 (emphasis added).

934

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

935

Safety and Security

936

"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.

937

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.

938

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What safety measures are needed for a live hearing where both parties are in the room?

What safety measures are needed where parties appear virtually?

What rules/decorum standards relate to safety?

What security measures are needed to prevent "hacking" or digital security compromises?

939

Standard of Evidence and Written Determination

940

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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).

941

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 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 appeal.

§ 106.45(b)(7)(ii)(A-F)

942

§ 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.

943

§ 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.]

944

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Appeals

945

§ 106.45(b)(8)(i) Appeals

(8) Appeals.

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

946

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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.

947

Serving Impartially and Without Bias

948

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).

949

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).
- 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*

950

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All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

951

Thank You!

Assessment Will Follow…

952

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NASPA
Student Affairs Administrators in Higher Education

Informal Resolution, Restorative Justice and Mediation

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

953

This Module is Designed for:

TRACK 1 – Title IX Coordinators

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

954

Informal resolution may present a way to resolve sexual harassment allegations in a less adversarial manner than the investigation and adjudication procedures that comprise the § 106.45 grievance process.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30098.

955

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.

956

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§ 106.45(b)(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.

[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.

(emphasis added)

957

§ 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)

958

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§ 106.45(b)(9)(i) (Written Notice)

Parties must be provided written notice that outlines

- *The allegations*
- *<u>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</u>*
- *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)

959

§ 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)

960

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.

961

Points on Informal Resolution

- The new regulations don't require it, but informal resolution is allowed.
- A formal complaint must be filed before any informal resolution process can begin.
- Both parties must voluntarily agree to informal resolution (written consent required). [No coercion or undue influence.]
- 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

962

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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?

963

What is arbitration?

- *The submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the award—a decision to be issues after a hearing at which both parties have an opportunity to be heard.*
- *Arbitration is a well-established and widely used means to end disputes. It is one of several kinds of Alternative Dispute Resolution which provide parties to a controversy with a choice other than litigation. Unlike litigation, arbitration takes place out of court: the two sides select an impartial third party, known as an arbitrator; agree in advance to comply with the arbitrator's award; and then participate in a hearing at which both sides can present evidence and testimony. The arbitrator's decision is usually final and courts rarely reexamine it.*
- *Arbitration can be voluntary or required.* [Except on a college campus, for Title IX purposes, informal resolution cannot be required.]

https://legal-dictionary.thefreedictionary.com/arbitration

964

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What is mediation?

Mediation, as used in law, is a form of alternative dispute resolution resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community, and family matters.

"Neutrals"

Campus "Ombudsperson"?

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

965

What is mediation? Cont'd

Mediation is a dynamic, structured, interactive process where an impartial third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques. All participants in mediation are encouraged to actively participate in the process. Mediation is a "party-centered" process in that it is focused primarily upon the needs, rights, and interests of the parties.

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

966

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

967

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

Mediators use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications, and licensing followed, which produced trained and professional mediators committed to the discipline.

- JAMS
- American Arbitration Association (AAA)
- American Bar Association, ADR Section
- Association for Conflict Resolution (ACR)
- CPR Institute for Dispute Resolution
- National Association for Community Mediation

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

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Mediation does not bar imposition of penalties.

E.g., Rajib Chanda, Mediating University Sexual Assault Cases, 6 Harv. Negotiation L. Rev. 265, 301 (2001) (defining mediation as "a process through which two or more disputing parties negotiate a voluntary 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 'win-win' requirement, nor does it bar penalties. A party can 'lose' or be penalized; mediation only requires that the loss or penalty is agreed to by both parties—in a sexual assault case, 'agreements . . . may include reconciliation, restitution for the victim, rehabilitation for whoever needs it, and the acceptance of responsibility by the offender.'")

Id. at 30406 n.1519 (emphasis added).

970

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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, (numeration added).

305 (2001)

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971

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.

https://en.wikipedia.org/wiki/Restorative_justice
(internal citations omitted)

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

972

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 behavior.*
- *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
(internal citation omitted)

973

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 restorative justice is that the respondent admits responsibility at the start of the process. However, this admission of responsibility does not necessarily mean the recipient has also reached that determination, and participation in restorative justice as a type of informal resolution must be a voluntary decision on the part of the respondent.

Id. **at 30406 (emphasis added).**

974

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Therefore, the language limiting the availability of an informal resolution process only to a time period before there is a determination of responsibility does not prevent a recipient from using the process of restorative justice under § 106.45(b)(9), and a recipient has discretion under this provision to specify the circumstances under which a respondent's admission of responsibility while participating in a restorative justice model would, or would not, be used in an adjudication if either party withdraws from the informal process and resumes the formal grievance process.

Id. **at 30406 (emphasis added).**

975

Similarly, a recipient could use a restorative justice model after a determination of responsibility finds a respondent responsible; nothing in the final regulations dictates the form of disciplinary sanction a recipient may or must impose on a respondent.

Id. **at 30406 (emphasis added).**

976

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Restorative Justice Resources Cited in the Commentary to the New Title IX Regulations

Clare McGlynn et al., "I just wanted him to hear me": Sexual violence and the possibilities of restorative justice, 39 Journal of L. & Society 2 (2012).

Katherine Mangan, Why More Colleges Are Trying Restorative Justice in Sex Assault Cases, Chronicle of Higher Education (Sept. 17, 2018).

Kerry Cardoza, Students Push for Restorative Approaches to Campus Sexual Assault, Truthout (Jun. 30, 2018).

Howard Zehr, The Little Book of Restorative Justice (Good Books 2002).

David R. Karp et al., Campus Prism: A Report On Promoting Restorative Initiatives For Sexual Misconduct On College Campuses, Skidmore College Project on Restorative Justice (2016).

Margo Kaplan, Restorative Justice and Campus Sexual Misconduct, 89 emp. L. Rev. 701, 715 (2017).

Id. at 30406 n.1518.

977

Restorative Justice vs. Mediation

Mediation

- Dispute doesn't necessarily have to cause a harm, can be just a disagreement
- One party doesn't have to admit wrongdoing/ parties are treated as moral equals
- Focuses on coming to an agreement
- settlement-driven
- Not necessarily focused on emotional needs of the parties

Restorative Justice

- A party has been harmed/ victimization has occurred
- The offending party must admit to wrongdoing before the process begins
- Focuses on reparations and looks to improve future behavior
- dialogue-driven
- Very focused on the emotional needs of the victim/victim empowerment

Bouskes & McDonough, *The Differences Between Mediation and Restorative Justice/Practice*, https://doc.gov.pn/sites/default/files/2/NMediation_versus_Restorative_Practice.pdf.

Restorative Justice Violence, How is Restorative Justice Different than Mediation, http://www.cyclonia.com/safety/19-how-is-restorative-justice-different-than-mediation/

978

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).

979

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).

980

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Confidentiality Cont'd

The recipient's determination about the confidentiality of informal resolutions may be influenced by the model(s) of informal resolution a recipient chooses to offer; for example, a mediation model may result in a mutually agreed upon resolution to the situation without the respondent admitting responsibility, while a restorative justice model may reach a mutual resolution that involves the respondent admitting responsibility. The final 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.

981

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.

982

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Thank you!

Assessment to follow…

983

NASPA
Student Affairs Administrators in Higher Education

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

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984

This Module is Designed for:

TRACK 1 – Title IX Coordinators

985

§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)

986

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§106.8(a) *Designation of Coordinator Cont'd*

The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

987

Restricting Access Could Not Fully Authorize

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 complainant's sex).

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30464 (emphasis added).

988

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The Title IX Coordinator

- Each institution must designate a Title IX coordinator
  - Deputy Coordinators?
- Coach? Champion?
- Works for…?
- Unlike any other job in higher ed?
- Evolving?
- Job description?
- Conflicts of interest?

We acknowledge commenters' concerns that these final regulations place many responsibilities on a Title IX Coordinator, and a recipient has discretion to designate more than one employee as a Title IX Coordinator if needed in order to fulfill the recipient's Title IX obligations. Id. at 30183.

[T]he 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. Id. at 30135 n.596.

989

Prior Guidance on Title IX Coordinators

990

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-education-reminds-schools-obligation-designate-title-ix-coordinator

991

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.**

992

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Highlights of April 2015 Guidance

- **Institutions must designate a Title IX Coordinator!**
  ". . . OCR has found that some of the most egregious and harmful Title IX violations occur when a recipient fails to designate a Title IX coordinator or when a Title IX coordinator has not been sufficiently trained or given the appropriate level of authority to oversee the recipient's compliance with Title IX." (4/24/15 DCL pg. 1.)
- **"Full Support"/"Support" mentioned several times**
- **"Expertise"**
- **Auditor-like position, with direct contact with federal government**
- **Direct communication with parents**

993

Highlights Cont'd

- **Visible position, including on webpage:**
  - Create a webpage with complete Title IX operative info, Title IX policies and procedures, and other related resources
  - *"A link to this page should be prominently displayed on the recipient's homepage."* (4/24/15 DCL, pg. 6.)
  - "Two-click rule"
  - Keep it updated→ No dead links
  - Discuss reporting options, including confidential options
  - Don't forget about social media!
  - Focus-group testing
  - Remember, your Title IX web presence is integral to compliance.

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Highlights Cont'd

- **"No vacancy" in position**
  - One designee
  - "Actually serving"
- **"Independence"**
- **Reporting structure**

". . . the Title IX coordinator should report directly to the recipient's senior leadership, such as the . . . college or university president." **(4/24/15 DCL pg. 2.)**

995

Highlights Cont'd

- **Coordinators should seek mentorship from and collaborate with other coordinators**
- **No conflicts of interest**
  ". . . designating a disciplinary board member, general counsel, dean of students, superintendent, principal, or athletics director as the Title IX coordinator may pose a conflict of interest." (4/24/15 DCL, pg. 3.) [NOTE: Expansion of this in 2017 guidance and new Title IX regulations.]
- **Full-time is ideal, but not required**
  "Designating a full-time Title IX coordinator will minimize the risk of a conflict of interest and in many cases ensure sufficient time is available to perform all the role's responsibilities." (4/24/15 DCL, pg. 3.)

996

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 guidance, and the recipient's Title IX policies and grievance procedures."* (4/24/15 DCL, pg. 6.)

997

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

998

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Highlights Cont'd

- Involved in prevention efforts
- Title IX team is broader than the Title IX Coordinator

  [T]he Title IX coordinator should work closely with many different members of the school community, such as administrators, counselors, athletic directors, non-professional counselors or advocates, and legal counsel. Although these employees may not be formally designated as Title IX coordinators, the Title IX coordinator may need to work with them because their job responsibilities relate to the recipient's obligations under Title IX. (April 2015 Title IX Resource Guide, pg. 3.)

  Fostering communication on the team

999

Highlights Cont'd

- Assist in the development of an annual climate survey and coordinate data collection and analysis (survey is not mandated, but suggested)
- "Access" to departmental records → Enrollment, athletics, discipline, harassment
- A comprehensive job: Recruitment/ admissions, counseling, financial assistance, athletics and athletic financial assistance, programmatic equity, pregnant and parenting student services, discipline, single-sex ed, employment, retaliation and harassment issues
- Employment

  ". . . employment actions such as recruitment, hiring, promotion, compensation, grants of leave, and benefits." (April 2015 Title IX Resource Guide, pg. 23.)

1000

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The Role of Title IX Coordinators Under the New Regulations with Regards to Sex Discrimination

1001

Overview of Role

Among other things, the Title IX Coordinator is responsible for responding to reports and complaints of sex discrimination (including reports and formal complaints of sexual harassment), informing complainants of the availability of supportive measures and of the process for filing a formal complaint, offering supportive measures to complainants designed to restore or preserve equal access to the recipient's education program or activity, working with respondents to provide supportive measures as appropriate, and coordinating the effective implementation of both supportive measures (to one or both parties) and remedies (to a complainant). As noted previously, the Title IX Coordinator is not precluded from also serving as the investigator, under these final regulations.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30372 (emphasis added).

1002

Coordinator as an Investigator

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

Id. at 30135.

1003

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).

1004

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Supportive Measures Cont'd

The Title IX Coordinator must ***promptly*** *contact the complainant to discuss the availability of supportive measures . . .*

Id. at 30087 (emphasis added).

1005

Supportive Measures Cont'd

Complainants will know about the possible supportive measures available to them and will have the opportunity to express what they would like in the form of supportive measures, and the Title IX Coordinator will take into account the complainant's wishes in determining which supportive measures to offer. The final regulations do prescribe that a recipient's Title IX Coordinator must remain responsible for coordinating the effective implementation of supportive measures, so that the burden of arranging and enforcing the supportive measures in a given circumstance remains on the recipient, not on any party.

Id. at 30183 (emphasis added).

1006

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Supportive Measures Cont'd

[T]he Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient's own system does not fall on the student receiving the supportive measures. *The Department recognizes that beyond coordinating and serving as the student's point of contact, the Title IX Coordinator will often rely on other campus offices to actually provide the supportive measures sought, and the Department encourages recipients to consider the variety of ways in which the recipient can best serve the affected student(s) through coordination with other offices while ensuring that the burden of effectively implementing supportive measures remains on the Title IX Coordinator and not on students.*

Id. at 30183 (emphasis added).

1007

Supportive Measures Cont'd

[I]f a recipient does not provide a complainant with supportive measures, then the recipient must document why such a response was not clearly unreasonable in light of the known circumstances.

Id. at 30219.

1008

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).

1009

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).

1010

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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 added).

1011

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 complainant 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).

1012

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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).

1013

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 regulations leave that decision in the discretion of the recipient's Title IX Coordinator.

Id. at 30134 (emphasis added).

1014

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).

1015

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).

1016

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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?

1017

§ 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.

1018

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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.

1019

§ 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.

1020

§ 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.

1021

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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Recommendations to a 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 decision-maker) who did not participate in the case as an investigator or Title IX Coordinator.

Id. at 30372.

1023

Remedies

*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).

1024

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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

1025

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).

1026

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).

1027

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 deciding that Title IX Coordinators should have no role in the hiring or firing of investigators. *Id. at 30252.*

1029

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).

1030

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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 particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.

Id. at 30252 (emphasis added).

1031

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 non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel.

Id. at 30252 (emphasis added).

1032

All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

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Final Thoughts

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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.

1035

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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Thank You…

Assessment to follow…

1037

NASPA
Student Affairs Administrators in Higher Education

Records Management and FERPA

Melissa M. Carleton
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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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FERPA – Basic Prohibition

- **Family Educational Rights and Privacy Act of 1974**
  - 20 U.S.C. 1232g; 34 C.F.R. Part 99
  - Prohibits colleges from disclosing educational records, or the personally identifiable information contained therein, without the written consent of the eligible student, unless an exception is met that allows disclosure without consent. 20 U.S.C. 1232g(b)(1).

FERPA - Disclosure

- **"Disclosure"**
  - Permitting "access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record." 34 C.F.R. 99.3

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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

1043

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

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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.

1045

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 dependent 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

1047

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.

1049

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**

1050

1051

Directory Information

- "Directory information" may be released without consent, if the annual FERPA notice includes what constitutes directory information and how to opt out of such disclosures. 34 C.F.R. 99.37
- Directory information typically includes:
  - Student's name, address, telephone number
  - Date and place of birth
  - Enrollment dates
  - Participation in school activities
  - Weight and height of members of athletic teams
- Directory information does not include social security numbers

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Health or Safety Emergency

- Schools may disclose information to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or others. 34 C.F.R. 99.36(a).
- Look to the "totality of the circumstances" to determine whether there is an "articulable and significant threat" before disclosing information without consent. 34 C.F.R. 99.36(c).
  - Such threat must be recorded in the access log. 34 C.F.R. 99.36(c).

1053

Health or Safety Emergency

- Comments to the FERPA regulations state there must be an "actual, impending, or imminent emergency" or a situation where warning signs lead school officials to believe that the student "may harm himself or others at any moment." However, an emergency does not mean a threat of a possible emergency for which the likelihood of occurrence is unknown. 73 FR 74838 (Dec. 9, 2008)

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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.

1055

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 non-forcible 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

1056

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

1057

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).
- 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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De-Identified/Redacted Records

- Records may be released if all personally-identifiable information has been redacted, as long as the school/college has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.
- See October 19, 2004 Letter to Robin Parker, available online at: http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/unofmiami.html -- "If, because of other records that have been released, the redaction of names, identification numbers, and dates and times of incidents is not sufficient to prevent the identification of a student involved in a disciplinary proceeding, including, but not limited to, student victims and student witnesses, then FERPA prohibits the University from having a policy or practice of releasing the information as such. The University either must remove or redact all of the information in the education record that would make a student's identity easily traceable or refuse to release the requested education record at all."

1059

Judicial Order/Subpoena

- Institution must disclose to comply with a judicial order or lawfully issued subpoena
  - Must make a reasonable effort to notify the eligible student before disclosure so that they can seek protective action against the order or subpoena (i.e. a "motion to quash")
  - The rules about notifying the student are different if the court order or subpoena requires secrecy (e.g. due to terroristic threats)
  - See 34 C.F.R. 99.31(a)(9)

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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

1061

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)

1062

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.

1063

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 final
  - 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(l).

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HIPAA?

- HIPAA protects certain treatment records that may be held by your institution's health/counseling center or hospital.
- Generally, when a party provides written consent for treatment records to be used in Title IX proceedings, they become education records subject to FERPA, not HIPAA
- See Joint Guidance on the Application of FERPA and HIPAA to Student Health Records, U.S. Department of Education and U.S. Department of Health and Human Services, December 2019

1065

Title IX and Confidentiality

Section 106.71(a) requires recipients to keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness (unless permitted by FERPA, or required under law, or as necessary to conduct proceedings under Title IX), and § 106.71(b) states that exercise of rights protected by the First Amendment is not retaliation.

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.

1067

"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.

1068

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.

Final Regulations at 30304.

1069

State Laws

- Privacy laws vary from state to state but may include causes of action such as:
  - "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 your state

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Maintenance of Records

- 34 C.F.R. 106.45(b)(10) – effective August 14, 2020
  - Recipients must keep records for seven years:
    - Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) [hearings], 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
    - Any appeal and the result therefrom
    - Any informal resolution and the result therefrom
    - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. [must make available on website]

1071

Maintenance of Records

- 34 C.F.R. 106.45(b)(10) – effective August 14, 2020
  - Recipients must keep records for seven years:
    - For each response required under 106.44, a recipient must create, and maintain, 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, 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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Public Right to Know?

- Public records law often requires release of information unless another law prohibits it
- Does FERPA prohibit release, or does it allow it?
  - No release of redacted records where journalist knew identity of student: *Krakauer v. State*, 396 Mont. 247 (Mont. Sup. Ct., July 3, 2019)
  - No release without consent of students, even when students went to media. *University of Kentucky v. The Kernel Press*, Case No. 16-CI-3229 (Fayette Circuit Court, 8th Div. Jan. 23, 2017)
  - Must release disciplinary information about students found responsible for sexual assaults on campus: *DTH Media Corp. v. Folt*, Case No. 142PA18 (N.C. Sup. Ct. May 1, 2020)
- No implied waiver of consent requirements where a student voluntarily goes to the media. Letter to Honorable Mark R. Herring, Family Policy and Compliance Office, July 2, 2015, available online at https://www2.ed.gov/policy/gen/guid/fpco/doc/letter-to-va-attorney-general-mark-herring.pdf

1073

Thank you!

Assessment to follow...

1074

NASPA
Student Affairs Administrators in Higher Education

Title IX: Campus Culture 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

1075

This Module is Designed for:

TRACK 1 – Title IX Coordinators

1076

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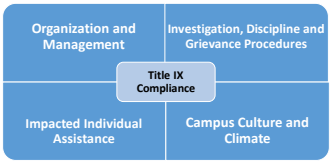
Four Corners Model

Lake's Four Corners of Title IX Regulatory Compliance



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Where and when did the culture/climate concept arise?

The Obama administration referred to "climate surveys" and "climate checks" in various resolution agreements and other publications.

1078

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Yale Resolution Agreement

Yale…will conduct periodic assessments (at least annually) of campus climate with regard to gender discrimination, sexual misconduct and Title IX, seeking input from students and student groups, including women's groups, as well as a wide variety of other sources.

The University will consider such assessments in identifying future actions to ensure that it maintains an environment that is safe and supportive to all students and in compliance with Title IX.

US Dept. of Ed., Office for Civil Rights, *Yale University Voluntary Resolution Agreement*, June 11, 2012, pg. 5.

1079

Yale Assessed…

1. The community's current understanding of Yale's policies, procedures, and resources relating to sexual misconduct;
2. Community members' impressions of the sexual climate in their own schools/departments and the University more generally;
3. Whether and how individuals feel they can influence the day-to-day climate in which they study, work, and live;
4. What additional actions the University should take to address and prevent sexual misconduct.

Yale University, *Report of the 2012-13 Campus Sexual Climate Assessment*, May 15, 2013, pg. 5.

1080

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.

1081

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 harassing behavior can escalate if left unaddressed, and that prevention of sexual harassment incidents before they occur is a worthy and desirable goal. 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.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30070 (emphasis added).

1082

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Guiding Principles For Addressing Campus Culture and Climate for Title IX Purposes

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Guiding Principle #1: Education

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Education

Education is the great hope in overcoming violence.

RFK discussed the challenges of the *"mindless menace of violence."*

Robert F. Kennedy, Cleveland, Ohio, 1968.

1085

Education

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

Robert F. Kennedy, Indianapolis, Indiana, 1968

1086

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

1087

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.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30125-26 (emphasis added).

1088

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Guiding Principle #2: The Law

1089

The Law

- The law recognizes its own limits with regard to combatting sex discrimination
  - Thus, voluntary compliance
- 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

1090

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Guiding Principle #3: The Title IX System Itself

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The Title IX System Itself

- Make your Title IX efforts known to the community
  - Promote the positive work you are doing to keep your community free from discrimination. What are the most positive features of the new regulations? How will you articulate that?
- Look to schools that have been through an investigation, for clues (especially investigations occurring after the new regulations are effective)
- Utilize the wisdom and experience of campus constituencies to help assess systems
- Title IX promotes fairness and has other objectives.
- Effective response to Title IX incidents helps to foster a healthy culture!
  - Title IX personnel must serve impartially, free from bias, sex stereotyping, prejudgment, prejudice, etc. This is essential for trust in the Title IX grievance process!

1092

Guiding Principle #4: Integration

1093

Integration

- Integrate Title IX with other public health and wellness initiatives, such as alcohol and other drug prevention:: Prevention, *Pro*vention and Education.
- Recognize that specific training for Title IX compliance purposes will exist as a subset of broader campus trainings and other initiatives.
- Interface Title IX into your institution's mission statement and enterprise risk management (ERM) system.
- Consider articulation of Title IX's mission in social justice work where appropriate.

1094

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Guiding Principle #5: Sensitivity

1095

Sensitivity

- Sonar
- Multicultural Initiatives
- LGBTQIA
- Religious Institutions
- COVID-19 context and the "Great Disruption"
- Choose your words and images; find the memes and thought leaders energizing your community

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Guiding Principle #6: Prevention

1097

Prevention

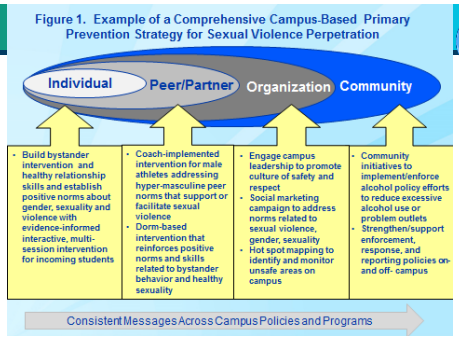
- AODV prevention….and *pro*vention
- Social norming on violence
- Bystander prevention programs
- Enlist <u>everyone</u> in prevention efforts

1098

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)

1099



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Prevention programs are legally required: VAWA Regs 34 CFR 668.46 (j)

Sexual assault prevention and awareness programs are required under the Clery Act

"Programs to prevent dating violence, domestic violence, sexual assault, and stalking. As required by paragraph (b)(11) of this section, an institution must include in its annual security report a statement of policy that addresses the institution's programs to prevent dating violence, domestic violence, sexual assault, and stalking."

1101

VAWA Regs 34 CFR 668.46 (j)

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

1102

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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 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) at 30126.

1103

[T]he final regulations neither require nor prohibit a recipient from disseminating information about bystander intervention designed to prevent sexual harassment. . . . Similarly, nothing in the final regulations requires or prohibits a recipient from posting flyers on campus encouraging students and others to report sexual harassment; recipients should retain flexibility to communicate with their educational community regarding the importance of reporting sexual harassment.

Id. at 30471.

1104

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.

Id. at 30190.

1105

Final Thoughts

- Flexibility to do prevention work does not mean do nothing!
- Remember to combat bias, sex stereotypes, prejudice and pre-judgement 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.

1106

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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!

1107

Thank You…

Assessment will follow.

1108

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NASPA
Student Affairs Administrators in Higher Education

Title IX Update: Spring 2023

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

1109

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

1110

Nothing in these training materials should be considered legal advice.

1111

The 3-Track NASPA Title IX Training Certificate focuses on the 2020 Title IX regulations, which are currently in effect.

Proposed new Title IX regulations were released in June 2022 and are currently in the final stages of promulgation. There is indication that the final regulations may be published in May 2023. The date of implementation for campuses is not yet known.

We will examine some of the language in the proposed new regulations at the end of this module. Remember that the proposed language will change, (potentially in major or minor ways), in the final version.

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The Title IX Landscape

1113

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

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

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Examples of Title IX Regulatory Enforcement Under Biden

LSU

- Title IX-related DOE investigation (also under investigation for Clery Act)
- LSU Law Firm Report
- NASA
- Voluntary Resolution Agreement (March 22, 2021)

1115

Examples of Title IX Regulatory Enforcement Under Biden

San Jose State

- Resolution agreement with U.S. Dept of Justice and U.S. Attorney's Office for the Northern District of California
- Female student-athletes were abused by an athletic trainer and SJSU failed to appropriately respond to reports of the abuse
- SJSU will pay $1.6 million to victims and will reform Title IX system
- SJSU's President stepped down

1116

Examples of Title IX Regulatory Enforcement Under Biden

Univ. of Maryland Baltimore County

- The U.S. Department of Justice is investigating the potential mishandling of sexual harassment cases
- The civil rights investigation, which is ongoing, was opened in 2020
- The school was previously investigated by the U.S. Dept. of Education in 2016.

U.S. Justice Department is investigating UMBC's Title IX compliance and response to sexual misconduct – Baltimore Sun - Ocean City Weather

1117

Examples of Title IX Regulatory Enforcement Under Biden

Troy University

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

- "OCR has a concern that the University did not make reasonable and responsive adjustments in response to the Complainant's pregnancy-related requests. At the time of the incidents at issue here, the University provided pregnant students no information, either in its 2020- 2021 Student Handbook or on its website about how students could seek adjustments related to pregnancy, and one professor interviewed by OCR had not received training regarding Title IX's application to pregnant students."
- "Moreover, the Title IX Coordinator did not consistently intervene when the Complainant contacted him about issues with certain classes and, when he did so, he was not always prompt."
- "The evidence to date also suggests that the University did not engage in an interactive process with the Complainant or otherwise attempt to determine what adjustments would be appropriate for each of her courses based on the information she provided about her pregnancy. Although the Complainant appears to have received some pregnancy adjustments from some professors, OCR is concerned that these efforts were ad hoc and uncoordinated and dependent on each professor's individual interpretation of the Title IX Coordinator's . . . email. "
- "Although the University has updated its Title IX webpage to include policies and information for pregnant students, it is unclear whether the University has provided faculty and staff training concerning its obligations under the Title IX regulations regarding pregnant students who request adjustments."

Troy University (PDF) (ed.gov)

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

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

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

Discrimination and exclusion

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

1119

Title IX— Cultural and Legal Issues

Tinder Points

- LGBTQI+ [NPRM at 23 n. 4] →
- Pronouns
- Transgender Athletes/ Bathrooms
  - *BPJ v. West Virginia State Board of Educ.*
  - "A federal judge . . . upheld the constitutionality of a West Virginia law that bars transgender athletes at public colleges and high schools from participating on teams that match their gender identity."
    (U.S. Judge Upholds WV Law on Trans Participation in Sports (insidehighered.com))
  - State legislatures enacting new laws: ex. adult cabaret bans or regulation

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

LOCAL
ETSU removes references that Title IX law protects LGBTQ students at lawmaker's behest
by: Jeff Keeling, Andee Daniel
Posted: Apr 1, 2022 / 11:00 AM EDT
Updated: Apr 1, 2022 / 11:00 AM EDT

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Title IX— Cultural and Legal Issues

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

1121

Title IX— Cultural and Legal Crossfire

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

1122

American Law Institute (ALI) Document (2022)

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

- This document is extraordinary and forward thinking.
- First effort by ALI to articulate principles of due process for student conduct administration in its history.
- Crafted by members of ALI, in consultation with others, the principles are likely to be influential to both jurists and educators—and indeed have been, as evidenced by newly proposed Title IX regulations that are noticeably consistent.
- All schools should review Title IX policies in consultation with this document.
- student-misconduct-td1-black-letter.pdf (ali.org)

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Title IX- Some Observations on Related Litigation and Legal Issues

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Title IX Updates—Court Watch

SCOTUS—Winds of change

- Faith protection—*Guadalupe, etc.*
- "Sex"—*Bostock, etc.*
- Damages Limits—*Cummings v. Premier Rehab Keller*
- Privacy/ Substantive Due Process—*Dobbs v. Jackson Women's Health Organization* (overturning *Roe*)
- Limits of Regulatory Authority—*State Farm, West Virginia v. Environmental Protection Agency*
- True Threats/Online Harassment—*Counterman v. Colorado* *WATCH THIS CASE IN SCOTUS DOCKET*

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Title IX Updates—Court Watch

SCOTUS Cont'd

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

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Title IX Updates—Court Watch

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

Examples

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

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

1127

Dimensions of Title IX-Related Litigation

- Florida "Stop WOKE" act (banning certain aspects of DEI training) declared unconstitutional
  - In *Honeyfund.com, Inc. v. DeSantis,* Judge Walker writes:

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

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

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Dimensions of Title IX-Related Litigation

- Athletic Equity
- Deliberate Indifference
- Due Process
- Retaliation
- Erroneous Outcome
- Selective Enforcement
- Plausible Inference
- "Preventable" Sexual Assault Claims – State Negligence Claims
- Hazing/Student Suicide
- Breach of Contract
- Negligent Investigation?
- Tortious failure to provide fair process?

1129

Civil Action Under Title IX

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

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

3-Part Framework

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

4. Promptness
5. Equitableness
6. Reasonableness

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

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

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From the 2020 Regulations:

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

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"Deliberate Indifference"

As the Supreme Court reasoned in Davis, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is "clearly unreasonable in light of the known circumstances." Id. at 30091 (internal citation omitted).

[U]nless the recipient's response to sexual harassment is clearly unreasonable in light of the known circumstances, the Department will not second guess such decisions. Id. at 30092 (internal citation omitted

1133

"Deliberate Indifference" Cont'd

[T]he final regulations apply a deliberate indifference standard for evaluating a recipient's decisions with respect to selection of supportive measures and remedies, and these final regulations do not mandate or scrutinize a recipient's decisions with respect to disciplinary sanctions imposed on a respondent after a respondent has been found responsible for sexual harassment.
Id. at 30034 n.60.

[T]he Department will not deem a recipient not deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment. Id. at 30091.

1134

Athletic Equity

Balow et al v. Michigan State et al, No. 1:21-cv-44 (6th Cir. 2022).

- MSU discontinued its men's and women's diving programs in 2020
- Members of the women's team sued, claiming the move violated Title IX by providing less opportunities for female athletes
- A U.S. district court judge ruled in August 2022 that MSU was not in compliance with Title IX
- The school must complete a Title IX compliance plan.

Federal Judge Rules Michigan State in Violation of Title IX (insidehighered.com)

1135

Deliberate Indifference

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613 (6th Cir. 2019).

*In 2011, Michigan State University (MSU) student John Doe sexually assaulted fellow student Emily **Kollaritsch**. Kollaritsch reported the assault, and the university opened an **investigation**. The investigation lasted over six **months**. During that time, MSU placed no restrictions on Doe and made no accommodations for Kollaritsch, even though the two lived in the same **dormitory**. The school concluded that Doe had violated MSU's sexual harassment policy, placing him on probation and issuing an order that prohibited him from contacting **Kollaritsch**. Doe proceeded to violate the order on at least nine occasions by "stalking, harassing, and intimidating" Kollaritsch, who had a panic attack on each **encounter**. She reported the violations and then filed a complaint for retaliatory harassment with **MSU**. During its investigation, MSU provided no interim safety measures, and Kollaritsch obtained a protection order from a local **court**. MSU concluded that no retaliatory harassment had **occurred**.*

Kollaritsch v. Michigan State University Board of Trustees, Harvard Law Review 133 Harv. L. Rev. 2611 *(June 10, 2020).*

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Deliberate Indifference

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613 (6th Cir. 2019).

For "causation," Judge Batchelder pointed to language in Davis that a school may not be liable for damages unless its "deliberate indifference 'subject[ed]' its students to harassment." She noted that Davis understood the verb "subject[s]" to mean that "deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." In the Sixth Circuit's view, the fact that Davis linked the verb "subject[s]" to harassment, not injury, was critical; it necessarily meant that a deliberate indifference claim requires further actionable harassment. Thus, "a plain and correct reading" of causation in Davis dictates two ways the school's response can result in further harassment: (1) through action that instigates harassment, or (2) through inaction that renders the victim unprotected from harassment. Either way, Davis "presumes that post-notice harassment has taken place." The court thus rejected the plaintiffs' interpretation that the phrase "or . . . make [students] . . . vulnerable to [harassment]" established a separate basis for liability. On these facts, Judge Batchelder concluded that Kollaritsch failed to show that her subsequent encounters with John Doe were severe, pervasive, or objectively offensive. Similarly, the mere fact that MSU allegedly left the other plaintiffs vulnerable to encountering their assailants was insufficient to establish actionable further harassment. The students thus failed to satisfy the causation element under Davis; the school's response had not caused them to suffer a second instance of actionable harassment.

Kollaritsch v. Michigan State University Board of Trustees, Harvard Law Review 133 Harv. L. Rev. 2611 *(June 10, 2020).*

1137

Due Process

- "Due Process" - a complex and multidimensional concept
  - More than dialectic between "complainants" and "respondents"
  - The college as bystander or neutral: Citizens United?
    - Peter Lake, *Colleges Are Legally Pummeled From All Sides. It's Time They Fought Back.* In Chron. of Higher Educ., The New Risk Management: A Multilayered Strategy for Today's Legal Threats (Jan. 2021). [This special report is available in the Chronicle store.]
  - Is this the way to create college court?
- What about resource imbalances between institutions or complainants/respondents?
- *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).
- *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019).
  John Doe v. Purdue University, Case No. 17-3565 (7th Cir. June 28, 2019).

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Erroneous Outcome

***Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994).**

A plaintiff must show facts both casting doubt on the outcome of the disciplinary proceeding and connecting that outcome to gender bias.

Samantha Harris, *Third Circuit: Private Universities that Promise Basic Fairness Must Provide Hearing, Cross-Examination to Students Accused of Sexual Misconduct,* FIRE Newsdesk (June 1, 2020).

1139

Selective Enforcement

***Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994).**

A plaintiff must plead facts showing that the institution treated a similarly situated individual differently on the basis of sex (e.g., that in a case where both parties were alleged to have had sex while heavily intoxicated and unable to consent, the university took action against one student but not the other).

Samantha Harris, *Third Circuit: Private Universities that Promise Basic Fairness Must Provide Hearing, Cross-Examination to Students Accused of Sexual Misconduct,* FIRE Newsdesk (June 1, 2020).

1140

Selective Enforcement

Radwan v. Manuel, **No. 20-2194 (2d Cir. Nov. 30, 2022).**

"Radwan presented multiple forms of evidence related to discriminatory intent, including: evidence of similarly situated male athletes in multiple misconduct incidents who were not disciplined as harshly, inconsistent reasoning for the level of punishment by different administrators at the University, varying assessments over time regarding the consequences of her misconduct, the failure of the University to properly apply its own student conduct policy, and giving conflicting dates to Radwan for her to appeal the termination of her athletic scholarship."

"Second Circuit reversed the District Court's grant of summary judgment for the University and the case will be remanded back to the District Court for further proceedings."

Title IX Claim: Selective Enforcement In, Same Decision Maker Rule Out (Part 3) (bricker.com)

1141

Plausible Inference

Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019).

"[T]o state a claim under Title IX, the alleged facts, if true, must support a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex."

**Amy Comey Barrett*

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"Preventable" Sexual Assault Claims – State Negligence Claims

***Karasek v. Regents of Univ. of California*, 956 F.3d 1093 (9th Cir. 2020).**

1. a school maintained a policy of deliberate indifference to reports of sexual misconduct,
2. which created a heightened risk of sexual harassment,
3. in a context subject to the school's control, and
4. the plaintiff was harassed as a result.

Karasek v. Regents of the University of California, No. 18-15841 (9th Cir. 2020) :: Justia

1143

Hazing/Student Safety

Gruver v. LSU

- Max Gruver died in a fraternity hazing incident.
- His parents allege a novel Title IX complaint: "that LSU discriminated against male students by policing hazing in fraternities more leniently than hazing in sororities."
- Trial date has yet to be set…

McCluskey v. Univ. of Utah

- Lauren McCluskey was shot and killed by a man she had dated (she broke off the relationship after finding out he was a convicted sex offender).
- Her family had repeatedly asked the University to intervene after he stalked and extorted her.
- The University admitted they could have done more to intervene and did not handle the situation properly. The University settled for $13.5 million.

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Breach of Contract

Doe v. University of the Sciences, No. 19-2966 (3d Cir. May 31, 2020).

Here, the fairness promised by the Student Handbook and the Policy relates to procedural protections for students accused of sexual misconduct, and Doe alleges that he did not receive a "fair and impartial hearing." In this context, a "fair hearing" or "fair process" "is a term of art used to describe a 'judicial or administrative hearing conducted in accordance with due process.'" [Internal citations omitted.]

We hold that USciences's contractual promises of "fair" and "equitable" treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.

1145

Breach of Contract

Stiles v. Brown University and *Smith v. Brown University*

- Plaintiffs in both cases allege breach of contract.
- Both cases involved male athletes suspended after sexual misconduct allegations. Both were suspended days after allegations were made against them and before the conclusion of a full Title IX investigation.
- *In Stiles* the judge ruled the University must reinstate Stiles "until the investigation concludes or a more thorough threat assessment warrants removal."
- In Smith, both parties agreed to dismiss the lawsuit.

Suspended athletes facing sexual assault allegations sue University - The Brown Daily Herald

1146

SCOTUS/*Bostock* and Implications for Title IX

Bostock v. Clayton County (June 15, 2020)

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

Holding: An employer who fires an individual merely for being homosexual or transgender violates Title VII of the Civil Rights Act of 1964.

1147

Bostock: Critical Language

"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."

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Bostock: Critical Language

"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."

1149

The *Bostock* Caveats

"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."

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The *Bostock* Caveats

"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."

1151

Battleground: Bostock and the New Dept. of Education Position on LGBTQ Protections

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

U.S. Dept. of Education, Office for Civil Rights, *The Department's Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, June 2021

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

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

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

U.S. Dept. of Education, Office for Civil Rights, *The Department's Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, June 2021

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

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

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

U.S. Secretary of Education Miguel Cardona

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

[Press release]
JUNE 16, 2021

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Bostock Pushback

- 21 State Attorneys General pushed back in a letter to Pres. Biden
- 20 States Sue Biden Administration
  - *Tennessee et al v. United States Department of Education et al*, Tennessee Eastern District Court, Case No. 3:21-cv-00308
  - On July 15, 2022, plaintiff's motion for injunction was granted and defendants motion to dismiss was denied.
    - Federal judge blocks Ed. Dept Title IX guidance for trans students (insidehighered.com)
    - Court temporarily halts Ed Dept from enforcing LGBTQ protections under Title IX | Higher Ed Dive
- FL House Bill 7 "Stop WOKE" sought to ban certain aspects of DEI training; was recently declared unconstitutional by a Florida judge
  - Florida Passes Stop WOKE Bill Prohibiting Diversity Training (natlawreview.com)

1155

Faith and Trifurcation?

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

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

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Some Reflections on *Bostock* and Title IX?

"Title IX's broad prohibition on discrimination "on the basis of sex" under a recipient's education program or activity encompasses, at a minimum, discrimination against an individual because, for example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming. All such classifications depend, at least in part, on consideration of a person's sex. The Department therefore proposes to clarify in this section [§ 106.10] that, consistent with *Bostock* and other Supreme Court precedent, Title IX bars all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."(NPRM at 522.)

- **How will campuses define "sex" going forward right now?**
- **Title VII =Title IX? Proposed rules aim to facilitate both processes.**
- **LGBTQI+ rights and *Bostock*…note the Court's emphasis on the specific issues raised. "On the basis of sex" //"Because of… sex"**
- **Spending v. Commerce clause…the "notice issue" …addressed at some length in NPRM**
- **How are religious institutions impacted? Title IX's " religious tenets" exception and its date of origin.**
  - Yeshiva University recent emergency request to SCOTUS to block a LGBTQ student club. Yeshiva University asks Supreme Court to let it block LGBTQ student club - CNNPolitics

1157

AREAS TO WATCH: ATHLETICS AND MEDICAL

***Snyder-Hill et al. v. The Ohio State University*, Ohio Southern District Court, Case No. 2:18-cv-00736-MHW-EPD**

- 93 plaintiffs sued The Ohio State University as a result of alleged sexual abuse they suffered as students at the hands of Dr. Strauss
- Title IX claims include:
  - Hostile environment/heightened risk
  - Deliberate indifference to both prior sexual harassment and reports of sexual harassment
- Judge granted Ohio State's motion to dismiss on the grounds of the statute of limitations (Sept. 22, 2021)
- Open cases against Ohio State are still pending
- Ohio State has previously settled with over 200 men

Kantele Franco, *Ohio State sex abuse survivors plan appeals, defend motives*, Associated Press, Sept. 28, 2021.

1158

Concluding Thoughts: Litigation

- Litigation potential always exists
- Follow your own policy
  - Do what you say and say what you do.
- Do not be afraid to consult with your attorney
- Documentation/Privacy
  - Recently a court in Pennsylvania ruled Title IX investigative files be protected against publication in a lawsuit involving Penn State
    Federal Court Grants Penn State's Motion to Protect Title IX Documents, Sacks Student Athlete's Call for Unfettered Disclosure - Lexology
- Equity, bias, impartiality
- Think "contractual fairness"
  - Peter Lake, *From Discipline Codes to Contractual Respect*, Chron. of Higher Educ. (Nov. 26, 2017).

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Aspect of 2020 Regulations Struck Down

34 CFR § 106.45(b)(6)(i) Vacated in *Victim Rights Law Center et al. v. Cardona*

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34 CFR § 106.45(b)(6)(i)

(6) Hearings.

(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

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§ 106.45(b)(6)(i) Cont'd

At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

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§ 106.45(b)(6)(i) Cont'd

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

1163

§ 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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Victim Rights Law Center et al. v. Cardona

The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: "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 … ." Please note that all other provisions in the 2020 amendments, including all other parts of 34 C.F.R. § 106.45(b)(6)(i), remain in effect. The affected provision at 34 C.F.R. § 106.45(b)(6)(i) is only applicable to postsecondary institutions and does not apply to elementary or secondary schools, which are not required to provide for a live hearing with cross-examination.

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

1165

Victim Rights Law Center et al. v. Cardona

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

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

Id.

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Victim Rights Law Center et al. v. Cardona

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

Id. at 1-2.

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The 2022 Proposed Title IX Regulations:

Highlights from DOE in Their Own Words

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Some Key Features of Proposed Title IX Regulations:

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

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

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

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Proposed Title IX Regulations:

Hostile Environment Sexual Harassment

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

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

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Obama-Era Definition of Hostile Environment

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

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

U.S. Dept. of Educ. Office for Civil Rights and U.S. Dept. of Justice Civil Rights Division, *University of Montana-Letter of Findings*, at 4 (May 9, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/09/08/um-lof-findings.pdf

1171

Trump-Era Definition "Sexual Harassment" [Three-Prong Test]

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a ***reasonable person*** *to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or*

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

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Biden-Era Definition of Sex-Based Harassment

Sex-based harassment prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that is:

(1) Quid pro quo harassment. An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

(2) *Hostile environment harassment.* Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;

(ii) The type, frequency, and duration of the conduct;

(iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;

(iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and

(v) Other sex-based harassment in the recipient's education program or activity.

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A Note on "Unwelcome Conduct"

The Department proposes retaining the requirement that the conduct in categories one and two of the definition of "sex-based harassment" must be unwelcome. Although the Department does not propose revising this requirement, the Department understands it is important to provide recipients with additional clarity on how to analyze whether conduct is unwelcome under the proposed regulations. Conduct would be unwelcome if a person did not request or invite it and regarded the conduct as undesirable or offensive. Acquiescence to the conduct or the failure to complain, resist, or object when the conduct was taking place would not mean that the conduct was welcome, and the fact that a person may have accepted the conduct does not mean that they welcomed it. For example, a student may decide not to resist the sexual advances of another student out of fear, or a student may not object to a pattern of sexually harassing comments directed at the student by a group of fellow students out of concern that objections might cause the harassers to make more comments. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that they object, then that would generally support a conclusion that the conduct was not unwelcome, depending on the facts and circumstances. In addition, simply because a person willingly participated in the conduct on one occasion does not prevent that same conduct from being unwelcome on a subsequent occasion. Specific issues related to welcomeness may also arise if the person who engages in harassment is in a position of authority. For example, because a teacher has authority over the operation of their classroom, a student may decide not to object to a teacher's sexually harassing comments during class; however, this does not mean that the conduct was welcome because, for example, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections they will be singled out for harassing comments or retaliation. (NPRM at 82-83.)

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Proposed Title IX Regulations:

Emphasis on Pregnancy and Parenting Students

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

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

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NOTABLE

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

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

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

U.S. Department of Education's Office for Civil Rights Announces Resolution of Pregnancy Discrimination Investigation of Salt Lake Community College (govdelivery.com)

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Proposed Title IX Regulations:

Broadens Mandated Reporters on Campus

The proposed regulations would promote accountability and fulfill Title IX's nondiscrimination mandate by requiring schools to act promptly and effectively in response to information and complaints about sex discrimination in their education programs or activities. And they would require that schools train employees to notify the Title IX coordinator and respond to allegations of sex-based harassment in their education programs or activities.

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

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Note:

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

It is the Department's current understanding that employees with responsibility for administrative leadership would include deans, coaches, public safety supervisors, and other employees with a similar level of responsibility, such as those who hold positions as assistant or associate deans and directors of programs or activities. The Department anticipates that employees with teaching responsibilities would include any employee with ultimate responsibility for a course, which could include full-time, part-time, and adjunct faculty members as well as graduate students who have full responsibility for teaching and grading students in a course. It is the Department's current understanding that employees with responsibility for advising would include academic advisors, as well as employees who serve as advisors for clubs, fraternities and sororities, and other programs or activities offered or supported for students by the recipient. When a person is both a student and an employee, the Department expects that the person would be required to notify the Title IX Coordinator only of information that may constitute sex discrimination under Title IX that was shared with the person while they were fulfilling their employment responsibilities (e.g., receiving information about sex discrimination from a student during class or office hours). Similar to employees who have the authority to institute corrective measures on behalf of the recipient, the Department now believes that whether an employee has responsibility for administrative leadership, teaching, or advising is a fact-specific determination to be made by the recipient taking into account the types of factors just discussed and any others that may be relevant in the recipient's educational environment.

NPRM at 184-181.

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A Note on Barriers to Reporting and Prevention

"It is the Department's current view that a recipient must identify and address barriers to reporting information that may constitute sex discrimination under Title IX in order to fulfill this obligation." NPRM at 168.

The Department has long emphasized the importance of a recipient's efforts to prevent sex discrimination. For example, in the preamble to its 2020 amendments to the Title IX regulations, the Department repeatedly acknowledged the importance of efforts to prevent sex discrimination. . . . The Department also added requirements related to training for certain employees in the 2020 amendments to the Title IX regulations . . . that serve a prevention function and thus are crucial to the fulfillment of Title IX. "

NPRM at 168 (internal citations omitted).

"The Department notes that under this proposed requirement, a recipient may use various strategies to identify barriers, such as conducting regular campus climate surveys, seeking targeted feedback from students and employees who have reported or made complaints about sex discrimination, participating in public awareness events for purposes of receiving feedback from student and employee attendees, or regularly publicizing and monitoring an email address designated for receiving anonymous feedback about barriers to reporting sex discrimination." NPRM at 171.

1179

Proposed Title IX Regulations:

Outlines Key Grievance Procedure Requirements

- *All schools must treat complainants and respondents equitably.*
- *Schools have the option to offer informal resolution for resolving sex discrimination complaints.*
- *Title IX Coordinators, investigators, decisionmakers, and facilitators of an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.*
- *A school's grievance procedures must give the parties an equal opportunity to present relevant evidence and respond to the relevant evidence of other parties.*
- *The school's decisionmakers must objectively evaluate each party's evidence.*

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

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A Note on "Bias" and "Impartiality"...

ALI states:

§ 4.1. Inquiries to Be Impartial, Fair, and Context-Sensitive
Colleges and universities should strive in all inquiries and investigations to be impartial, fair, and sensitive to context.

§ 6.3. Impartiality
Colleges and universities should adopt procedures and criteria for selecting impartial decisionmakers.

§ 6.3c. Challenges for Bias
Colleges and universities should provide a simple procedure for complainants or respondents to challenge the participation of an investigator or adjudicator in their case.

1181

ALI on "Bias" and "Impartiality":

- "One sense of impartiality is structural, the idea that the judge of a case should not be chosen for the case because of his or her likely views on the outcome."
- "Another aspect of impartiality is the avoidance of financial or other forms of self-interest in the adjudication: an impartial adjudicator is one who does not have a financial interest in the outcome."
- "A third sense of impartiality means that the person has not prejudged the facts and is not likely to have difficulty maintaining an open mind and deciding based on the evidence presented."
- "Prior involvement in or knowledge of the facts at issue may create the appearance or reality of bias."
- "Still another sense of impartiality is decisionmakers' freedom to decide without fearing repercussions from the influence of 'mob' passions."
- "One source of potential bias may arise when a decisionmaker has a preexisting relationship with one or more parties."

See ALI, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities | American Law Institute (ali.org)., at 179-193.

1182

"Bias"

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

"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."

NPRM at 281:

"To ensure that the grievance procedures are equitable, a recipient must ensure that the procedures are administered impartially. The Department therefore proposes retaining—in proposed § 106.45(b)(2)—the requirement that any person designated as a Title IX Coordinator, investigator, or decisionmaker must not have a conflict of interest or bias regarding complainants or respondents generally or regarding a particular complainant or respondent."

1183

Proposed Title IX Regulations:

Outlines Key Grievance Procedure Requirements

• The proposed regulations would not require a live hearing for evaluating evidence, meaning that if a school determines that its fair and reliable process will be best accomplished with a single-investigator model, it can use that model.

• A school must have a process for a decisionmaker to assess the credibility of parties and witnesses through live questions by the decisionmaker. The proposed regulations would not require cross-examination by the parties for this purpose but would permit a postsecondary institution to use cross-examination if it so chooses or is required to by law.

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

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Proposed Title IX Regulations:

Outlines Key Grievance Procedure Requirements

• In evaluating the parties' evidence, a school must use the preponderance-of-the-evidence standard of proof unless the school uses the clear-and-convincing-evidence standard in all other comparable proceedings, including other discrimination complaints, in which case the school may use that standard in determining whether sex discrimination occurred.

• A school must not impose disciplinary sanctions under Title IX on any person unless it determines that sex discrimination has occurred.

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

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NOTE: Standard of Proof Alignment with ALI

"The Department notes that the American Law Institute (ALI) membership, at its May 2022 Annual Meeting, approved the following principle as part of its project on procedural frameworks for resolving campus sexual misconduct cases in postsecondary institutions:

> § 6.8. Standard of Proof
>
> Colleges and universities should adopt the same standard of proof for resolving disciplinary claims of sexual misconduct by students as they use in resolving other comparably serious disciplinary complaints against students. Standards that require proof either by a "preponderance of the evidence" or by "clear and convincing evidence" can satisfy the requirements of procedural due process and fair treatment. Whatever standard of proof is adopted, decisions that the standard of proof is met should always rest on a sound evidentiary basis.

The Department's proposed regulations would align with the ALI position, providing that for sex discrimination complaints a recipient can use either the preponderance of evidence or the clear and convincing evidence standard of proof but must not use a higher standard of proof for evaluating evidence of sex discrimination than for other forms of discrimination or other comparable proceedings." NPRM at 353-354 (internal citations omitted).

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NOTE: Discipline v. Punishment

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

The Difference Between Punishment and Discipline (verywellfamily.com).

1187

Proposed Title IX Regulations:

Supportive Measures for Any Sex Discrimination

Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment.

Under the proposed regulations, schools would be required to offer supportive measures, as appropriate, to restore or preserve a party's access to the school's education program or activity. The current regulations require this support only when sexual harassment, rather than any form of sex discrimination, might have occurred.

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

1188

Proposed Title IX Regulations:

Retaliation

The proposed regulations would make clear that schools must not intimidate, threaten, coerce, or discriminate against someone because they provided information about or made a complaint of sex discrimination or because they participated in the school's Title IX process – and that schools must protect students from retaliation by other students.

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

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What's next for the proposed regulations?

- **60 day notice and comment period has ended.**
  - Last notice and comment period garnered nearly 125,000 comments.
  - This go around the proposed regs garnered 235,000. Thousands weigh in on new Title IX rules inside higher ed.com
- **It is possible the new regulations will be released in May 2023 and will go into effect later in 2023 or 2024.**
- **There will be a separate process for student athletes/transgender issues. Expect more on informal resolutions, Clery and Ferpa interpretation to come?**

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Where is Title IX headed?

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

- LGBTQI+ protections: transgender athletes' rights issues
  - Several states have laws that prevent transgender individuals from playing on female sports teams
- March 2021, class action lawsuit filed against the Dept. of Education in Oregon federal court by 33 LGBTQI+ plaintiffs from 30 institutions.
  - Is the religious exemption in Title IX constitutional?
- *Speech First, Inc. vs. Fenves; Speech First, Inc. vs. Cartwright*
- State law pushbacks
- Rewrite Codes….again? And when? Notice and comment likely to change proposed rules
- Apply Title IX practices to other conduct codes?
- Time for preventative audits: lessons from LSU, USC.
- Nuclear weapons??? and Reproductive Rights—Title IX makes significant pivot…
  - SCOTUS overturns *Roe v. Wade* in *Dobbs*

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

- Political landscape 2024 :::SCOTUS
- End game for Title IX and detailed grievance regulation…what is ultimately sustainable? Will what we know of Title IX today devolve to state variances, subject to federal court oversight?
- Reporting and reporters…do we want this much flexibility?
- Training means assessment, especially on reporting and definitions.
- Culture intervention—rise , or return, of "remedies"
- New Clery manual?—prevention and reporting on it.
- Let's get Constitutional…What about *Citizens United*? Even *Gebser/Davis? Mathews v Eldridge? Textualism, Originalism, and the Title IV trojan horse*. ALI and "mission sensitivity."
- SCOTUS → limits of federal regulatory power

1193

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

- Does education culture have better solutions? Can we be, must we be, impartial in relation to our own mission? What are the limits of rooting out bias? Are the legal rules themselves a Title IX problem? *Fenves ::: NPRM on bias/// "Defamation by Litigation":::FERPA restrictions*
- Budgets and industry challenges. DOE cost estimates are perhaps "aspirational."
- College court becomes more like family court—supportive services and review.
- Protections for Title IX operatives….2015 guidance.
- Lawyers and legalisms….Student conduct dominated by law, lawyers and legalisms? Law as competitor?
- The Transparency Dilemma:: a)revise FERPA or b)create more detailed hearing and notice procedures….(DOE goes with b.)

1194

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

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

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Thank You…

Assessment to follow…

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NASPA
Student Affairs Administrators in Higher Education

Track 1: Title IX Coordinator
LIVE SESSION on Legal Issues
March 7, 2023

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

Jacob Sapp
Attorney
Education Law Division, Bricker & Eckler

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This Live Session is Designed for:

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What we hope to accomplish…

- **Updates and Highlight of Select Issues (~60 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 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.

1199

Definitive Answers vs. Choice Points

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Updates

1201

Legal Updates – Challenges to the Devos Regs

Original 4 Challenges

Cmlth. of Pennsylvania v. Devos, 1:20-CV-01468 (D.D.C. June 4, 2020)

-> Preliminary Inj. Denied, Aug. 12, 2020 / Held in Abeyance

Know Your IX v. Devos, No. 1:20-cv-01224 (D. Md. May 14, 2020)

-> Dismissed Oct. 22, 2020 for lack of standing

State of New York v. Devos, 1:20-cv-04260 (S.D.N.Y. June 4, 2020)

-> Voluntarily dismissed Nov. 3, 2020

Victim Rights Law Center v. Devos, 1:20-cv-11104 (D. Mass. June 10, 2020)

-> Cross Exam A&C update July 28, 2021, Appealed

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Legal Updates – Challenged to the Devos Regs

The Women's Student Union v. Devos, 21-cv-01626-EMC (Northern District of California)

-> **Defendant's Motion to dismiss granted, Sep. 21, 2021**

The only change in new regs from litigation:

-> Victim Rights Law Center v. Devos

1203

Legal Updates

VRLC - Cross Exam Update, OCR Enforcement

Dear Students, Educators, and other Stakeholders,

I write with an important update regarding the Department of Education's regulations implementing Title IX of the Education Amendments of 1972, as amended in 2020. On July 28, 2021, a federal district court in Massachusetts issued a decision in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021). This case was brought by several organizations and individuals challenging the 2020 amendments to the Title IX regulations.

The court upheld most of the provisions of the 2020 amendments that the plaintiffs challenged, but it found one part of 34 C.F.R. § 106.45(b)(6)(i) (live hearing requirement for the Title IX grievance process at postsecondary institutions only) to be arbitrary and capricious, vacated that part of the provision, and remanded it to the Department for further consideration. In a subsequent order issued on August 10, 2021, the court clarified that its decision applied nationwide. The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: "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…." Please note that all other

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Legal Updates

VRLC - Cross Exam Policy Update

"In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process. For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross examined at the live hearing."

1205

Legal Updates

Challenges to Title IX Religious Exemption

Hunter v. US Dept. of Educ.

INTRODUCTION

1. Thirty-three Plaintiffs bring this class action to put an end to the U.S. Department of Education's complicity in the abuses and unsafe conditions thousands of LGBTQ+ students endure at hundreds of taxpayer-funded, religious colleges and universities. The Plaintiffs seek safety and justice for themselves and for the countless sexual and gender minority students whose oppression, fueled by government funding, and unrestrained by government intervention, persists with injurious consequences to mind, body and soul.

2. The Department's inaction leaves students unprotected from the harms of conversion therapy, expulsion, denial of housing and healthcare, sexual and physical abuse and harassment, as well as the less visible, but no less damaging, consequences of institutionalized shame, fear, anxiety and loneliness.

MTD Granted (Jan. 2023)

1206

Legal Updates

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 13 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOANNA MAXON, an individual;
NATHAN BRITTSAN, an individual,

Plaintiffs-Appellants,

v.

FULLER THEOLOGICAL SEMINARY, a California nonprofit corporation; et al.,

Defendants-Appellees.

No. 20-56156

D.C. No.
2:19-cv-09969-CBM-MRW

MEMORANDUM*

1207

Religious Exemption - Application To

C.F.R. § 106.12(c). To the extent that the statutory language could be construed in multiple ways, we defer to DOE's longstanding interpretation and conclude that Title IX's religious exemption encompasses educational institutions, including divinity schools like Fuller, that are controlled by their own religiously affiliated boards of trustees. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

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To the extent that Plaintiffs ask us to second-guess Fuller's interpretation of its own religious tenets, we cannot grant Plaintiffs any relief. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000). The school's Sexual Standards state that "sexual union must be reserved for marriage, which is the covenant union between one man and one woman" and outline the expectation that all members of the school community "abstain from what it holds to be unbiblical sexual practices." After discovering that Plaintiffs were both in same-sex marriages, Fuller dismissed them for violating this standard. To the extent that Plaintiffs were dismissed because their marriages were with spouses of the same sex, rather than the opposite sex, Plaintiffs' claim fails because the religious exemption applies to shield these religiously motivated decisions that would otherwise violate Title IX's prohibition on sex discrimination. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1741

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Religious Exemption – Notice Not Required

3. Fuller was not required to provide any written notice to DOE to claim the religious exemption. Plaintiffs point to a regulation in place at the time this lawsuit was filed requiring that

> [a]n educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall 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 which conflict with a specific tenet of the religious organization.

34 C.F.R. § 106.12(b) (enacted May 9, 1980). Reading the regulation to *require* an advance statement, however, conflicts with the clear language of 20 U.S.C. § 1681(a)(3), DOE's longstanding practice, and the current text of section 106.12(b).

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Title IX OCR Guidance Update

Cardona Transgender Student Guidance

DEPARTMENT OF EDUCATION

34 CFR Chapter I

Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County

AGENCY: Office for Civil Rights, Department of Education.
ACTION: Interpretation.

SUMMARY: The U.S. Department of Education (Department) issues this interpretation to clarify the Department's enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX of the Education Amendments of 1972 in light of the Supreme Court's decision in *Bostock v. Clayton County*. This interpretation will guide the Department in processing complaints and conducting investigations, but it does not itself determine the outcome in any particular case or set of facts.

June 23, 2021 "Dear Educator"

I also want to bring to your attention OCR's public notice based on the Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ___ (2020), which clarifies that Title IX's protection against sex discrimination encompasses discrimination based on sexual orientation and gender identity. Specifically, OCR clarifies that the Supreme Court's decision in *Bostock* applies to the Department's interpretation of Title IX. In its decision, the Supreme Court explained that "it is impossible to discriminate against a person" because of their sexual orientation or gender identity "without discriminating against that individual based on sex." *Id.* at 1741. That reasoning applies regardless of whether the individual is an adult in a workplace or a student in school.

1211

Legal Updates

Legal challenge to Cardona Transgender Guidance

Tennessee et al v. United States Department of Education et al

6. This recent guidance from the Department and the EEOC concerns issues of enormous importance to the States, employers, educational institutions, employees, students, and other individual citizens. The guidance purports to resolve highly controversial and localized issues such as whether employers and schools may maintain sex-separated showers and locker rooms, whether schools must allow biological males to compete on female athletic teams, and whether individuals may be compelled to use another person's preferred pronouns. But the agencies have no authority to resolve those sensitive questions, let alone to do so by executive fiat without providing any opportunity for public participation.

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Transgender Guidance – Injunction

IV. CONCLUSON

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction [Doc. 10] is **GRANTED** and Defendants' Motion to Dismiss [Doc. 49] is **DENIED**. Accordingly, it is hereby ordered that Federal Defendants and all their respective officers, agents, employees, attorneys, and persons acting in concert or participation with them are **ENJOINED** and **RESTRAINED** from implementing the Interpretation, Dear Educator Letter, Fact Sheet, and the Technical Assistance Document against Plaintiffs.[18]

This preliminary injunction shall remain in effect pending the final resolution of this matter, or until further orders from this Court, the United States Court of Appeals for the Sixth Circuit, or the Supreme Court of the United States.

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Legal Updates – 11CA/Adams

Adams by and through Kasper v. School Board of St. Johns County, 57 F.4th 791 (11th Cir. 2022)

1) Does the School District's policy of assigning bathrooms based on sex violate the Equal Protection Clause of the Constitution? and

2) Does the School District's policy of assigning bathrooms based on sex violate Title IX?

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Legal Updates – Adams 11CA

- Equal Protection:
- Intermediate Scrutiny: Policy is substantially related to an important government interest.
- The bathroom policy clears both hurdles because the policy advances the important govern- mental objective of protecting students' privacy in school bath- rooms and does so in a manner substantially related to that objective.
- Heightened Privacy interest when children use communal bathrooms.
- "[s]eparate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required, by re- gard for individual privacy." Ruth Bader Ginsburg, The Fear of the Equal Rights Amendment, Wash. Post, Apr. 7, 1975, at A21
- Not just bathroom, but changing rooms.

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Legal Updates Adams 11CA

Title IX

- Statute is not ambiguous = Ordinary meaning of the word at the time Congress enacted. = Biology at time of birth.
- Statute has Carveouts = Separate living facilities
- Bostock = "proceed[ed] on the assumption" that the term "sex," as used in Title VII, "refer[ed] only to biological distinctions between male and female." 140 S. Ct. at 1739.
- Title VII & Title IX differences: Spending clause legislation with unambiguous enforcement conditions.

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Legal Updates – Supreme Court

WEST VIRGINIA ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

- Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." E. Gellhorn & P. Verkuil, Controlling *Chevron*-Based Delegations, 20 Cardozo L. Rev. 989, 1011 (1999). We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn.* v. *FCC*, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).
- Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. *Utility Air*, 573 U. S., at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims. *Ibid.*

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Regulatory Update – Title IX Regs

Statement of Need:

This rulemaking is necessary to align the Title IX regulations with the priorities of the Biden-Harris Administration, including those set forth in the Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (EO 13988) and the Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity (EO 14021).

Summary of the Legal Basis:

We are conducting this rulemaking under 20 U.S.C. 1681 et seq.

Alternatives:

This was discussed in the notice of proposed rulemaking (NPRM) and will be discussed in the final regulations.

Anticipated Costs and Benefits:

This was discussed in the notice of proposed rulemaking (NPRM) and will be discussed in the final regulations.

Risks:

This was discussed in the notice of proposed rulemaking (NPRM) and will be discussed in the final regulations.

Timetable:

Action	Date	FR Cite
NPRM	07/12/2022	87 FR 41390
Final Action	05/00/2023	

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Regulatory Update

Title IX Athletics NPRM Promised

Consistent with Title IX and with Congress's decision to afford the Secretary special discretion to promulgate regulations in the unique context of athletics, the Department will consider, in a separate notice of proposed rulemaking, amendments to § 106.41 to address whether and how the Department should amend § 106.41 in the context of sex-separate athletics, pursuant to the special authority Congress has conferred upon the Secretary to promulgate reasonable regulations with respect to the unique circumstances of particular sports, including what criteria, if any, recipients should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team.

1219

Regulatory Update

ED/OCR **RIN:** 1870-AA19 **Publication ID:** Fall 2022

Title: •Nondiscrimination on the Basis of Sex in Athletics Education Programs or Activities Receiving Federal Financial Assistance

Abstract:

The Department plans to issue a final rule amending its regulations implementing Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., consistent with the priorities of the Biden-Harris Administration. These priorities include those set forth in Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation and Executive Order 14021 on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity.

Action	Date
NPRM	12/00/2022

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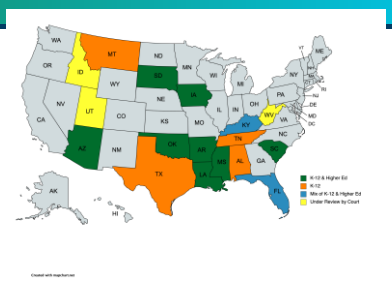
Title IX & Transgender Considerations

- **Federal Guidance**
  - -> Executive Order
  - -> OCR Dear Educator Letter & Guidance
- **State transgender school sports laws**
- **Meriwether v. Shawnee State University**

1221



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NCAA – Disclosure & Verify Rule

According to the new policy, all incoming, current and transfer college athletes must disclose annually to their school whether their conduct has resulted in an investigation, discipline through a Title IX proceeding or a criminal conviction for sexual, interpersonal or other acts of violence. A failure by the athlete to accurately and fully disclose investigatory activity, a disciplinary action or criminal conviction may result in penalties, including a loss of athletics eligibility as determined by the school.

In addition, schools will need to take reasonable steps to confirm the information provided by prospective, continuing and transfer student-athletes and provide it to other member schools if the student-athlete attempts to enroll in a different college or university. Finally, NCAA member schools must have policies in place to gather conduct-related information from former schools attended by recruited prospects or transfer student-athletes.

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Since 2017, Attest Annually

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

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New Attestation

4. All incoming, continuing and transfer student-athletes have completed an annual disclosure related to their conduct that resulted in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.** Transfer student-athletes also must disclose whether a Title IX proceeding was incomplete at the time of transfer. Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.

Annual student-athlete disclosure/questionnaire

5. Institutions have taken reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence.** In a manner consistent with federal and state law, all NCAA member institutions must share relevant discipline information and incomplete Title IX proceedings as a result of transfer with other member institutions when a student-athlete attempts to enroll in a new college or university.

Institution takes reasonable steps to confirm student-athlete is being truthful

6. An institution choosing to recruit an incoming student-athlete or accept a transfer student- athlete must have a written procedure that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the student left the institution with an incomplete Title IX proceeding, was disciplined through a Title IX proceeding or has a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to have it written and to gather information consistent with that procedure could result in penalties.

Written policy about collecting information from other schools

1225

NCAA – Title IX Rule Resources

1) **Checklist**: https://ncaaorg.s3.amazonaws.com/ssi/violence/2020-21BOG_SVPolicyTFChecklist.pdf

2) **Timeline**: https://s3.amazonaws.com/ncaaorg/ssi/violence/2020-21BOG_SVPolicyTFTimeline.pdf

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New Athletic Equity Resources from DOE

- Supporting Equal Opportunity in School Athletic Programs: *A Resource for Students and Families* (2023) Supporting Equal Opportunity in School Athletic Programs A Resource for Students and Families (PDF) (ed.gov)
- Title IX and Athletic Opportunities in Colleges and Universities: *A Resource for Students, Coaches, Athletic Directors, and School Communities* (2023) Title IX and Athletic Opportunities in Colleges and Universities A Resource for Students, Coaches, Athletic Directors, and School Communities (PDF) (ed.gov)
- Title IX and Athletic Opportunities in K-12 Schools: *A Resource for Students, Parents, Coaches, Athletic Directors, and School Communities* (2023) Title IX and Athletic Opportunities in K-12 Schools A Resource for Students, Parents, Coaches, Athletic Directors, and School Communities (PDF) (ed.gov)

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Withdrawal of Prior Guidance

Many guidance documents were rescinded on 8/26/2020, including:

- 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*
- *See* "Rescinded Policy Guidance" Office for Civil Rights | U.S. Department of Education

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Watch YouTube for Videos from OCR

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

OCR Short Webinar on How to Report Sexual Harassment under Title IX (July 27, 2020)

Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar (July 23, 2020)

OCR Webinar on Due Process Protections under the New Title IX Regulations (July 21, 2020)

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

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

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OCR Title IX website launched on August 14, 2020.

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

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Title IX Adjacent- What's Happening Now

- Annual Security Report
- Campus Safety Survey
- Biennial Review

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Special Issues Highlight #1 Mandatory Responses to a *Report*

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106.44(a) https://www.federalregister.gov/d/2020-10512/p-6454

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.

1233

Responses in Regards to a Respondent Where There Is No 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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- 2018 NPRM § 106.44(b)(2) Removed from Final 2020 Regulations
  - "When a recipient has actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint. . . ."
- There is no requirement in the final regulations to bring the respondent in and question them if no formal complaint is filed.
- Can/should a Title IX coordinator file a complaint in an instance of multiple reports on the same respondent if no complainant wants to file a formal complaint?
  - *The Title IX Coordinator may consider a variety of factors, including a pattern of alleged misconduct by a particular respondent, in deciding whether to sign a formal complaint. Id.* at 30217.
  - *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. Id.*
  - *[T]he Title IX Coordinator still possesses the discretion to sign formal complaints in situations involving threats, serial predation, violence, or weapons. Id.* at 30128.

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Special Issues Highlight #2 Mandatory Responses to a *Formal Complaint*

1236

106.44(b) + 106.45 https://www.federalregister.gov/d/2020-10512/p-6455

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

1237

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 known
  - Location, if known
  - The alleged misconduct that constitutes sexual harassment
- 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 or statements during the grievance process

Notice should be provided to allow the respondent enough time to prepare before the initial interview.

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

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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.*

Id. at 30136 (emphasis added).

1241

Filing a Formal Complaint as a Title IX Coordinator

- ***When a Title IX Coordinator believes that with or without the complainant's desire to participate in a grievance process, a non-deliberately indifferent response to the allegations requires an investigation, the Title IX Coordinator should have the discretion to initiate a grievance process.***
- ***When a Title IX Coordinator determines that an investigation is necessary even where the complainant (i.e., the person alleged to be the victim) does not want such an investigation, the grievance process can proceed without the complainant's participation; however, the complainant will still be treated as a party in such a grievance process.***

Id. at 30131

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Filing a Formal Complaint as a Title IX Coordinator

- ***The Department desires to respect a complainant's autonomy as much as possible and thus, if a grievance process is initiated against the wishes of the complainant, that decision should be reached thoughtfully and intentionally by the Title IX Coordinator, not as an automatic result that occurs any time a recipient has notice that a complainant was allegedly victimized by sexual harassment.***

Id.

Consistent application of factors, written reasoned analysis.

1243

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?
- Consistency & Reasoned analysis applying Regulatory Elements.

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§ 106.45(b)(3)(i)

(3) Dismissal of a formal complaint—

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

(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 recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(emphasis added)

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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.

(emphasis added)

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§ 106.45(b)(4)

(4) Consolidation of formal complaints. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

(emphasis added)

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Title IX Coordinator Serves as Gatekeeper

Please note that the response provided to you by OCR is not legal advice and does not constitute an OCR determination regarding the compliance or non-compliance with respect to the new Regulations.

- "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. The Title IX Coordinator may make the determination of whether mandatory dismissal of a formal complaint is appropriate, or the recipient may designate other Title IX personnel to make that determination."
- T9questions@ed.gov response to Jake Sapp, 1/19/2021

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Special Issues Highlight #4 Bottom-Line Rules

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106.45(b) – Recipient Discretion

- 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.
- 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. https://www.federalregister.gov/d/2020-10512/p-3426

1251

Recipients Discretion (non-exhaustive)

- Training https://www.federalregister.gov/d/2020-10512/p-1594
- Required objective standards for prohibition on conflicts of interest & bias https://www.federalregister.gov/d/2020-10512/p-2975
- Addressing conduct that falls outside of Title IX https://www.federalregister.gov/d/2020-10512/p-5450
- Introduction of New Evidence https://www.federalregister.gov/d/2020-10512/p-3412

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"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 process;*
- *select the standard of evidence to apply in reaching determinations regarding responsibility;*
- *use an individual decision-maker or a panel of decision-makers;*
- *offer informal resolution options;*
- *impose disciplinary sanctions against a respondent following a determination of responsibility; and*
- *select procedures to use for appeals.*

Id. at 30097 (bullets added).

1253

Special Issues Highlight #5 Expert Witnesses

1254

Expert Witness

- Federal rules of evidence do not apply
- Is it relevant? That is the ultimate question.
- What could they opine on?
  - Medical information?
  - Polygraph tests?
- How should they be vetted?
- Can not be excluded if relevant.
- *§ 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.*

https://www.federalregister.gov/d/2020-10512/p-3404

1255

Special Issues Highlight #6 Confidentiality

1256

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Confidentiality

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

1257

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.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30296 (emphasis added).

1258

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[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.

Id.

1259

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. *Id.*

1260

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.

Id.

1261

"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).

1262

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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).

1263

Special Issues Highlight #7 Pregnant & Parenting

1264

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Title IX - Pregnancy & Parenting

- (b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.
- https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html

1265

OCR – Pregnancy / Parenting

The University will provide training regarding the Title IX rights of pregnant students and the University's obligations regarding pregnant students to all faculty, as well as to all staff involved in providing Title IX resources or addressing requests for adjustments from pregnant students. This training must include: (i) how and to whom students may submit requests for adjustments to the regular program; (ii) the contact information for the University's Title IX Coordinator and any individual(s) tasked with coordinating the University's response to requests for adjustments from pregnant students; (iii) the process for identifying and providing adjustments; (iv) examples of pregnancy-related adjustments; and (v) the grievance procedure for students to file complaints of sex discrimination, including pregnancy-related complaints.

1266

OCR – Pregnancy / Parenting

The University will assess the effectiveness of the training referenced in Item III above, by conducting a survey of the faculty and staff who attend the training. The survey will specifically inquire about their knowledge regarding: (a) how and to whom students may submit requests for adjustments to the regular program; (b) the contact information for the University's Title IX Coordinator and any individual(s) tasked with coordinating the University's response to requests for adjustments from pregnant students; and (c) the grievance procedure for students to file complaints of sex discrimination, including pregnancy-related complaints.

1267

OCR – Pregnancy / Parenting

By March 15, 2023, the University will develop a system for tracking (i) requests for pregnancy-related adjustments for students made to the Title IX Coordinator, faculty or other staff; (ii) the responses to the requests, including verification of adjustments provided by faculty, staff or others; and (iii) the reasons for the denial of any requests.

1268

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Title IX – Pregnancy & Parenting

Resources:

1) *Supporting the Academic Success of Pregnant and Parenting Students* (2013): Pamphlet - Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972
2) *Pregnant or Parenting? Title IX Protects You From Discrimination At School* (2020): Know Your Rights: Pregnant or Parenting? Title IX Protects You From Discrimination At School (ed.gov)
3) *Discrimination Based on Pregnancy and Related Conditions* (2022): Pregnancy Fact Resource (PDF) (ed.gov)

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Special Issues Highlight #8 Litigation Issues

1270

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Recognized Sex Discrimination COA

Deliberate Indifference	Pre-Assault Claim	Retaliation	42 U.S.C. 1983 – Due Process & Equal Protection
Erroneous Outcome	Selective Enforcement	Plausible Inference	Inequity in Athletics

Arbitration?

1271

Title IX Litigation Considerations

- 2011 DCL Settlements continue
- Baum v. Haidak Cross Exam (Circuit Split)
- Athletics: Equal Opportunity / Accommodation
- Mandatory Reporter v. Responsible Employees
- Plausible Inference
- State Law, Private COA Enforcement

1272

Tabletop Exercises and Breakout Groups

1273

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.**
  - You can start with either scenario.
- **Please spend about 20 minutes discussing each scenario 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 & Jake will go over the scenarios.**
- **Breakout rooms are not recorded.**
- **Please make sure you are unmuted and video is on.**

1274

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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 via email to discuss supportive measures and ask that Complainant A speak with you.

1275

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's repeated asks for Respondent X to stop touching, texting and "sexting" Complainant B. This increased "sexting," coupled with hearing about Complainant A's formal complaint, prompted Complainant B to file a formal complaint. Complainant B mentions "extreme discomfort" participating in any future activities with the French Club since Respondent X serves as the club's president.

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Scenario #1 Continued

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

1277

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?
- 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?

1278

Scenario #2

Respondent and Complainant have notified you, the Title IX coordinator, of the following information regarding their advisors:

Respondent has designated Law Yer as Respondent's advisor of choice.

Complainant has designated Par Ent as Complainant's advisor of choice.

Per the requirements in § 106.45(b)(5)(vi), after interviewing parties and witnesses and gathering physical evidence, the Title IX investigator sends the initial collection of evidence to Complainant, Respondent and their advisors. Respondent and Complainant submit their responses to the evidence to the investigator within the allotted 10-day timeframe. The Title IX investigator then takes into account the responses of both parties to the evidence and begins to draft the final investigative report.

Five days later, the final investigative report is provided to both parties and their advisors, with notice that the live hearing will take place 14 days later.

1279

Scenario #2 Continued

Two days before the hearing, Complainant contacts you via email and states that Complainant has heard that Respondent's advisor, Law Yer, is an attorney. Complainant would like to change their advisor to someone who is an attorney, but their preference, Att 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 indicates that Complainant, Complainant's original advisor (Par Ent), and 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 unfair and inequitable. Att Orney called your campus general counsel to discuss this matter. Att Orney states that not allowing the extension prevents Complainant from "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 the Title IX coordinator, you are concerned with this request for a four to five week extension because this will cause the hearing to move into the period of final exams, right before the conclusion of the fall semester.

1280

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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?

1281

Special Issues Highlight #9 Advisors

1282

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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 <u>any restrictions on the active participation of advisors during the grievance process must apply equally to both parties</u>.** https://www.federalregister.gov/d/2020-10512/p-3445
- **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?
  - Retaliation policy?

1283

Closing Thoughts and Questions

1284

Closing Thoughts

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

1285

A Reminder…

All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

1286

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Future Live Sessions

- LIVE SESSION: *Title IX Grievance Procedures/Sexual Misconduct Procedures*
  - March 9th (Thursday) 1:00 – 5:00 pm ET
- LIVE SESSION: *Title IX Investigations*
  - March 10th (Friday) 1:00 – 5:00 pm ET
- All module assessments must be completed by March 24th

1287

Thank you!

Questions?

1288

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NASPA
Student Affairs Administrators in Higher Education

LIVE SESSION on Title IX Grievance Procedures/Sexual Misconduct Procedures

March 9, 2023

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

1289

This Live Session is Designed for…

TRACK 1 – Title IX Coordinators

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

1290

What we hope to accomplish…

- Highlight of Select Issues (~120 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.

1291

Definitive Answers vs. Choice Points

1292

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Withdrawal of Prior Guidance

Many guidance documents were rescinded on 8/26/2020, including:

- 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*
- *See* "Rescinded Policy Guidance" Office for Civil Rights | U.S. Department of Education

1293

Special Issues Highlight #1 Relationships of Decision-Makers to Other Title IX Operatives

1294

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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.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30372 (emphasis added).

Should the Title IX coordinator offer recommendations on responsibility?

1295

Title IX Investigator ←→ 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?

1296

Special Issues Highlight #2
Revisiting Consent

1297

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.

1298

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Consent

The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.

Id. at 30124.

Consent

The third prong of the § 106.30 definition of sexual harassment includes "sexual assault" as used in the Clery Act, 20 U.S.C. 1092(f)(6)(A)(v), which, in turn, refers to the FBI's Uniform Crime Reporting Program (FBI UCR) and includes forcible and nonforcible sex offenses such as rape, fondling, and statutory rape which contain elements of "without the consent of the victim."

Id. at 30124.

1299

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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).

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).

1301

1302

Consent

The final regulations require Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution, to be trained on how to conduct an investigation and grievance process; this would include how to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.

Id. at 30125 (emphasis added).

1303

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.

Role, if any, of affirmative consent? REMEMBER: State laws.

1304

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Special Issues Highlight #3 Revisiting "Tuning"

1305

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

Nothing in the final regulations precludes a recipient from applying the § 106.45 grievance process to address sexual assaults that the recipient is not required to address under Title IX. *Id.* at 30065 (emphasis added).

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

Id. at 30091 (emphasis added).

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

Id. at 30093 (emphasis added).

Tuning? Traps?

1306

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"Non-sexual Harassment Sex Discrimination"

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

Id. at 30095.

1307

Conduct That Does Not Meet Sexual Harassment Definition

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

Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct. *Id.* at 30037-38 (emphasis added).

Similarly, nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States.

Id. at 30038 n.108 (emphasis added).

Tuning? Traps?

1308

§ 106.45 may not be circumvented…

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

Id. at 30095.

1309

2021 Q&A

- **Question #7—Addressing Conduct that Does Not Meet Definition of Sexual Harassment**
  - *Yes. . . . A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.*

Dept. of Education, Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 2021), at 6 (internal citation omitted).

1310

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Special Issues Highlight #4 Revisiting Advisors and Cross-Examination

1311

"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 cross-examination question; and*
- *recipients can oversee cross-examination in a manner that avoids aggressive, abusive questioning of any party or witness.*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30313 (internal citations omitted, bullets added).

1312

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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.

1313

"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).

[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).

1314

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 cross-examination questions any decision to exclude a question as not relevant.

Id. at 30331 (emphasis added).

1315

Respectful Questioning

The Department acknowledges that predictions of harsh, aggressive, 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.

Id. at 30316.

1316

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Abusive Questioning Should Not be Tolerated

[W]here 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.

Id. at 30331 (emphasis added).

1317

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 cross-examination on behalf of that party.

Id. at 30320.

1318

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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.

1319

Firing an Advisor

A party cannot "fire" an assigned advisor during the hearing, but if 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 cross-examination questions.

Id. at 30342 (emphasis added).

1320

Advisors May Conduct "Direct" Examination

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).

1321

Cannot Impose Training on Advisors

[R]ecipients may not impose training or competency assessments on advisors of choice selected by parties, but nothing in the final regulations prevents a recipient from training and assessing the competency of its own employees whom the recipient may desire to appoint as party advisors.

Id. at 30342 (emphasis added).

1322

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July 2021 Q&A

- Cross-examination
  - Question #39—*At a live hearing, "each party's advisor [must be permitted to] to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." The 2020 amendments refer to this process of questioning as cross-examination.* Dept. of Education, Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 2021), at 21.
  - Question #43—*The preamble says that an advisor's cross-examination role "is satisfied where the advisor poses questions on a party's behalf, which means that an assigned advisor could relay a party's own questions to the other party or witness." Thus, for example,* ***a postsecondary school could limit the role of advisors to relaying questions drafted by their party***. *Id.* at 23 (emphasis added).

1323

Special Issues Highlight #5
Creating a Hearing Agenda

1324

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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)

1325

A Sample Outline Of A Hearing Agenda

Start of Hearing, Introduction, Rules of Decorum, Technology specifics, etc.
Opening Statements (if allowed – time limit?)
- Opening Statement by Complainant
- Opening Statement by Respondent

Questioning by Decision-Maker(s)
- Questioning of Investigator (if required)
- Questioning of Complainant
- 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)
- Complainant's advisor questions the Respondent and any Witnesses
- Respondent's advisor questions the Complainant and any Witnesses

Decision-Maker(s) ask any follow-up questions
Closing Statements (if allowed – Time limit?)
- Closing Statement by Complainant
- 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.

1326

Under this provision a recipient may, for instance, adopt rules that instruct party advisors to conduct questioning in a respectful, non-abusive 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.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30361.

1327

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

1328

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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.

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1329

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. *Id.* at 30349.

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1330

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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).

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1331

Non Submission to Cross-examination Cont'd

If parties do not testify about their own statement and submit to cross-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).

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1332

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 cross-examination.

Id. at 30349 (internal citations omitted).

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1333

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 questions, the decision-maker must disregard statements of that party or witness but must reach a determination without drawing any inferences about the determination regarding responsibility based on the party or witness's failure or refusal to appear or answer questions. Thus, for example, where a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination. *Id.* at 30328.

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1334

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Non-Appearance of Party/Advisor

[A] party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear. Similarly, where one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor must still cross-examine the other, appearing party "on behalf of" the non-appearing party, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance). *Id.* at 30346.

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1335

Where a Complainant Does Not Appear

In cases where a complainant files a formal complaint, and then does not appear or refuses to be cross-examined at the hearing, this provision excludes the complainant's statements, including allegations in a formal complaint.

Id. at 30347.

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1336

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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.

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1337

Where No Party Appears

[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 non-statement evidence has been gathered and presented to the decisionmaker.

Id. at 30361.

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1338

"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 cross-examination, 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 cross-examination (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. *Id.* at 30322.

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1339

"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 non-statement 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.

RECONSIDER! In light of new Dept. of Education interpretations and clarifications.

1340

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Victim Rights Law Center et al. v. Cardona

The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: "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 . . ." Please note that all other provisions in the 2020 amendments, including all other parts of 34 C.F.R. § 106.45(b)(6)(i), remain in effect. The affected provision at 34 C.F.R. § 106.45(b)(6)(i) is only applicable to postsecondary institutions and does not apply to elementary or secondary schools, which are not required to provide for a live hearing with cross-examination.

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

1341

Victim Rights Law Center et al. v. Cardona

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

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

Id.

1342

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Victim Rights Law Center et al. v. Cardona

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

Id. at 1-2.

1343

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

1344

§ 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) . . .

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30054 (emphasis added).

1345

§ 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;

(emphasis added)

1346

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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).

1347

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).

1348

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Standard of Evidence - 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

1349

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 persuade you that it is highly probable that the fact is true.* CACI No. 201. More Likely True—Clear and Convincing Proof https://www.justia.com/documents/trials-litigation-caci.pdf

1350

Recipients May Train Beyond Relevance

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 questions 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.***

Id. at 30337 (emphasis added).

1351

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.

1352

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Rules on Weight of Evidence

A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents.

Id. at 30294.

1353

Weighing Evidence

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 character evidence.

Id. at 30337 (emphasis added).

1354

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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).

1355

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).

1356

Evidence-From Relevance to Probativeness

- Weigh the impact of physical evidence. Consider role of photographic and videographic 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).* Id. at 30321.
  - 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.

1357

Special Issues Highlight #8 Written Determination

1358

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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).

1359

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 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 appeal.

§ 106.45(b)(7)(ii)(A-F)

1360

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IRAC: Basic content of a report

- Issue(s)/Procedural Posture
- Rule (Policies/Allegations)
- Analysis (Rationales)
- Conclusion(s)

1361

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 evidence meets the applicable standard of evidence****.*

    Id. at 30260-61 (emphasis added).
  - Consider the Jameis Winston incident at FSU. Justice Harding "wrote that both sides' version of the events had strengths and weaknesses, but he did not find the credibility of one 'substantially stronger than the other.' 'In sum, the preponderance of the evidence has not shown that you are responsible for any of the charged violations of the Code,' Harding wrote." ESPN, Jameis Winston ruling: No violation (Dec. 21, 2014).
- Admission of Responsibility?
- Remedies/Sanctions

1362

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 occur in the recipient's education program or activity, or did not occur against 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)(i). ***Decisions about whether the recipient's burden of proof has been carried must be made in accordance with §§ 106.45(b)(6)-(7) – not prematurely made by persons other than the decision-maker, without following those adjudication and written determination requirements.***

Id. at 30290 (emphasis added).

1363

Special Issues Highlight #9 Supportive Measures, Sanctions and Remedies

1364

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§ 106.45(b)(7)(iv)

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

- Remedies
- Sanctions
- Continuation of Supportive Measures

1365

Special Issues Highlight #10 Revisiting Appeals

1366

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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:

1367

§ 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.

1368

§ 106.45(b)(8)(ii)

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

1369

§ 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.

1370

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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?

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Tabletop Exercises and Breakout Groups

1372

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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.**

1373

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.

1374

Scenario #1—Questions

- 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?

1375

Special Issues Highlight #11 Designation of "Hearing Officers" and "Decision-Makers"

1376

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Hearing Officers

- **Should you designate a separate hearing officer who is not a decision-maker?**
  - *With respect to the roles of a hearing officer and decisionmaker, the final regulations leave recipients discretion to decide whether to have a hearing officer (presumably to oversee or conduct a hearing) separate and apart from a decision-maker, and the final regulations do not prevent the same individual serving in both roles.* *Id.* at 30372.
- **What is their role?**
- **Who should take this position?**
  - Title IX Coordinator? General Counsel? Someone else?

1377

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

1378

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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).

1379

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!"

1380

Scenario #2—Questions

- 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 in-person hearing versus a virtual hearing?
- Who enforces the rules of decorum at the live hearing?

1381

Special Issues Highlight #12
Rules of Decorum

1382

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What are some possible rules of decorum?

- Promptness
- Respectful behavior at all times
- Turn off cell phone
- No gum chewing
- No outbursts, talking out of turn, spontaneous utterances
- If virtual, be in a private space free from disruption

1383

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).

1384

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Scenario #3

At a Title IX hearing in which you are a decision-maker, Complainant's advisor, Law 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 cross-examination. 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?"

1385

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."

1386

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?

1387

Special Issues Highlight #13 Lawyers as Advisors

1388

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Lawyers as Advisors

- All advisors should be provided information regarding hearing procedures/processes/rules in advance
- Title IX hearings are not court
- Will you allow objections?
- Will you allow challenges to the relevance determinations made by the decision-makers?

1389

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 challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing.

Id. at 30343 (emphasis added).

1390

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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?"

1391

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?

1392

Special Issues Highlight #14 Relevance & Rape Shield Protections

1393

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.

1394

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Prior Sexual History/Sexual Predisposition

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

Id. at 30103 (emphasis added).

1395

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).

1396

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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.

1397

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.

1398

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).

1399

Decision-Maker to Determine Relevance Cont'd

The new regulations *require "on the spot" determinations about a question's relevance.*

Id. at 30343.

[A]n explanation of how or why the question was irrelevant to the allegations at issue, or is deemed irrelevant by these final 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.

Id. at 30343.

1400

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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 (emphasis added).

1401

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).

1402

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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).

1403

Scenario #5

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

"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 hooked up with Complainant in high school?"

1404

Scenario #5 —Questions

- Is this a relevant question?
- When are questions about a respondent's prior sexual history allowed?

The Department reiterates that the rape shield language . . . does 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.

Id. at 30353.

1405

Special Issues Highlight #15 Counterclaims

1406

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Counterclaims

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).

1407

Closing Thoughts

1408

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Closing Thoughts

- Tuning
- "Looking around corners."
- "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

1409

Watch YouTube for Videos from OCR

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

OCR Short Webinar on How to Report Sexual Harassment under Title IX (July 27, 2020)

Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar (July 23, 2020)

OCR Webinar on Due Process Protections under the New Title IX Regulations (July 21, 2020)

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

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

1410

OCR Title IX website launched on August 14, 2020.

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

1411

A Reminder…

All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

1412

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All module assessments must be completed by March 24!

1413

Thank You…

Questions?

1414

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NASPA
Student Affairs Administrators in Higher Education

LIVE SESSION on Title IX Investigations

March 10, 2023

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

1415

This Live Session is Designed for…

TRACK 1 – Title IX Coordinators

TRACK 3 – Title IX Investigators

1416

What we hope to accomplish...

- Highlight of Select Issues (~75 minutes)
- Tabletop Exercises in Breakout Groups (60 minutes)
- Discuss Tabletop Exercises in the Larger Group (~75 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.

1417

Definitive Answers vs. Choice Points

1418

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

1419

Title IX Investigator ←→ Title IX Coordinator

The final regulations do not preclude a Title IX Coordinator from also serving as the investigator.

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30135 n.596.

Does the Title IX coordinator "supervise" investigators?
Make hiring/firing decisions regarding investigators?
Should the Title IX coordinator offer input on the investigation in any way if not serving as the investigator?
  Input on gathering evidence?
  Input on the final report?
What conflicts of interest could arise?

1420

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Title IX Investigator ←→ Title IX 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 in a hearing?

1421

Special Issues Highlight #2 Written Notification Prior to an Investigation

1422

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 known
  - Location, if known
  - The alleged misconduct that constitutes sexual harassment
- 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 or statements during the grievance process

Notice should be provided to allow the respondent enough time to prepare before the initial interview.

1423

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).

1424

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July 2021 Q&A

- Question #36—Respondent should presumed not responsible but that doesn't mean a complainant should be presumed to be lying.
  - *Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant's credibility have done so in error.* Dept. of Education, Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 2021), at 20.

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

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Concurrent Law Enforcement Activity

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).

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf) at 30099 n.466.

1427

Police Investigations

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

Id. at 30099 n. 467 (emphasis added).

1428

Is it possible to be told to "stand down" in regards to conducting your Title IX investigation by police or other legal authority? What about pending litigation?

What should you do?

1429

Special Issues Highlight #4 Definition of "Sexual Harassment"

1430

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"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)

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Special Issues Highlight #5 Definition of "Consent"

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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.

1433

Consent

The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.

Id. at 30124.

1434

Consent

The third prong of the § 106.30 definition of sexual harassment includes "sexual assault" as used in the Clery Act, 20 U.S.C. 1092(f)(6)(A)(v), which, in turn, refers to the FBI's Uniform Crime Reporting Program (FBI UCR) and includes forcible and nonforcible sex offenses such as rape, fondling, and statutory rape which contain elements of "without the consent of the victim."

Id. at 30124.

1435

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.

Role, if any, of affirmative consent? REMEMBER: State laws.

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Special Issues Highlight #6
Scope

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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)

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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.

1439

Special Issues Highlight #7
Dismissals

1440

§ 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.

(emphasis added)

1441

§ 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.

(emphasis added)

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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.

1443

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).

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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?

1445

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

1446

§ 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.

(emphasis added)

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Special Issues Highlight #9 Preparing for an Interview

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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?

1449

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.

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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

1451

Special Issues Highlight #10 Fact Finding and Data Collection

1452

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

1453

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

1454

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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).

1455

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.

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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?"

Source: Russell Strand, Frontline Training Conference, 2018

1457

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 Conference, 2018

1458

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

1459

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

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Why would you consider conducting an investigation without assessing credibility?

- 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.

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Tabletop Exercises and Breakout Groups

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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.
  - 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.

1463

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.

1464

Scenario #1—Questions

- 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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Special Issues Highlight #11 Minimum and Maximum Role of Investigators

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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?**
- **2021 Q&A**: Question #7—Addressing Conduct that Does Not Meet Definition of Sexual Harassment
  - *Yes. . . . A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.*

1467

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

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

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Remember § 106.45(b)(1)(x)

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)

1469

Scenario #2

You are an investigator for ABC University investigating an allegation of non-consensual 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.

1470

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

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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.

(emphasis added)

§ 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)

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§ 106.45(b)(5)(vii)

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(emphasis added)

"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").*

Id. at 30248 n.1021 (emphasis added).

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

1475

1476

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 added).

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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).

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If a recipient allows parties to provide additional evidence after reviewing the evidence under § 106.45(b)(5)(vi), any such additional evidence that is summarized in the investigative report will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of an appeal under § 106.45(b)(8).

Id. at 30307 (emphasis added).

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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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Paring Down the "Universe" to "Relevant"

"[D]irectly related" may sometimes encompass a broader universe of evidence than evidence that is "relevant." *Id.* at 30304.

Non-treatment records and information, such as a party's financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party under § 106.45(b)(5)(vi), and all evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant" such that evidence about a complainant's sexual predisposition would never be included in the investigative report and evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) . . . *Id.* at 30304.

1481

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.

1482

Relevance

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

Id. at 30247 n. 1018.

1483

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).

1484

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Rape Shield Protections and the Investigative Report

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

Id. at 30353-54 (emphasis added).

1485

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).

1486

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Rape Shield Language

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

*1) if offered to **prove that someone other than the respondent committed the alleged sexual harassment**, or*

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

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

1487

Possible Format for the Final Investigative Report

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

VI. ANALYSIS?

VII. CONCLUSION

Covered in-depth in the module on report-writing.

1488

Scenario #3

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.

1489

Scenario #3—Questions

- What should be done at this point in the investigation?
- Who can you reach out to for assistance?
- What rules for advisors can be put in place with regards to interviews? What will you do if advisors refuse to cooperate with such rules?

1490

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Special Issues Highlight #13
Advisors

1491

§ 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)

1492

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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).

1493

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

1494

Scenario #4

Complainant has filed and signed a formal complaint alleging sexual misconduct by Respondent. In an interview with you, the Title IX Investigator, the Respondent claims that someone other than Respondent committed the alleged sexual assault against Complainant on the night in question, and that Complainant has deliberately filed a complaint against Respondent to "get even with Respondent." The alleged assault occurred at an off-campus building owned by a recognized student organization during a party where everyone was engaged in heavy alcohol use. Respondent, who is unable to afford an attorney, asks you, the Investigator, to help Respondent determine what evidence would help demonstrate that Respondent is not the actual perpetrator.

1495

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?

1496

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Special Issues Highlight #14 Burden of Gathering Evidence and Burden of Proof…Thinking Ahead to the Hearing

1497

§ 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).

1498

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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;

(emphasis added)

1499

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).

1500

Burden to Gather Inculpatory and Exculpatory Evidence

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.***

Id. at 30319 (emphasis added).

1501

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).

1502

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Data Gaps

[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 deficiencies.*

Id. at 30248 (emphasis added).

1503

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. at 30291 (emphasis added).

1504

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Standard of Evidence - 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

1505

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 persuade you that it is highly probable that the fact is true.* CACI No. 201. More Likely True—Clear and Convincing Proof https://www.justia.com/documents/trials-litigation-caci.pdf

1506

Special Issues Highlight #15
Counterclaims

1507

Counterclaims

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).

1508

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Closing

1509

Closing Thought

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

1510

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Watch YouTube for Videos from OCR

- *The First Amendment and Title IX: An OCR Short Webinar* (July 29, 2020)
- *OCR Short Webinar on How to Report Sexual Harassment under Title IX* (July 27, 2020)
- *Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar* (July 23, 2020)
- *OCR Webinar on Due Process Protections under the New Title IX Regulations* (July 21, 2020)
- *OCR Webinar on New Title IX Protections Against Sexual Assault* (July 7, 2020)
- *OCR Webinar: Title IX Regulations Addressing Sexual Harassment* (May 8, 2020)

1511

OCR Title IX website launched on August 14, 2020.

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

1512

A Reminder…

All Title IX personnel should serve in their roles impartially.

All Title IX personnel should avoid

- *prejudgment of facts*
- *prejudice*
- *conflicts of interest*
- *bias*
- *sex stereotypes*

1513

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1514

All module assessments must be completed by March 24th!

Thank You…

Questions?

1515

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